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Confidentiality in the professions of law, medicine, psychotherapy and in the Roman Catholic Church

Robinson, Bambi Elizabeth Stuart, Ph.D.

The Ohio State University, 1988

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UMI
CONFIDENTIALITY IN THE PROFESSIONS OF LAW, MEDICINE, PSYCHOTHERAPY AND IN THE ROMAN CATHOLIC CHURCH

DISSERTATION

Presented in Partial Fulfillment of the Requirements for the Degree Doctor of Philosophy in the Graduate School of the Ohio State University

By

Bambi Elizabeth Stuart Robinson, B.A., M.A.

* * * * *

The Ohio State University

1988

Dissertation Committee

C. Kielkopf
B. Rosen
T. Rudavsky

Approved by

B. Rosen
Adviser
Department of Philosophy
To My Parents
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VITA

1981.................................B.A., University of North Carolina-Greensboro
1984 .................................M.A., The Ohio State University
1981-Present .......................Teaching Associate, Department of Philosophy, The Ohio State University

FIELDS OF STUDY

Major Field: Philosophy - Ethics and Applied Ethics
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SPECIAL NOMENCLATURE

In my dissertation, I use a number of technical notions. For purposes of clarity, I will explain these terms below. I am not attempting to create strict philosophical definitions. Rather, I am merely allowing the reader to know how I use the words in the dissertation.

The first of these is 'obligation'. If an individual has an obligation to perform an action, then he is morally bound to perform that action. Obligations can be divided into two types: categorical and prima facie.

A categorical obligation is one that cannot be overridden under any circumstances. It is an absolute obligation which admits of no exceptions. For purposes of style, I will use the words 'categorical' and 'absolute' to refer to this type of obligation.

A prima facie obligation is one which can be overridden. To have a prima facie obligation means that, all things being equal, an individual should keep that obligation. However, it may be that circumstances arise which morally require one not to meet the obligation. For example, when I promise to meet you for lunch, I acquire an obligation to do so in virtue of the promise, and if nothing occurs which overrides this obligation, I should keep this promise. If, on the way to lunch, I am the only witness to a traffic accident and I can help the injured people, then I have an obligation to do so which overrides my obligation to meet you for lunch.
Prima facie duties do not all carry the same weight of obligation. In any given situation, the prima facie duty which is one's actual duty carries the strongest obligation. Thus in the above example, the obligation to help an injured person and perhaps save a life is a stronger obligation than the obligation to keep a promise to a friend. This obligation is often referred to as the actual obligation, to distinguish it from an obligation which is merely prima facie. The actual duty is what a person must do if she is to do the morally correct action.

The distinction between primary and secondary obligations is one commonly made in the field of professional ethics. A professional's primary obligations are those which she has to her client. These obligations derive from the professional's role and the actual or implied contract existing between the professional and her client. A professional's secondary obligations are those which she has to others and to society. A professional's primary obligations are generally stronger than her secondary obligations to others.

The distinction between primary and secondary obligations serves two purposes. First, it acts to delineate the normal sphere of the professional's responsibility. Under normal circumstances, the professional is concerned primarily with her obligations to her client.

Second, this distinction indicates which of the prima facie obligations is weightiest in normal circumstances. The professional need not focus on her secondary obligations in ordinary circumstances because during such times, the professional's primary obligations are the weightiest obligations.
Confidentiality refers to a promise between two or more individuals that communications made within the confines of their relationship will be protected by them from unauthorized disclosure. When an individual and a professional enter into a relationship, this promise is generally implicit; it is considered to be part of what is entailed by the relationship. This promise creates an obligation for the recipient of the communications that she will not divulge the contents of the communications without permission of the individual who made the communications. Just as there are two types of obligation, so are there two types of confidentiality.

An absolute obligation of confidentiality entails that under no circumstances are the contents of the communication to be revealed to any person not present when the communications were made. For purposes of style, I will sometimes refer to this sort of confidentiality as categorical confidentiality.

Prima facie confidentiality is a specific prima facie obligation, which, like any prima facie obligation, can be overridden by a stronger obligation. It is any form of confidentiality which is not absolute. For this reason, I frequently refer to it merely as 'confidentiality'.

To violate confidentiality is to reveal the contents of the communication to persons not present when the communications were made, without the consent of the person who made the communication. It is not a violation of confidentiality if the person who made the communication gives his consent. Violation can occur either by word or deed.

For the violation to be verbal, it is sufficient that it is apparent to the person who made the communication that he is the person being
discussed. Thus, someone verbally violating confidentiality need not make explicit reference to the individual, or mention him by name; it is enough that sufficient detail is present that the individual can recognize himself.

If the violation occurs by action, then the person violating confidentiality acts on the information communicated. The person violating confidentiality acts in a way that he would not act if he did not have the information originally revealed by the person who made the communication.

The Seal of the Confessional refers to the absolute confidentiality of communications made during confession in the Roman Catholic Church. For purposes of style, I also use the words 'Seal of Confession' and 'Seal' to refer to this type of confidentiality.

Testimonial privilege is a rule of evidence in law. The main objective of testimony and other forms of evidence is the discovery of facts which will assist the court in the resolution of the controversy under litigation. Testimonial privilege refers to a right under common law or existing by statute whereby the holder of the privilege (the client) can prevent the person to whom the communications were made (the professional) from testifying concerning it in a court of law. I will also refer to testimonial privilege as 'the privilege' and 'legal privilege'. (Legally) privileged communications are just those communications which are protected by the privilege.
INTRODUCTION

In today's high-paced technological society, the amount of personal information about an individual that has become readily available to any interested person has grown tremendously from past years. Someone's credit record, once a matter known only by that person and his banker, can now be known by anyone who can access the appropriate computer records, with or without proper authorization.

Even without the use of technology, private information learned from another person may be shared with others. An Episcopal minister in California, who learned during confession that a woman had embezzled church funds, informed the police and the woman was tried, convicted, and sentenced to jail. A psychiatrist, wishing to enliven a dull cocktail party, talked freely about the "nut of the day".

The above items are all examples of breaches of confidentiality. In both cases, contained in the professional relationship was the implicit promise of confidentiality. Confidentiality was violated when the promises were broken. Confidentiality refers to a promise between two or more individuals that communications made within the confines of their relationship will be protected by them from unauthorized disclosure. When an individual enters into a relationship with a professional, this promise is generally implicit; it is considered to be part of what is entailed by the
relationship, just as the professional working on behalf of the client is an implicit part of the relationship. This promise creates an obligation for the recipient of the communications that she will not divulge the contents of the communications without permission of the individual who made the communications. Just as there are two types of obligation, so are there two types of confidentiality.

An absolute obligation of confidentiality entails that under no circumstances are the contents of the communication to be revealed to any person not present when the communications were made. For purposes of style, I will sometimes refer to this sort of confidentiality as categorical confidentiality.

A prima facie obligation of confidentiality is a specific prima facie obligation, which, like any prima facie obligation, can be overridden by a stronger obligation. It is any form of confidentiality which is not absolute. For this reason and because it is the most common understanding of confidentiality, I frequently refer to it merely as 'confidentiality'.

Breaches of confidentiality occur quite frequently in today’s society: employers, insurance companies, credit bureaus and law enforcement agencies all want access to confidential information concerning individuals. Many professions have codes of professional ethics which legally oblige them not to reveal confidential information, which entails that many people find themselves in the uneasy position of having obligations both to disclose the confidential information and to keep it strictly confidential.
For example, a psychiatrist is asked to examine a prisoner to determine if he is competent to stand trial. In the interview with the prisoner, the psychiatrist determines that the prisoner is competent. He also learns that the prisoner abused children and professes to dislike them, although he claims not to have abused children for many years. As someone employed by the court, the psychotherapist has an obligation to reveal findings of competency to the court. The psychotherapist also has an obligation to society to protect its members from harm, which is normally accomplished through therapy. The psychotherapist also has a general obligation to his clients to keep matters confidential. Is the psychiatrist morally required to reveal this information to the authorities, or does he have an overriding obligation to keep the prisoner's communications confidential? This is just one moral quandary involving the notion of confidentiality for which there is no clear answer. Even in cases where the law deals with such questions, we must determine whether or not the law delivers the morally correct answer.

There is no consensus within the professions of law, medicine, psychotherapy, and the Roman Catholic Church as to the nature of the obligation of confidentiality. Many physicians hold it to be a practically empty obligation - if everyone can see that a patient has a broken arm, or spots on her face, what good reason does he have to maintain confidentiality? Priests, and some members of other professions hold confidentiality to be an absolute obligation. Most professionals hold confidentiality to be an obligation whose strength lies somewhere between the near-zero-point of some physicians and the absolute obligation of the
priests. One sort of obligation cannot, at the same time, be meaningless, sometimes overridable, and absolute.

The focus of my dissertation is to determine the nature of the obligation of confidentiality. I will argue that confidentiality is best understood as a very strong prima facie obligation, overridable only in cases where not to do so would allow some innocent person(s) to come to serious harm or death. My argument will proceed in two parts. First, I will examine the arguments given by members of each profession in favour of an absolute obligation of confidentiality and show that they do not work. Then I will present positive arguments in favour of a prima facie obligation of confidentiality. I will examine the arguments and problems of each profession separately. At the end of the dissertation, I will present a case study to illustrate the morally correct resolution to a problem of confidentiality faced by the four professions I have examined. I will also discuss a general approach or rule for determining when it is obligatory to break confidentiality.

First, however, I will examine arguments which have been advanced to justify the general practice of confidentiality and show that these general arguments are also unable to establish that confidentiality is an absolute obligation.

There are three major arguments used to justify the general practice of confidentiality, outside the context of any given professional relationship. The first is that confidential information is a type of secret and we ought
to keep secrets. Second, confidentiality is said to be necessary for the continuation of human relationships. The obligation to keep communications confidential also derives from an individual's right to privacy concerning his personal affairs. All of these arguments establish that confidentiality is best understood as a prima facie obligation. As I shall show, none of these demonstrate that it is an absolute obligation.

Confidentiality in the professions is a promise of secrecy made within the confines of a professional relationship. The sharing of information wished confidential is generally done with an implicit or explicit promise that disclosures made between two or more people will be kept secret. A promise of secrecy is a promise to perform, or refrain from performing some action, in this case, remaining silent, which will guarantee the secret. I claim that a promise of secrecy creates a prima facie obligation to remain silent.

In those professions where the communications are generally held to be confidential, the obligation to keep the secret rests on the professional. In the helping professions, such as medicine, the patient may reveal things to the doctor which he does not want to have revealed to others.

The promise of secrecy protects the patient. The obligation of keeping the secret does not rest on the divulger of the information, in this case the patient, for two reasons. First, the communications are about the patient; it is his personal affairs which are being discussed. An individual can choose to reveal whatever information he chooses about himself.
without breaking an obligation to keep such matters secret: he is the one
who asks others to keep such matters secret.

Second, the professional, in this case the physician, does not reveal
private personal matters about herself in treating the patient. Treatment
focuses on the patient's problems, and the information supplied by the
professional derives from the teachings of the profession. For example,
when advising a patient on dieting, the physician might discuss the effects
of calories on weight, and nutrition. She would not discuss weight
problems she had as a teenager.

Such an obligation, however, does not guarantee absolute secrecy. As
with any promise, we must decide if we were right in making it, and even if
we were right, we must sometimes decide if a circumstance warrants
breaking it. Suppose Mary tells Anne that she would rather go to a dance
with Steve than with anyone else, and elicits a promise from her not to tell
anyone. Such a promise may be overridden in circumstances such as Steve
confiding to Anne that he would like to take Mary to the dance, but is
afraid she does not like him. In such a case, all concerned would agree it
is morally permitted to break the promise of secrecy. Thus a promise of
secrecy is a good reason to maintain confidentiality, but one that can be
overridden.

Related to the argument that confidential information is a secret and
we ought to keep secrets is the argument that confidentiality derives, at
least in part, from a respect for relationships among people.¹

Relationships would not survive without respect for the secrets of
friends and associates. If we could not confide private, personal
information to individuals without fear of what we say being discussed with others, we would tend to keep private thoughts to ourselves.

Relationships depend on personal communication taking place between the parties involved. Sharing information of varying degrees of intimacy sustains relationships; without the sharing of information, relationships will fade away. Thus confidentiality helps to maintain existing relationships and create new ones.

This argument does not appear to generate an absolute obligation to maintain confidentiality for two reasons. First, all relationships, even among friends, do not contain either an implicit or explicit promise of confidentiality as to communications between the individuals. Many people have friends whom they know cannot be counted on to keep a secret, yet they still share a great deal of personal information with these friends. Thus, while some relationships might be damaged by unauthorized disclosure of information, not all relationships are damaged.

Additionally, even in those relationships where secrets are generally kept, private information may be shared with others if we think our friends will benefit by a breach of confidentiality. Thus, while relationships may depend on keeping some communications confidential, this does not justify absolute confidentiality.

The third argument used to justify the general practice of confidentiality is a deontological one which claims that an individual has a right to privacy concerning his personal affairs. Privacy is considered to be an important right as it allows an individual some control over the dissemination of personal information concerning him. A promise of
confidentiality allows the individual to share, with others whom he chooses, information, yet keeps it out of the prying eyes of others.

The importance placed on this right, however, is not enough to generate an absolute obligation of confidentiality. That a right of privacy is not considered by rights-theorists to be our strongest right can be seen by the number of circumstances which make it permissible to override this right. For example, someone running for political office loses a right to privacy, at least in large part, because he is a public figure and electing him may have a significant impact on the county/state/country/world (depending on which office he is seeking). For people well out of the public eye, a right to privacy is sacrificed when other concerns surface such as the right of others to have access to court records.

In my dissertation I will examine the issues of confidentiality and privileged communications as they apply to various professions. In particular, I will focus on confidentiality as it relates to four "helping" professions, i.e., legal, medical, psychotherapeutic, and religious. These professions have as an ultimate goal the betterment of peoples' lives, yet the number and types of communications which each profession treats as confidential are dissimilar, as are some of the reasons given to justify maintaining confidentiality in the different professions. These professions treat confidentiality with varying degrees of strictness, ranging from the absolute categorical obligation for priests to keep
secrets to the minimal confidentiality maintained by many members of the medical profession.

Various professions have incorporated the idea of confidentiality into their codes of ethics. This serves to strengthen the obligation to keep confidential communications shared between the client and the professional. While some elements of these codes of ethics may also be part of their legal obligations, the codes of ethics are taken as indicating the ethical responsibilities of the professionals. In its "Principles of Medical Ethics", the American Medical Association specifically states:

"The following Principles adopted by the American Medical Association are not laws, but standards of conduct which define the standards of honorable behavior for the physician."\(^2\)

The Principles of Medical Ethics state the following concerning confidentiality:

"A physician shall respect the rights of patients, of colleagues, and of other health professionals, and shall safeguard patient confidences within the constraints of the law."\(^3\)

Arguments which purport to show that confidentiality is an absolute obligation for various professions such as the ministry and the medical profession are generally of three types. First, without a promise of confidentiality, individuals will not seek help from professionals of that profession. Second, even if they do seek help, without a promise of absolute confidentiality, the individuals will not reveal information which is necessary if the professional is to help them adequately. Finally, it is frequently argued that absolute confidentiality within the confines of the professional relationship will increase the safety of society.
One major argument is offered, in all professions, against making confidentiality an absolute obligation; there are circumstances in which not breaking confidentiality leads to disastrous consequences. In a case currently under litigation, the failure of a psychologist to warn the client's wife or the police that the client was dangerous allowed the client to kill his son. If the psychologist had warned either the wife or the police, it is quite likely that the client's son would not have been killed.

As indicated above, the psychotherapeutic profession is one in which questions concerning confidentiality arise. In the above example, the psychologist had an obligation to the client to maintain confidentiality concerning their discussion. Once the psychologist determined that the client was dangerous to his family, he had an obligation to protect the unknowing family. In cases such as this I will argue that the obligation to protect the family outweighs the obligation to maintain confidentiality.

Another profession in which questions of confidentiality arise is in the ministry. In the Catholic church, members of the church are required to confess their sins at least once a year; it is a religious duty. In various Protestant religions, e.g., Episcopal, Lutheran and Presbyterian, confession is not required of members of the church, but is an optional part of the religion. Different churches conduct confession differently - Lutherans confess to any member of the church and Presbyterians can confess to a ruling council of elders - but all maintain that the contents of confession are to be kept absolutely confidential. In the dissertation I will examine only confession as practiced in the Catholic religion as the arguments presented by Catholic theologians and philosophers are more
complete and stronger than the arguments presented by theologians of other religions. Thus the arguments of the Catholic church are more likely to work than the arguments of other religions.

Although members of a church can look to church doctrine for guidance, they may still encounter moral quandaries. Consider the following example: a penitent confesses to a priest that he has just poisoned the sacramental wine which will be used in Mass in 30 minutes. The morally correct course of action, according to Catholic church doctrine, is to do nothing. The priest must drink the wine and serve it at mass, and cannot warn anyone. Merely knowing the Catholic doctrine does not mean the priest is not caught in a moral quandary. He must decide, as a person, if the consequences are dire enough to warrant breaking the Seal of the Confessional, regardless of Church doctrine.

The medical profession is similar in many respects to the psychotherapeutic profession. Psychiatrists, the original psychotherapists, are physicians who are also trained in psychiatry. While medicine has become more specialized since the days of the "old family doctor", patients still go to physicians for help, both physical and emotional. Patients expect that physicians will keep confidential those communications and/or diagnoses the patients wish kept confidential. The Hippocratic Oath contains a clause which is taken by the medical community as generating an obligation of confidentiality for physicians: "All that may come to my knowledge in the exercise of my profession or outside of my profession or in daily commerce with men, which ought not to be spread abroad, I will keep secret and will never reveal."
Physicians in the 1980s, however, face a number of problems which make it difficult to keep this obligation absolutely. Even if the physician did not routinely have to interact with other staff members and insurance companies, questions of confidentiality might still arise, as in the following case.

A forty-seven-year-old engineer has polycystic kidney disease, in his case a genetic disorder, and must have his blood purified by hemodialysis with an artificial kidney machine. Victims of the disease (at the time of his diagnosis) usually die a few years after symptoms appear, often in their forties, though dialysis and transplants can often stave off death for as much as ten years.

The patient has two children: a son, eighteen, just starting college, and a daughter sixteen. Though the parents know that the disease is genetic – that their children may carry it and might transmit it to their own offspring – the son and daughter are kept in the dark. The parents insist the children should not be told because it would frighten them unnecessarily, would inhibit their social life, and would make them feel hopeless about the future. They are firm in saying that the hospital staff should not tell the children; the knowledge, they believe is privileged (confidential) and must be kept secret. Yet the hospital staff worries about the children innocently involving their future spouses and victimizing their own children.8

The parents wish the information to be kept secret, allowing them to decide if and when the children will be told of the disease. However, as the disease is genetic, it can be argued that the children have a right to know so that they can seek genetic counselling before having children. There are no clear guidelines which instruct the hospital staff on the morally correct action concerning the confidential information. In my dissertation, I will create some guidelines for difficult decisions such as these in which different obligations must be weighed.9

The legal profession is another helping profession which must face problems of confidentiality. Communications made to an attorney were considered absolutely confidential under common law. Today, there are a
few circumstances which permit the attorney to break confidentiality without his client's permission such as when the client admits an intention of committing future crimes. The attorney must hold admissions of past crimes as confidential according to his professional code of ethics. This is an area which needs further investigation, especially in light of the following example.

An attorney represented a client accused of a string of serial murders and won the case by reason of a technicality in the law. The client promised the attorney he would not kill in the future, but the attorney is not sure he is telling the truth. According to his ethical code, the attorney must keep the guilt of his client a secret, yet doing so may put innocent lives at risk. More generally, there is a question of what the attorney ought to do about a client who has confessed his guilt to the attorney, but is pronounced innocent by the court due to a technicality in the law.

In the next chapter I will take up the issue of confidentiality in the legal profession, followed by an examination of a problem of confidentiality peculiar to the legal profession, i.e., perjury. In the chapters that follow, I will examine the notion of confidentiality in the fields of medicine, psychotherapy and the Roman Catholic Church. I will end the dissertation with an examination of the obligations of the various professionals in cases of child abuse, and finally make a few concluding remarks.
Before turning to the problems of the dissertation, a word on my philosophical biases. I hold a consequentialist theory of ethics. The dissertation does not presuppose this, though it does suppose that the final theory will have a significant consequentialist component. I maintain such a consequentialist outlook for two reasons. First, most of the arguments presented are of a consequentialist nature. When I show that a consequentialistic argument is wrong, I do so by accepting its consequentialist nature and demonstrate that if consequentialism is true, the argument will not work as some might have thought. In other words, I criticize consequentialist arguments on consequentialist grounds. As most of the arguments presented for confidentiality in the professions are of this nature, much of the reasoning done in the dissertation will be consequentialist in nature. In dealing with the occasional deontological argument, I criticize it on deontological, as well as on consequentialist grounds.

Second, I have come to believe that consequentialism in some form, probably with a rich theory of value, is the ethical theory that is most likely to be true. Theories with principles and rules which consistently promote harm over good are not doing what I take one of the goals of ethics to be. In my incompletely worked out view, ethics is intended as providing us with reasons, rule, principles, etc., which promote good and minimize harm. Thus I accept as true that in a conflict between actions,
rules, principles, etc., that act/rule/principle is right/true which promotes the most good.

I realize this assumption may cause some controversy. But, since it is not the focus of my dissertation, I will not here defend it at length. I side with Mill in his criticism of Kant. Whenever a deontological theory claims some action or rule is right, it generally appears to be appealing to the good consequences of doing that action or following that rule, or to the bad consequences which would come of not doing so. To quote Mill:

"[Kant], whose system of thought will long remain one of the landmarks in the history of philosophical speculation, does, in the [Metaphysics of Ethics], lay down a universal first principle as the origin and ground of moral obligation; it is this: "So act that the rule on which thou actest would admit of being adopted as a law by all rational beings." But when he begins to deduce from this precept any of the actual duties of morality, he fails, almost grotesquely to show that there would be any contradiction, any logical (not to say physical) impossibility, in the adoption by all rational beings of the most outrageously immoral rules of conduct. All he shows is that the consequences of their universal adoption would be such as not one would choose to incur."10
Notes


3. Ibid


5. Ibid pp.101-105


9. This is done throughout the chapters of the dissertation. A summary is presented in the chapter entitled "Concluding Remarks".

CHAPTER II
CONFIDENTIALITY AND THE LEGAL PROFESSION

In this chapter of my dissertation, I will examine arguments presented in favour of the obligations of confidentiality and privileged communications for the legal profession.

Attorneys are bound by two kinds of confidentiality. The first, called "secrets", are those communications protected by the ethical obligation of confidentiality. "Confidences", also called "privileged communications", refer to those communications protected by laws covering the attorney-client privilege which are protected from revelation in a court of law. According to the ABA Code of Ethics, the set of confidences is a subset of the set of secrets.

DR 4-101 Preservation of Confidences and Secrets of a Client
(A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.¹

EC 4-4 The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidences and secrets of his client. This ethical precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge. A lawyer should endeavor to act in a manner which preserves the evidentiary privilege; for example, he should avoid professional discussions in the presence of persons to whom the privilege does not extend. A lawyer owes an obligation to

17
advise the client of the attorney-client privilege and timely to assert the privilege unless it is waived by the client.2

The notion of legal privilege is a more limited one than that of confidentiality. Legal privilege refers to the legal obligation for the attorney not to reveal client confidences in a court of law without permission of the client. Confidentiality is more general, being an ethical obligation not to reveal client confidences in any arena without permission of the client. The arguments concerning keeping attorney-client communications secret generally focus on the legal privilege, i.e., keeping communications confidential during legal proceedings. This is due to the nature of an attorney's work, which generally involves giving legal advice and assisting his client during legal proceedings. The arguments presented are arguments for keeping secret communications between attorney and client, and so apply to confidentiality generally as well as confidentiality in the courtroom.

On first reading, some of the arguments presented in favour of confidentiality appear to be arguments for categorical confidentiality. In reading them, one may find phrases such as "keeping inviolable the secrets of the client", or "one is never permitted to reveal the secrets".

These arguments are not, however, arguments for categorical confidentiality, regardless of the language used to present them. The conduct of lawyers is regulated by a detailed code of ethics which provide instructions concerning when it is permitted or required to inform others (usually the court or the police) of the contents of a client's communications. Rule DR 4-101 C is one of these:
[DR 4-101]
(C) A lawyer may reveal:
(1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
(2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
(3) The intention of his client to commit a crime and the information necessary to prevent the crime.
(4) Confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.3

As I will show, since attorneys recognize that there are circumstances under which they are at least permitted to violate confidentiality, the arguments they present supporting confidentiality are best taken as arguments establishing a prima facie duty to preserve confidentiality. Occasionally arguments are advanced against an obligation of confidentiality, but these are rare.4

In what follows, I will examine four arguments which have been presented in favour of a prima facie obligation of confidentiality. The first of these is historical, and not advocated today. The second argues that confidentiality is necessary for the proper functioning of the attorney-client relationship. The third argument claims that confidentiality is necessary to get the expert legal advice needed in a complex 20th century society, and the final argues from societal interests.

Today, the privilege is said to belong to the client. It is his protection that his communications will not be revealed in a court of law against his will. Except for a few circumstances, stated above in DR 4-101 C, the client, not the attorney, decides when, if ever, to make public his
communications to his attorney. In the 16th century, and continuing until 1776, however, the privilege belonged to the attorney as a gentleman, and not to the client. The privilege was derived from the obligations of honour among gentlemen. The attorney gave a promise of secrecy to his client, and the courts recognized the right of a gentleman not to violate a promise of secrecy. This justification of attorney-client confidentiality came to an end in 1776 during the trial of the Duchess of Kingston.

The idea of 'honour among gentlemen' has fallen out of favour today and will not now serve as an adequate justification for the existence of the legal privilege for two reasons. First, it assumes that all attorneys are honourable gentlemen, with the associated high moral standards. It is doubtful that all lawyers of the 16th and 17th centuries were gentlemen, and it is even more doubtful today. In America of the 1980s, there seems to be an emphasis placed on getting ahead at all costs, taking as many shortcuts as are needed, and there seems to be a lack of emphasis placed on inculcating high moral standards in our young. If the attorney is neither honourable nor a gentleman, then his pledge of secrecy based on his honour as a gentleman amounts to nothing.

If we discard the notion of 'honourable gentleman', and retain the idea of a pledge of secrecy given by one person to another, we still will not have an adequate justification for the privilege.

Privileged communications are an exception to the general rule of evidence. The basic purpose of evidence, which includes testimony, is the discovery of facts which will allow the court or jury to come to a proper resolution of the controversy under litigation. The court is interested in
uncovering all the relevant facts possible, so anything which limits the scope of revealed information is discouraged. If the privilege were to be justified and accepted on the grounds that a promise of secrecy was made, then an individual could keep a lot of information vital to his case from being revealed in court by obtaining a promise of secrecy from those involved. This might prevent much needed information from being revealed in court, resulting in unfair verdicts, and preventing justice from being carried out. Thus if the maximum amount of relevant information is to be revealed, as proponents of our legal system seem to desire, the existence of the legal privilege cannot be justified by an appeal to secrecy. Privilege is derived from a desire for secrecy, but more is necessary to justify it.

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A second justification for the privilege and confidentiality, was developed during the 17th and 18th centuries. This justification took the privilege from the attorney and granted it to the client: now it was the client who could choose to have communications between client and attorney revealed or kept secret. The argument to justify this confidentiality is that confidentiality is necessary for the proper functioning of the attorney-client relationship. This argument is a consequentialist one: it claims that the results of refusing to keep the client's conversations confidential will adversely affect the attorney-client relationship in ways discussed below. Adversely affecting the attorney-client relationship entails that the attorney will not be able
to represent his client to the full extent of his abilities, so the client is unlikely to get adequate representation in court. This will harm the client and hence is not a good thing. Hence, maintaining confidentiality is an obligation of the attorney.

Our society is a complicated one, full of complicated laws and legal processes. It has become nearly impossible for an individual who lacks legal training successfully to work his way through the legal muck and the mire and present his own case in court. Expert legal advice has become necessary. In order for an attorney to advise his client adequately, he must have knowledge of the relevant facts pertaining to the case.

Someone seeking legal advice has no way of knowing what information is relevant and what is irrelevant to the case. Sometimes, information which, to the layman, seems to be totally irrelevant, may be the information that allows the client to win his case. Suppose, for example, that a 16 year old girl has been abused at home and so ran away to a friend’s house. The child wishes to live with her friend, an older woman. In some states, a child above the age of 14 can choose the person who will become her foster parent. As the child is a minor, her actual age might be thought to be irrelevant. But it is knowledge of the child’s age that will allow her to be placed in the home of her choice.

As the client is unlikely to be able to sort out the relevant from the irrelevant, the attorney must do it so as to prepare the case. However, to do this effectively, he needs to know what the client knows concerning the matter. Assuring the client that the material will be kept confidential,
that it will not be revealed in the courtroom, is one way to convince the client to reveal the facts of the matter.

With relatively innocuous cases, the attorney does not need the assistance of a promise of confidentiality to convince his client to reveal everything he knows about the case. In many cases, however, the client may have information he would prefer not to discuss for fear of it being revealed and used against him in a court of law. The client may be embarrassed about things he has done, or they may be immoral, so he does not feel comfortable discussing them with his attorney. It is for obtaining this sort of information that the legal privilege is necessary, for the legal privilege will prevent the confidential information from being brought into court against the client's wishes. The more general obligation of confidentiality is aimed at preventing the attorney from revealing information in other circumstances. However, as it is in the arena of the courtroom that the client, in this relationship, is largely concerned with confidentiality, the legal privilege is generally the obligation under scrutiny. For the attorney to function effectively, he must convince his client to entrust him with all the facts. Therefore, a promise of silence concerning the information is necessary.

This justification for silence on the part of the lawyer is incorporated in the Annotated Code of Professional Responsibility for lawyers. Thus it is established policy for them.

EC 4-1 Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him. A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally
free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant. The observance of the ethical obligation of a lawyer to hold inviolate the confidences and secrets of his client not only facilitates the full development of facts essential to proper representation of the client but also encourages laymen to seek early legal assistance.9

The American Bar Association argued for confidentiality of attorney-client communication in ABA Opinion 250 (1943). This opinion was cited as a reason for adopting EC 4-1.

"The purposes and necessities of the relation between a client and his attorney require, in many cases, on the part of the client, the fullest and freest disclosures to the attorney of the client's objects, motives and acts. This disclosure is made in the strictest confidence, relying upon the attorney's honor and fidelity. To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance. Based upon considerations of public policy, therefore, the law wisely declares that all confidential communications and disclosures, made by a client to his legal adviser for the purpose of obtaining his professional aid or advice, shall be strictly privileged; - that the attorney shall not be permitted, without the consent of his client, - and much less will he be compelled - to reveal or disclose communications made to him under such circumstances."10

This justification for confidentiality and the legal privilege is echoed in an article by Max Radin in the California Law Review and in a Comment in the Yale Law Review.

"The best [argument for the privilege] is the frequently asserted theory that public policy is involved. All persons ought to be able fully and freely to tell their lawyers all the facts, however remote, which surround the case, without fear that the lawyer's knowledge of these facts may be used to establish claims against them or subject them to penalties. It is part of the public policy against self-incrimination."11
"Another popular explanation for the attorney-client privilege is that it exists as a necessary aid to the process of litigation. In order to prepare his case for trial, the theory goes, a lawyer must have complete, frank disclosure from his client, and to achieve this, the lawyer must be able to assure the client of perfect confidentiality, ergo, the privilege."

Radin has teased apart the argument that confidentiality is necessary for the proper functioning of the attorney-client relationship into two arguments. In the first, he argues that confidentiality is justified because it protects a policy against self-incrimination, which is judged to be of value in (and out of) our legal system. Radin’s second argument is that confidentiality is necessary because it allows the client to reveal freely all he knows about the subject under discussion, which allows the attorney more freely to protect his client’s interests, one of which is not to incriminate himself.

Wigmore, who established the four criteria used to determine whether or not a particular profession will be granted the privilege, also uses this argument to justify confidentiality for the legal profession.

"The policy of the privilege has been plainly grounded since the latter part of the 1700s on subjective considerations. In order to promote freedom of consultation of legal advisers by clients, the apprehension of compelled disclosure by the legal advisers must be removed; hence the law must prohibit such disclosure except on the client’s consent."

The argument that confidentiality is necessary for the proper functioning of the attorney-client relationship is not merely a dry, dusty theory to be found only in law books, but not in the "real world". This can be seen in passages from cases which have been argued in court.

"[T]he privilege exists to protect not only the giving of professional advice to those who can act on it but also allow the giving of
information to the lawyer to enable him to give sound and informed advice....The first step in the resolution of any legal problem is ascertaining the factual background and sifting through the facts with an eye to the legally relevant."

"In the eighteenth century when the desire for truth overcame the wish to protect the honor of witnesses and several testimonial privileges disappeared, the attorney-client privilege was retained, on the new theory that it was necessary to encourage clients to make the fullest disclosures to their attorneys, to enable the latter to properly advise the clients. This is the basis of the privilege today."

"The base of the attorney-client privilege lies the policy that one who seeks advice or aid from a lawyer should be completely free of any fear that his secrets will be uncovered."

Any consequentialist argument, such as the above, succeeds only so long as it can demonstrate that its conclusion brings about the best consequences. However, in cases in which maintaining the obligation established in the conclusion brings about worse consequences than an alternative, the argument fails. A new argument is created, with a new conclusion establishing an obligation which brings about better consequences. Thus, the argument that confidentiality is necessary for the preservation of the attorney-client relationship is tempered by the realization that the attorney is an integral part of other relationships.

The attorney may act as advocate and adviser to her client. However, the attorney is also an officer of the court, and as such, owes a responsibility to the court in its attempt to discover the truth and bring matters before the court to a fair and proper resolution. Sometimes the attorney will have to weigh the costs and benefits of the consequences of following the
conflicting duties. Occasionally her duties to the court and to others will override her obligations to her client. These duties are touched on in the Annotated Code of Professional Responsibility.

EC 7-1 The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law. The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits. In our government of laws and not of men, each member of our society is entitled to have his conduct judged and regulated in accordance with the law; to seek any lawful objective through legally permissible means; and to present for adjudication any lawful claim, issue, or defense.14

EC 7-39 In the final analysis, proper functioning of the adversary system depends upon cooperation between lawyers and tribunals in utilizing procedures which will preserve the impartiality of tribunals and make their decisional processes prompt and just, without impinging upon the obligation of lawyers to represent their clients zealously within the framework of the law.15

EC 7-11 The responsibilities of a lawyer may vary according to the intelligence, experience, mental condition or age of a client, the obligation of a public officer, or the nature of a particular proceeding. Examples include the representation of an illiterate or incompetent, service as a public prosecutor or other government lawyer, and appearances before administrative and legislative bodies.16

EC 7-10 The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.17

An attorney has two prima facie duties which may make it necessary to reveal the client's confidential communications to others. The first, stated in EC 7-10 (see above), is a duty to prevent others from suffering needless harm. The second duty, a legal duty, derives from the aims of the court, i.e., to arrive at the truth and a fair adjudication of the matter at hand. When these are weightier than the obligation of confidentiality, and
thus conflict with it, the attorney's actual obligation is to violate confidentiality.

EC 7-10 states that the lawyer has an obligation to "treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm." This rule may be directed at courtroom behavior, where, for example, in the process of questioning a witness, the attorney must pick between a gentle or a harsh approach to questioning. Obviously, there will be cases when forcing a witness to answer a question will cause pain no matter how gently the question is asked, such as asking a father to recount the manner in which his young child died. The attorney, however, should seek to minimize the pain, and thus the harm, inflicted on the witness.

There are other occasions, outside of the courtroom, on which the attorney may be able to avoid causing harm to others. For example, a savvy client may know that if she tells her attorney about an intended future crime, the attorney is, according to his ethical code, at least permitted to reveal this information to the proper authorities. This client may tend to seek advice and information concerning the consequences of her actions by asking the attorney about "hypothetical" cases. As one of the roles of an attorney is that of adviser on legal matters, asking for advice, even of hypothetical cases, is not ordinarily a problem: it only becomes a problem when the client tells her attorney of her intentions to commit future crimes.

If the lawyer knows his client, he may not only realize that his client is talking about a real, and not a hypothetical case, but he may also be able
to deduce the time and/or location of the future crime, as well as the identities of any innocent victims. In such a case, the lawyer has an obligation, based in ordinary morality, to do all he can to protect the innocent person from harm, even if that means violating confidentiality. Ordinarily, people have an obligation not to harm others. An attorney who allows, through his own inaction, someone to come to harm, can be said to be indirectly responsible for that harm. By remaining silent, the attorney does promote the attorney-client relationship, which, in and of itself, may be said to be a good thing. This silence, however, allows harm to come to someone.

By remaining silent, the attorney can be seen as aiding and abetting his client in his future crimes. This is not the function of the attorney-client relationship. According to EC 7-1, "The professional responsibility of a lawyer derives from his membership in a profession which has the duty of assisting members of the public to secure and protect available legal rights and benefits." A lawyer who is reasonably sure that the case of future crime his client is discussing is not hypothetical is not helping her secure her legal rights and benefits, but, instead, may be said to be advising her on how best to commit the crime. Now not only do we have an innocent person coming to harm, but we also see the attorney-client relationship being perverted. Thus, in cases where an attorney can prevent harm from befalling others by warning the appropriate individuals about the crimes his client intends to commit, since less harm is produced by this alternative, the attorney ought to warn concerning the future crime.
The American Bar Association recognized this duty to warn in its canons of ethics. According to DR 4-101 (C): "A lawyer may reveal... (3) The intention of his client to commit a crime and the information necessary to prevent the crime." This is a prima facie obligation which may override the attorney's duty to keep his client's confidences. The attorney is permitted to violate confidentiality, presumably in cases where the crime is of a serious nature. Thus, when a client reveals his intent to have sexual relations with his wife in a position which, by law, is a crime, the seriousness of this offense is not enough to override the attorney's obligation to his client. Crimes of a more serious nature, such as murder or embezzlement, would override the obligation of confidentiality.

The lawyer also has a legal duty occasionally to violate confidentiality. This duty derives from the aims of the court, i.e., to arrive at the truth and a fair adjudication of the matter at hand.

A lawyer is supposed to act as advocate and adviser to his client, even when he knows that his client is guilty of some past crime. He is not, however, supposed to assist his client in the commission of future crimes.

"For a lawyer to represent a syndicate notoriously engaged in the violation of the law for the purpose of advising the members how to break the law and at the same time escape it, is manifestly improper. While a lawyer may see to it that anyone accused of crime, no matter how serious and flagrant, has a fair trial, and present all available defenses, he may not co-operate in planning violations of the law. There is a sharp distinction, of course between what can lawfully be done and advising how unlawful acts can be done in a way to avoid conviction. Where a lawyer accepts a retainer from an organization, known to be unlawful, and agrees in advance to defend its members when from time to time they are accused of crime arising out of its unlawful activities, this is equally improper."  

DR 7-101 (A) In his representation of a client, a lawyer shall not: (4) Knowingly use perjured testimony or false evidence.
(6) Participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.
(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.23

Thus, if an attorney has good reason to believe that his client will engage in future illegal activity, he has a legal obligation to reveal this fact to the appropriated individuals. This issue is more fully discussed in the next chapter on perjury.

The argument that confidentiality is necessary for the proper functioning of the attorney-client relationship establishes that confidentiality is best understood as a prima facie obligation.

Confidentiality ought not to be maintained in cases in which doing so would bring harm to others. Among other prima facie obligations, there is a prima facie obligation to prevent the future commission of crimes by the client. To maintain confidentiality in such circumstances would not only allow harm, which could be prevented, to befall others, but it also perverts the role of the attorney. The attorney’s role would change from one that benefits society by protecting people’s rights to one that harms society by the aiding and abetting of the violations of the rights of others.

The third argument for a prima facie obligation of confidentiality is closely linked to the second. It is that confidentiality is necessary to get the expert legal advice needed in our complex 20th century society.

One reason for the existence of the laws is to protect the rights of the individuals living in the society. Our current society is incredibly complex and shows a corresponding complexity in its laws. For an individual to
protect some of his legal rights, he must be able to find his way through the confusing maze of laws. This is frequently difficult, if not impossible, for someone who lacks legal training to do. Thus to protect some of his legal rights, an individual may have to obtain the help of an attorney.

Without a promise of confidentiality, an individual may feel apprehensive about seeking the needed help for fear that the attorney would reveal the contents of their conversation to others. A man who is seeking a divorce may not want anyone to know of the sordid or unhappy details of the breakup of his marriage and only reluctantly tells his attorney so as not to be "taken to the cleaners" by his wife. If this man is not promised confidentiality and reassured that the attorney will let no one, save perhaps the secretary, know the details of his miserable life, he may not seek legal assistance. If this is an average person with little, if any, knowledge of the law, he may lose his rights to his property, children, and income unless he has legal assistance. Thus to protect an individual's rights, a promise of confidentiality is necessary.

Alternatively, an individual may seek to protect her rights even without a promise of confidentiality, by seeking legal assistance. Such an individual, however, runs the risk of having her legal rights impinged on or taken away if what she reveals to her attorney indicates that she has violated some laws. Suppose a woman, who has come to realize the error of her formerly evil ways, repents of her past misdeeds and decides to create a scholarship for a university using the profits from her previous nefarious acts. Not knowing the laws covering the endowment of a scholarship, she seeks the help of an experienced lawyer. In their
discussion, the woman reveals that she obtained the money by swindling rich executives. If the attorney does not have an obligation to keep the conversation confidential, the woman may find herself handed over to the authorities and eventually tried and sent to prison. Obviously, in this case, the university would not get its scholarship. More importantly, however, the woman has had her rights jeopardized. She sought legal counsel for a worthwhile and legitimate purpose, and ended up losing some of her rights (e.g., freedom). Moreover, a lack of confidentiality cost her the right not to incriminate herself, since she told her lawyer, who then repeated it to the authorities.

Some people, notably Bentham, have argued that since the woman had committed past wrongs, she is not morally entitled to have her rights protected and the law would be better if it reflected this. They argue that there ought not to be confidentiality for the attorney-client relationship; that the legal privilege ought to be violated when a person confesses her guilt. According to Bentham,

"If it be in the nature of the exclusionary rules [rules which exclude certain evidence from court, such as communications protected by the attorney-client privilege] to save the judge from deception oftener than it leads him into it, all this mischief [harm caused by the exclusionary rule] may be found to make amends for, and outweighed."25

In other words, an exclusionary rule, such as the attorney-client privilege, is only justified when it allows a judge to come to know the truth more often than if the rule were not in effect.

Bentham claims that violating a client's trust and revealing his confidences to the court is not immoral.
"An immoral sort of act, is that sort of act the tendency of which in, some way or other, to lessen the quantity of happiness in society. In what way does the supposed cause in question [revealing client confidences] tend to the production of any such effect? The conviction and punishment of the defendant, he being guilty, is by the supposition an act the tendency of which, upon the whole, is beneficial to society."26

He argues that the only consequences which will ensue from an attorney informing his client that their communications will not be held confidential is that a guilty person will not get as much assistance from the lawyer. This, in turn, means that the lawyer will not be able to make a 'false defense' for the client. If the client is innocent, he will not fear to have the subject of his communications with his attorney revealed in court as he will have nothing to hide. "Whence all this dread of the truth? Whence comes it that anyone loves darkness better than light, except it be that his deeds are evil?"27 Since the only function the privilege really serves is to protect the guilty, which is contrary to the purpose of law, the testimonial privilege should be abolished.

This argument considers only cases, such as most criminal cases, when (presumably) one party is guilty and the other is innocent. However, the law applies not only in criminal cases but also in civil cases where the line between guilt and innocence may not be so clearly defined. Consider, for example, a woman who unknowingly bought stolen jewelry. She bought the jewelry from a jewelry dealer in good faith. The dealer had purchased it from a chain of other people whose first member was the thief who had stolen it. The original owner of the jewelry, from whom it had been stolen, discovered its whereabouts and took the owner to court to get the jewelry back. In a case such as this, there are no clearly marked lines of
guilt and innocence, yet each woman might reveal things to her lawyer which she does not want revealed in court.

According to Bentham, an innocent person has nothing to hide so will not mind if all her communications are made public, whereas the guilty person deserves to have all the sordid details of her life made public. In this case no one "deserves" the punishment of having her private conversations made public, yet each has revealed things to her attorney which she does not want made public. Thus Bentham's argument, which assumes a clear distinction between innocent and guilty parties and assumes that an innocent party has nothing to hide, works at most only for a portion of legal cases. Thus it does not prove that the legal privilege should be abolished as the legal privilege is meant to be applied to all branches of law.

Even within criminal law, it is not clear that Bentham's argument is a good one. In many cases, one party is clearly guilty of wrongdoing in the crime in question and the other innocent. Contrary to Bentham, it does not follow either that the guilty party deserves to have the possibly sordid details of his life made public or that the innocent party will mind having details of his life made public. A guilty party deserves to be punished for his crime, but that punishment is set after a verdict of guilty is returned in court. By having information, which may be known only to the attorney and client, made public, the guilty party is punished both during the trial and after.

A person who is innocent of a crime may not have an unblemished life. (Most people have at least one skeleton in their closet.) In preparing the
case, the attorney will encourage his client to reveal all he knows about
the events surrounding the crime, which may include information the client
finds embarrassing. It is likely that the innocent party would not want the
information to be revealed to others. Keeping these communications as
privileged will keep them out of court.

In cases where the line blurs between guilt and innocence, the argument
for civil cases applies. Thus Bentham's argument does not prove that the
legal privilege would be abolished.

The legal profession appears to uphold the argument that
confidentiality is necessary to get the expert legal advice needed in our
complex 20th century society. According to the Comment to Rule 210 of the
A.L.I. Model Code of Evidence (1942):

"The continued existence of the privilege is justified on grounds of
social policy. In a society as and governed by laws as complex and
detailed as those imposed upon us, expert legal advice is essential.
To the furnishing of such advice the fullest freedom and honesty of
communication of pertinent facts is a prerequisite. To induce clients
to make such communications, the privilege to prevent their later
disclosure is said by courts to be a necessity."


"This principle we take to be this; that so numerous and complex are
the laws by which the rights and duties of citizens are governed, so
important is it that they should be permitted to avail themselves of
the superior skill and learning of those sanctioned by the law as its
ministers and expounders, both in ascertaining their rights in the
country, and maintaining them most safely in courts, without
publishing those facts, which they have a right to keep secret, but
which must be disclosed to a legal adviser and advocate, to enable
him successfully to perform the duties of his office, that the law has
considered it the wisest policy to encourage and sanction this
confidence, by requiring that on such facts the mouth of the attorney
shall be forever sealed."
Contrary to Bentham, who claimed that the legal privilege serves no purpose for a guilty person other than to hide his guilt, the court in Hatton v. Robinson argued that it serves another function. Guilty people, as well as innocent, have many rights that can best be protected with the help of legal counsel. The privilege remains necessary, though not absolute, for guilty parties to prevent injustice from being done to them, such as excessive charges or sentences.\(^{28}\)

The protection of an individual’s rights as she, with the help of an attorney, seeks to work her way through the tortuous maze of the law is a good reason in favour of an obligation of confidentiality. Yet when an individual violates, or threatens to violate, the rights of others, arguments can be presented demonstrating that confidentiality ought to be broken; arguments which were presented in the previous section.

When one individual threatens another with harm or death, basic rights are violated, such as an innocent person’s right to life. When an attorney is told of his client’s intentions to wreak havoc on the life of another, he becomes an accomplice to that wrongdoing. As I have argued, it is morally better in situations such as this for the attorney to violate confidentiality than to remain silent.

The final argument for maintaining confidentiality between lawyer and client derives from societal interests. Confidentiality enhances a relationship the community desires to encourage, in part because it
promotes justice and compliance with laws. The promise of confidentiality encourages a client to tell his attorney information that might be damaging to the client. Where this potentially damaging information involves the client's intentions of future wrongdoing, the attorney may be able to persuade her client not to do these misdeeds by pointing out the legal (and moral) consequences of these actions. Where psychological counselling is indicated, the attorney may be able to convince her client to seek professional help in order to rid him of these evil intentions.
Additionally, the attorney may be able to encourage her client to comply with the laws of the society. The end result of these actions is a society existing with fewer harmful acts, thus increasing the overall good produced.29

Natta v. Hogan, 392 F.2d 686,691 (10th Cir.,1968)
"The attorney-client privilege is designed 'to facilitate the administration of justice,' in order 'to promote freedom of consultation of legal advisor by clients.'" (citations omitted)

"Its [privilege's] purpose is to encourage full and frank disclosure between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends on the lawyer's being fully informed by the client."

According to the American Lawyer's Code of Conduct, it is in the public interest for the client to make a full disclosure to his attorney. The claim is made that it is only through the counsel and advocacy of an attorney that individuals can "fully exercise [their] autonomy and realize other important rights under the Constitution and laws."30 The lawyer also functions as advisor: "a substantial part of an attorney's time is devoted
to advising clients that a particular course of conduct should not be followed on grounds of legality or morality." It is argued that unless clients are candid with their attorneys, these functions cannot be served.

In order for a client to be candid, he must trust his attorney. As confidentiality is essential to establishing that trust, it is argued that an attorney has an obligation to keep confidential information obtained in conversation with his client.32

Scott Stone and Ronald Liebman, in Testimonial Privileges, argue that "[a]ll confidential communications of legal advice from counsel should be privileged, because lawyers' advice helps to promote compliance with the law and disclosure of the advice does not serve any purpose except where the advice per se is at issue..."33

This argument is consequentialist in nature, noting the consequences of attorney-client confidentiality for all of society, not merely the client. The focus of this argument is in the benefits which attorney-client confidentiality will give to society: increased compliance with society's laws and fewer wrongdoings on the part of clients, which minimizes conflict between individuals in society and promotes a more harmonious society.

This argument only works, however, as long as society's interests are generally being protected; it is the protection of societal interests that serves as the major premise for the argument that the confidentiality of the attorney-client relationship ought to be preserved. There may be occasions on which societal interests will not be promoted, but rather, harmed, for example, cases of confessions of intentions to harm or kill
others. Killing violates the law and, except for a few well-justified cases, is generally considered to be morally wrong. It also creates a less harmonious society; creating anxiety, especially for those closely associated with the death. In such cases, the attorney's prima facie obligations to society override his prima facie obligations to his client.

Society's interests would be better served by not permitting the attorney to advise his client concerning future crimes, other than to tell her not to commit them. The role of the attorney is to protect his client's rights, and to promote her interests in the legal system. It is one thing for an attorney to assist a client in preparing a case concerning past wrongdoings, trusting that the adversarial nature of our legal system will generally uncover the truth as it is supposed to do. It is quite another thing for an attorney to assist her client in future wrongdoings, which will promote harm in society without the opportunity of having this wrongdoing being uncovered through the checks and balances of a court of law. The former promotes compliance with laws, the latter promotes a disregard for laws.

If an attorney remains silent, and does not warn concerning a planned death, society's interests are not served. In such a case, society's interests would be promoted if the attorney violated the confidentiality of the attorney-client relationship, thus protecting others from harm or death. Thus it is permissible for the lawyer to violate confidentiality when there are more pressing societal interests than the interest in maintaining the confidentiality of the attorney-client relationship.
Notes


2. Ibid. p.152

3. Ibid. pp. 170-1

4. One notable argument, to be discussed later, was presented by Bentham in *Rationale of Judicial Evidence: The Works of Jeremy Bentham*Edited by John Bowring, (Edinburgh: William Tait, 1842)

5. Notes and Comments "Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine" 17 Yale Law Journal 1226 (1962) p. 1228


   Max Radin "The Privilege of Confidential Communication Between Lawyer and Client" 16 Calif. L. Rev. 487 (1928) p.487

6. Wigmore cites two cases that brought an end to this justification for the existence of the privilege. (p.531)

   "20 How. St. Tr. 586 (1776), Notable British Trial Series 256 (Melville ed. 1927). This was a trial by the House of Lords for bigamy. Lord Barrington, an old friend of the accused, refused to disclose whether the Duchess had ever admitted to the first marriage. He invoked his honour. The Lords adjourned to discuss the point and announced that "it is the judgement of this House that you are bound by law to answer all such questions as shall be put to you." One year later, in Hill's Trial, 20 How. St. Tr. 1362 (1776), Hotham, B., in commenting to the jury on the testimony of an informer who disclosed secrets the defendant had confided in him, said "that if this point of honour was to be so sacred as that a man who comes by knowledge of this sort from an offender was not to be at liberty to disclose it, the most atrocious criminals would every day escape punishment; and therefore it is that the wisdom of the law knows nothing of that point of honour".

7. This case is fictional, but derives from discussions with a law student who has been involved in cases like it.

8. It should be noted that everything the client tells the attorney is not automatically privileged. If the information was known to many people, one of them may be required to testify concerning it in court. Generally, when individuals outside the attorney-client relationship (excluding individuals such as secretaries who assist the lawyer) are aware of the information, it is said to be public knowledge and therefore cannot be held as privileged.

10. Ibid, fn. p.151


12. Notes and Comments: "Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine" op cit, p.1231


15. Ibid, p.279


17. Ibid, p.304

18. Ibid

19. Ibid, p.277

20. Those who have not been corrupted by a study of philosophy would say that the attorney knows that his client is lying.

21. **Annotated Code of Professional Responsibility**, op cit, p.171

22. ABA Opinion 281 (1952)

23. **Annotated Code of Professional Responsibility**, op cit, pp.305-6


29. This argument is cited in:
   Wigmore, *Evidence in Trials at Common Law*, op cit, p.549
   United States v. United Shoe Machinery Corp. 89 F. Supp. 357

    Commission on Professional Responsibility. The Roscoe Pound -

31. Ibid

32. Ibid

CHAPTER II

THE PROBLEM OF PERJURY

In this chapter I will discuss the issue of perjury, a specific kind of case in which I show that the attorney has an obligation to violate confidentiality because of other, overriding obligations. I am treating it as a separate chapter as it involves a specific issue. The previous chapter dealt with the general arguments presented for and against the notion of absolute confidentiality.

The issue of perjury is peculiar to the legal profession. No other profession must face the problem of deciding what obligations members of that profession have towards a person who lies after swearing to tell "the truth, the whole truth, and nothing but the truth": this occurs only in a court of law.

Initially, the solution to the problem seems simple: the defendant has lied after swearing to tell the truth in a court of law, whose goal it is to uncover truth, and thus the defendant has committed a wrong action. This action should be exposed to the court by the defendant’s attorney who knows the defendant is lying only because of information revealed to him in confidence.

Yet things are not always as simple as they first appear. A defense attorney is bound by a number of sometimes conflicting prima facie
obligations. There are two conflicting obligations in a case of perjury. As an officer of the court, an attorney has an obligation not to offer false testimony; he must be candid in his dealings with the court. If an attorney does not reveal the perjury to the court and proceeds with the defendant's testimony in the usual manner, he will have participated in a fraud upon the court.

An attorney also has an obligation to his client to preserve the confidentiality of their communications. If the attorney informs the court of his client's intentions to perjure himself either directly, by requesting permission to withdraw from representation, or indirectly, by refusing to question the defendant in the usual manner or by refusing to use the false testimony in his closing arguments, he is likely to have disclosed confidential communications to the court.

Obviously, on most occasions of perjury, both obligations cannot be upheld simultaneously. Much has been written on this issue, with arguments flying fast and furiously supporting one or the other of these obligations. Monroe Freedman has come to be identified with the side upholding the obligation to the client of confidentiality, while most of the rest of the legal profession upholds the obligation to the court.

The ABA Code of Professional Responsibility, which sets out the obligations had by attorneys, is of little help in resolving this issue. While some of the canons and rules state that an attorney has a duty to expose perjury after it has occurred, other canons and rules appear to conflict with this.
EC 7-5 states: "...A lawyer should never encourage or aid his client to commit criminal acts or counsel his client on how to violate the law and avoid punishment therefor."

EC 7-26 states: "The law and Disciplinary Rules prohibit the use of fraudulent, false, or perjured testimony or evidence."

DR 7-102 (A) states: "A lawyer shall not...(4) Knowingly use perjured testimony or false evidence, (5) Knowingly make a false statement of law or fact."

However, DR 7-102 (B) (1) appears to conflict with the above:

"A lawyer who receives information clearly establishing that his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication."

(Emphasis added)

It is this inconsistency, as well as Canon 4's emphasis on the weightiness of the obligation of confidentiality, that leads some, such as Freedman, to the conclusion that the attorney is obligated to remain silent concerning his client's perjury. They conclude that the canons prohibiting perjury in general refer to perjury by individuals other than the attorney's client.

In the previous chapter, the ABA or custom has indicated which of the competing obligations is the attorney's actual obligation. In this instance, without such guidance, the profession needs to provide independent argumentation. In this chapter I will argue that the obligation not to offer false testimony is stronger than the obligation to the client of confidentiality, and will show that Freedman's arguments, stated in
"Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions", are mistaken in part because they rest on an erroneous view of the nature of confidentiality.

A simple, though inadequate answer to the problem is proposed by William Meagher. He states:

"Therefore, it must be accepted as a first principle that under no circumstances may counsel present evidence known to him to be false in any case, criminal or civil. It is the departure from this basic absolute that leads to the "trilemma" which Freedman finds inescapable. This "trilemma" actually need not arise: it can be avoided by a clear understanding at the very threshold of the lawyer-client relationship regarding the ethical limits beyond which counsel may not and will not go. Then the client will have no right to claim later that he was deceived by promises of confidentiality to make prejudicial disclosures which the attorney is required at all costs to conceal.""3

Thus, the best way to avoid the problem of perjury is to appraise the client of the limits of attorney-client confidentiality at the onset of the professional relationship.

This solution, appealing though it may be, is inadequate for the following reason: it presupposes that the issue under consideration has been settled in favour of the attorney's obligation to the court. Yet this has not yet happened - the discussion of this issue is just beginning, so it has not yet been proven that in cases of perjury, the attorney's obligation is to the court. Furthermore, the proponents of this solution seem to take it as an a priori given that the attorney's obligation is to the court in cases of perjury, and not to his client. It is not that easy, however.

Before we can determine that the attorney's obligation is to the court, we must examine the arguments on both sides of the issue. It is not obviously true that the attorney's primary obligation is to the court. In what
follows, I will examine the arguments on both sides of the issue and demonstrate that the attorney's obligations do lie with the court.

Monroe Freedman argues that not only is it permissible for an attorney to allow her client to commit perjury, but that the attorney has an obligation zealously to defend her client, including supporting the perjury by treating it as normal testimony.

Freedman does say the attorney has an obligation to attempt to persuade her client not to commit perjury before the perjury is committed. Obviously, if the client surprises the lawyer with a lie in court, it is too late for the attorney to dissuade him from committing perjury. Frequently, however, the client announces his intention to commit perjury during pretrial discussions with his attorney. At this time, the attorney must point out the consequences of perjury, both legal and moral. She may stress that lies on the witness stand are frequently discovered during cross examination, possibly illustrating the point by noting that (fictional) people such as Perry Mason always knew who was lying. She may note that if the client is caught committing perjury, the jurors are unlikely to believe that the rest of his testimony is true. Furthermore, if the perjury is detected, the opposing attorney, in his closing arguments, can tell the jury to take the perjury into account in judging all of the defendant's other testimony. In criminal cases, the judge can use the information that the defendant committed perjury to help determine the type and length of the sentence. However, if the persuading and cajoling do not succeed, and the client decides to commit perjury, then the attorney can do nothing to act against him and must continue to support her client in court.
Freedman's arguments for the claim that the defense attorney's overriding obligation is to her client rest on his view about attorney-client confidentiality generally.

Our current legal system is an adversary system based on the idea that the most effective means of determining the truth in court is to present a clash between conflicting views - the defense attorney and the prosecutor - to an impartial judge and/or jury. The task of the court as a whole is to discover the truth; the task of the defense attorney is zealously to defend and protect her client's rights; and the task of the prosecution is to prove, with some degree of proof ranging from "a preponderance of the evidence" to "beyond a reasonable doubt", that the defendant is guilty.

In order for the defense attorney to defend her client zealously, there must be full and uninhibited communication between client and attorney. In many cases, such as with indigent clients and court appointed lawyers, the attorney will have to pry in order to discover information. Freedman argues that the only way in which this can occur is if the attorney can convince her client that nothing he says will be used against him. Thus, the attorney must promise her client absolute confidentiality. Freedman does allow one exception to this rule: the communications of a client's intentions to commit a crime ought not to be held privileged. In all other matters, however, he claims that confidentiality ought to be held inviolable.

Freedman's main argument supporting an obligation to allow the client to commit perjury rests on the notion of inviolable (or nearly inviolable) confidentiality. The argument consists of little more than a review of the
relevant ABA Canons of Professional Ethics, concluding that since the
Canons are inconsistent and since the obligation of confidentiality is more
stringent than other obligations, the Canons relating to a prohibition
against perjury must not apply to the defendant. Thus an attorney may not
reveal her client's perjury.

Freedman provides little in the way of argumentation for his claim that
attorney-client confidentiality is an obligation which can very rarely be
overridden, it being permissible to violate it only in cases where the client
intends to commit a crime. He appears to view confidentiality as an
absolute rule containing a few exceptions, rather than as a prima facie
obligation. He claims that confidentiality is necessary for the functioning
of the attorney-client relationship. However, he allows for some
exceptions to the obligation the attorney has to protect the confidences of
his client, thus demonstrating that confidentiality is not absolutely
necessary for the functioning of the attorney-client relationship; it merely
facilitates the relationship.

If the argument to maintain confidentiality in the face of perjury is to
succeed, he either needs to argue for exceptionless confidentiality or
provide more reasons for us to believe that perjury, which appears to
cause some harm, at least to the court, ought not to be an exception to
confidentiality. Freedman denies the first alternative; he explicitly
allows for exceptions in cases of future harms in the forms of crimes.

Freedman has an argument for the second alternative lurking in the
background, which he does not clearly state. Freedman seems to believe
that, generally speaking, the legal system works, i.e., it arrives at "the
truth" and justice is served. The judicial system works because it is set up as an adversary system with the defense attorney and the prosecutor taking opposite sides, serving different functions. The function of the defense attorney is to protect her client's rights, while the function of the prosecutor is to prove, beyond a reasonable doubt, that the defendant is guilty. Even if a defendant commits perjury on the witness stand, Freedman believes it is likely that the lies will be discovered when the prosecution cross examines the witness. Thus the best defense against perjury is not for the defense attorney to expose the perjurer to the court, but instead to depend on the prosecutor to discover the lies.

This argument rests on the idealistic assumption that all the players in the judicial system will have equal abilities and will be very good at their roles; that the truth will come out in every case. The truth is, all the members of the judicial process are humans, and as with any group of humans, some will be superior to others in their ability to think, reason, prosecute/defend, and discover lies. If the defense attorney possesses superior skills, and the prosecutor is mediocre, then, assuming the defendant is able to lie reasonably well, the prosecutor may not discover the lie. Given the variations in skill levels had by attorneys, it becomes less likely that the adversary system will arrive at the truth, especially when lies are being perpetrated on the court, assisted by one of the adversaries. Differences in levels of skill and reasoning abilities of the opposing counsel are sufficient to ensure that justice will not always be served: the better attorney is more likely to be able to convince the jury that he is right, independently of the truth of the matter. Another factor
which affects the outcome of a trial is the economic resources of the defendant. A wealthy defendant is able to afford to hire a very good attorney, who may well be able to do a better job than the prosecutor. Permitting lies to be offered as testimony further frustrates the goal of justice. Thus, in order to have the judicial system work as Freedman and everyone else seems to think it should, perjury ought not to allowed to occur and attorneys ought not to uphold their clients' lies in court.

Freedman's other argument for an attorney's obligation to defend her client zealously through perjured testimony consists of examining all the alternative actions the attorney could do, and arguing that each of them is an unworkable solution to the problem. This leaves supporting her client in his perjury as the attorney's only choice, hence Freedman claims that she is obligated to pursue that route.

The first alternative he considers is to refuse to put the individual on the stand. Obviously, if an individual does not take the stand, he can say nothing and thus has no opportunity to present perjured testimony. There appears to be a consensus in the legal community that third party witnesses ought to be prevented from testifying if it is known that they will commit perjury. Thus, for example, the girlfriend of the defendant who intends to swear falsely that the defendant spent the night in question with her ought not to be called by the defense attorney who knows that the defendant spent the night alone, without witnesses who can corroborate his story. While Freedman does not specifically address the issue of third party witness perjury, it seems reasonable so suppose that he endorses this solution because the only cases of perjury that he
discusses are cases in which the defendant intends to commit perjury. The problem of what to do about the perjured testimony does not arise, and so does not need to be addressed, if the attorney simply refuses to put a third party witness who intends to lie on the stand.

Freedman does not believe, however, that it is permissible to refuse to put a client on the stand simply because the attorney has good reason to believe the client will offer perjurious testimony. Freedman states:

"Assume, for example, that the witness in question is the accused himself, and that he has admitted to you, in response to your assurances of confidentiality, that he is guilty. However, he insists upon taking the stand to protest his innocence. There is a clear consensus among prosecutors and defense attorneys that the likelihood of conviction is increased enormously when the defendant does not take the stand. Consequently, the attorney who prevents his client from testifying only because the client has confided his guilt to him is violating that confidence by acting upon the information in a way that will seriously prejudice his client's interests."7

Thus Freedman believes that the defense attorney may not keep the defendant from taking the stand because that would result in harm to the defendant based on what was discussed confidentially.

Another reason for allowing the defendant to take the stand derives from the unpredictability of human nature. It may happen that when the defendant actually takes the stand and swears to tell "the truth, the whole truth, and nothing but the truth", the warnings and admonitions of his attorney finally "sink in". He may decide that the risks of being caught outweigh any benefits that could come of perjuring himself, and so not present the perjurious testimony which earlier he had planned to present. It is not known how often this occurs, but given the frequency with which
humans change their minds, it is reasonable to suppose that it does happen, at least occasionally.

If the defense attorney does not permit her client, whom she is reasonably sure will commit perjury, to take the stand, then she is sanctioning her client before he has had the opportunity to tell his story, truthful or not. To prevent her client from taking the stand is a sanction because, as Freedman noted, he is more likely to be convicted if he does not testify, regardless of his guilt or innocence. Punishment should follow a wrong act, not precede a merely intended wrong act. Thus the defendant should be allowed to take the witness chair and testify on his own behalf, facing the consequences if the testimony he presents is perjured.

Freedman examines another alternative to supporting one's client in his perjury, stating: "Perhaps the most common method for avoiding the ethical problem just posed is for the lawyer to withdraw from the case..." He divides the option of withdrawal into three types - withdrawing well before the trial, immediately before the trial, and during the trial - and rejects all three as being permissible actions which a defense attorney can do.

Freedman rejects the notion that an attorney who has been unable to dissuade his client from committing perjury may withdraw well in advance of the trial so that the attorney, at least, will not participate in a fraud against the court. He states:

"The client will then go to the nearest law office, realizing that the obligation of confidentiality is not what it has been represented to be, and withhold incriminating information or the fact of his guilt from his new attorney. On ethical grounds, the practice of withdrawing from a case under such circumstances is indefensible,
since the identical perjured testimony will ultimately be presented. More importantly, perhaps, is the practical consideration that the new attorney will be ignorant of the perjury and therefore will be in no position to attempt to discourage the client from presenting it. Only the original attorney, who knows the truth, has that opportunity, but he loses it in the very act of evading the ethical problem.9

There are really two arguments presented here. The first is that since the original attorney is withdrawing to prevent perjury from occurring, yet it is reasonably certain that the perjured testimony will be presented anyway, the original attorney is not permitted to withdraw. The second argument is that the opportunity for the new attorney to dissuade the client from perpetrating a fraud upon the court is lost if the client either lies to the new attorney or merely withholds the damaging information.

There are two problems with the first of these arguments. First, it assumes that an attorney will merely listen passively as her client states his version of the facts of the case. An attorney will probe and question, seeking facts that the client may deem irrelevant yet which may be pertinent to the case at hand. During this process, the attorney may discover the inconsistencies and lies in the client's testimony. After all, this is what Freedman says a skilled prosecutor will do - expose the untruthful testimony - and there is no basis for the assumption that the prosecutor will invariably have these skills and a defense attorney will invariably lack them. Furthermore, the defense attorney will have the time before the trial in preparing the case to get to know the client that the prosecuting attorney lacks during the trial. The new attorney will then have the opportunity to dissuade the defendant from committing perjury and will be able to withdraw if she is unsuccessful. Eventually, after
seeing enough attorneys, the client may come to realize that if he persists
with his intention to commit perjury, he will face the court without the
benefit of counsel, which is a foolish thing to do in our society of
complicated laws and legal procedures.

Of course it may happen that the new attorney will not catch the lie as
some people are quite accomplished liars. However, Freedman assumed
that it is inevitable that the new attorney will not discover the intention
to commit perjury and so it is inevitable that perjury will be committed.
This, I have argued, is not the case.

The second problem with this argument concerns Freedman's statement:
"On ethical grounds, the practice of withdrawing from a case under such
circumstances is indefensible, since the identical testimony will ultimately
be presented." He appears to be claiming that since the perjured
testimony will be presented whether or not the attorney withdraws, that
there is no difference, morally speaking, between the two actions.

Yet there is a major difference between the two alternatives. If the
attorney assists her client in presenting his perjured testimony by not
exposing it and questioning him in the usual manner, then the attorney,
who is an officer of the court, has corrupted her role as an officer of the
court. Her job is to defend her client's rights as well as generally to help
promote truth and justice in court. The client, however, does not have a
right to commit crimes, perpetrate frauds, or present false testimony
under oath, although he may choose to do these things. If the attorney
supports her client in this decision by not revealing his testimony as being
perjured, then she is promoting falsehood in court, whose purpose is the revelation of truth, not protecting the rights of her client.

If the client lies without the support of his attorney, then falsehood is still being presented in court. However, and this is what Freedman seems to overlook, he does not have a role in court which has obligations to the court and to justice. If he chooses to commit perjury, then he does so alone without corrupting a part of the judicial process.

There is another possible interpretation of this argument. Freedman might be arguing that if action X will be done by person A no matter what person B does, then B is obligated to continue a service Y that is the means for doing X. He does claim that it is indefensible for the attorney to withdraw as the client will ultimately present the testimony with or without this attorney's help.

This principle, however, is not obviously true. In particular, it is not clear that it holds in cases where X is illegal or immoral. Suppose, for example, that Mindy asks Thomas, a physician to supply her with enough narcotics not only for her personal use, but also enough for her to sell to the schoolchildren whom she regularly supplies. If Mindy does not get the narcotics from Thomas, then she will seek out some other source, who might supply her with contaminated drugs. If we followed Freedman's reasoning, then Thomas is obligated to supply Mindy with narcotics, since she would get it in any event. This, however, is not correct. Even on consequentialist reasoning it is wrong since although the children may come to harm from the contaminated street drugs, they would still come to harm with the pure drugs supplied by Thomas. A better state of affairs
would be not to give Mindy or the children any drugs from any source.
People are not obligated to assist others in doing wrong even if the wrong
would occur without their help. People are not obligated to commit wrong
actions; that is contrary to the nature of obligation. Thus this
interpretation of Freedman's argument also fails to establish that the
attorney is not permitted to withdraw from the case.

Freedman seems to place greater weight on the second argument
against withdrawal that if the client either lies to the new attorney or
merely withholds the damaging information, then the new attorney will not
be able to dissuade the client from committing perjury. This is indicated
by his introduction to the arguments in which he states: "More
importantly, perhaps...." There is a basic flaw with the reasoning,
however: if the first attorney was unable to dissuade her client from his
intent to commit perjury, why should we assume that the second attorney
will be better able to do this? The client is committed enough to his
intention to commit perjury that he lost his first lawyer and had to obtain
the services of a second. If he was going to be dissuaded from his evil
intentions, it seems likely that this would have happened when his first
attorney stated her intention to withdraw because of his intentions to
commit perjury. There is not good reason to suppose that a second
discussion of the consequences of perjury will dissuade where the threat
of and subsequent withdrawal of an attorney failed to do so.

It is a more difficult matter for the attorney to withdraw immediately
before the trial. The briefs have been written, evidence collected, and
witnesses interviewed. The attorney has prepared the defendant, and
knows what he will say and what questions to ask. All the work and preparation are disrupted when the defendant suddenly turns to her and says, "They'll never believe the truth; they'll convict me. I'm going to lie." Freedman argues that it is impermissible for the attorney to withdraw in such a case.

Freedman notes that as the trial is about to begin, according to legal procedure, an attorney is able to withdraw only if she possesses a very serious reason, and even then, the motion for a withdrawal from representation is rarely granted.\textsuperscript{10} Furthermore, unless the attorney chooses to lie to the judge, she can only successfully withdraw by revealing that she knows the defendant is guilty. Freedman states: "Such a revelation in itself would seem to be a sufficiently serious violation of the obligation of confidentiality to merit severe condemnation."\textsuperscript{11} Furthermore, since the judge will have knowledge of the defendant's guilt, "the client in such a case might well have grounds for appeal on the basis of deprivation of due process and denial of the right to counsel, since he will have been tried before, and sentenced by, a judge who has been informed of the client's guilt by his own attorney."\textsuperscript{12}

The response to this argument is similar to one given above. The obligation of confidentiality derives in part from the nature and purpose of the attorney-client relationship. The purpose of the defense attorney is to protect the rights of the defendant. The defendant does not have a right to commit crimes, perpetrate fraud, or commit perjury. Thus, it can be seen that communications regarding these actions fall outside the purposes of the attorney-client relationship. Confidentiality is not an
absolute obligation; even Freedman reluctantly agrees with this.
Confidentiality ought not to be promised to communications that fall
outside the purposes, and thus the scope, of the attorney-client
relationship.

Some might argue that a lot of irrelevant information is revealed in
communications between client and lawyer, and that the above argument
would count all of this, including possibly embarrassing personal
information, as not privileged or confidential. Since allowing all of this
information to be made public is an unacceptable result, some would claim
that the argument fails. It should be noted, however, that there is a
difference between irrelevant information which is revealed by the client
because he does not know what information will be relevant, and
information regarding intentions to act that are contrary to the purpose of
the attorney-client relationship. The relationship exists to help a client
secure/defend his rights; it is not designed as a shield for all sorts of
nefarious and illegal activities. The irrelevant information is revealed as
the client tries to help the attorney build a defense for his case. The
same cannot be said for a client’s announced intentions to commit wrongful
actions. Thus the argument protects the irrelevant information, but not
wrongful intentions.

The second part of Freedman’s argument addresses the issue of a client
being deprived of his rights to effective counsel and a fair trial.
Freedman claims that the attorney deprives the client of his right to
effective counsel and a fair trial by withdrawing and telling the judge why
she is doing so. However, the attorney is not doing this willy-nilly. She
is reacting to actions taken by her client, so the client is the one who is choosing a course of action which will effectively deprive him of adequate representation. As it is his free choice to commit perjury after being warned of the consequences, it is not the case that the attorney is depriving the client of his rights; he has chosen to give them up.

Freedman's discussion of the permissibility of the defense attorney withdrawing because of surprise perjury by the defendant during the trial differs little from his discussion of the permissibility of withdrawal immediately before the beginning of the trial and is subject to the same criticisms. I will not bore the reader by reiterating what I have stated above.

The final alternative to supporting actively one's client is to allow him to take the stand and engage in free narrative testimony, in which the client tells his story without questions or direction from his attorney.

Freedman has the following to say about this approach:

"A solution even less satisfactory than informing the judge of the defendant's guilt would be to let the client take the stand without the attorney's participation and to omit reference to the client's testimony in closing argument. The latter solution, of course, would be as damaging as to fail entirely to argue the case to the jury, and failing to argue the case is "as improper as though the attorney has told the jury that his client had uttered a falsehood in making the statement." 13

Freedman is not incorrect in his assessment of this alternative: the benefits of this form of testimony are not outweighed by the negative effects it produces. 14

The free narrative technique would allow the defendant to tell his story in court without the directed questions put by a suspicious defense
attorney who is afraid her client will present perjurious testimony. The defendant is more likely to be able to tell his story, although it does allow for the possibility that the defendant will present a fully thought-out lie. This latter result is not as bad as it may first appear: various authors indicate that juries typically discount the testimony of the defendant; after all, he would not be expected to say anything negative against himself. Thus little harm results from allowing the client to testify in this manner.

The free narrative testimony is also subject to cross-examination. Although the defense attorney will not ask questions when such testimony is given, the same is not true of the prosecutor. The free narrative technique is used rarely during trials, so when it is used, both judge and prosecutor are likely to be suspicious as to the reason it is being used. Hence the prosecution is likely to make an extra effort to uncover perjurious testimony.

There are problems with this approach, however. Although juries are likely to discount the testimony of defendants, they are less likely to do this in cases of "white-collar crime" and white collar defendants than with lower class defendants. Additionally, some individuals are more accomplished liars than others, and the accomplished liar may not be found out during the cross-examination when there is less time to ask the defendant questions, and the sorts of questions that can be asked and the material that can be asked about are restricted by the rules of court room procedures. Thus many perjurers may successfully lie under oath. According to Wolfram, "To permit defense counsel to employ the perjurious
free narrative testimony of the defendant in all criminal cases would allow an unacceptably high risk of acquittals."15

Freedman's additional requirement for the free narrative approach is that the defense attorney not refer to the defendant's testimony in her closing arguments. This is held to be impermissible because it is tantamount to announcing the fact of the client's perjury to the entire court. This is impermissible because it means convicting the client based on what he told the attorney in confidence. Unless the defense attorney is quite good in the rhetoric she uses to present her closing arguments, the jury is likely to pick up on the fact that the testimony was omitted from the arguments and surmise the reason why. Thus, claims Freedman, the jury is more likely to find the client guilty.

This latter claim of Freedman's, however, rests on his notion of the confidentiality of attorney-client communications. As I have argued above, Freedman's position is mistaken. The defense attorney's function is to secure and protect the rights of her client, and this does not include assisting her client to perpetrate a fraud upon the court. As Lefstein says: "In [Freedman's] view, the criminally accused is not only entitled to effective counsel, he is entitled to counsel who will provide active assistance in presenting perjured testimony and who will vigorously argue known perjured testimony to the jury. This is surely the antithesis of what the lawyer's role ideally should be."16

Freedman's arguments designed to show that the defense attorney's obligations to her client outweigh her obligations to the court in cases of perjury are unsuccessful in their attempt. Furthermore, he has not shown
that all other alternatives available to the defense attorney are
impermissible. I have shown that many of his arguments rest on an
incorrect understanding of the obligation of confidentiality. Once this
obligation, and the role of the attorney are correctly understood, it can be
seen that it is permissible for the defense attorney either to withdraw
from the case or reveal the perjury to the court.

It may be argued that withdrawal by defense counsel or the revelation
of perjury in court are wrong because the client expected confidentiality to
be an absolute obligation, and was misled by the attorney-client
relationship. It is at this point that what I described earlier as "the
simple although inadequate answer" enters the picture; at the end of the
discussion after it has been decided that to support the client in his
intentions to commit perjury is wrong. Confidentiality is an obligation with
certain limitations, and these limitations should be made known to the
client so as not to mislead him. Lefstein suggests that the following
statement be made to clients at the beginning of the attorney-client
relationship:

"Anything you tell me is privileged. That is, I cannot reveal what
you tell me to anyone, including the judge. However, I can reveal
information about a crime you are planning to commit, including the
crime of perjury. Thus, if you were planning to lie on the witness
stand in your forthcoming trial, I would reveal this fact to the court.
Now, of course, I am not assuming that you are planning to do this,
but I think that, in fairness, I ought to explain to you how the
attorney-client privilege works."17
Notes

1. ABA Code of Professional Responsibility DR 7-102 (A) (4),(5),(6), (B) (1),(2)

2. ABA Code of Professional Responsibility DR 401 (B)

   This approach can also be found in:
   Norman Lefstein "The Criminal Defendant who Proposes Perjury: Rethinking the Defense Lawyer's Dilemma"
   6 Hofstra L.Rev. 665 (1975) p.688

   64 Michigan L.Rev. 1469 (1966)


6. Freedman, Lawyer's Ethics in a Adversary System, op cit p.6


8. Ibid p.1476


10. Ibid pp.1476-7

11. Ibid p.1476

12. Ibid p.1477

13. Ibid, citations omitted

14. My discussion of the merits and drawbacks of the free narrative style of testimony derive in part from:
    Freedman "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions" op cit p.1477
    Wolfram "Client Perjury" op cit pp.849-853
15. Wolfram, "Client Perjury" op cit pp.852-3


17. Ibid p.688
CHAPTER III
CONFIDENTIALITY AND THE MEDICAL PROFESSION

The obligation of confidentiality has a long tradition in medicine. It is contained in the Hippocratic Oath:

"Whatever, in connection with my professional practice, or not in connection with it, I see or hear, in the life of men, which ought not to be spoken abroad, I will not divulge, as reckoning that all such should be kept secret."

This oath, while perhaps not taken by modern doctors as stating their actual obligations to their patient, is interpreted by many as stating the view still held by many today that regardless of how the medical profession actually functions, confidentiality ought to be taken as an absolute obligation. In this chapter I will examine the various arguments that have been advanced to show that confidentiality is an absolute obligation and demonstrate that while they provide good reasons for maintaining confidentiality, they do not prove that it is an absolute obligation. I will then provide positive arguments in favour of treating confidentiality as a prima facie obligation.

The first argument advanced to demonstrate that confidentiality does not admit of exceptions, and thus is an absolute obligation, argues that
violating confidentiality would limit the autonomy of the patient as well as violate his right to privacy. It is generally accepted that individuals have a right to privacy. Privacy involves many things, including: freedom from unwanted intrusion of other people, sights, or sounds; the freedom to conduct certain activities in a solitary fashion, if desired; protection from disclosure of material considered by the individual to be embarrassing; and control over the dissemination of personal information about one's self.

Confidentiality is one aspect of privacy. It allows us to share, with others of our choosing, information we wish kept secret; that we wish to ensure is revealed to no one outside our choosing. Confidentiality allows us to maintain our autonomy; to choose freely both with whom we wish to talk and what we wish to say to them. Thus, the argument goes, if we wish to respect an individual's right to privacy and not limit his autonomy, confidentiality ought never to be violated. According to Gerald Adams,

"Confidentiality is an aspect of privacy which allows us to share sensitive information with selected associates in a manner which preserves our feelings of privacy and sense of personal integrity. Confidentiality is based on a sort of contract which assures the individual about control, i.e., volunteered information will be allowed to go absolutely no further than the specified recipient. Arrangements involving privacy and confidentiality are literally what allow us to live together, and at the same time exchange intimacies and preserve a large degree of autonomy."

There are, however, occasional conflicts between individual rights and societal needs. The above argument can be interpreted as espousing a rights-based theory of morality, with a right to privacy being understood as absolute, i.e., it instills in others an absolute obligation of non-interference. Such a system is, in effect, saying that no other ethical
concerns can ever matter as much as privacy. To dismiss all other moral factors as less important in every instance is absurd. A right to privacy is important, but it does not seem to be as important in most cases as, say, an innocent individual's right to life.

The argument from privacy can be seen as espousing a general rights-based theory in which several rights are understood as categorical rights. Such a system of morality, however, is generally taken to be unworkable, in large part because such a system provides no method for resolving conflicts between two conflicting rights. If in the above example we treat both the right to privacy and the right to life as categorical, then we immediately encounter a conflict. There is no way to protect completely the client's right to privacy and the innocent individual's right to life. If we protect a homocidally inclined client's right to privacy, then we jeopardize the innocent individual's right to life and if we protect the innocent's right to life, then we must violate the privacy of the client.

In order to decide which of these rights is the most stringent, we need a method for weighing the rights in question. While there seems to be no obvious way to weigh rights directly, we can weigh them indirectly by examining the strengths of the obligations generated by each right. Thus, to determine the stringency of the rights in question, we need to determine which of the prima facie obligations generated by these rights is the weightiest, and thus the actual obligation. The actual obligation is derived from the most stringent of the rights in question.

A right to privacy instills in others an obligation of non-interference. A right to life instills in others an obligation of interference, at least
during times when that right is being threatened. Thus, in cases of conflict between a right to life and a right to privacy, we are faced with two competing obligations: interference and non-interference. Obviously, since we cannot do both, we must choose between them. In cases where a life is at stake, the interference right generally is the weightier.

As someone who inclined to be a consequentialist, I would argue that we must choose our actual obligation by appealing to consequences. Upholding the obligation of interference, which entails that we violate someone's right to privacy may cause some embarrassment or inconvenience to the individual, but such an individual will live to see another day in which she can again choose whether or not to reveal private information to others. Upholding the obligation of non-interference, which entails that we violate someone's right to life entails that this individual will not live to see another day and will make not more decisions. The loss of an innocent life generally is more of an evil than the suffering of embarrassment or harm to a reputation. Thus, the obligation of interference is the weightiest of the obligations and is the actual obligation. Thus, the right to life is more stringent that the right to privacy.

A second argument advanced to demonstrate that confidentiality is an absolute obligation rests on the idea that there is an implied contract between a physician and her patient, and one of the terms of that contract is that confidentiality will be maintained regarding the communications
that pass between them, test results, diagnoses, etc. If the physician violates confidentiality, either she knows that the implied contract is not what the patient thought it was, that is, it does not guarantee confidentiality, or she violates the contract by breaching confidentiality. If she knows that the contract is not what the patient believes it to be, then she has misrepresented the nature of the physician-patient relationship to the patient from the onset of the relationship. Since lying is wrong, confidentiality ought not to be violated. If she agrees to the contract, but then violates confidentiality anyway, she has violated the terms of the contract which is wrong, so confidentiality ought not to be violated.

Following this line of reasoning, Arthur Caplan argues:

"If the right to privacy means, roughly, the right to control access of others to oneself, either through information about oneself or getting access to one's person, and if confidentiality has something to do with the right to keep information about oneself secret and non-public, then the researcher [physician] in this case acts unethically if he or she violates the terms of the experimental relationship. That is, there exists a contract with certain conditions laid out; when those conditions are violated, then the violator has done something wrong."5

This argument seems to assume, without argumentation, that lying and violating the terms of a contract are always and absolutely wrong. Caplan does not seem to mean it is only prima facie wrong; in using phrases such as "acts unethically", he seems to mean that breaking confidentiality is wrong in some more absolute sense. This, however, is not obviously true. As argued above, an ethical system which espouses a set of inviolable values is unlikely to be a workable one.
Lying and violating the terms of a contract are wrong—they may bring harm and pain—and generally there is a prima facie obligation not to do these acts. However, lying or violating the terms of a contract may lead to a greater good and thus be justified. For example: Rob, a chemist, has a contract with a large chemical firm which stipulates that as he is engaged in research that could turn a profit for the company, he may not reveal the details of his work to anyone. Rob finds himself engaged in a research program which produces hazardous byproducts. The company reasons that it is not cost effective to do anything about this byproduct: it would cost more to solve and fix the problem than to pay off the relatives of the unfortunates who fall victim to this hazardous byproduct and subsequently die. If Rob abides by the terms of his contract, he will remain silent and allow unsuspecting people to die. He is not committing a wrongful act by not violating his contract, but he is allowing a greater wrong to occur: innocents dying as a result of his and his company’s actions. In this case, Rob would be morally justified in violating the terms of his contract.

Since we occasionally are justified in either lying or violating a contract, this argument does not succeed in showing that confidentiality is best taken to be an absolute obligation.

A consequentialist argument advanced in an attempt to demonstrate that confidentiality is an absolute obligation is that violating confidentiality violates the trust the patient has placed in the doctor and
so damages the therapeutic relationship. In this regard, Robert Gellman writes:

"The reason for confidentiality has remained the same throughout the years; failure to protect information may hinder the physician's ability to provide needed medical care to his patient." 7

Anne Rich writes:

"Many argue, and quite strenously, that the invasion of the fundamental basis of the doctor-patient relationship [violating confidentiality] will lead to the erosion of trust in medical practitioners." 8

This argument differs from the preceding, although at first glance they may seem similar, in that the focus of the argument is on the bad consequences which result from breaching confidentiality rather than focusing on something inherently wrong with violating confidentiality, i.e., the violation of an individual's rights.

In order for a physician to prescribe effective treatment for a patient, he must have full knowledge of his patient's condition. In the case of a broken arm, the patient quite likely is willing to describe all that is wrong: "My arm, Doc - it's killing me." Not all patients, however, are so willing to discuss their problems; they may be ashamed of their symptoms and too embarrassed to discuss them without assurance that other people will not be told. For example, some people were told during childhood that talking about one's bathroom habits is dirty and never done by "nice" people. As a result, such a person may have difficulty telling her physician that, of late, she has experienced increased frequency of urination, the only symptom she manifests of diabetes. With assurances of confidentiality, the patient becomes more likely to overcome her shame and tell her
physician of her symptoms, resulting in diagnosis and treatment of her diabetes.

A blanket assurance of confidentiality is necessary because only the patient knows what information she considers to be personal and sensitive. Most people do not care who knows about their broken bones, but wish information about sexual disfunctions kept private. There are some people, however, who wish information about their broken bones kept confidential. Chuck Yeager broke his ribs the night before he was to fly the X-1 and become the first person to break the sound barrier. He wished the knowledge kept confidential for if the Air Force had known about his condition, he would have been grounded.

A patient may not mind if her doctor breaches confidentiality concerning a problem which she does not consider to be sensitive and which she may freely discuss with others. She is likely to feel betrayed or embarrassed if the physician violates confidentiality concerning a condition which she considers to be intimate or of which she is ashamed. When a patient's confidences are betrayed, she is less likely to fully trust the doctor; after all, if he violated confidentiality once, she has reason to believe he may do it again.9 If she does not trust the doctor to keep what she says confidential, she is less likely to continue to tell him about her problems, aches, pains, etc. Consequently, the doctor will have less information on which to base his diagnosis which may impair his ability to treat his patient effectively. Thus, since a doctor does not know what information the patient considers sensitive and would not want revealed to others, and his ability to treat his patients effectively is diminished if he
violates his patients' confidences, especially those that are sensitive, he ought never to violate confidentiality. Thus, the argument goes, confidentiality is best understood as an absolute obligation.

The major premise of this argument is that violating confidentiality leads to bad consequences. This argument shows that the consequences of violating confidentiality are generally worse than the consequences of not violating confidentiality. Thus, it is claimed, the doctor's obligation to preserve his patient's confidences is his actual obligation.

Physicians, however, have a number of different types of obligations. One such obligation is captured by the rule "doctors ought to preserve their patients' confidentiality". Another obligation is captured by the rule "doctors ought to protect innocent people from harm which they, in their capacity as physicians, can prevent". Both obligations derive from the role of the physician. The first obligation stems from a physician's primary obligations to his patient, and the second derives from his secondary obligations to society. There are times when these two obligations come into conflict. If both obligations were taken to be actual obligations, there would be no way to resolve the conflict; no matter what the physician did, he would do a wrong action. This problem can be overcome by understanding the two obligations as variably weighted prima facie obligations. In such cases, it is necessary to choose between them by determining which minimizes bad consequences (or maximizes good consequences).

There are times when the consequences of protecting confidentiality are worse than the consequences of not violating confidentiality. That this
occurs seems to be the motivation behind the various laws requiring physicians to report various medical conditions.

Epilepsy is a condition which is misunderstood by many. Medication is available to help epileptics lead normal, seizure-free lives, but some, even with the aid of medication still are subject to either petit mal or grandes mal seizures.

Because of the stigma that frequently is attached to having epilepsy, many people with this condition wish knowledge of their affliction kept secret. A person with epilepsy may be shunned by his friends who fear he will embarrass them by suffering a grand mal seizure in public. They may also not know what to do in such a situation, which makes them feel helpless, so they avoid such situations by avoiding their friend.

Employers may fire epileptics for fear that they are mentally defective and unable to function like "normal folk".

Factors such as these lead some epileptics to desire a curtain of secrecy drawn around their disease. They wish their physicians to hold the matter strictly confidential. If the doctor, after listening to their pleas, violates confidentiality, the patient is likely to feel hurt and betrayed, which may impair the doctor-patient relationship. This is not a good state of affairs: harm is being done.

But suppose that the epileptic desiring confidentiality is a bus driver, whose epileptic seizures have not been entirely brought under control by medication. If the physician informs the appropriate authorities, including the department of motor vehicles, about the driver’s epilepsy, the result will be the suspension of driving privileges for the epileptic. This causes
a bad state of affairs. The results of not violating confidentiality, however, have the potential to be much worse. A seizure may occur at any time, and frequently does so without warning. During a seizure the person may black out, become "distanced from reality", or go into convulsions. If this were to occur while the individual is driving a bus, the result is likely to be an accident, which will injure or kill passengers on the bus.

The loss of a job for a bus driver with epilepsy is a certainty, although he can seek other employment. It is claimed that the impairment of the doctor-patient relationship is highly likely. The injury to the passengers, or their death, is less likely. Considerations such as these led Michael Kottow to write:

"Ultimately, degrees and probability of harm are so difficult to assess, that they will hardly deliver an intersubjectively acceptable argument for or against confidentiality, except for one: breaching confidentiality cannot be a significant and enduring contribution against harmful actions, for these are no more than potential, whereas the damages caused to the confident, to the practice of confidentiality, and to the honesty of clinical relationships are unavoidable."\textsuperscript{10}

"Physicians who believe themselves in possession of information that must be disclosed in order to safeguard public interests are contemplating preventative action against the putative malefactor. Like all preventative policies, breaching confidentiality is difficult to analyze in terms of costs/benefits: is the danger real, potential, or fictitious? What preventative measure will appear justified? How much harm may these measures cause before they lose justification?"\textsuperscript{11}

Kottow's argument, in short, is that the only degree of harm that can be assessed in the conflict between the doctor's obligation to his patient and his obligation to others is the high likelihood of harm that will come to the physician-client relationship - it will be ruined. Because the likelihood of harm to others is uncertain, confidentiality is best understood as an
absolute obligation. "Confidentiality cannot but be, factually or morally, an all or none proposition."  

However, in weighing the consequences of various outcomes, it is not enough to say that a harm which is very likely is always worse than a possible harm, the occurrence of which is less likely. If the harms are equal in weight, this is true. In cases where the harms are unequal in weight, it is not: a great harm that is not very likely to occur may outweigh a moderate harm that is more certain. In the above example, the harms have different weights. The harms that are claimed to be have a high likelihood of occurrence are damage to the doctor-patient relationship and the loss of a job. These harms are only moderate; they are not as great as severe injury or loss of life by unsuspecting persons. Furthermore, the probabilities of an epileptic having a seizure while driving are not insignificant.

Generally speaking, a great harm that is possible, but whose probability of occurring is so low as to make it practically certain that the harm will not take place will not override a lesser harm that is more likely to occur. However, when the probability of the harm occurring increases, eventually it will be great enough to override a lesser harm which has a greater probability of occurring. In the realm of human affairs, where much that occurs does not admit of precise quantification, e.g., the extent of the possible harm, and the probabilities of various actions actually occurring, no precise formulas can be offered. Decision theory, which theoretically could provide us with the mechanisms for how to calculate expected
utilities does not tell us how to get the numbers that we need in order to do the calculations.

An example might help to make this clearer. It is possible that by lecturing to his class, Prof. Haight will cause his students to explode, merely by the sound waves of his voice vibrating in an odd way one day. On such a day, Prof. Haight would cause great harm to his students by causing them to explode. If Prof. Haight were to remain silent, his students would suffer the moderate harm of missing his lecture. On the face of it, it seems that Prof. Haight has an obligation to remain silent in class. This state of affairs changes, however, when the notion of probability is introduced. The probability of Prof. Haight's voice causing his students to explode is vanishingly small. The probability of his students missing lecture if he remains silent is nearly certain, but not completely certain as he might write his lecture on the board. Since the probability of great harm occurring if he talks is so small, it, combined with the magnitude of the potential harm, does not show that Prof. Haight has an obligation to be silent in class.

The probabilities of an epileptic suffering a seizure are not so small. The probabilities vary according to the person: some people can go for months without a seizure, while others suffer from several a day. Thus it is worse to allow an epileptic to risk injuring or killing others than to harm the doctor-patient relationship and force the patient to lose his job. Thus confidentiality must admit of exceptions and, so, is not an absolute obligation; it is a prima facie obligation which can, in some instances, be overridden by stronger obligations.
This argument applies not only to cases of epilepsy, but also to other medical conditions. This has led state legislatures to enact statutes requiring physicians to report such things as venereal diseases, gunshot wounds, and child abuse.

Some proponents of absolute confidentiality for doctor-patient relationships have sought to sidestep the "harm to a particular patient versus harm to others" argument by arguing that violations of confidentiality will damage all doctor-patient relationships, which will adversely affect society.14

"The invasion of the fundamental basis of the doctor-patient relationship will lead to the erosion of trust in medical practitioners, and ultimately could jeopardize standards of public health."15

In the article, it is clear from the context that "the fundamental basis of the doctor-patient relationship" refers to confidentiality. It is claimed that breaking confidentiality will cause patients, generally, to lose trust in physicians. This, in turn, will deter patients from seeking help which will adversely affect society. As these results are undesirable, confidentiality is best understood as an absolute obligation.

This argument rests on two assumptions. First, it is assumed that violations of confidentiality for particular patients will, in fact, become widely known. The second assumption is that people who are sick or in pain will be deterred from seeking relief by consulting a physician if they know that physicians sometimes violate confidentiality.
The assumption that violations of confidentiality will become widely known has some merit. The reason, however, is not that people know that particular confidences of particular patients have been revealed to others, but that people generally are aware that physicians, by law, are required to report various conditions to the appropriate authorities. This information is learned through various media, such as television, newspapers, magazines and novels. So if knowledge of breaches of confidentiality will lead to the erosion of public trust and thus lead people not to consult physicians, it is too late. There is, however, no evidence that large numbers of people who need treatment are not seeking physicians for treatment. It is hard to say exactly what such evidence would look like. However, if crowded waiting rooms and increased numbers of insurance claims are any indication, then more people than ever who need treatment are seeking it. Furthermore, if this claim were true, it would be the sort of thing that would be discussed widely in medical journals and in the news media. I found no evidence of such discussion, except with regards to AIDS patients, whom I will discuss at the end of this section.

The second assumption, that people will not seek the aid of a physician if they know of widespread violations of confidentiality, is false. In order for the argument that violations of confidentiality will lead to a decline in public health to work, it must be the case that large numbers of individuals with infectious diseases will not seek treatment primarily out of fear that their confidences will be revealed to others. This is an unlikely state of affairs. Many diseases bring pain and may, if untreated, lead to death.
Since most people generally wish to avoid pain and death, they will seek to do whatever they can to prevent it. Effective treatment for infectious diseases is available only from medical personnel. Thus, it seems reasonable that infected individuals will seek medical help to cure their problem now, and will worry about possible consequences - such as confidences not being kept confidential - later. Further proof of people's willingness to do whatever is necessary to prevent pain or death can be found in the large numbers of cases of individuals who seek alternative treatments - frequently treatments of, at best, a dubious nature on medical grounds - when conventional treatments have failed.

There is no evidence that people who need medical treatment are being deterred from receiving it due to violations of confidentiality. They may be deterred by fear of such things as doctors or needles, but that is not the issue here. The issue is: do violations of confidentiality damage physician-patient relationships to the extent that people do not seek treatment out of fear that knowledge of their condition will not be kept confidential. There is no evidence to indicate that this occurs. Perhaps the social scientists need to conduct studies to determine whether or not this deterrence actually occurs. The only empirical evidence available indicates that those individuals who do seek treatment assume that confidentiality is a prima facie obligation. This, however, does not reveal anything concerning whether or not others, who were not surveyed, were deterred because of a prima facie obligation of confidentiality. However, as argued above, for people in need of treatment, the only source
of effective treatment is from physicians; qualms about possible violations of confidentiality may not arise until later.

As there is no conclusive evidence available on either side of this issue, physicians ought to violate confidentiality occasionally. They do not know for certain that more lives will be saved, more harm prevented, by maintaining an absolute obligation of confidentiality; indeed, they do not know with certainty how much harm would be prevented by such an obligation. One role of the physician is that of saving lives and preventing harm that comes from the spread of diseases. Since the best known way of doing so is to treat confidentiality as a prima facie obligation, then confidentiality is best understood as a prima facie obligation.

Suppose, for the sake of argument, that enough individuals are being deterred from seeking needed treatment as to pose a threat to public health. In the case of infectious diseases, public health officials can fight the problem of carriers who have "gone underground" by informing the public through the media. This was done during the measles outbreak at the Ohio State University in 1982. This action will minimize the harm done by untreated infectious individuals by encouraging the public, or at least those at risk, to seek preventive treatment, e.g., measles shots. As concerns about public health are high, the government has set aside money to be spent on such preventive programs. The cost to the individuals are either free or cost a small amount of money. As people generally do not desire to get infectious diseases, and as the cost for preventive treatment is minimal, or free, people will generally seek preventive treatment. Once
treated, the infectious individuals who have not sought treatment will not be able to infect them. Thus even if violations of confidentiality deter some individuals from seeking necessary treatment, public health can be protected.

Physicians and public health officials can also turn to epidemiologists for help in locating the carriers of the disease. Epidemiologists specialize in tracking the course of infectious diseases by finding someone with the disease and determining from whom he got it, and then tracing ahead to determine who he may have given it to. In order for epidemiology to be effective, only some infected individuals must be willing to seek treatment. There is no question but that this happens. The success of epidemiologists helps to ensure public health even if violations of confidentiality deter some individuals from seeking treatment.

Patients suffering from AIDS would seem to support the argument that since patients will avoid physicians out of fear that their disclosures will not be kept confidential, confidentiality is best understood as an absolute obligation. Physicians are trying to limit the spread of this disease by discovering who the sexual partners of AIDS victims are so they can be notified that they are at risk for developing AIDS and so they can take precautions to preclude the further transmission of this disease. Many people with AIDS did not seek the help of physicians. Some might claim that if confidentiality were strictly maintained, these people would have sought medical help.

With AIDS, however, the issue is not that simple. There are two important differences between AIDS patients and patients with other
afflictions. No cure is available for AIDS, which may make medical treatment appear to be ineffective. It does not seem likely that people, generally, would seek any form of treatment which is perceived as ineffective. Thus most people living in a 20th century technological society would seek the help of a physician for physical maladies rather than seeking out the help of a tribal medicine man: the latter treatment is perceived as ineffective. The flourishing of home "remedies" for the HIV virus which have been reported in the news lend credence to the claim that people with AIDS perceive a traditional medical program as ineffective and are willing to try just about anything in an attempt to live.

The second difference between AIDS patients and other patients is that while medical personnel are willing to treat nearly anyone, there is growing evidence that many medical personnel are unwilling to treat AIDS patients.17 Due to the nature of their profession, physicians are more at risk for contracting the HIV virus than are laymen who merely have casual contact with these individuals. A physician's fear and dislike of his patient is likely to become known by that patient: physicians have no more claim to a poker face than do most people, and people are generally able to figure out when they are feared and/or disliked. Knowledge that a physician fears and/or dislikes a patient seems likely to disincline, at least to some extent, that patient from seeking treatment from that physician. It is a fairly normal reaction to avoid those who dislike us.

I have presented two alternative explanations for why people suffering from AIDS have not sought a physician's care to the extent that the rest of the population has when suffering from other afflictions. I do not know of
any data which shows that either of these or the breaching of confidentiality is the real reason that many people suffering from AIDS do not seek treatment, if indeed there is a single reason. Thus we cannot conclude, as the argument claims, that confidentiality is an absolute obligation on the basis that violating confidentiality will cause people not to seek help.

It is known that by violating confidentiality, some harm can be prevented. Those persons who have shared needles or had sexual relations with a person suffering from AIDS can learn that they are at risk for the deadly disease, and can learn to take precautions to prevent its possible transmission to others. This will result in lives being saved. It is not known what would occur if confidentiality were strictly kept, and we are not likely to find out given that any controlled study that examines that matter will place innocent lives at risk. Thus, on the available evidence, in dealing with persons afflicted with AIDS, the physician's secondary prima facie obligation to society to ensure the safety of others is seen as more weighty than his primary prima facie obligation to his patient to maintain confidentiality. Thus his obligation to ensure the safety of others is his actual obligation, and he must violate confidentiality and notify the appropriate authorities so that the people the patient has put at risk can be notified.

Thus the argument fails. It is not the case that absolute confidentiality is necessary to prevent wide-spread damage to all doctor-patient relationships which would adversely affect society.
Another argument advanced to demonstrate that confidentiality is an absolute obligation concerns harm that could befall the patient should news of his medical conditions be revealed to others without his consent.18

In arguing for a medical privilege, which would have the effect of making confidentiality absolute in the courtroom, Anne Rich presents the following argument:

"...some medical data contain sensitive and intimate details, the disclosure of which would positively harm either the patient's medical treatment and/or reputation in society, and therefore should not be disclosed."

If it is revealed that a patient suffers from a condition, such as AIDS, which currently has a negative image in the minds of many, then the patient's reputation likely will be harmed, and he may be shunned by family and friends, and fired from his job. The patient already suffers because of his medical condition, and so we have an obligation not to make him suffer further, especially if he contracted the disease accidentally.20

AIDS most commonly afflicts homosexual men with promiscuous sexual habits, and intravenous drug users. Many people are prejudiced against members of these groups.

AIDS is a feared disease because many people still do not know how it is transmitted — many myths still abound, such as AIDS can be spread by casual nonsexual contact — and because it is a disease which is always fatal and for which there is no cure. This has led many people to protest
allowing hemophiliac children who contracted AIDS to attend school. A family with AIDS-infected children was forced out of town in Indiana by ignorant people who feared they would catch the disease.

The consequences for some individuals whose infection with AIDS becomes widely known have been bad. Many children have been barred from school and some have been forced to move out of town. Adult males may be accused of being gay, which is not an accepted lifestyle in many parts of today's culture. Many people refuse to touch AIDS patients, thus denying them the human contact most individuals need. Adults may be fired, and thus deprived of a source of income, merely because their employers are afraid the patients will infect other employers or because they do not want to allow someone to work for them who will die at any time. These consequences are terrible. Thus, the knowledge that a person has AIDS should be revealed to no one outside the doctor-patient relationship.

As terrible as these consequences might be to the patient, the consequences of not revealing this information could be much worse. The argument has been given above, so I will not lay it out in detail again. Briefly, the argument states that some persons with infectious diseases or other medical conditions may put others at risk. An AIDS patient who infects another with the disease sentences that person to death: as yet there is no cure for AIDS. The consequences of violating confidentiality are damage to the patient's reputation, his friendships or his employment. The consequences of not violating confidentiality are possible infection and death of innocent people. Since the consequences of not violating confidentiality are worse than the consequences of violating
confidentiality, it follows that confidentiality is not best understood as an absolute obligation. It is a prima facie obligation, and in some circumstances, the physician's actual obligation is to protect the health of others who were put at risk. Furthermore, it is possible to mitigate the damages done to the patient by educating the people who will come in contact with the patient. This solution has worked quite well in cases of hemophiliac children with AIDS.

The above argument for absolute confidentiality also assumes that information about the patient's condition will become widely known by all who know him. After all, a patient's reputation cannot be ruined, nor can he be shunned by friends, if the information is not widely known. Some individuals need to be told. For example, a teacher would be told that one of her young students has AIDS so she can take precautions should she risk coming into contact with the student's bodily fluids. But with proper education, the teacher is less likely to tell others. Thus if the patient's condition is revealed only to those with a need to know, it is less likely that his reputation will be damaged.

A final argument for absolute confidentiality is that limited confidentiality is equivalent, in the patients' eyes, to no confidentiality at all. Kottow writes:

"Confidentiality collapses, unless strictly adhered to, for even occasional, exceptional or otherwise limited leaks are sufficient to discredit confidentiality into inefficiency...Nor can the description [of the doctor-patient relationship] be qualified - 'usually confidential' - or made into a conditional - 'conditional unless' -
statement, for these halfhearted commitments are, from the confider's point of view, as worthless as no guarantee of confidentiality at all. Confidentiality cannot but be, factually and morally, an all or none proposition.21

Apparently, Kottow believes that there can be no middle ground; people are only capable of understanding confidentiality as an all or nothing proposition and are unable to conceive of confidentiality holding in some situations but not others. This is not true.

Empirical studies have been done which show that patients do perceive confidentiality to be a prima facie obligation.22 These studies examined patients' perceptions concerning situations such as getting a second opinion, using the case in a journal article, and discussing patients with friends. Generally, people thought confidentiality was kept more strictly in social settings than in medically related situations. For example, 87% of the patients thought that their cases were commonly discussed with other physicians to illustrate a medical point, while only 33% believed physicians commonly discussed their case with non-medical friends.23 The studies also found that a majority of patients believe that confidentiality was kept more strictly than did medical personnel.

Patients thought that confidentiality was violated on occasion; that it is a prima facie obligation that can be overridden on occasion. They did not necessarily believe that all such times were legitimate, e.g., discussing cases at parties, but they recognized that confidentiality is not treated as an absolute obligation. They recognized it as an obligation, but not as an absolute one. The argument advanced above is that patients cannot conceive of a prima facie obligation of confidentiality. However, as
the studies show that they clearly are able to do so, this claim cannot be used to justify an absolute obligation of confidentiality.

Another study examined patients' actions when they had to choose whether or not their consultation with a physician would be confidential. 67% of the patients chose to consult with a physician in a room with the door open (they did not close it after entering the room), even when there were people outside the door. Thus it is not true that patients always seek confidentiality in a doctor-patient relationship as Kottow seems to believe they do. That some may does not show that people, generally, are unable to conceive of less than absolute confidentiality, and it is this idea with which the argument is concerned.

Furthermore, the purpose of the study by Weiss, et al was to determine the extent to which guarantees of confidentiality motivate patients to choose one sort of medical practitioner over another. He assumed that patients who use confidentiality as a criteria for selecting a source of health care may seek such care in a private setting where it is to be expected that confidentiality would be more strictly maintained than in a teaching hospital where patients know that many doctors will be examining them and reading their records. The study found that, in general, patient beliefs about how confidentiality was maintained were similar in both the private practice setting and in the teaching hospital. Thus patient beliefs about the strength of the obligation of confidentiality are not of major importance to patients in selecting health care. It is not a promise of absolute confidentiality that motivated these patients to seek help, but,
rather, some physical complaint. This lends support to the view that absolute confidentiality is not essential in the practice of medicine.26

Clearly these studies are not concerned with reporting dangerous medical conditions and infectious diseases to the proper authorities. But they, together with the general knowledge of limited confidentiality that we get from the media, are enough to show that patients can understand the concept of limited confidentiality. Most already believe that the confidentiality of their communications is not violated in casual conversation, yet it may be violated in communications with other medical personnel. Others may not have fully considered the matter. The argument, however, claims that people, generally, are unable to conceive of confidentiality as anything but an all or nothing proposition. Clearly, as the aforementioned studies show, a majority of them can. It is possible for people to understand a notion of confidentiality that is justifiably violated under certain circumstances but not under others. Thus the argument that the only way for confidentiality to exist, and for patients to understand it, is as an absolute obligation fails.

Furthermore, evidence from the field of psychiatry indicates that trust is what is essential to a doctor-patient relationship, not absolute confidentiality. James Beck did a study to determine the effects of violating confidentiality and warning others of intended harm by the patient. He surveyed 38 psychiatrists, asking them if they had ever warned of threatened harm by a patient, whether they discussed this with the patient before or after warning, and what the effects on the therapeutic relationships were. He found that:
"Forty-two percent of the sample had been involved in a case in which a warning was actually given, and another 32 percent had seriously considered giving a warning. The warnings given seldom had an adverse effect on the therapeutic relationship. Only warnings that were not discussed with the patient or one which was given without good reason were judged to be harmful to the therapeutic relationship. There were only four such cases; in two of them, later discussion between patient and therapist repaired the damage to the therapeutic relationship. The results support the conclusion that warnings per se have little or no apparent effect; how they are integrated into the therapy is the important variable."27

If no degree of confidentiality existed in the medical relationship, patients might withhold non-life-threatening information from their physicians. Confidentiality encourages an atmosphere of trust. However, this atmosphere of trust can be obtained with a prima facie obligation of confidentiality. It can be maintained without absolute confidentiality for, as the study by Beck shows, by the physician remaining honest with her patient concerning warning authorities about the patient's condition, trust is maintained. Trust is broken, and the relationship most likely damaged, if the doctor lies to her patient and the patient learns of this. Once a person has proven herself to be a liar, assertions by that person as to her current honesty are viewed with a skeptical eye. Trust can be strained if the doctor constantly violates confidentiality, so violations should be kept to a minimum in order to maintain a good doctor-patient relationship. Thus confidentiality is best understood as a strong prima facie obligation.

The strongest reason that can be given for violating confidentiality is that doing so is sometimes necessary to prevent harm from befalling
innocent third parties. Physicians are frequently concerned with preventing the spread of disease.

A physician has a primary obligation to his patient. His professionally role is that of healer; he has obligations to try to cure his patient, treat her humanely and minimize her suffering. But the physician does not only owe obligations to his patient: he also owes obligations to society in general to see that infectious diseases are not spread among its members if he can prevent this and he has an obligation to protect society from dangerous medical conditions had by some of its members (his patients). Both of these obligations are prima facie in nature, and the physician is generally able to follow both. Usually, by treating his patient, he also protects society.

In today's society, we no longer have the luxury of living far apart on huge tracts of land. Instead, we are crammed into large cities, being forced into close contact with our fellow humans. In such situations, diseases can spread rapidly if no precautions are taken. A single sneeze can put millions of germs into the air space of others.

Physicians, due to the nature of their jobs, are in a position to do something about the spread of disease as well as protecting the members of society from dangerous medical conditions had by their patients. Physicians are faced with a large spectrum of situations, ranging from those which clearly demand encroaching on individual rights for the common good, to those which are more controversial, to those where no adequate justification can be given for encroaching on individual rights for the common good.
Persons suffering from the common cold clearly fall into this last category. Once a person catches a cold, nothing can be done to cure him, although medication can be given to alleviate his symptoms. This patient poses no real risk to society. He is contagious—at least in the early stages of his cold—but colds are not life threatening illnesses. Colds might inject a bit of misery into your life, and although they may occasionally make you wish you were dead (until the worst part of the cold passes), if you are a reasonably normal person, they will not kill you. Furthermore, it is unlikely that the patient is the only source of the cold: colds seem to be the sorts of things which pop up everywhere.

The epileptic bus driver discussed above is a case in which the individual’s desire for confidentiality must be denied for the sake of society. In that case, not violating confidentiality puts innocent passengers at risk of bodily harm or death.

A person who has AIDS also puts the public at risk. AIDS is a deadly disease for which there is no cure. It has been compared to the Black Death of medieval times which wiped out two thirds of the population of Europe. Until there is a cure, the most that health officials can do is to institute measures to interrupt the unchecked transmission of AIDS in order to protect large numbers of our population from contracting the disease and dying. To this end, the AIDS patient’s desires for complete confidentiality must be denied. Confidentiality must be violated, but only as much as necessary.

The health authorities should be notified, and it may be appropriate to reveal the identity of persons with AIDS to their former and current
sexual partners, to those with whom they have shared IV needles, and to anyone who may have come in contact with their bodily fluids. This will serve to help curtail future transmission of the disease.

However, a patient's right to privacy is important, as are his wishes that this information be kept confidential. Thus violating confidentiality ought not proceed beyond such boundaries.

"The identification of persons infected with HTLV-III should be limited to the greatest extent possible without sacrificing the public health."29

Another reason for violating confidentiality, which shows that confidentiality is best interpreted as a prima facie obligation, is that much medical research is accomplished by using persons' medical records.30 To determine what treatments are the most effective for ovarian cancer, it is much better to review a hospital's records for the past 10 years than to enroll large numbers of women with ovarian cancer in an experiment. In an experimental situation, some women may be put at risk if their treatment is ineffective. Any mistakes in treatment in the past are already done; no new mistakes need be made. Reviewing past medical records will allow physicians to determine which treatments are effective and which are not without putting people at risk with ineffective treatments. This is one way in which medical progress occurs. The harm to the individual patient can be minimized by not linking the patient's name with the data after the charts have been read and by revealing the information only to the appropriate members of the medical community. The benefits to society -
more effective treatments, knowledge of factors that affect diseases, etc. - outweigh the harm to the individual which can be minimized by using the appropriate safeguards. Thus confidentiality ought to be violated, on occasion, for purposes of medical research. Thus confidentiality is a prima facie obligation.

A final reason for understanding confidentiality as a prima facie obligation is that violations are necessary in order for the physician to provide adequate care for her patient. Medicine today has become an extremely specialized discipline; no longer can the old country doctor do everything from fixing a broken arm to birthing a horse. Doctors must consult with each other on moderately-hard to hard cases. This is generally done with the patient's consent, but there are times when a physician wishes to consult on a diagnosis before talking with her patient or when it is not convenient to obtain the patient's consent before consulting with other physicians. It is possible to argue that the patient gives informed consent for the doctor to do whatever is necessary to cure him. However, if the patient does not know that his physician was consulting with others and believes that his doctor is keeping his communications, diagnoses, etc. confidential, then that patient's confidentiality has been violated. It is still permissible for the doctor to violate confidentiality in such circumstances because seeking opinions from colleagues is the only means that can be used to the end of
effectively treating the patient, which is the reason the patient and doctor have formed their relationship in the first place.

In this chapter I have shown that the obligation of maintaining confidentiality is not an absolute obligation. It is best understood as a prima facie obligation.
Notes

1. On a straightforward reading, this merely state that whatever ought not to be divulged, ought not to be divulged, an uninteresting analytic statement. It does not tell us what is to count as information that ought not to be divulged. However, this has, through the centuries, been taken to be a statement of the obligation of confidentiality. This quote is not meant as a clear statement of the obligation of confidentiality, but is meant to illustrate the point that confidentiality is important to physicians and has frequently been interpreted as an absolute obligation.


2. See, for example:

3. Gerald Abrams, "The Right to Privacy When Lives are at Stake," op cit, p.253

4. Abrams, "The Right to Privacy When Lives are at Stake," op cit, p.258

5. Caplan "The Right to Privacy When Lives are at Stake," Troubling Problems in Medical Ethics: The Third Volume in a Series on Ethics, Humanism, and Medicine. op cit, p.247
   Michael Kottow advances a similar argument in "Medical Confidentiality: An Intransient and Absolute Obligation," Journal of Medical Ethics 12 (1986) p.118

6. Forms of this argument can be found in:
   Abrams,"The Right to Privacy When Lives are at Stake," op cit p.259
   Gellman,"Divided Loyalties: A Physician's Responsibilities in an Information Age," op cit, p.818
   Kottow,"Medical Confidentiality: An Intransient and Absolute Obligation," op cit, p.118
   David J. Mayo, "Confidentiality in Crisis Counseling: A Philosophical Perspective," Suicide and Life Threatening Behavior 14 (Summer 1984) p.99
Rich, "Should Medical Records be Privileged?" op cit, p.585
Barry Weiss, "Confidentiality Expectations of Patients, Physicians,
and Medical Students," *Journal of the American Medical Association*
247 (21 May 1982) p.2696

7. Gellman, "Divided Loyalties: a Physician’s Responsibilities in an
Information Age," op cit, p.818

8. Rich, "Should Medical Records be Privileged?" op cit, p.585

9. This is, admittedly, a very weak inductive argument. However, in
interpersonal relationships, we frequently observe one instance of a
behavior and think that it is typical behavior for the person. This is
especially true when we do not know the person well.

10. Kottow, "Medical Confidentiality: an Intransient and Absolute
Obligation," op cit, p.118

11. Ibid, p.120

12. Ibid, p.118

13. Ibid, p.121

14. See, for example, Kottow, "Medical Confidentiality: An Intransient and
Absolute Obligation," ibid, pp.119-20

15. Rich, "Should Medical Records be Privileged?" op cit, p.585

*Journal of the Royal College of General Practitioners* (May 1986),
p.227
Weiss, "Confidentiality Expectations of Patients, Physicians and
Medical Students," op cit
Barry Weiss, et al, "Confidentiality Expectations of Patients in
23 (1986), pp.387-91

17. Daniel M. Fox, "The Politics of Physicians’ Responsibility in Epidemics:

18. See, for example,
Rich, "Should Medical Records be Privileged?" op cit, p.585


20. I mean here to distinguish between cases of acquiring AIDS through
unprotected intercourse with a known AIDS victim, or sharing needles
with other intravenous drug users, and cases of hemophiliacs
acquiring AIDS
from a contaminated dose of the clotting factor they need. In the former cases, one might argue that the patient deserves everything he gets since he knowingly undertook risky behavior. This argument can be bypassed in cases of people innocently contracting AIDS through contaminated blood products.


22. Weiss, "Confidentiality Expectations of Patients, Physicians and Medical Students," op cit


26. Here, as elsewhere in the dissertation, I am discussing the practice of not adopting confidentiality as an absolute obligation. This is to be distinguished from discussing confidentiality using an act view.


28. This is not meant to be an exhaustive list of a physician's obligations: it is merely a list of his major obligations.


30. Versions of this argument can be found in:
   Abrams, "The Right to Privacy When Lives are at Stake," op cit, p.262
CHAPTER IV

CONFIDENTIALITY AND THE PSYCHOTHERAPEUTIC PROFESSION

Confidentiality has long been held to be essential to a successful therapeutic relationship between therapist and client. Although Freudian psychotherapy is no longer the dominant form of therapy used, many forms of psychotherapy still require the client to explore, in agonizing detail, parts of his life which are generally kept quite private, and about which the client wants no one outside of therapy to know. In order for the client to be willing to discuss these thoughts and feelings with a therapist, and to feel comfortable doing so, some assurance of confidentiality is necessary. All this is granted. However, this has led many people to claim that an assurance of absolute confidentiality is necessary in the practice of psychotherapy.

The arguments presented for and against absolute confidentiality in psychotherapy are all consequentialist in nature. Those which are made in favour of absolute confidentiality claim that the results of violating confidentiality would be so devastating as to outweigh any harm which might come from maintaining a client’s confidences. Those arguments presented in favour of a more limited notion of confidentiality typically argue that the results of occasionally violating confidentiality are not nearly so horrible as might be supposed and that the good which results in
situations where a psychotherapist violates confidentiality outweighs any harm which would result from doing so. In this chapter I will examine the arguments advanced in favour of absolute confidentiality in psychotherapy, and show that while they are reasonable arguments for a prima facie obligation of confidentiality, they do not generate an absolute obligation. I will also argue in favour of a prima facie interpretation of the obligation of confidentiality in psychotherapy.

There are cases where to grant absolute confidentiality leads to disastrous consequences. In 1967, Prosenjit Poddar, a student at the University of California at Berkeley met and fell in love with another student, Tatiana Tarasoff. His love was unrequited, and he fell into a deep depression. Six months later, Poddar sought psychiatric help from Dr. Lawrence Moore at the Cowell Memorial Hospital at the University. During the course of therapy, Poddar confided his intention to kill Tarasoff. At Moore's request, the campus police briefly detained Poddar, but released him when he appeared rational. Moore's superior, Dr. Harvey Powelson, then instructed that no further action be taken to detain Poddar and that his records be destroyed. No one warned Tarasoff or her parents. Two months later, when Tarasoff returned from Brazil, Poddar killed her. Tarasoff's parents then brought suit against the Regents, the campus police, and the hospital's doctors.

It is because of cases like this that many people argue that psychotherapists occasionally are obligated to violate their clients' confidences. They argue that the consequences of great harm or death to
an innocent victim outweigh any damage to the client or the therapeutic relationship which might ensue.

In this case, Tarasoff v. Regents of the University of California\(^1\) the Supreme Court of California ruled that

"When a psychotherapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another he incurs an obligation to use reasonable care to protect the victim against such danger, that discharge of such duty may require the therapist to take one or more of various steps, depending on the nature of the case..."\(^2\)

The court ruled that while ordinarily there is no duty to control the conduct of another or to warn those endangered by such conduct, a duty does exist when the defendant stands in some special relationship to either the person whose conduct needs to be controlled or to the foreseeable victim of that conduct. Due to the special nature of their profession, psychotherapists owe a duty to society to protect its members from harm. The court claimed that sometimes the duty to protect society actually does override the duty not to reveal confidential information. Since this duty conflicts with making confidentiality absolute, the court argued that confidentiality must allow of exceptions.

Individuals who argue in this manner tend to claim that it is obvious that more harm will come of making confidentiality an absolute obligation than of making it a prima facie obligation which psychotherapists are obligated to violate under rare and extreme circumstances. However, not everyone agrees with this line of reasoning. Those who argue against allowing violations of confidentiality generally cite statistics and studies in an attempt to support their arguments.
As with any consequentialist argument, the correct resolution is ultimately achieved by an evaluation of the consequences. In what follows, I will show that the projected harm which those who support an absolute obligation claim will follow from permitting psychotherapists to violate confidentiality is not as great as claimed, and is not as great as the potential harm which results from making confidentiality an absolute obligation. Thus, on consequentialist grounds, I will show that confidentiality is a strong prima facie obligation, to be violated on certain, albeit rare, occasions. Given the complexity of human behavior, it is unlikely that a complete list of the conditions under which another prima facie obligation will outweigh the prima facie obligation of confidentiality. However, general guidelines on when to break confidentiality can be given.

The nature of my criticisms of the arguments is more empirical in nature than is usual in philosophical argumentation. I do this because of the empirical nature of the arguments presented by psychotherapists; consequentialist arguments are typically empirical in nature.

A major argument advanced to show that any obligation of confidentiality in psychotherapy must be an absolute obligation is that without the promise of strictest confidentiality, individuals will be deterred from seeking needed help.

According to this line of argumentation, if an individual believes that the psychotherapist is occasionally obligated to violate this confidentiality, and reveal to others his innermost passions, thoughts,
intentions, etc., this individual will be less inclined to seek treatment.

Seeking help from a psychotherapist is not, in general, a socially acceptable thing to do. Mere disclosure of the therapy itself can severely damage the client's reputation in the community or impair his chances of employment. In the 1972 presidential election, for example, presidential candidate George McGovern asked Senator Thomas Eagleton to step down as his running mate when it was revealed that Senator Eagleton had undergone psychiatric treatment.

People who visit psychiatrists are frequently viewed by others as mentally aberrant. They may be stigmatized; described by such words as "nut", "looney", and "fruitcake". Fear of having such labels given them by friends and associates creates a reluctance by the individuals to seek aid. This reluctance can be alleviated by a promise of confidentiality concerning not only information discussed during therapy, but also the fact that the individual is undergoing therapy. Without a promise of absolute secrecy, some people claim that many people will be deterred from seeking psychological help.

"Given the importance of confidentiality to the practice of psychiatry, it becomes clear the duty to warn...will cripple the use and effectiveness of psychiatry. Many people...will be deterred from seeking it."3

Ultimately, if enough individuals decide not to seek help, psychotherapists will be without clients. Thus, without the confidentiality that promotes trust in the psychotherapeutic relationship, the practice of psychotherapy will wither away and die.
It is not clear, however, that limited breaches of confidentiality would actually deter prospective clients from seeking psychotherapy. The above argument appears to assume that any breach of confidentiality would be loudly broadcast far and wide, published in the newspapers or reported on the news, as was the case during the 1972 election. Yet this need not be the case. Any breaches of confidentiality deemed necessary by the therapist to protect the client from injuring herself or others can be done discretely in such a way as to maintain as much confidentiality as is consonant with effective treatment. Thus a limited violation of confidentiality need not brand the client a "nut" and lead to a breakdown in the profession.

It is said that confidentiality provides the very foundation upon which the practice of psychotherapy rests. Much of what is said in the course of therapy is very difficult to say. In the early stages of therapy, much of what is done is done with the purpose of the client developing trust in both the psychotherapist and the therapeutic relationship. An assurance of confidentiality on the part of the psychotherapist facilitates this development of trust. Even without an explicit assurance of confidentiality, many individuals seeking therapy assume that the psychotherapist will reveal the contents of their conversations to no one. One survey indicates that psychotherapists believe that approximately 86% of their clients assume that what is said in the course of therapy will be kept confidential.
The client is especially concerned with protecting his privacy, keeping the communications secret, when disclosure of information involves a psychiatric label which often encourages society to believe the individual is hopelessly mentally deranged or uncontrollable or dangerous, e.g., "psychotic", and "sociopath". Such labelling of clients is not unusual: current insurance practices and some hospital practices require a labelling of clients based on the DSM III.

These facts have led some individuals to claim that the practice of psychotherapy requires that what transpires during the course of therapy be kept absolutely confidential; to do otherwise would destroy the practice of psychotherapy. Unfortunately for those advocating this line of reasoning, there does not exist conclusive evidence to support the claim that psychotherapy would be undermined by occasional breaches of confidentiality. Furthermore, evidence exists suggesting that absolute confidentiality is not essential for successful therapy.

In arguing against a duty to protect potential victims from harm, many people have cited studies, mentioned below, which they claim demonstrate that without absolute confidentiality, clients will not make the full disclosure necessary for successful therapy.

The assumption that confidentiality is essential to successful treatment has long been made by psychotherapists. It is a very difficult assumption to test since if it is correct, those clients who are denied confidentiality as a part of the research will have treatment disrupted. Psychotherapists are very reluctant to risk doing this as it is tantamount to deliberately injuring the client. The research that has been done
generally proceeds by using indirect methods, for example, by surveying psychotherapists as to their beliefs concerning what their clients would do, by putting hypothetical questions about predicted behavior to randomly selected individuals, or by doing controlled experiments using students enrolled in introductory psychology courses.

One such survey, cited by Justice Clark in his dissenting opinion to 'Tarasoff v. Regents', "indicated that 5 out of 7 people interviewed said they would be less likely to make full disclosure to a psychiatrist in the absence of assurance of confidentiality." There are problems with this survey, and others like it, which cast doubts on the validity of its conclusions.

First, the figures cited by Justice Clark in his dissenting opinion are inaccurate. It would be accurate to say that of those individuals surveyed who expressed an opinion, 5 out of 7 people interviewed said they would be less likely to make the full disclosure it is claimed is necessary for successful therapy without an assurance of confidentiality. However, out of the total number of individuals surveyed, including those who did not know whether or not they would be less likely to make full disclosure, only 3 out of 7 people interviewed said they would be less likely to make full disclosure without an assurance of confidentiality. While 3 out of 7 may appear to be a significant number, as I will discuss below, there is no indication that the people surveyed are the sorts of people who are likely to seek therapy. People seeking therapy may be willing to do whatever is necessary for successful treatment, including making a full disclosure in the absence of absolute confidentiality.
Second, the questions were written in such a way as to indicate that the only available choices were absolute confidentiality or no confidentiality at all.\(^8\) This is an inaccurate representation, for those who argue in favour of an obligation to violate confidentiality argue for such an obligation only in extreme circumstances which occur infrequently.

A study by Woods and McNamera used psychology students in a laboratory setting to show that without an assurance of confidentiality, individuals will limit their disclosures.\(^9\) They argued that instructions regarding confidentiality had a very strong effect on the depth of self disclosure. No significant difference was found between those subjects promised confidentiality and those told nothing, but there was a difference found between those two groups and those subjects who were told that the material they revealed might not be kept confidential.

This study, however, does not accurately test the question of whether disclosure by the psychotherapist of his client's communications under infrequently occurring extreme circumstances would harm the course of therapy. The subjects involved in the study were divided into three groups: those who were promised "strictest confidentiality", i.e., absolute confidentiality, those who were told that records of their conversations might be made available to other members of the psychology department and a copy might be placed in their university files, and those who were told nothing regarding confidentiality. This situation is more accurately representative of a choice between absolute confidentiality and no confidentiality at all, rather than a choice between absolute confidentiality and an occasional violation of confidentiality under
extreme circumstances when the psychotherapist's duty to others overrides his duty to keep his client's disclosures confidential. Thus the results of the study are not fully applicable to the question of whether or not a psychotherapist is occasionally obligated to violate confidentiality.

Another problem associated with studies designed to show that absolute confidentiality is necessary for successful therapy relates to the people involved in the studies and the testing conditions of the studies. The study cited by Justice Clark surveyed 108 individuals who were not randomly selected. This size sample of a non-randomly selected group is not large enough to make sweeping generalizations about the beliefs of individuals. Furthermore, there is no indication that the individuals participating in the survey were of the sort who would be likely to seek the help of a psychotherapist. A plausible hypothesis is that those who feel the need for psychotherapeutic help will seek it out even in the complete absence of confidentiality.

The study by Woods and McNamera used 60 college students enrolled in introductory psychology classes at Ohio University. It is very likely that these students participated in order to receive a grade in their psychology class. It is a common practice to get the subjects needed for psychology experiments by requiring students in introductory psychology courses to participate in two or three studies in order for them to receive a grade in the course. This is crucially different from individuals who seek out psychotherapeutic help because of the extreme emotional turmoil generally felt by those who seek such help, and there is no evidence to suggest that these students ever have, or are likely to, see a therapist. Students may
be reluctant to answer questions regarding intimate details of their lives, while individuals in emotional distress, as I shall argue below, may be willing to do just about anything to free themselves of the emotional turmoil.

Under ordinary, normal circumstances, individuals who are not experiencing any major sort of emotional turmoil are not even likely to consider seeking psychotherapeutic help. However, many people who are suffering from emotional and psychological anguish realize that they need to seek counselling in order to end the turmoil; that a skilled therapist can assist them to do what they have been unable to do on their own.

Emotional and psychological distress is not a pleasant state of affairs. Many people who find themselves in such circumstances desire to put an end to such distress. Under ordinary circumstances, individuals typically do not reveal intimate details of their lives to strangers. However, in therapy, frequently the only way to resolve the emotional and psychological distress is to talk about those intimate problems. So it seems to be a reasonable hypothesis that people who are experiencing this distress and want it to end will make such disclosures. If the only readily available means of ending emotional distress are either discussing personal items with a therapist or death (which would end the turmoil by ending the life), many people would prefer life and so seek help.

Furthermore, the study by Woods and McNamera was done in the controlled setting of a university psychology laboratory, which has a much different atmosphere than the office of a psychotherapist.
Against these dire predictions that without an assurance of absolute confidentiality psychotherapy will not work, and so will wither away and die, is evidence that psychotherapy works just fine in an atmosphere of limited confidentiality; indeed, the profession appears to be flourishing now more than ever.

Therapy can be successful when done in front of an audience. Albert Ellis, creator and proponent of the form of psychotherapy known as "Rational-Emotive Therapy", routinely used to demonstrate his approach in action by having someone from the audience work with him on stage, in front of the audience. In 1965, a film series entitled "Three Approaches to Psychotherapy" was made for the purpose of educating psychology students, in which a woman named Gloria underwent therapy while being filmed. Today, in 1988, there are television shows, such as "People in Crisis", on which individuals publicly explore their problems with a licensed therapist.

Success in therapy despite pre-therapy agreements concerning limits on confidentiality also demonstrates that absolute confidentiality is not necessary for successful therapy. Before therapy begins, many therapists have their clients sign contracts containing clauses relating to such things as payment, goals, length of therapy and limitations on confidentiality.

Contracts signed by students using the Student Consultation Service at Ohio State contain the following clause:

The Student Consultation Service is a training center for Counseling Psychologists. For this reason your counseling interviews, though confidential, will be recorded and observed, and your counselor supervised by the staff of the Consultation Service. This staff
includes graduate students associated with the Student Consultation Service and the supervisory faculty.

Clients enter such therapy knowing that confidentiality will not be absolute, yet treatment is successful under such conditions. (For a discussion of 'successful' see note 12) This indicates that violations of confidentiality may not be as detrimental to effective treatment as has been thought.

The success of group therapy also indicates that absolute confidentiality is not necessary for successful treatment. Group therapy is one type of therapy available to clients in which clients meet with a therapist and other clients to uncover and solve their problems. All members of the group are instructed to maintain strict confidentiality concerning disclosures made by all members of the group. Such an environment, though, is not conducive to maintaining absolute confidentiality. In many groups, such as families, individuals have opposing interests, which can create anger and hostility between group members. Persons who are angry as a result of occurrences within the group are less likely to keep secrets. Even with the likelihood of breaches of confidentiality, group members are expected to make the disclosures necessary for effective treatment and the method is quite successful, especially in family therapy.13

The success of therapy despite the presence of only limited, or prima facie confidentiality indicates one of two things: either limited confidentiality does not inhibit complete disclosures on the part of the
client, or clients do limit their disclosures, indicating that complete
disclosure is not necessary for successful treatment.

iv

A related, and somewhat more successful argument against an
obligation to violate confidentiality is that limiting confidentiality or
violating it would destroy a particular psychotherapist-client relationship.

"The nature of the illness and treatment of the kind of dangerous
person who voluntarily comes to therapy makes the imposition of...a
duty [to warn] particularly destructive. Such a person is typically
not a hardened criminal but rather one whose violence is the product
of passion or paranoia....When a therapist tries to deal with the
potential for violence of such patients, he must enter into a
therapeutic alliance in which feelings are acknowledged at the same
time that impulses to act them out are discouraged. To maintain this
attitude of respect for and acceptance of the patient's feelings while
discouraging any violent action is often the central task of the
therapist. If all goes well, the patient whose feelings are accepted
will come to trust the therapist and be able to explore and
understand his violent impulses and consider meaningful alternatives
to them." 14

If the psychotherapist has an obligation to protect an innocent victim
from harm by his client, this may harm the therapeutic alliance. If the
client sees the therapist as aligning herself with those with whom the
client has problems instead of with the client, the client is likely to feel
betrayed and so break off the therapeutic relationship. This, in fact, did
happen in the 'Tarasoff' case. Prosenjit Poddar did not return to
counselling after Dr. Moore violated confidentiality and called in the
campus police. Obviously, if the therapeutic relationship is brought to an
end, the client no longer receives the therapy she wants and/or needs.
While it is true that psychological harm may result to an individual who leaves therapy after learning that her psychotherapist has violated confidentiality, this likely harm needs to be balanced against the likely harm which would result if the client were to carry out her threats against an innocent third party. There is no readily available formula for comparing competing likelihoods. What we and psychotherapists do is judge on the basis of our past experience and general background knowledge.

A psychotherapist comes to know, very well, his clients, especially those who return for more than an initial session; it is part of a psychotherapist's training to sharpen his perceptions as well as to learn how to help people. While untrained individuals may not be able to determine if the threat a person makes is real or merely the expression of pent up anger, it is to be expected that a psychotherapist, involved in an ongoing psychotherapeutic relationship with his client, would be able to make that determination. If a psychotherapist believes that his client is making a real threat, his first obligation is to his client, to help him "work through" his anger and frustration, and so to defuse the threat. This, however, is not always possible. In such a case, the psychotherapist is in a position to weigh the predicted costs to his client brought about by violating confidentiality versus the predicted costs to his client's intended victim.

In either case, there is the uncertainty associated with predicting the future. It is not known with certainty that either the therapeutic relationship and the client will be harmed, or that the potential victim will
actually be harmed. However, of the possible alternatives, it is generally the case that the harm to the potential victim, or his possible loss of life, is worse than the psychological harm which would be accrued by the client. Thus the psychotherapist, who also has an obligation to society which derives from the nature of his profession, has an obligation to the potential victim to prevent harm from befalling her.

Many people who object to an obligation to protect the potential victim do so because of the lack of warning which precedes the psychotherapist's violation of confidentiality and the extreme measures they believe the psychotherapist will take to protect the potential victim.

It is likely that a client will feel betrayal when her psychotherapist reveals the contents of their conversations to others. This sense of betrayal, however, can be minimized. By discussing the limits of confidentiality at the onset of therapy, something one survey indicates that only 14.5% of psychotherapists routinely do\textsuperscript{15}, the client will not be taken completely unaware if the psychotherapist must violate confidentiality. A discussion of the unlikelihood of this state of affairs occurring would reassure the client that it is quite likely that everything she says will be kept confidential which, in turn, will promote the trust which is necessary for a psychotherapeutic relationship to be successful.

James Beck did a study to determine the effects of violating confidentiality and warning others of intended harm by the patient. He surveyed 38 psychiatrists, asking them if they had ever warned of threatened harm by a patient, whether they discussed this with the patient
before or after warning, and what the effects on the therapeutic relationships were. He found that:

"Forty-two percent of the sample had been involved in a case in which a warning was actually given, and another 32 percent had seriously considered giving a warning....the warnings given seldom had an adverse effect on the therapeutic relationship. Only warnings that were not discussed with the patient or one which was given without good reason were judged to be harmful to the therapeutic relationship. There were only four such cases; in two of them, later discussion between patient and therapist repaired the damage to the therapeutic relationship. The results support the conclusion that warnings per se have little or no apparent effect; how they are integrated into the therapy is the important variable."16

The psychotherapist may also protect the potential victim by methods other than directly warning the victim. There may be times when warning the victim may be the most effective way of protecting him. In other cases, however, committing the client to the local hospital may be the method which causes the least amount of harm to all concerned. Some threats, for example, are made because the client is unable to manage all the pressures bearing down on her. These threats are real, but the psychotherapist believes that if the client is given time to "cool off" she will be able to untangle her problems; sometimes all that is needed is two or three days away from the client's routine situation and habitat for the client to be able to work out the feelings behind her threats instead of carrying them out. Commitment proceedings would result in the client being placed in a hospital and given the time to think things through.

In summary, it may be that the particular psychotherapist-client relationship is destroyed. However, on many occasions, the predicted harm that is prevented is greater than the predicted damage done to the client, so the therapist's obligation to protect third parties overrides his
obligation to protect the confidences of his client. Furthermore, the psychotherapist can minimize the shock of betrayal and, in the case of commitment, is usually able to continue working with the client.

The option of committing the client instead of warning the victim leads to the possibility of overcommitment of clients on the part of psychotherapists. That such overcommitment is undesirable has led some to use this possibility as an argument against a psychotherapist's obligation occasionally to violate confidentiality.

Emergency commitment statutes are typically designed to provide brief intervention to prevent immediately threatened harm, either to self or to others. Typically, they allow certain law enforcement personnel and psychiatric personnel to commit an individual who has threatened harm to himself or to others with or without the consent of the individual. Psychotherapists generally try to get their clients to commit themselves voluntarily, but where this attempt is not successful, it may be necessary for the psychotherapist to resort to involuntary commitment.

Once committed, it may be difficult for the client to regain his freedom, especially if he was committed against his will. In order to obtain his release, the client may have to prove that he is both sane and not dangerous. Proving one's sanity is a notoriously difficult thing to do. A client who reacts negatively to the commitment proceedings - goes in kicking and screaming - and is hostile towards the hospital staff simply because he does not want to be there and he perceives the staff as
responsible for keeping him there, will have a hard time proving to anyone that he is not dangerous.

Some people have claimed that if psychotherapists have an obligation to protect potential victims from harm, they may choose to commit their clients instead of warn the intended victim. As clients frequently utter threats during the course of therapy, it is claimed that psychotherapists will commit clients more often than necessary. Since commitment deprives people of their liberty, many innocent people will be so deprived and will find it difficult to regain their freedom. This has led many to conclude that psychotherapists do not have an obligation to protect potential victims from harm.18

"The critics of Tarasoff fear that rather than forcing the possibility of heavy civil sanctions or the wrath of the public, the psychotherapist will err on the side of safety and tend to overcommit his patients."19

"...a duty to warn...greatly increases the risk of civil commitment - the total deprivation of liberty - of those who should not be confined. The impairment of treatment and risk of improper commitment resulting from the new duty to warn will not be limited to a few patients but will extend to a large number of the mentally ill. Although under existing psychiatric procedure only a relatively few receiving treatment will ever present a risk of violence, the number making threats is huge, and it is the latter group - not just the former - whose treatment will be impaired and whose risk of commitment will be increased."20

One assumption made by those advocating this line of reasoning is that the psychotherapists and law enforcement personnel will be allowed to "play God" and commit people willy-nilly. If this were true, then committing a client every time he made a threat or expressed extreme hostility would be easy and psychotherapists might choose to err on the
side of caution and overcommit. This assumption, however, is not generally true, as I shall show.

Commitment procedures vary from state to state, but many states provide safeguards for commitment proceedings. California, for example, by means of the Lanterman-Petris-Short Act, established guidelines for involuntary commitment as well as a comprehensive set of procedures to safeguard against overcommitment. Under the terms of this Act, specifically designated individuals can commit individuals for periods of time ranging from an initial 72 hours to 90 days. However, as the length of time of commitment is increased, more people are brought into the proceedings to ensure that the individual is not being arbitrarily committed without a legitimate reason. In addition, the individual being committed has a right to counsel and to a full court hearing if the commitment is for longer than two weeks. Thus, the Lanterman-Petris-Short Act, and others like it, discourage casual commitment.

The dire predictions of overcommitment are also based on the assumption that a psychotherapist will be unable to distinguish between real threats uttered by his clients and ones that are merely expressions of anger and frustration, but which will not be carried out. This is another line of reasoning used by those who object to psychotherapists having an obligation to violate confidentiality and warn concerning the intended actions of their clients.
In the decision to "Tarasoff v. Regents", the Supreme Court of California ruled that:

"When a psychotherapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another he incurs an obligation to use reasonable care to protect the victim against such danger..."23

The decision rests on the belief that psychotherapists can predict dangerousness in their clients, at least with the same reasonable degree of care exercised by other psychotherapists. The court did not require perfect accuracy in predicting dangerousness, but expected that predictions of violence would occur with a high degree of success.

Many people, however, claim that psychotherapists cannot predict dangerousness in their clients with any degree of accuracy.24 If psychotherapists cannot distinguish between real threats and words uttered merely to relieve anger and frustration, then a duty to warn is ineffective in a significant number of cases, and thus, it is claimed it is pointless to require therapists to warn. By imposing a duty to warn, psychotherapists are likely to warn potential victims and/or commit their clients much more than is actually necessary. In the many cases where the client had no intention of carrying out his threat, he is harmed by the violation of confidentiality with no resulting benefit as the potential victim was already safe. Because so many innocent people will be harmed by a duty to warn, and because it is unworkable, some people argue that it is wrong for psychotherapists to have an obligation to warn.

An oft quoted passage summarizes this line of reasoning:

"Assume that 1 person out of 1000 will kill. Assume also that an exceptionally accurate test is created which differentiates with 95%
effectiveness those who will kill from those who will not. If 100,000 people were tested, out of the 100 who would kill, 95 would be isolated. Unfortunately, out of the 99,900 who would not kill, 4,995 people would also be isolated as potential killers. In these circumstances, it is clear that we could not justify incarcerating all 5,090 people. If, in the criminal law, it is better that 10 guilty men go free than that 1 innocent man suffer, how can we say in the civil commitment area that it is better that 54 harmless people be incarcerated lest 1 dangerous man be free?"25

The crux of this argument is the claim that since psychotherapists are unable accurately to predict violence in their clients, many innocent persons will be committed.

There are two responses to this, which I will develop in the rest of this section. The first is that the statistics which have been presented are not completely applicable to cases in which a psychotherapist commits a client as a result of a specific threat. Since the projected numbers of innocent individuals making threats of violence are too high, the actual number of people who might be committed as a result of uttering threats is not catastrophic as the above quote makes it appear. Second, there is a trade off to be made between the potential harm to an innocent individual and the temporary loss of freedom by persons misdiagnosed as being dangerous to others. I will argue that since the loss of life or risk of bodily harm is worse than a temporary loss of freedom, the risk of overcommitment is not a stumbling block to understanding confidentiality as a prima facie obligation.

In addition to the above passage, the numbers of which are speculative, people who argue against psychotherapists having an obligation occasionally to violate confidentiality cite numerous studies in which psychotherapists either failed to predict violence in people who later
committed violence or inaccurately labelled as dangerous individuals who did not prove to be dangerous. Daley discusses four studies done on prison inmates who were either to appear before a parole board or who were recommended for release. These studies used such factors as the committing of acts of violence and the committing of violent sex crimes in an attempt to predict future acts of violence, such as assaults. In these studies, psychiatrists mis-diagnosed violence in prisoners 50-90% of the time; the psychiatrists over-predicted the number of inmates who actually did commit violent acts.26

Another oft cited quote comes from a report put out by the American Psychiatric Association.

"With respect to most predictions of violence...[t]he likelihood of the expected behavior such as violation of parole by a released prisoner whose previous crime was one of violence or the possibility of serious assault being committed by a released mental patient would be very slight. This means that even if the characteristics of such future violent patients could be specified with fairly great accuracy, predictions based upon such characteristics will identify far more 'false positives' than 'true positives.' Even if an index of proneness to violence could be developed so as to identify correctly prior to release 50% of those individuals who will violate parole by committing violent offenses, the actual employment of such an index would identify eight times as many 'false positives' as 'true positives.' This means that eight of the nine persons retained in prison as a result of application of the index would not have committed such offenses if released."27

The studies used in this line of argumentation can be divided into two main types.28 The first involve records of psychotherapists who serve as advisors to courts and mental facilities in criminal and civil commitment contexts. The second type of study are statistical surveys which try to pinpoint the causes of violence and find environmental and social characteristics indicative of the person with a tendency to violence.
Unfortunately for those who rely on these studies to prove their point, these types of studies, as I shall argue below, are not applicable to the Tarasoff type of case, one in which in the course of a regular, ongoing therapeutic relationship which the client entered into voluntarily, the psychotherapist comes to realize that her client's threats are real. It is in this type of relationship that the questions of whether the psychotherapist has an obligation to violate confidentiality arise.

In the first type of study, there is no ongoing therapeutic relationship. Instead, there is a court appointed psychiatrist, or a psychotherapist whose job it is to review a prisoner's record and perhaps talk with him briefly in the context of parole hearings, or an intake psychotherapist in a mental facility. In an ongoing psychotherapist-client relationship, the therapist's primary obligation is to his client and he has the time to develop a working relationship with his client. This allows the psychotherapist to gather more information about his client, to get to know his client better, and to figure out "what makes him tick". The primary obligation of the psychotherapists cited in the studies was to the facility which hired them, for example, a court appointed psychotherapist is engaged to determine the defendant's state of mind and reports his findings to the court. In such cases, the psychotherapist-client relationship is very short lived and is entered into for reasons other than assisting the client in resolving his personal problems. As the individual did not seek out therapy on his own, he is less likely to make full disclosure or to trust the psychotherapist than is someone who voluntarily seeks counselling. In such cases, it is less likely that the psychotherapist
will be able to distinguish between real and unreal threats as he lacks the
knowledge of the client. The court appointed therapist is more likely to
err on the side of caution and state that the defendant is actually
dangerous, especially if he believes the court desires that sort of
judgement and he wishes to retain his job. 

The psychotherapists involved in the second type of study sought to
find environmental or social characteristics which would identify
dangerous individuals. The report, cited above, of the American
Psychiatric Association, is of this type. These studies, also, are not
relevant to the Tarasoff-type case. In the first place, they, too, lack the
presence of an ongoing relationship between psychotherapist and client.
Many studies of this type involve keeping data on prison inmates to see
which ones return to a life of violent crime, or try to find some correlation
between various psychological tests and future tendencies to violence.
Such studies may be done by researchers who examine the inmates' records
for such things as diagnoses and demographic factors. They then search
for a correlation between any of these factors, or between diagnoses and
later acts of violence. This is not analogous to a psychotherapist who is
involved in an ongoing relationship with the client, and who knows his past
history as well as ways in which the client typically acts and reacts. If
cues are given by the client to indicate actual dangerousness, they may be
subtle and peculiar to the person, or they may be overt, and are likely to
be discoverable by someone who knows that individual and is trained to be
perceptive, etc. These are not the sorts of things that show up clearly
during a one-time visit for the purpose of diagnosis for a court or parole board or are clearly evident on a standardized test.

A major factor missing from these studies is the presence of a specific threat. In the Tarasoff case, Dr. Moore knew that Poddar’s threat was specifically directed against Tarasoff. In surveys seeking to uncover a characteristic indicative of dangerousness, the psychotherapists are not evaluating whether a specific threat is real or not, but whether individuals will, at some point in the future, commit some violent act or other.

There is disagreement among the experts as to how well dangerousness can be predicted. However, at least one professional organization has decided that dangerousness can generally be predicted. The Canadian Psychiatric Association has provided guidelines for the detection of potential dangerousness. These are not hard and fast rules, but rather things to look for in assessing the potential for future violence in clients.

1. The Offense
   Legal Category. Past crimes as a predictor of future violence are of limited value. Some studies have suggested that sexual offenses against children have the highest rate of recidivism of all crimes.

2. Details of the Offense
   The degree of violence exhibited by the individual is crucial. The impulsivity of the act is of significance as impulsive violence tends to re-occur. Alcohol and drug abuse may predispose an individual to aggressive behaviour.

3. The Victim
   A high percentage of homicides occur in emotionally charged situations of a domestic nature in a disturbed love relationship. Such factors as the victim’s provocative behaviour and attitudes of cooperativeness are important predisposing factors to inciting violence.

4. Past Behaviour
   Many studies suggest if there is one indicator of future violent behaviour, it is past violence. There are many exceptions to this, as violence occurring in previously non-violent individuals is far from a rare phenomenon.
5. Personality of Mental Illness Profiles

There is no diagnostic category such as the dangerous personality. In general, statistical data show that those who have been diagnosed as seriously mentally ill are not more dangerous than those who have never had psychiatric diagnoses apply to them. This is not to say that particular aspects of certain mental disorders may not carry a high risk for future dangerousness such as a depressed deluded woman who feels that it is best to put her child out of misery because the world is such a terrible place, or a man suffering from delusional jealousy.

What is important in any personality assessment is the personal and social history. There is evidence to suggest that early deprivation, poverty, family violence and paternal alcoholism are major causative and contributing elements to future violence...

6. Violent Fantasies and Dangerousness

The patient who begins to discuss violent fantasies and feelings will in most cases not commit any violent act. The likelihood of violence can only be assessed by considering the personality, medical and psychosocial history of the patient.

Thus, the evidence used to show that psychotherapists cannot predict violence misses the mark. It is likely true that psychotherapists cannot predict whether or not individuals randomly plucked off the street will commit some violent act in the future. However, psychotherapists involved in an ongoing therapeutic relationship with a client come to know that client rather well. Factors which they use to evaluate dangerousness include such things as a past history of violent acts or continued abuse done to the client. These, coupled with a specific threat of violence, are the sorts of things that lead psychotherapists to predict violence and so take steps to prevent harm from befalling the intended victim. While the success rate of predictions of violence in such circumstances is not perfect, it is likely to be higher than the above quoted statistics.
The issue still remains, however, that non-dangerous individuals may be committed in the mistaken belief that they pose a danger to others. One could argue that any such commitment is unjustified.

However, there is a trade off to be made. At stake are the potential harm to or loss of life of innocent individuals which is likely to occur if confidentiality is understood as an absolute obligation. This is to be contrasted with a temporary loss of freedom of non-dangerous clients who have been incorrectly diagnosed as dangerous which may occur if confidentiality is understood as a prima facie obligation. The potential loss of life is a worse state of affairs than the potential temporary loss of freedom. After all, someone who has temporarily lost her freedom will almost certainly regain it, while someone who has lost her life can never get it back. Furthermore, as I showed above, the number of people who are at risk for such commitment is less than the initial predictions. Thus, the psychotherapist has an obligation to protect others he believes his client places at risk, even if doing so entails that some non-dangerous people are committed. Thus confidentiality is best understood as a prima facie obligation, overridable when it is outweighed by the psychotherapist's obligations to others.

A final argument offered against imposing a duty to warn on psychotherapists is that instead of minimizing violence to society by protecting victims from harm, such an obligation will actually increase the amount of violence present in society. This argument rests on the
arguments discussed above that if psychotherapists are occasionally obligated to violate confidentiality, significant numbers of potential clients will be deterred from seeking therapy, or, once in therapy will leave it. It may be that the individuals who will threaten violence are members of this group. If these individuals were not deterred from therapy or did not leave it before resolving their problems, then the psychotherapists would be able to help them and convince them not to act on their violent impulses. However, if they are deterred from therapy or leave it before resolving their problems, they will not receive this help and may act on their violent impulses. Thus, it is claimed, there is likely to be a net increase in violence to society.

This argument cannot be dismissed by noting that it rests on the general deterrence argument discussed earlier. While occasional violations of confidentiality are unlikely to deter most people, it may deter those individuals who have the violent sorts of impulses that lead psychotherapists to violate confidentiality. This seems to be the claim of those who present the above argument. However, this still does not show that confidentiality is best understood as an absolute obligation for two reasons. First, an obligation of confidentiality which is known to be limited may attract people who harbor dangerous impulses yet do not want to act on them. Second, the proposition that limited confidentiality will deter individuals from therapy is an assertion which is not backed by empirical data.

Some people with harmful propensities enter therapy and make disclosures about their pent-up hostilities and violent impulses as "cries
for help. These clients may feel a lack of control in their lives which they hope can be provided by the psychotherapist. An obligation of confidentiality which is known to be limited may attract these potentially dangerous people to therapy, knowing that the psychotherapist will take steps to ensure that their violent acts are not carried out. Thus although some people with violent tendencies may be deterred, others may seek out therapy because of a limited obligation of confidentiality.

There is, however, no empirical evidence to show, one way or the other, whether a prima facie obligation of confidentiality deters potentially violent individuals from seeking therapy. Indeed, it would be a very difficult proposition to test. It may be that lives would be saved and harm prevented with an obligation of absolute confidentiality, but how many lives and how much harm is unknown. An obligation to violate confidentiality occasionally will prevent harm from befalling some individuals and will save lives. Thus, with a goal of minimizing harm done to innocents, confidentiality is best understood as a prima facie obligation, for it is far more certain that such an obligation will prevent harm than will an absolute obligation of confidentiality.

The argument that a limited notion of confidentiality will result in an increase in violence to society also argues that some individuals in therapy may leave it after learning that confidentiality has been violated. This is what Beck predicts will happen when the psychotherapist does not discuss the matter with his client prior to issuing a warning. However, if an individual leaves therapy because his psychotherapist warned his potential victim about harm that may befall her, then the victim has been
warned and she and the police can take steps to ensure that she is not harmed. An individual who threatens harm against a specific person is unlikely to go on a killing spree because he has been thwarted in his attempts; he is after a specific person for a specific reason, not humanity in general. A client who is found to be dangerous to humanity generally is likely to be committed to a psychiatric institution, thus preventing the predicted violence. Thus there does not seem to be any justification for the claim that an obligation to protect a potential victim from harm will lead to an increase in violence.

The strongest argument in favour of a slightly limited notion of confidentiality in psychotherapy, to remind the reader once again, is that violating confidentiality is necessary to protect an unsuspecting innocent individual from coming to harm at the hands of the client. Due, in part, to her training and her role as a therapist, a psychotherapist can come to have knowledge that her client intends to bring harm to another. She, at that point, is subject to several prima facie obligations: to protect the privacy of her client by maintaining confidentiality concerning the content of their conversations, to treat effectively her client's emotional problems, and to protect the public safety. One of the reasons for the existence of the profession of psychotherapy is that treating those with emotional problems results in individuals better able to cope with the pressures of modern living. This promotes public safety as the members of society will be more likely to peacefully coexist with each other.
On rare occasions, however, a psychotherapist is unable to effect change in her client and her client may tell her of his intentions to commit violence upon another person. At this point, the psychotherapist is unable to meet her obligation to treat her client effectively and the obligation to protect the confidentiality of the content of their discussions must give way to the protection of the threatened individual. As I have shown above in my discussion of the arguments for absolute confidentiality, a worse state of affairs will come into being if the psychotherapist protects the confidentiality of her client's communications to her than if she alerts the victim or the appropriate authorities of her client's intentions. Thus, in cases where a client expresses a threat which his psychotherapist, based on her training, believes to be real, she has an actual obligation to protect the potential victim from coming to harm by warning the appropriate individuals or committing her client to a psychiatric institution to allow him a "cooling off" period.

A psychotherapist also has an obligation to break confidentiality when necessary to fulfill his obligation to treat his client effectively. There are occasions on which a psychotherapist does not have the knowledge necessary to assist his client with his problems. In such cases, if the psychotherapist has built a good relationship with his client, he will have to consult with others to be able to continue therapy. Such consultation is generally taken for granted in our society, but consulting usually does violate confidentiality. Generally, people are not upset when one professional seeks information and advice from another; it is unlikely to be perceived as gossip, but as an attempt to help the client. In such a case,
no one is harmed and both the client and the psychotherapist benefit from the violation of confidentiality. Since the psychotherapist may not be able to treat his client effectively without such a consultation, he is obligated to violate confidentiality when consultation is needed.

The arguments which have been presented as establishing that psychotherapists have an obligation to maintain absolute confidentiality concerning the contents of therapeutic sessions have been shown not to work. I have argued that to require that psychotherapists always maintain strictest confidentiality would allow more harm to exist than imposing an obligation on psychotherapists to violate confidentiality on certain, rare occasions. Many of the arguments for absolute confidentiality present good reasons for maintaining confidentiality generally within a psychotherapeutic relationship, but not for absolute confidentiality. Revealing one's most private and innermost thoughts to a therapist is not an easy thing for most people to do and a promise of confidentiality, within limits, does facilitate this.
Notes

1. "Tarasoff v. Regents of the University of California" 17 Cal.3d 425 Cal. Rptr. 131 (1976)

2. Ibid

3. "Tarasoff v. Regents", op cit, Justice Clark, dissenting


5. Various forms of this argument can be found in:
   'Tarasoff v. Regents', Justice Clark dissenting


7. "Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Doctrine of Privileged Communications," op cit, pp.1255,1262
   "If there were such a legal obligation [to disclose confidential information if asked to do so be a lawyer in court], would you or would you not be less likely to make free and complete disclosure to the following?" Psychiatrist: less likely (45) not less likely (22) do not know (41)
   Psychologist: less likely (47) not less likely (18) do not know (43)

8. Ibid.


10. "Responses from 108 laymen were obtained through personal solicitation. This solicitation was conducted by salesmen and representatives of National Fruit Product Co., Inc. located in various parts of the eastern half of the country. Those answering our questionnaire tended to be non-lower class socially and economically." "Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Doctrine of Privileged Communications," op cit, fn. p.1227
11. The questions asked ranged from the relatively innocuous (e.g., "How do you spend your spare time?") to the quite intimate (e.g., "How can you tell when you are getting sexually aroused?") "Confidentiality: Its Effects on Interviewee Behavior," op cit, p.716

12. Success in therapy is difficult to gauge. It is judged by therapist and client. Generally, when both believe that whatever problems which brought the client to therapy have been overcome, as well as any additional ones which emerged in the course of treatment, therapy has been successful. There are no tests or scales which can determine success. In therapy involving pre-therapy agreements and group therapy, psychotherapists and clients report success. My knowledge of this comes from background work I have done in psychology and is supported by citations in "The Patient or His Victim: The Therapist's Dilemma," op cit, pp.1041-1043

13. One study which supports the claimed effectiveness of group therapy is Spokane and Oliver (1983). They did a metastudy of studies measuring the effectiveness of various forms of treatment, specifically as they relate to vocational intervention. They found that individuals receiving group therapy were better off than 39% of the control groups.


15. Unfortunately, the psychotherapists were not asked what they said to their clients in discussing confidentiality, or how they broached the subject.
"Where the Public Peril Begins: A Survey to Psychotherapists to Determine the Effects of Tarasoff", op cit


17. "The Patient or His Victim: The Therapist's Dilemma," op cit, pp.1052-1055

18. See for example:
"The Patient or His Victim: the Therapist's Dilemma," ibid


22. Ibid

23. "Tarasoff v. Regents", op cit

24. Variations of this argument can be found in
   "Untangling Tarasoff: Tarasoff v. Regents," op cit, p.199
   "The Tarasoff Decision: Suing Psychotherapists to Safeguard
    Society," op cit, pp.363-364
   "Where the Public Peril Begins: A Survey to Psychotherapists to
    Determine the Effects of Tarasoff," op cit, p.170
   "Tarasoff and the Psychotherapist's Duty to Warn," op cit, pp.940,942,fn.p.942-943

25. Livermore, Malmquist, and Meehl, "On the Justifications for Civil
   Commitment" 117 U. of Pennsylvania Law Review 75 (1968)

   Cites studies by Wenk, Robison, and Smith (1965,1963) and Kozol,
   Boucher, and Garofalo (1972)

   Association Task Force Report 8 (July 1974)
   cited in "Where the Public Peril Begins: A Survey of Psychotherapists
   to Determine the Effects of Tarasoff", op cit, p.171 fn.35

28. An indepth look at many such studies was done in "Untangling Tarasoff:
    Tarasoff v. Regents," op cit. My discussion of these studies
    derives, in part, from this article.

29. Seligman, in "Untangling Tarasoff: Tarasoff v. Regents," op cit, cites a
    number of articles in support of this claim.

30. F. Shane, "Confidentiality and Dangerousness in the Doctor-Patient
    Relationship: the Position of the Canadian Psychiatric Association,"
    Canadian Journal of Psychiatry 30 (June 1985), pp. 295-6

31. At this point, all I can do is reason and speculate. I was unable to
    find studies to give me the needed figures. I base my speculations
    on my knowledge of psychotherapy as well as on the many discussions
    I have had throughout my life concerning the nature of counselling
    and different cases (my mother was a psychotherapist and I have had
    many discussions with her as well as some of her colleagues).
    Additional information comes from work I have done in counselling
    psychology where sections of the coursework involved the
    assessment of dangerousness.
32. Versions of this argument can be found in:
"Untangling Tarasoff: Tarasoff v. Regents," op cit p.193
Andrew Thompson, Ethical Concerns in Psychotherapy and Their Legal
Ramifications (Lanham, MD: University Press of America, 1983), p.84
"Where the Public Peril Begins: A Survey to Psychotherapists to
Determine the Effects of Tarasoff," op cit p.170
"Tarasoff and the Psychotherapist's Duty to Warn," op cit p.944

1039–1040

34. This, too, is difficult to test empirically. If the psychotherapist either
warns the victim or the police, or has the client committed, violence
is prevented. But it is not known for certain that the violence would
have occurred without the intervention of the psychotherapist.
However, it seems likely that a prima facie obligation of
confidentiality will prevent harm as there are occasions on which the
psychotherapist did not warn and harm occurred.

35. "When the Patient Threatens Violence: An Empirical Study of Clinical
Practice after Tarasoff," op cit
CHAPTER V
CONFIDENTIALITY AND THE ROMAN CATHOLIC CHURCH

One context in which questions of confidentiality arise in the Catholic church is the confessional. It is a sacrament, a religious duty, for Catholics to confess their sins at least once a year, which allows them to receive penance for their sins. The sacrament of penance consists of four parts. First, the penitent must show contrition for his sins. After doing so, he must confess his sins, following which is satisfaction, i.e., he must do a good deed to make up for past wrongs. Following this, the priest grants absolution for the penitent's sins. The purpose of penance is the remission of sins. In this chapter I will examine arguments which purport to show that the seal of the confessional is a categorical obligation. I will then argue that these arguments only justify a prima facie obligation to keep confidential those communications made during confession.

Confidentiality as practiced in the Catholic Church differs from confidentiality as found in other professions. According to Catholic theologians and philosophers, the secrets revealed by a penitent to a priest during confession are to be kept absolutely confidential; this is a categorical obligation which may not be overridden. Many people mistakenly believe that anything uttered to a priest for any reason will be protected by the seal of the confessional, however, a confession is to be
kept absolutely confidential only if the confession is genuine and sacramental, done for the purpose of obtaining absolution. Most of the members of other professions believe that while confidentiality is to be kept as strictly as possible, it is a prima facie obligation which, on rare occasions, may be overridden.

Canon law provides priests with a guide for dealing with various aspects of their profession, and contains canons pertaining to the Seal of Confession.

Canon 889: "The sacramental seal is inviolable, and the confessor must therefore carefully beware of betraying a penitent by words or signs, or in any other way, for any reason whatsoever. The obligation of keeping the sacramental seal also binds the interpreter and all others to whom the knowledge of the confession has in any way come."5

Canon 890: "The confessor is absolutely forbidden to use the knowledge derived from the confession to the disadvantage of the penitent, even when there is no danger of revelation. The actual superiors, as well as confessors who are afterwards made superiors, cannot make any use whatever of the knowledge of sins gained in the confessional for the purpose of the external government."6

The Reverend Woywood notes that the keeping of any other kind of secret by people is only a prima facie obligation. "In the case of confession, however, the Church does not admit excuses of any kind, and binds the priest to secrecy, though it may entail the sacrifice of his life, his honour, or anything else that is most dear to him."7 The seal of the confessional differs from merely keeping secrets. According to Scheiler, the seal does not admit parvitas materiae. The seal exists "even with regard to the person who has confessed, or whom the secret concerns," in other words, the identity of the penitent is protected. Finally, the seal never admits of any exception.8
Canon 2369 states the penalties for priests who violate the Seal of the confessional. Theologians distinguish between direct and indirect violations of the seal of the confessional. A priest directly violates the seal when he reveals the actual sins of the penitent which were revealed to him in the confessional. A priest indirectly violates the seal when he does not reveal the actual confession, but by word, sign, or action more or less causes the content of the confession to become known. According to Scheiler:

"For a violation of the seal, it is not necessary that the person with whom the confessor speaks knows that he is making use of the knowledge gained in the confessional; it is enough that the confessor should speak from this knowledge. Nor is it necessary that the person of the penitent should actually be recognized by him with whom the confessor speaks; it suffices that the circumstances should be such that the identity of the penitent emerges sufficiently distinct from what the confessor says, or that the person of the penitent may possibly be recognized, or that well-founded suspicion could arise."10

Doctrines of the Catholic Church are justified according to one or more of the following: natural law, divine law, or ecclesiastical law.11 It is generally agreed that since even the Pope cannot remove the obligation of keeping the seal from a priest, the arguments for keeping the seal of confession must arise from natural and divine law. Dominic Viva, in discussing a 1682 Vatican document wrote that the seal must derive from natural and divine law - if it derived merely from ecclesiastical law, it would admit of exceptions.12
The major argument given by theologians from natural law is a consequentialist one that without a promise of absolute confidentiality, no one would go to confession. If a priest violated the seal of confession, then the penitent risks many things, such as being punished for past crimes, being the object of gossip and ridicule, having his reputation ruined and ruining relationships with family and friends. These risks would disincline the penitent from confessing his sins. Confession, however, is a good and useful thing: it provides for the easing of the conscience and encourages the penitent to refrain from committing future "sins", which promotes the common good. Therefore, what is revealed by a penitent during confession must be kept absolutely confidential by the priest.

The claim that the seal of the confessional is a necessary condition for individuals to confess their sins has been stated many times by theologians throughout history. Hincmar of Reims, in 860, argued that no one would confess his sins to his prelate, if he had to fear that he would be exposed in public.

In discussing whether it is permissible to reveal the confession of a heretic, Richard of Middletown (after 1281) states:

"In no case is the priest allowed to reveal a confession, no matter whether the penitent repents of his sins or not, whether he accuses himself of a past sin or one to be committed at some future time, whether it be a sin against good morals or against the faith. Therefore, we must reject the view expressed in the verse: 'Est haeresis crimen, quod nec confessio celet.'...Such a use of the knowledge gained in confession must necessarily deter the faithful from the tribunal of Penance, because if others learn from a penitent
that he was removed from office in consequence of confession, they as well as the penitent will easily be induced to conceal their sins in the future."15

Duns Scotus (about 1308) stated that the reason for the obligation of the seal of the confessional "lies in the fact that the violation of the seal would necessarily deter the faithful from receiving the sacrament of Penance."16

Bartholomew Fumus, a Dominican, wrote the widely read Summa Aurea Armilla in 1595. In it he states that "the confessor must not do anything out of knowledge he has obtained in confession that would be apt to deter the penitent from Penance. He should, on the contrary, act as if he had never heard anything from the penitent."17 Fumus is not as extreme in his position as was Richard of Middletown. Fumus believed that it was permissible for a priest to warn his superiors or others in general terms, but it was not permissible to act in an unfriendly manner to the penitent or remove him from (ecclesiastical) office on the basis of his confession.18

Others, however, disagreed with Fumus and took a stronger stance. In 1590, Claudius Aquaviva, General of the Jesuits, issued instructions to all superiors of the Jesuits that they were forbidden to use the knowledge obtained in confession to guide, in any way, the lives of their subordinates. Even indirect violations of the seal entail "grave danger for the liberty of conscience of subordinates." Aquiviva instructed the superiors to act as if they had heard nothing in confession.19 A few years later, Pope Clement VIII issued similar instructions to the superiors of all Catholic orders.20
Thomas Sanchez, in De Matrimonio (1607) argues:

"Even though others may not notice that the confessor makes use of his knowledge, the penitent himself will in many cases grow suspicious; and even if this were not the case, people will be deterred from confession if they knew that the priest is allowed to make use of what he hears in the confessional. Therefore, the same reason which is alleged to prove the strict obligation of the seal, also forbids the use of knowledge obtained in confession because by this same proceeding the sacrament would be equally made odious." 21

In discussing whether the seal of the confessional ought to be violated to protect the life of a monarch, Cardinal du Perron, in Replique a la Response du Roi de la Grande Bretagne (1618), argued against direct violations of the seal of the confessional. He claimed that no one would confess bad intentions if he knew they would be revealed. The Cardinal claimed that if people did not go to confession, then the priest would be deprived of two ways of protecting people. The first method involves the priest threatening with divine vengeance the person who confesses to plans of future crime and refusing absolution to the penitent. Secondly, du Perron suggests that the priest may be permitted to warn in general terms, i.e., reveal the crime to be committed, but not the name of the future criminal. 22 It should be noted that for many intended crimes, it would be impossible to warn concerning the crime without also revealing the name of the penitent. For example, if a priest were to warn Beth that someone or other is planning to harm her, this is likely to induce paranoia in Beth, but is not likely to enable to protect herself adequately from attack. If she knew who was going to attack her, she could avoid that person and change her plans so that their paths will not cross. Without a name, the only way
to protect herself against attacks is to lock herself away from everyone or just avoid everyone.

Martin Bonacina (1643) argues for a stricter view than Cardinal du Perron. He claims that the use of knowledge obtained from confession involves, to a certain extent, a revelation of the confession and "a humiliating reproach to the penitent." Thus the seal prohibits the priest from doing anything which might tend to bring disgrace or harm to the penitent.23

St. Alphonus (1905-1909) argued that:

"Never, and in no case, is the slightest disclosure of the secrets of the confessional permitted, not even to save one's life, to save the state, or to remedy the greatest spiritual necessity. The reason for this most stringent obligation is clear. If there were only one exception made, people would always be in a state of fear that this or that sin might be sufficient ground for lawfully breaking the seal, and the Sacrament would thereby become odious."24

On 9 June 1915, the Holy Office once again instructed priests to keep absolutely confidential that which they heard in confession. People must avoid direct violation of the seal and also "the very appearance or suspicion of injury." The reason given is that people who hear a priest discussing a confession will take offense at such conduct and become distrustful, "which is diametrically opposed to the nature of the sacrament."25

Scheiler argues that without the seal of the confessional, mandatory confession "would assuredly be too burdensome to the faithful; indeed, its observance would become simply morally impossible if confessors were not bound by the strictest obligation to preserve the seal of the confessional."26
Two issues are intertwined here. The first concerns the distinction drawn by some between revealing general information about the confession and revealing none at all. All of the theologians discussed above argue that directly violating the seal of the confessional is never permissible, but there is some disagreement as to whether indirect violations of the seal are permissible. I believe that if one is always forbidden then the other must be, too, although as I will argue below, it is permissible to violate the seal, directly or indirectly, under certain circumstances.

Direct violation of the seal of the confessional has been claimed to be forbidden because an individual would be very unlikely to confess her sins if there was a chance that others would learn of their misdeeds and she discovered that her confession had been made public. This is clearly more likely in cases of direct violation, where the confession itself is made known, than indirect, where the actual confessions are not revealed, but made known by word, sign or action, which includes discussing a confession in general terms. It is still possible, however, that an indirect violation which becomes widely known is likely to at least make the penitent fearful that it is her confession being discussed and may be recognized as the penitent's by her family and friends. Since either direct or indirect violation of the seal of the confessional may allow the penitent and others to recognize the penitent's confession, there is no reason to treat them separately.

The second issue intertwined in the above argument concerns the nature of the obligation. The argument apparently rests on the assumption that the only kind of obligation is a categorical one: without such an
obligation, a priest is permitted to freely discuss the contents of a confession with any person for any reason. Those who argue in this manner seem to assume that without a categorical obligation, the contents of confession will be discussed in the sermon on Sunday morning, and perhaps that transcripts of all confessions will be made public. According to Lea:

"It is a self-evident proposition that if auricular confession is to be enforced, the penitent must be assured of the inviolable secrecy of his admissions of wrong-doing. To say nothing of the danger of punishment for graver crimes, his family relations and his reputation might be too nearly imperilled for him to venture on the unburdening of his conscience if there were the risk that even his less grievous sins and weaknesses might be bruited abroad, and no man's life or honor would be safe against the stories that might be circulated by a malignant priest. The Church, in making confession a matter of precept, has, therefore, been obliged to give assurance to its children that they can repose absolute reliance on the impenetrable silence with which their utterances shall be covered."27

There is, however, another form of obligation that lies between the strict categorical obligation and no obligation at all. This obligation is a prima facie obligation. According to a theory that countenances prima facie obligations, all things being equal, one should keep one's obligation. There may be cases, though, in which it becomes necessary to violate the prima facie obligation because some other obligation takes precedence. If the obligation to keep the seal of the confessional were a weighty one, then it would be overridden in only extraordinary circumstances, such as imminent harm to innocents.

A strong prima facie obligation to keep the seal of the confessional would, I claim, produce better results than a strict categorical obligation. The vast majority of people going to confession have not committed crimes
(as defined by law), put the lives of others at risk, etc. They go to confession to relieve themselves of the guilt caused by such actions as lying, "naughty" thoughts, or sexual promiscuity; things considered to be sins by the Roman Catholic Church. As these are not the sorts of actions which have consequences serious enough to override the obligation to keep silent, the confessions of these individuals would be kept confidential. People would still go to confession, have their consciences eased and be encouraged to refrain from engaging in wrong acts in the future. The rare individual who uses the confessional as a place to warn or boast of imminent harm to others would not, under my proposal, be protected under the seal, but would be turned over to the authorities. This prevents harm to others as well as giving the individual doing the threatening a chance to get help.

The argument for a categorical obligation assumes that any violation of confidentiality will be done in a public manner. This, however, need not be so. The seal need only be violated to the extent that will prevent harm from occurring. Thus, in the case of a penitent who confesses to having poisoned the sacramental wine, the priest need only dispose of the wine. If a husband confesses to having intentions of killing his wife, the priest might call the police and/or a psychiatrist, as well as calling the wife to recommend that she seek shelter elsewhere. In neither of these cases does the public need to know, so they will not be told.

Lea's form of the argument claims that without a categorical obligation of confidentiality, a "malignant priest" would spread stories concerning the penitent's confession. If the priest is truly malignant, it is not clear
that a categorical obligation, even one with penalties attached, is going to keep him from violating the seal of the confessional.

If the force of the obligation is what is supposed to prevent the priest from freely discussing the confession, then a very strong prima facie obligation, which carries nearly the force of a categorical one, would seem to be enough to prevent a priest from discussing a confession, except in the dire circumstances when doing so is permitted. A very strong prima facie obligation entails that unless the circumstances are sufficiently desperate so as to override the obligation, the obligation is binding.

If the penalties attached to the obligation are what motivates a priest not to break the seal, then to prevent a priest from talking freely it would be enough to attach penalties to violating a prima facie obligation of confidentiality in any but dire circumstances, such as threatened harm to others. As freely discussing the contents of a confession, or bruiting abroad vicious rumours about a penitent are not likely to be justified exceptions to the obligation of confidentiality, a priest who did these things would still be subject to the penalties stated in Canon 2369.

A possible rebuttal to this objection can be found among the arguments for absolute confidentiality proposed primarily by the scholastics. Gratian popularized the argument in 1140 in the widely read *Concordia Discordantium Canonum*. The priest is supposed to be an intermediary between the penitent and God. As such, he represents God and God's forgiveness to the penitent. Thus he does not hear the confession as
priest _qua_ man, but priest _qua_ God. Thus the priest cannot reveal what was discussed during confession because the priest _qua_ man does not know what was discussed. God desires that confidentiality be absolute (more on that later), so there is no one who can justifiably reveal the secrets of the confession.

Stephen of Tournay (1160-1170), in discussing whether a bishop can reveal the confession of a guilty man, argues that he cannot because the sin was not revealed to him _qua_ man, but in his capacity as a minister of God. John of Faenza (1121) and Simon of Bisiniano (1179) proposed similar arguments.

Pope Eugene III (1145-1153) issued a decree concerning a clerical judge's knowledge, obtained in confession, of a man's guilt. Eugene III decreed that the judge could not charge the man with the crime and find him guilty because he knows who the guilty man is as a representative of God, not as a man.

According to Alexander Hale, "What the priest knows by confession he knows as God, not as man, and he can [is permitted to] deny it under oath."  

Aquinas (1225-1275) argues against direct violation of the seal of the confessional:

"...whatever the priest knows through confession he, in a sense, does not know, because he possesses this knowledge not as man, but as the representative of God. He may, therefore, without qualms of conscience, swear to his ignorance in court, because the obligation of a witness extends only to his human knowledge."  

Duns Scotus rebutted this proposed rebuttal. He noted that the priest is not God, but merely God's minister, even if he is acting as an
intermediary between God and man. The priest qua man has knowledge of
the contents of the confession because it is as a man that he is the
minister of the sacrament of penance, and it is as a man that he sits in
judgement and judges a case, although he does so with divine authority.
That the priest qua man has knowledge of the contents of the confession is
proven by the priest who acts wrongly and discusses the contents of
confession with others, or who, after observing many instances of a type
of sin in his parish makes that particular sin the topic of a sermon.

Aquinas and Duns Scotus (and many others) argued that the seal of the
confessional can also be justified on the basis of divine law. According to
this argument, the seal is of the essence of confession. Confession is
ordained by divine law. Therefore, the seal of the confessional is ordained
by divine law.38

Two responses can be made to this argument. First, it is not obvious
that the seal is of the essence of confession. Second, confession does not
seem to be divinely ordained, contrary to Aquinas’s claim.

Aquinas argued that the seal was an integral part of confession; that
secrecy is of the essence of confession.39 Many others echoed Aquinas’
justification of the absolute nature of the seal of the confessional: Peter
of Tarentaise40, Hugh of Strasbourg41, John of Freiburg42, Albert of
Brescia43, Bartholomew of Pisa44, Nicholas of Osimo45, Baptist de
Salvis46, John Cagnazzo47, Sylvester Prierias48, Capreolus49, Estius50,
and Billuart51.
However, for X to be of the essence of Y, X must have always been part of Y. Y must not, and indeed, could not have existed for some period of time before X is added to it. Yet this is the relationship between confession and the seal.

Confession in the Catholic Church has existed as long as the Church has, but it has not existed in the same form for the entire time. During the first three centuries of the Catholic Church's existence, confession was done publicly before the entire parish. It was not until the middle of the eighth century when the Celtic system of penitentials spread throughout Europe that a private system of confession became popular. At this time, priests began to keep confidential that which was revealed during confession. Thus the seal cannot be of the essence of confession since confession was practiced successfully without it for 800 or so years. One could say that what was practiced was not actually confession, but that is not plausible because people were confessing their sins, expressing remorse and receiving absolution. The promise of secrecy was added later by the priest; that does not change the fact that earlier penitents were admitting to wrongdoing - sins - and receiving forgiveness.

Some theologians have argued that the seal cannot be of the essence of confession. Cardinal John de Lugo (1660) argued that "secrecy is not something essential to the sacrament, because the latter may by its nature be administered publicly. Therefore, the remission of sins need not necessarily be expressed by the seal." Today, some confessions are done publicly or in a group setting, and the sacrament is administered publicly.
One premise of the argument that the seal of the confessional is ordained by divine law is that the sacrament of confession is ordained by divine law (see above). This premise, as I will show below, is false.

When confession was declared to be a sacrament, it was decreed that all Catholics were obligated to confess their sins at least once a year. Confession was not declared obligatory by canon law until the Fourth Lateran Council of 1215. Prior to that time, confession was done on a purely voluntary basis, although Catholics were encouraged to confess.

During the 12th and 13th centuries, Catholic doctrine became more conservative, and theologians were unwilling to accept or listen to views other than the teachings of the Catholic Church. Officials of the Catholic Church became concerned with the problem of increasing heresy among Catholics and other people in Europe. They wanted to identify heretics so as to put an end to their heretical beliefs and possibly to the heretic as well. One result of this was the various inquisitions that cropped up throughout Italy and France, (The Spanish Inquisition, while probably the best known of the inquisitions, did not start until the end of the 15th century.)

One issue examined by the Fourth Lateran Council in 1215 was the issue of heresy. It was concerned both with defining heresy and putting an end to it. The Council realized that many parish priests had very little idea of what was occurring in their local parishes since people only confessed their sins (or talked to the priest) when they felt a need, desired forgiveness, etc. Thus the priests might not know if there were heretics in their parishes. One way to detect heretical beliefs in people
was to force them to confess sins at least once a year. Thus the Fourth Lateran Council decreed that yearly confession was an obligation for all Catholics.\textsuperscript{55}

Guido de Monteroquer, at the Council, stated that the purpose of obligatory confession was to detect heresy; it was not said that obligatory confession was divinely inspired. During the 13th century, people had to be forced to confess through the use of threats. People did not become comfortable with the idea of obligatory confession until the end of the 13th century.\textsuperscript{56}

Navarrus, a canonist of the sixteenth century, wrote:

It must be assumed that Christ, in prescribing confession and making it obligatory, tacitly determined conditions without which confession is not at all or hardly possible...without strict silence on the part of the priest, confession would be an intolerable burden...the seal is not an absolutely necessary part of Penance, because Christ could have imposed confession as a duty without it. But it cannot be presumed that He did so, because it would agree neither with the spirit of the gospel nor human nature. The reasons by which we trace the seal to the divine law, therefore, are reasons of congruity and equity rather than of strict logic."\textsuperscript{57}

Peter of Bassoll also argued that the obligation to keep absolutely confidential the contents of a confession cannot be proven by arguments on divine law.\textsuperscript{58}

Rev. Kurtscheid states that Christ, who was believed by Catholics to be God's spokesman, did not expressly command that the seal of confession be either created or maintained.\textsuperscript{59} He argues that since it is not unreasonable to assume that Christ did not want confessing to be an unsupportable burden, "the strict silence of the confessor no doubt is in harmony with the intention of the Divine Lawgiver."\textsuperscript{60}
By saying 'it is not unreasonable to assume', Kurtscheid indicates that the argument for the absolute status of the seal has left the divine realm and entered the realm of ordinary morality. Thus if the seal of the confessional is to be shown to be absolute, it must be shown on grounds of ecclesiastical law or natural law. Both of these have already been ruled out as ways of providing arguments for the categorical obligation of the seal, which leaves the claim that the seal of the confessional ought never to be broken, without adequate justification.

Other arguments can be provided which demonstrate that the seal of the confessional is best taken to be a prima facie obligation. The most obvious of these is that occasionally, by protecting the confession of a penitent, the priest allows a great evil to come to be, e.g., injury to others.

As it exists now, as a categorical obligation, the seal of the confessional may not be violated for any reason. In discussing this, Henry Lea writes:

"The definition of violation of the seal was speedily enlarged, so as to cover not only the publication or revelation to any one of sins confessed, but also any hint or sign which might raise suspicion or convey knowledge of what has occurred in the confessional - even if a priest should say of a thief about to be hanged that he had shown great contrition in confessing his thefts. What the priest knows...is not to influence his action in any manner...If he is an abbot and learns in confession that the latter is unfit for his post, he cannot remove him; if he discovers that his servant is a thief, he cannot discharge him, and the degree of precautions which he can adopt, as, for instance, with regard to the custody of keys is disputed point;...he cannot refuse to celebrate a marriage of which he has thus learned an absolute impediment; he cannot baptize or save the
life of an unborn child of a dying mother who has confessed to him its existence; he cannot prevent the execution of one whom he thus knows to be innocent...There is no limit to the extravagance of the theologians in defining the infinite importance of the seal."

By making the obligation to keep the seal of the confessional an absolute, non-overridable obligation, theologians and priests of the Catholic Church permit harm to be done to others who may be innocent of any wrongdoing. It is admitted that permitting harm to befall an innocent person is not always morally forbidden. There are cases in which allowing a little harm now will prevent greater harm in the future. So, for example, a parent who sees that his toddler is about to touch a hot stove, and who has warned her not to touch hot stoves in the past, permits the child to burn herself rather than telling her not to touch the stove because the child will remember the pain better than the warning and so is more likely to avoid hot stoves in the future.

This seems to be a line of reasoning used by the Catholic Church in maintaining that the obligation to keep the seal is a categorical one. By allowing some harm to go on unimpeded, priests prevent what the Catholic Church claims is the greater harm of people refusing to confess their sins for fear of the seal being broken. However, as I argued above, occasionally violating the seal of the confessional need not lead to widespread fear and unwillingness to confess.

Generally, bringing about an evil state of affairs is permissible when doing so minimizes the amount of evil present, or brings about the a better state of affairs. Allowing innocent third parties to suffer harm or even
death is a worse state of affairs than occasionally violating the seal of the confessional to protect these individuals.

When a priest violates the seal of the confessional, the penitent’s right to privacy is violated. If others learn of the content of the penitent’s confession, he may suffer embarrassment, and his relations with family and friends may become strained. If the priest is discrete in revealing the contents of the confession, few people need know about it, so others may not learn of these matters. There may also be some positive results for the penitent, e.g., he may (voluntarily or involuntarily) be able to receive help for whatever physical or psychological problem caused him to threaten harm to others.\(^6\) If the priest either turns the penitent over to the proper authorities or warns the intended victim, then an innocent person will be spared unwarranted harm.

If the priest chooses to keep secret the contents of the penitent’s confession when he has reason to believe that the penitent will cause will cause harm to an innocent, then the penitent is free to harm the innocent party. The penitent’s right to privacy will be upheld, but an innocent person may be harmed or killed, thus violating his right not to be injured or killed. Furthermore, the priest cannot get help for the penitent if the penitent does not want it.

As can be seen by comparing the two alternatives, the priest who upholds the sanctity of the confessional brings about (or is partially responsible for the bringing about of) a worse state of affairs than the priest who violates the seal of the confessional. Thus the priest, on certain occasions, ought to violate the seal of the confessional.
The position that the seal of the confessional is a strong prima facie obligation which may, very rarely, be overridden was not without its supporters during medieval times. Supporters became fewer as the official church doctrine of absolute confidentiality took hold. Most of the theologians supported only indirect violations of the seal of the confessional.

One fairly common reason for arguing for the permissibility of indirect violations of the seal was the existence of hard cases, i.e., cases in which the priest did not know if absolution could be given or what sort of penance should be imposed. As far back as 850, the Synod of Pavia decided that a confessor could seek the advice of a bishop and if necessary, the bishop could consult with two or three other bishops. In extraordinarily difficult cases, it was permitted to discuss the case with the provincial synod. In all of these cases, discussion with other clergy was permitted on the condition that the name of the penitent was not mentioned.63

Huguccio (about 1188) claimed that discussing the penitent's confession with someone who can help him is not really a violation of the seal and therefore is permitted. His argument seems to be that because the priest is communicating to someone who can do the penitent, who has evil thoughts and intentions, more good than harm, he is not breaking the seal. "...the confessor, while not permitted to reveal the matter, may communicate it secretly to persons who are likely to persuade the penitent to desist from his evil purpose, and will not injure him, e.g., to his father, mother, or wife, to the bishop or some such person."64
William of Auxerre (1220) stated that the priest is permitted to reveal the contents of a confession "in an important case," provided that he has the permission of the bishop and it can be done without harm to the penitent or to the sacrament of penance. Auxerre reported on three cases presented in Paris, two of which involved priests learning of impediments to marriages, the third concerning the irregularities of a cleric who was about to be ordained. It was decided that in these cases, it was permissible to reveal the contents of the confession on the grounds that this did not constitute a violation of the seal. A violation of the seal was defined as "the improper divulging of confessions," and this was merely an "opening" of the seal. The reason given was that evil must be prevented as far as possible. Thus violating the seal of the confessional was still forbidden, but in some cases, revealing the contents of a confession is not a violation.

The problem of confessed future crimes is a problem for theologians and canonists. In a sacramental confession, the penitent is supposed to show contrition for his actions and desire to make amends for past wrongs. While someone who plans a future crime may be sorry for what he is about to do, it is paradoxical to say he is repentant for his future actions. If he were truly repentant, he would cease and desist from committing the future crime. Vales Reginald (1616) notes that sacramental confession is the basis of the seal: without confession, there is no seal of the confessional. Sacramental confession occurs "whenever the penitent has the intention of accusing himself and submits his sins to the power of the keys." A simulated confession, in which the penitent seeks merely to ask
the priest for advice, or which serves as a place for the penitent to brag about his intended crime, is not a sacramental confession. It is not necessary that the penitent desire to receive absolution at that time; what is necessary is that the penitent accuse himself before the priest so that the priest can judge him. Reginald reconciles the apparent contradiction of the penitent who has the intention of accusing himself before the priest and yet still has the intention of committing a future crime by the 'bona' or 'dubia fides' of the penitent. However, concludes Reginald, if the penitent shows that he does not intend to accuse himself before the priest, "but means to cause serious trouble to the confessor, or seduce him to sin, then there is no obligation of the seal, because there is no sacramental confession." The rule which was developed by Reginald and other theologians, is that whenever the intentions of the penitent are doubtful, the presumption is in favour of the seal.

Raymond of Penafort, in his *Summa Confessorum* of 1237, discussed three ways to deal with the problem of future crimes. First, the priest is permitted to tell the bishop of danger, but without revealing the name of the penitent. The second way is to tell a friend or relative of the penitent who can help the penitent. Finally, he says that a confession made with the intention of continuing in sin is not a sacramental confession, and therefore, the priest is not bound by the seal of the confessional.

William of Rennes (1241) wrote that the seal of the confessional does not apply to future crimes. He claimed that when a penitent intends to commit future crimes, the priest has duty to reveal the matter to persons who can help, not harm the penitent, provided that it can be done without
scandal. William said that in such a case, the penitent must be told that his confession does not fall under the seal of the confessional.70

Vincent of Beauvais (1244) claimed that it is permissible to reveal the contents of a confession in order to prevent the spread of heresy. "In no case must the confession be revealed except when the penitent accuses himself of heresy and perverts many, so that they may avoid him as a heretic after he has been admonished by the priest or, if need be, by the bishop."71

Alexander of Hales (1245) stated that future sins are not protected by the seal of the confessional, although the confessor still has an obligation to keep silent in order to prevent scandal, unless some weighty reasons override this obligation.72

In the same vein, the author of the Opuscula, which was attributed to Pope Celestine V (1296) states:

"Whenever someone tells the confessor something injurious to others, he may reveal it to those who are likely to benefit the penitent, but not to injure him; however, this must be done cautiously, without naming anybody. Many are of the opinion that a priest is not bound to observe sacramental silence in respect to a heretic or an infidel."73

In many cases, however, it would be difficult to reveal the matter to someone who can benefit the penitent without revealing the name of the penitent. Nothing is said regarding the resolution of this problem.

Nicholas de Tudeschis (1445) stated: "The sins committed, not those to be committed, are reckoned as communicated in confession."74 When something is not the subject of confession, it is not protected by the seal. Tudeschis argued that the priest is obligated to reveal the intentions of
future crimes so that they may be prevented. "This view, of course, is
justified only when it is certain that the penitent is determined to carry
out his wicked purpose, not if he repents of it."75

Angelus Carletus, commonly called 'de Clavasio', in his widely read
Summa Angelica of 1470, also argued in favour of an obligation to reveal
confessed future crimes. He argued that if the penitent does not repent of
his evil intentions, and is dangerous to the public welfare or a specific
individual, the confessor has an obligation to reveal the confession to
someone who can remedy the situation without causing danger to the
penitent.76 Thus the obligation extends to preventing future harm, but
the priest still has an obligation to protect the welfare of the penitent.

In the Codex Lat. 18,406 from a monastery of Tegernsee, the argument
was presented that it is obligatory to reveal the contents of the
confession in order to prevent future harm.

"If the penitent confesses that he intends to take revenge, kill
somebody, or set someone's house on fire, the confessor cannot pass
this over in silence and allow the crime to be perpetrated. He should
rather inform the father or good friend of the penitent, saying to
him: "Your son, or your friend, intends to do this or that; punish him,
that he may not carry out his evil design, else you will be an
accessory to the murder." If the penitent has no father or mother or
friend to whom the priest can communicate the matter without
danger, let him take into his confidence another priest, or a
trustworthy citizen, and in their presence exhort his parishioner to
desist from the evil deed. The others should declare that they would
not tolerate such a deed. Perhaps it would be advisable for the
priest to warn the person threatened in a general way and admonish
him to be reconciled with his enemy if he has any, lest some evil
befall him."77

Again, the priest has two prima facie obligations. The first is to prevent
harm from coming to others if he has the knowledge to do so, and the
second is to prevent harm from befalling the penitent, if that is within his
power. Thus the intentions of the penitent should only be revealed to those who can help him.

Prierias, late in the fifteenth century, argued that if the evil to be prevented is greater than the evil of violating the seal of the confessional, the priest has an obligation to reveal the confession, provided that he can do so without danger to himself and to the advantage of the penitent and others.\textsuperscript{78}

Lawrence Bouchel, in his \textit{Summa Beneficiale} of 1628, argued that it is permissible to reveal the contents of a confession to prevent harm to others. \textit{"...The sole reason for the seal of confession is the shame and disgrace of the penitent if he were to be punished for repented transgressions. This reason, however, is not of such weight or importance that the sacred person of the sovereign or the interests of his government must be placed in jeopardy on its account."}\textsuperscript{79} Bouchel can be seen as arguing that the interests of the safety of individuals such as the sovereign outweigh the interests of the penitent.

In the seventeenth century, many canonists and theologians still believed that it was permissible to use the knowledge obtained in confession to prevent a greater evil, provided it could be done without direct or indirect revelation or injury to the penitent.\textsuperscript{80} This doctrine was condemned in 1682, when it was submitted to the Congregation of the Inquisition as one of the errors of the Jansenists.

Those theologians, prior to 1682, who believed that it was permissible to use the knowledge gained in confession to prevent harm and to benefit the penitent, also generally believed that the seal was inviolable. This
apparent discrepancy was explained by saying that those communications pertaining to intended crimes were not to be considered part of a sacramental confession, and so were not protected by the seal of the confessional.

The seal of the confessional entails an obligation like any other confided secret. But like all secrets, there are cases in which the obligation of secrecy ought to be overridden. The obligation to keep secret the contents of a confession is more stringent than the ordinary obligation to keep a secret; it should not be overridden lightly.
Notes


3. Ibid. p. 22


6. Ibid

7. Ibid


13. The argument tends to be stated as a very strong empirical claim: no one would go to confession without a promise of absolute confidentiality. I suspect that theologians actually mean that generally, people would tend not to confess their sins without a promise of absolute confidentiality. However, some theologians (St. Alphonus, for example) claim that even a single violation of the seal of the confessional would act as a general deterrent.

15. Richard of Middletown, in Sent., IV, d. 21, art. 4, qu. 2, ad 4 & concl.:
In nullo casu licet sacerdoti revelare confessionem, sive confitens peniteat sive non: sive confiteatur peccatum iam operae perpetratum sive perpetrandum: sive sit peccatum in morbus sive in fide....Praelatus...removendo ab officio suum subditum, quem per confessionem scit male uti suo officio, et si faciat utilitatem illius, tamen facit contra utilitatem communis, quia alii per revelationem remoti ab officio acientes, quod pro sua confessione a suo officio remotus est, proniores redditur ad hoc ut non confiteantur secundum veritatem, et ille idem minus confessionem reverebit, et pronior erit ad peccatorum suorum colationem.
Cited in Kurtscheid, *The Seal of Confession*, op cit, pp. 175-6, p. 209

16. John Duns Scotus, Comment. in Sent., IV, d. 21, qu. 2:
Quare reprobandus est ille versus iuristarum: Est haeris crimen, quod nec confessio celat, non quin metrum sit bonum, sed sententia est falsa.
Cited in Kurtscheid, *The Seal of Confession* op cit, p. 176, 279

17. Bartholomew Fumus, *Summa Aurea Armilla*
Si quis scit aliquem tantum in confessione excommunicatum, vel inimicum, non debet propter hoc ipsum vitare, nec peiorem faciem quam antea ei ostendere, et breviter nihil agere propter quod possit confitens retrahi, et taliter se debet habere confessor, ac si nihil de eo unquam audisset nisi aliunde hoc sciat.
Cited in Kurtscheid, *The Seal of Confession*, op cit, p. 211

18. Ibid

19. Claudius Aquaviva *Instructio V. De Notitia Habita per Confessionem*
Tametsi non desunt doctores, qui sentiant, salvo sacramentalis confessionis sigillo, iustis de causis licere nonnumquam confessario (cum id fieri potest sine ulla revelatae confessionis suspicione) uti extra confessionem notitia per confessionem habita; tamen quoniam haec doctrina et eam exigit in tanta re circumspectionem, quam servare perdifficile sit; et interim posset aliquando retardare subditorum libertatem, quam huius fori sanctitas et nostrae societatis institutum requirunt in seipsis rebusque nosciae aperiendis; idcirco visum nobis est in Domino statuere, sicut et severe statuimus, pro reverentia qua semper societas nostra coluit huius sacramenti inviolabile sifillum, et libertatem; ut omnes superiores diligenter caveant, ne vel ipsi vel nostrorum aliquis, supradictam doctrinam usquam introducant; nec illam publice aut privatim doceant, nec ea utantur ullo modo (nisi forte de paenitentis licneta), sed ita prorsus in omnibus casibus nostris se gerant confessarii, ac si in confessione nihil pentus audivissent; sibile persuadeant, ut humanarum rerum regimen ab hoc sacramento longissime distat, ita debere nullatenus ab eo pendere.
Cited in Kurtscheid, *The Seal of Confession*, op cit, p. 213

20. Ibid
21. Thomas Sanchez, *Disputation de Sancto Matrimonii Sacramento*, I, III, disp. 16, qu. 1, n. 3:
Non licebit, ob crimen auditum in confessione negare illi etiam occulte Eucharistiam, ordines, suffragium vel movere eum ab officio ad nutum amovibili, quia saltem ipsi paenitenti obicitur crimen de illoque facto ipso reprehenditur...nihil confessionem ita difficilem, onerosam et odiosam reddet, quam si peccatores intelligent posse confessorem ob solius confessionis notitiam ipsos privare ordinibus, Eucharistia, officiis honorificis, negare suffragia ad obtinenda officia vel beneficiâ cum haec omnia tanti homines faciunt....Esto ne remotus ipse ab officio suspicari posset id ortum habere ex confessione, at satis est homines nosse peccata sola confessione cognita ius tribuere ad hoc, ut omnino timeant confiteri ab eaque retrahantur.
Cited in Kurtscheid, *The Seal of Confession*, op cit, pp. 218-9

...l'autre, qu'il peut il doit avertir le prince de prendre garde a soi et se tenir sur ses gardes et lui donner avis qu'il y a conspiration contre sa personne, c'est-à-dire reveler non le confessant en particulier, mais la confession en general, et decouvrir non le criminal, mais le crime.
Cited in Kurtscheid, *The Seal of Confession*, op cit, p. 159

23. Martin Bonacina, *De Paenitentiae Sacramento*, disp. 5, qu. 6, sect. 5, punct. 4, n. 13
Ex dictis ergo constat confessarium circa audita in confessione se debere gerere ac si nihil sciret in iis rebus ex quibus se queretur podur, confusio aut damnum paenitenti confessorio alter agent.
Cited in Kurtscheid, *The Seal of Confession* op cit, p. 224

Cited in Scheiler, *Theory and Practice of the Confessional*, op cit, p. 468


28. I am assuming that the individual who uses the confessional in this manner will not be talked out of his intended action by the priest. The person who claims to threaten harm, but is actually crying out for help, is likely to seek counselling voluntarily upon the recommendation of the priest.

29. Anselm of Lucca, *Collectio canon* 23
Cited in Kurtscheid, *The Seal of Confession*, op cit, pp. 99-100

Videtur quod possit episcopus accusare eum, qui crimen suum confessus est ei, si tamen habeat probationes. Et hoc est verum, si confessus est ut homini, non ut deo; vel etiam si ut deo crimen suum confessus episcopo perduraverit in crimine suo et episcopus postea possit habere testes, non tamen ex prima confessione, quam ex sequenti criminis repetitione bene poterit eum accusare. Ab isto autem, de quo hic dicitur, non debet abstinere, quin ei communicet publice, privatim autem non...quia non ut homini, sed ut deo revelatum est peccatum, cuius vicaris est sacerdos.
Cited in Kurtscheid, The Seal of Confession, op cit, p. 105

Potest dici tamen quia si aliquis manifestavit crimen suum episcopo tamquam deo et perduraverit in crimine suo et episcopus postea poterit habere testes, non tamen ex prima confessione quam ex sequenti criminis repetitione poterit eum accusare.
Cited in Kurtscheid, The Seal of Confession, op cit, p. 105

Ipse episcopus crimen quod solus novit, probare per testes non protest, nihil proferat, i.e. ad accusationem non prospicet, qui a tunc esset proditor crimins, non correptor....Punire eum non potest, quia non ut iudex sed ut Deus novit.
Cited in Kurtscheid, The Seal of Confession, op cit, p. 105

34. Kurtscheid, The Seal of Confession, op cit, pp. 107-8

35. Alexander Hales, Alex.de Ales Summae P. IV. Q. XIX Membr. 2, Art. 1
Cited in Lea, A History of Auricular Confession, op cit, p. 426

36. Thomas Aquinas, Comm, in Sent., IV, d. 21, qu. 3, art. I, sol. I
 Nec tamen sigillum confessinis contra caritatem militat, quia caritas non requirit ut apponatur remedium peccato quod homo nesciat; illud autem quod sub confessione scitur, est quasi nescitum, cum non sciat ut homo, sed ut Deus...homo non adducit in testimonium nisi est homo; et ideo absque laesione conscientiae potest iurar se nescire quod scit tantum ut Deus....Similiter absque laesione conscientiae potest praetulatus impunitum dimittere peccatum, quod scit ut Deus.
Cited in Kurtscheid, The Seal of Confession, op cit, p. 195


38. Lea, A history of Auricular Confession, op cit pp. 412-4

39. Thomas Aquinas, Comment, in Sent. IV, d. 21, qu. 3, art. 2, sol
 Duo sunt propter quae sacerdos tenetur peccatum occultare. Primo et principaliter quia occultatio est de essentia sacramenti, in quantum scit illud ut Deus, cuius vicem gerit ad confessionem. Alio modo propter scandalum.
Cited in Kurtscheid, The Seal of Confession, op cit, p. 275
40. Peter of Tarentaise, *Comment. in Sent.*, IV, d.21, qu.4, art 2  
Cited in Kurtscheid, *The Seal of Confession*, op cit, p.275

41. Hugh of Strasbourg, *Compendium Theological Veritatis*  
Cited in Kurtscheid, *The Seal of Confession*, op cit, p.275

42. John of Frieburg, *Summa Confessorum*, t.III, t.t.34, qu.91  
Cited in Kurtscheid, *The Seal of Confession*, op cit, p.275

43. Albert of Bescae, *Summa*, pars III, c.1  
Cited in Kurtscheid, *The Seal of Confession*, op cit, p.275

Cited in Kurtscheid, *The Seal of Confession*, op cit, p.276

Cited in Kurtscheid, *The Seal of Confession*, op cit, p.276

Cited in Kurtscheid, *The Seal of Confession*, op cit, p.276

Cited in Kurtscheid, *The Seal of Confession*, op cit, p.276

Cited in Kurtscheid, *The Seal of Confession*, op cit, p.276

49. Capreolus, *Comment. in Sent.*, IV, d.21, qu.2, art.3  

50. Estius, *Comment. in Sent.*, IV, d.17, #14  
Cited in Kurtscheid, *The Seal of Confession*, op cit, p.276

51. Billuart, *De Sacram. Paenit.*, diss.8, art.1  
Cited in Kurtscheid, *The Seal of Confession*, op cit, p.276

52. Cardinal du Lugo, *De Sacrem. Paenit.*, disp.23, sect 1, n.2  
Cited in Kurtscheid, *The Seal of Confession*, op cit, p.278

53. My discussion of the intellectual, political and social atmosphere of  
the medieval Catholic church derives in part from discussions with  
Ms. Elizabeth Todd whose master's thesis focusses on aspects of the  
medieval church.

54. "Heresey", at the time, referred mainly to possessing beliefs which were not traditionally espoused by the Catholic Church.

56. Ibid

57. Navarrus, In Cap. Sacerdos, n.32,33
   Cited in Kurtscheid, The Seal of Confession, op cit, p.282

58. Peter of Bassoll, Comment. in Sent., IV,d.21,qu.2:
   Istae rationes etiam sunt probabiles. Et forte quantum at aliquas earum
   necessario universaliter non concludunt, sed non eum modo eas amplius
   discutere; nam in talibus non possunt adduci muta meliores rationes.
   Cited in Kurtscheid, The Seal of Confession, op cit, p.281

59. Kurtscheid, The Seal of Confession, op cit, p. 283

60. Ibid

61. Lea, A History of Auricular Confession, op cit, pp. 431-2

62. I am assuming that someone who sets out to harm or kill another is not
    generally well adjusted and will probably have a psychological or
    physical reason for doing such a thing.


64. Huguccio, commentary on the Decretum Gratiani, Cod. Bamb.
   Lat.,p.II,28,fol.418b:
   Si dubitat [sacerdos] qualter de tali peccato debeat iniungere penitentiam,
   secure peccatum sit ei manifestatum, Episcopo tamen suo in tali articulo, sc.
   ut eum consulat de modo penitentie, sats credo quod possit dicere secreto
   illud peccatum talibus perrsonis que possunt prodesse et non obesse, ut patri
   et matri et episcopo et similibus arg. XII q. V hoc videtur.
   Cited in Kurtscheid, The Seal of Confession, op cit, pp.130-1

65. William of Auxerre, Summa
   Cited in Kurtscheid, The Seal of Confession, op cit, p.123

   cited in Lea, A History of Auricular Confession, op cit, p.421

67. Reginald, Praxis Fori Paenitentialis
   Cited in Kurtscheid, The Seal of Confession, op cit, pp.189-90

68. Kurtscheid, The Seal of Confession, op cit, p.191

69. Raymond of Penaforte, Summa Confessorum, l.c.XXIV 537
   (1) Ad hoc dicunt quidam, quod debet adire episcopum et dicere custodi: vgili
      super oves tuas, quia lupus est in grege;
   (2) vel si placet, dic quod possit revelare talibus, qui possunt prodesse et non
      obesse; and
(3) Praeterea quantum ad primum praecise videtur, quod non sit astrictus sacerdos propter vim paenitentia, tum quia ille non agit paenitentiam, tum quia non servat fidem, cum sit hereticus et infidelis; ideo tali non est fides servanda. Et multae aliae rationes possent inducere. Et idem in similibus.

Cited in Kurtscheid, The Seal of Confession, op cit, pp.135-6

70. William of Rennes, in his Apparatus to the Summa of Raymond:
Ad verbum: Quoniam qui peccatum in poenitentiali iudicio sibi detectum praesumpserit reveleare. Commissum subintellige, non committendum, quia, si quis confitetur sacerdoti quod vult interficere hominem vel aliquod nequiter operari, non tenetur sacerdos omnino celare; sed tali persona revelare debet, qui possit prodesse et non obesse...debet etiam praemonere, quantum poterit sine peccato et scandalo, illum, cui alios proponit inferre damnum vel inuriam et dicere ei, qui huiusmodi nequam propositum confessus est, quod nec receptit nec tenetur recipere sub sigillo confessionis.

Cited in Kurtscheid, The Seal of Confession, op cit, pp.137-8

71. Vincent of Beauvais, Speculum Historiale, lib.VIII, cap 44:
Porro neque verbo neque facto neque signo debet sacerdos revelare peccatoris confessionem nisi in uno casu, scil. quando aliquis confitetur haeresim suam et multos corrupt, nec vult aliquo modo resipiscere: tunc enim sacerdos debet dicere omnibus ut vitent illum tamquam haereticum ipso praemonito: et per se, et per episcopum si opinus est. Unde versus: Est haeresis crimen quod nec confession celat.

Cited in Kurtscheid, The Seal of Confession, op cit, p.138

72. Alexander of Hales, Summa Theol., Part IV, qu.19, membr.2, art.2:
Ad evidentiam huiusmodi problematis nota, quod tripliciter potest aliquis peccatum confiteri: Uno modo confitendo peccatum praeteritum, quod nollet fecisse, nec proponit facere; et talis confessio clauditur sub sigillo. Alio modo potest quis confitetur peccatum praeteritum, quod nollet fecisse, sed potius permanere, et talis confessio ad unic clauditur sub sigillo, quamvis enim peccatum, quod proponit facere de futuro, secundum se claudi non debet sub sigillo, tamen propter connexionem quam havet in confessione cum peccato de praeterito, quod nollet fecisse, sub sigillo habet occultari. Tertio modo potest quis confitent peccatum praeens, non tamen ut praesens, sed potius ut est in proposito, de futuro....Dico ergo quod non tenetur celare simpliciter, nec si sacerdos talem confessionem revelaret, posset condemnari tamquam violator sifilli confessionis...debet tamen celare ratione publicae honestatis, nisi inconveniens aliquod grave sequeretur; tunc enim credo quod non esset talis confessio penitus tacenda;...sed caute et secrete alicui, qui posset et vellet prodesse, innoscenta.

Cited in Kurtscheid, The Seal of Confession, op cit, p.139

73. Opuscula, attributed to Pope Celestine V:
Si vero detegantur confessario quae sint in praejudicium aliquidus, potest revelare talibus qui possint prodesse et non obesse, caute nominando nominando; haereticus autem et infidel, non tenetur sacerdos secundum multos.
Cited in Kurtscheid, *The Seal of Confession*, op cit, pp.144

Tene hoc semper ment., quod peccatum commissum non committendum dicitur
detegi in paenitentia, quod intellige, quando iste dicat se omnino
commissurum, secus si paeniteret de voluntate praedicta; haec tunc est
peccatum commissum respectu voluntatis.
Cited in Kurtscheid, *The Seal of Confession*, op cit, p.146

75. Ibid

76. Angelus Carletus, *Summa Angelica*:
Tertius casus secundum Innocentiom et sequitur Panormitanus in cap. Omnis
de paenit. et rem, est, quando quis confitetur se velle facere aliquid malum,
quia istud non est dictum in paenitentiali foro et ideo pro ratione istius
sactamenti non tenetur celare.
Cited in Kurtscheid, *The Seal of Confession*, op cit, pp.147-8

77. Codex Lat. 18,406:
Sed esto quod quis confitetur, quod aliquem occidet aut domum eius comburet,
qua forte patrem suum occidit, aut eum exhaereditavit, quid faciet sacerdos?
debete sustinere quod ille occidatur, aut quod domus eius comburatur? Ad
hoc s. Augustinus tale dat consilium in concione, sc. quod sacerdos hoc dicat
tali, qui velit et possit prodesse et non obesse, ut, si ille malefactor patrem
habeat aut aliquem propinquum amicum familiarissimum, dicat ei sacerdos:
filius tuus aut amicus proponit tale malum facere. Castiga ergo ipsum et
corrigi, ne possit tanta facinus perpetrare; aliter enim eris particeps
criminalis et reus homicidii. Si autem ille nec patrem nec matrem nec aliquem
habeat amicum, cui sacerdos hoc possess secure revelare, assumat sacerdotes
et alios bonos viros secum, de quibus sit certus, quod illum non trahant ad
mortem et his presentibus parochianum suum moneat, ut a proposito tam
perverso desistat. Et ei dicant alii, quod non sustinebunt quod in hoc facto
tan scelerato procedat. Et forte non est malum quod sacerdos interim ad
illum, cui facta est comminatio, accedat et sibi dicat: Si quem offendisti
patrem eius occidendo aut ipsum exhaereditavit, consulo tibi quod
compositionem facias cum eo et ego ego inter vos mediator, alter enim tibi
poterit malum contingere.
Cited in Kurtscheid, *The Seal of Confession*, op cit, p.134

Confessio III #2

79. Lawrence Bouchel *Somme Beneficiale*
Cited in Kurtscheid, *The Seal of Confession*, op cit, pp.165-6

80. Vittorelli not. in Tolet, Instruct. Sacerd Lib. III.cap.15
CHAPTER VI
CONFIDENTIALITY AND THE PROBLEM OF CHILD ABUSE

Child abuse is a problem of growing concern in this country. Increased
awareness of this problem has brought to light many more cases than were
reported in the past. In a contest between a relatively large, strong adult
and a relatively small and defenseless child, who frequently loves and
trusts the adult, the adult will "win" unless outside forces step in to
protect the child. As more people become aware of the magnitude of the
problem, and the consequences for abused children, both now and
throughout the children's lives, demands are being made to the authorities
that something must be done to protect the abused children. In this
section I will examine the moral obligations of attorneys,
psychotherapists, priests, and physicians toward abused children and
abusive adults.

Abuse can have many effects on children, many of which stem from
repeated abuses: abuse is generally a recurring phenomena. Children who
are physically abused may display bruises, lacerations, burns or broken
bones. According to one source, the most commonly encountered problem
suffered by abuse victims is subdural hemorrhage. Physicians frequently
discover intracranial hemorrhage and skull fractures. Children who are
sexually abused may become pregnant or contract venereal diseases.
Studies show that pregnancy occurs up to 25% of the time. Abused and sexually abused children are very likely to suffer psychological damage, both immediate and long term. The effects of sexual abuse on children include such things as nightmares, suicide, low self esteem, guilt, depression, drug abuse, prostitution, and sexual dysfunction. The amount and intensity of psychological damage due to sexual abuse depend on factors such as the length of time the incestuous relationship continued and the age of the child at the onset of incest. Additionally, after becoming parents, formerly abused children are likely to abuse their children: abuse is a learned behavior that is frequently repeated from one generation to the next.

Children are relatively defenseless beings who must rely on adults for food, shelter, as well as love and nurturing. They are at the mercy of adults who are bigger, stronger and more knowledgable than they are. Young children have little choice but to obey their parents and endure whatever treatment is meted out. Children generally love their parents, and may rationalize their parents' abusive behavior or may not know that there is anything wrong with their parents' behavior.

Many people are reluctant to interfere in cases of abuse because there is a perceived obligation not to interfere with the raising of children. Until recently, it was considered by most to be a parent's right to raise his or her children as he or she saw fit. This perceived obligation has lost favour among many - it is perceived by fewer to be an obligation - with the increased awareness that children have rights and are not merely the property of their parents.
It is largely because of the defenselessness of children, probably coupled with the belief that childhood is supposed to be a fun, carefree time, and the growing awareness that children have rights, that leads people to demand that action be taken; that abused children be protected from the adults who harm them. Several types of laws have been created with the aim of protecting children from continued abuse. Abusers can be punished under criminal law. The court may also terminate parental rights or institute protective supervision when parents are found to have been abusing their children. All states have laws which require certain individuals to report known or suspected child abuse or neglect.

Ohio's procedure for reporting child abuse is fairly typical of such laws. It requires certain specified professionals, including attorneys, physicians, psychologists, and persons rendering spiritual treatments through prayer in accordance with the tenet of a well recognized religion, which I take to include priests, to report known or suspected cases of child abuse to children services board, or the the county department of welfare, or a municipal or county peace officer. Children services or the welfare department will investigate each reported case, within 24 hours, and make any recommendations to the county prosecutor or city attorney deemed necessary for the protection of the children. Following this, protective services and emergency supportive services will be made available to the abused children "in an effort to prevent further neglect or abuse, to enhance their welfare, and, whenever possible, to preserve the family unit intact."
Ideally, when abuse is discovered, the abusing adult would receive the therapy needed to prevent further abusive behavior and the child would receive counselling to prevent future psychological problems. Incestuous behavior generally indicates that the whole family is suffering from psychological problems, so in an ideal world, the family would receive therapy so as to end the problems. Unfortunately, this does not always happen. If an abusive parent is tried under criminal laws, he may be sent to prison or separated from his children. A psychiatric evaluation may be done, but evaluations rarely uncover the root of a person's problem and are not equivalent to therapy.

The children who are abused frequently are removed from the family setting and placed in foster care. Many children who are abused believe it is their fault - "If I was better, Mommy wouldn't hit me" - and placing them in foster care reinforces this belief. In the child's eyes, he has been taken away from his parents, so he must have done something wrong.10

The above serves to show that the good intentions behind the child abuse reporting laws do not always translate into good consequences for the people involved. The world, however, is not an ideal place, and the lawmakers have created laws which at least attempt to provide the best protection possible for abused children. In what follows I will discuss factors and arguments that generate the moral obligations of attorneys, psychotherapists, priests, and physicians, and state the moral obligations of these professionals. They differ, in part, from the legal obligations stated above, and this difference increases the amount of protection, both physical and psychological, afforded abused children.
A Case of Abuse

Joe Connelly has been having sexual intercourse with his thirteen year old daughter, Amy, for the past two years. These acts have bothered him, and he wants to stop. He and his wife, Melissa, who is unaware of these incestuous acts, have begun discussing a divorce due to problems in their marriage. Joe is afraid that if Melissa or her attorney learn of the incest that he will never be allowed to see Amy again. This fear leads him to discuss the matter with his attorney.

Joe is a Roman Catholic who regularly attends church. He knows that his sexual relations with Amy are a sin, and has confessed the matter to his priest on several occasions. In an attempt to discover why he has been abusing his daughter, and to end such behavior, Joe has started seeing a psychotherapist.

During a routine physical exam, Amy's physician discovers evidence that she has been sexually molested. Amy admits to her physician that her father has been having sexual relations with her for two years and that she wishes it would stop.

The Attorney's Obligation

Joe's attorney has an actual obligation to notify the appropriate authorities, e.g., Children Services, concerning Joe's incestuous relationship with Amy.

An attorney's role is to protect his client's rights and to help him work his way through the torturous maze we call "the law". An attorney's primary obligations are to his client and derive from this role. An
attorney also has obligations to the public who trust attorneys generally to see that justice is done, at least as much as is possible.

Three major arguments have been presented as justification for confidentiality generally in the attorney-client relationship. I shall now show that none of these arguments can justify maintaining confidentiality in this case.

The first argument is that confidentiality is necessary to ensure the proper functioning of the attorney-client relationship. As only the attorney knows what information is relevant to his client’s case, the client must feel able to talk freely. A promise of confidentiality is supposed to facilitate this. As was argued previously, this line of argumentation does not support an absolute obligation of confidentiality. In particular, it does not support maintaining confidentiality when the client announces plans to commit future crimes or wrongdoing.

Child abuse is generally, and in my case specifically, an ongoing problem. Due to recent attention which has been paid to this problem in newspapers, magazines, and television dramas, the fact that once abuse starts, it generally continues, frequently for years, is now common knowledge. It is knowledge that we would expect a lawyer to have. Thus, if an attorney maintains confidentiality in cases in which his client has admitted to committing child abuse, and assists his client in his aim to keep the child near him, then the attorney is helping the client with a continuing crime. This is a perversion of the attorney’s role. The attorney’s role is to assist people in conflicts of past wrongs, and to assist them in protecting their legal rights and in furthering their causes,
to the extent the law allows. While the attorney performs in accordance with his role, society, which sanctions the roles of the various professionals, benefits. When the attorney, or any professional, perverts his role, in general, society no longer benefits, and harm is done. Because of this, the attorney is not justified in performing actions which go against his established role. The prima facie obligation to protect the child and report the child abuse is stronger than his obligation to maintain his client's confidences. Thus, the argument presented above does not justify maintaining confidentiality in cases of admitted child abuse.

The second argument which justifies confidentiality generally in the attorney-client relationship is that given the complexity of today's legal system, it is necessary for an individual to seek the help of an attorney to protect some of his legal rights. It is claimed that an assurance of confidentiality will encourage individuals to seek needed help. Yet this argument was shown to fail to justify an absolute obligation of confidentiality; in cases where the client threatens the rights of others, if the attorney assists his client, he becomes an accomplice to these wrongful acts. This, too, is a perversion of the attorney's role which is to assist people in conflicts of past wrongs, where the harm has already been done, and to assist them in protecting their legal rights and in furthering their causes, to the extent the law allows. An adult who abuses a child causes harm to that child and violates her rights. Thus this argument does not demonstrate that the prima facie obligation of confidentiality is the weightiest of the competing obligations when a client admits to abusing a child.
The final justification for confidentiality generally in the legal relationship is that a promise of confidentiality will encourage the client to be candid with his attorney. If the client confesses plans of future crimes, the attorney may be able to talk him out of this. This promotes societal interests by promoting justice and compliance with the laws.

Child abuse, however, is not an ordinary crime. Child abusers are not like bank robbers, who may decide to forego their plans after learning of the probable consequences of their actions. Child abusers generally cannot stop abusing children merely by being made aware of the moral and legal consequences of their actions. Many child abusers were themselves abused as children and are repeating behavior they learned as children. Others know that what they do is wrong, yet cannot seem to help themselves. Therapy is generally necessary if the abuser is to stop the abuse before the child reaches an age at which she puts an end to it. Incest generally lasts for several years and generally ends, without intervention, as the girl goes through adolescence. In adolescence, the girl's social focus is generally aimed outside the family, she begins to recognize her own rights, and the adult's influence on her begins to wane.12

An attorney is not trained as a counselor and cannot perform the therapy necessary to stop the abuse, nor is that his job. All he can do is apprise his client of the legal and moral consequences of his actions. The above argument from societal interests only works so long as it is likely that the attorney can dissuade his client of his intended actions and convince him to conform to the law. This does not happen in cases of child
abuse. Furthermore, society has an interest in protecting children. Thus, in cases of abuse, maintaining confidentiality does not promote the societal interest of conformance with the laws and thwarts the societal interest of protecting children from harm. Thus this argument does not support maintaining confidentiality concerning cases of child abuse.

It may be argued that as an attorney has no psychological or medical training and so cannot be expected to recognize cases of child abuse. Since an attorney cannot recognize cases of abuse, it is foolish to require him to report such cases. Thus attorneys do not have an obligation to report cases of suspected child abuse.

This argument, however, does not show that an attorney can never know of cases of abuse. In cases which the client states he is abusing his child, or having sexual relations with her, such as in the case presented above, the attorney has clear and compelling evidence for believing that abuse is taking place. Attorneys may not have as many opportunities as medical personnel to become aware of cases of abuse, but when they do, for the reasons stated above, they have an obligation to violate confidentiality and report the abuse.

The Psychotherapist's Obligation

The following dilemma is found as an exercise in an introductory logic textbook. It reflects a common position.

"If psychotherapists respect their client's right to confidentiality, then they will not report child abusers to the authorities; but if they have any concern for the welfare of children, then they will report them. Psychotherapists must either report or not report child abusers to the authorities. Therefore, psychotherapists must either
Psychotherapists have a way out of this dilemma which stems from their professional role and their training. Due to their training, psychotherapists are able to distinguish between the sincerely reformed child molesters and the non-sincerely reformed child molester. What they ought to do depends on which sort of abuser the particular client is. In Joe’s case, the psychotherapist ought not to report Joe’s abuse of Amy to Children Services.

In an ideal world, when abuse is discovered, the child would receive counselling in order to overcome any psychological problems caused by the abuse. The abuser would feel terrible concerning the abuse which has been done and would stop the abuse and seek the counselling that is usually needed for someone to stop abusive behavior. Abuse generally reflects underlying marital, and sometimes family, problems, so ideally the wife would also receive counselling as would, perhaps, the rest of the family. While this cannot change the past, it can produce good consequences for the people involved while minimizing the harm done.

A psychotherapist can help to realize this ideal. She has the training and skill to help people with their problems: that is her job. She can counsel not only the child and parent, but also the entire family if necessary.

The world, unfortunately, is not an ideal place. Even if we assume that there are enough psychotherapists to work with every child and child abuser, not every child abuser would be willing to seek therapy. Of those
who would be willing, not every child abuser wishes to change his behavior. Such a person may just enter therapy to fool the authorities into thinking he has reformed his wicked ways. Therapy is unlikely to be effective for someone who does not wish to change. In such a case, harm would actually continue while those who could protect the child would be fooled into thinking that good was occurring.

A psychotherapist has the training to be able to tell when a client is not sincere about affecting change or is unable to affect change. A psychotherapist ought to violate confidentiality and alert the authorities to the presence of abuse in such a case so as to protect the child. In order to attempt to keep the client in therapy and eventually get him to decide he wants to change, the best course for the psychotherapist to follow is for her to warn her client of the upcoming breach of confidentiality. In cases of breaches of confidentiality, psychotherapists have been able to keep the clients in therapy provided they were candid with their clients.14

Some child abusers genuinely desire to end their abusive behavior. In such cases, psychotherapists can maintain the prima facie obligation of confidentiality and prevent future harm from befalling both the child and the adult. Through therapy the child abuser can learn to overcome his tendencies to abuse his child and work to repair the damage to his familial relationships.

In such a situation, the child may remain at risk. After all, psychotherapists are not omniscient, and some people may be able to fool the psychotherapist into thinking they have reformed when in fact they have not. To safeguard the child, the child should be placed in therapy.
This gives the psychotherapist the opportunity to restore the child's self-esteem, convince the child the abuse was not her fault, etc. It also serves as a safety check on the parent: if the parent continues to abuse the child, this will come out during sessions with the child. Low income families can avail themselves of community mental health centers, which charge on a sliding scale. Thus expense cannot be used as a reason not to have various members of the family in therapy.

By allowing the client and his child to remain in therapy without notifying Children Services, or other authorities, the child's life is able to return to normal. The family will not be broken up by the courts, and the child will remain with her parent(s) instead of being placed in foster care.

This solution for the psychotherapist to the problem of conflicting obligations in cases of child abuse is not a nice, tidy rule. It requires the psychotherapist to decide each case on its own merits in accordance with the guidelines given above. The psychotherapist has a primary obligation to her client and secondary obligations to society. One of the secondary obligations is to the children of society who need more protection than most adult members of society who can fend for themselves. As I stated above, these two obligations can both be followed in cases where the abuser genuinely wants to affect change. In cases where the abuser does not want to change, the prima facie obligation to protect the child becomes the actual obligation as to do otherwise allows known and preventable harm to continue.
The Priest's Obligation

Joe's priest has an actual obligation to inform Children Services concerning Joe's incestuous relationship with Amy, as Joe attends church regularly and has confessed the matter to his priest on several occasions. Today's confessions are generally done face to face, so the priest knows who made the confession and is able to report the matter to Children Services. To safeguard Amy, he has an actual obligation to report the matter.

For some priests, the obligation to report or not report is a moot point. In any church that continues to use the darkened confessional booths so heavily featured in Hollywood movies, the priest may have no idea who is making the confession and is thus unable to report the matter. In this case, all the priest can do in an attempt to safeguard the child is to attempt to persuade the penitent to refrain from abusing his child in the future and to seek psychotherapeutic help.

Many priests, however, know the identity of the penitent as most confessions today are done face to face. In such a case, if the priest protects the confession of a penitent who confesses to abusing her child, he is allowing great harm to come to be, i.e., the probable continued abuse of a child. As priests engage in pastoral counselling, listen to confessions, etc., it is expected that they would know that abuse is a continuing situation. As I argued in the chapter on confidentiality in the Roman Catholic Church, the priest has an obligation to violate confidentiality when doing so would prevent more harm than strictly keeping the seal of the confessional, as in cases where the penitent
threatens future harm to another. In a case of child abuse, the priest ought to inform the authorities about the abuse. Not to do so would allow great harm to continue to befall the child; harm which is physical and psychological, and which can be long lasting and continued into future generations. Given the possible magnitude of the harm, both physical and psychological, to the child, the priest ought to report the matter to the authorities.

It has been argued that if priests violate the sanctity of the confessional, people would be afraid to go to confession for fear that the priest will reveal the content of their confession to others. In reporting the matter to Children Services, however, the priest does not have to let anyone know that he reported the abuser. Reports to Children Services are generally confidential and can be made by anyone, including neighbors, teachers and anonymous tipsters. Thus the penitent does not have good reason to believe that it was the priest who called Children Services. The priest need not tell the penitent that he called if he is concerned that doing so will harm the apparent sanctity of the confessional. Thus, alerting the authorities of a case of abuse does not automatically leak to the abolition of confession due to lack of attendance. The seal need not be weakened in either the penitent's eyes or the eyes of others.

Priests are not likely to believe that anonymous reporting is an acceptable solution. This is likely due to their belief that the seal of the confessional is sacrosanct; it is thought to be an absolute obligation admitting of no exceptions. Anonymous reporting is a violation of the seal, but done so that it does not become common knowledge that
violations occur. Thus priests are likely to believe that this anonymous reporting is wrong.

However, as I argued in the chapter on confidentiality in the Roman Catholic Church, confidentiality is not best understood as an absolute obligation. Confidentiality is, I argued, a prima facie obligation, although one admitting of few exceptions. The priests' reluctance to report stems from their acceptance of a mistaken notion of the nature of the obligation of confidentiality.

The solution of anonymous reporting is offered as a permissible alternative to aiding abused children. The priest is also permitted to discuss the matter with the penitent. However, if the priest fears for the sanctity of the confessional and what violations might do to other penitents, he has a method for both keeping the knowledge of violations of the seal from the public eye, as well as aiding abused children.

During the confession itself, the priest ought to do all he can to dissuade the penitent from harming his child by discussing the possible consequences of such actions and by refusing to grant absolution. However, given the nature of abuse, the priest can be expected to know this is unlikely to be enough and hence is obligated to protect the child by violating the seal of the confessional.

Some priests are also trained psychotherapists. In such a case, the obligations laid forth above for psychotherapists apply to the priest. The priest ought to counsel the penitent separately from the confessional if the penitent genuinely wishes to affect change. He also ought to provide counselling for the child as a check that the abuse has stopped.
The Physician’s Obligation

Amy’s physician has an actual obligation to report the abuse to Children Services.

Physician’s have a primary obligation to their patients: to heal and prevent illness, at least when possible, and to minimize suffering. They have secondary obligations to the public: to minimize the spread of disease, and to protect its members from such harm as is detectable and preventable by physicians. Both sorts of obligation are prima facie, however physicians are generally concerned only with their obligations to their patients, and only occasionally with their obligation to society such as on occasions when the two conflict.

When a child shows evidence of abuse, that child needs not only medical treatment for any injuries she sustained, but also protection from future abuse. When the patient is the child, the physician’s primary and secondary prima facie obligations do not conflict, so there is no question as to which obligation to follow. The physician lacks the power to protect the child himself, so he must alert those who can, such as Children Services.

Questions of conflicting obligations arise when the child either denies that abuse has occurred or when the patient is the abusing parent who admits to committing abuse.

When a child denies that abuse has occurred, although it appears clear to the examining physician that the child has been abused, or when the child is afraid to have action taken, the physician still ought to report the abuse to Children Services. While it is generally taken to be correct that
it is wrong to force treatment on one who does not wish it, this rule does not apply in this case. A child under, roughly, the age of ten lacks both the knowledge and rationality to be able both to judge what course of treatment is in her best interest and to choose whether or not to follow that course. An abused child is frequently motivated by fear of her parent and possible retribution, or believes that she, not her parent, is the one who is bad. Thus, as is true in so many areas of a child's life, it is adults who must decide what is to be done for the child. In cases of abuse, Children Services ought to be notified.

If the abusing parent admits to committing abuse, the physician has an prima facie obligation to report the matter to the authorities. A physician has the expertise to recognize an abused child, but not to sort out sincerely reformed from non-sincerely reformed child molesters. Without this ability and without the expertise of the psychotherapist to affect change in the parent, the physician who does not report cases of abuse keeps the child at risk of further abuse. Confidentiality breaks down when remaining silent means that someone else is likely to be harmed. Thus, in cases of child abuse, the physician is obligated to violate confidentiality to prevent further harm to the child.

Summary

The actual obligations of the various professionals discussed above, who face the problem of child abuse, vary. While members of all four professions have an actual obligation to protect abused children, their obligations to the child abuser differ, and hence what they ought to do
after discovering a case of abuse also differs. This difference derives from the differing natures of the professions and the training and expertise of the members of those professions.

The best solution to a case of child abuse is one in which the greatest amount of good occurs. In all cases this means that the child is protected from continued abuse, which, if allowed to continue, would likely result in further physical or psychological damage. Only the psychotherapist can ensure this will happen without violating confidentiality, at least in some cases, by engaging both the abuser and the child in therapy. Lawyers, physicians, and priests lack the expertise and training to affect change in the abusing parent and are not able to protect the child themselves, so they have an obligation to violate confidentiality and alert Children Services, who can protect the child.

An ideal solution to cases of child abuse is not only to protect the child, but also for the abuser and the child to receive counselling. If possible, the child would remain in her home, as placing a child in foster care may intensify her feelings that she did something wrong.

Unfortunately, the professionals discussed above cannot ensure that this will happen. Such a solution would have to come from the policy makers of the community. Psychotherapists, priests, attorneys, and physicians are able to aid in the solution to the problem of child abuse only in so far as their roles and training allow. Psychotherapists come the closest to being able to reach the ideal solution, but even they cannot counsel and affect change in a child abuser who does not wish to stop abusing his child. Priests, physicians, and attorneys can only turn the
matter over to Children Services; they lack the training to do anything else to protect the child.
Notes


Justice and Justice, The Broken Taboo, op cit, p. 175-199

4. Justice and Justice, The Broken Taboo, op cit, p.131

5. James and Nasjleti, Treating Sexually Abused Children and Their Families, op cit, p.33
Justice and Justice, The Broken Taboo, op cit, p.199


8. Ibid


Maisch, Incest, op cit, p.209

11. These arguments will be briefly stated here. For the complete arguments, see the chapter on confidentiality in the law.

12. Maisch, Incest, op cit, p.194


15. For the complete argument, see the chapter on confidentiality in the Roman Catholic Church.
CHAPTER VII

CONCLUDING REMARKS

Confidentiality refers to a promise between two or more individuals that communications made within the confines of their relationship will be protected by them from unauthorized disclosure. This promise creates an obligation for the recipient of the communications that he will not divulge the contents of the communications without permission of the individual who made the communication. The concept of confidentiality is often justified on grounds of privacy; we have a right to keep certain information about ourselves private, and it is prima facie wrong for another to reveal this information without our consent.

Professionals have two kinds of obligations: those to their clients, and those to others and the rest of society. The obligations to the clients, their primary obligations, stem from the professional's role. These obligations are stronger than those of the ordinary morality affecting all members of a society. There is a contract between the professional and the client which obligates the professional to bring her professional skills and training to bear on the problem presented by the client. Several obligations come from this role of the professional. One of these obligations for the professionals discussed in this dissertation is the obligation of confidentiality.
Most of the professional’s obligations to others, and to society — their secondary obligations — are ordinary obligations; they are part of the ordinary obligations governing us all. After all, the professional does not have the special relationship to others that she does to her client.

Conflicts may arise between the professional’s obligations to her client and her obligations to others, as in the case of upholding a promise of confidentiality versus preventing harm to others. While a professional’s obligations to her client are generally stronger than her obligations to others, occasionally her obligations to others will limit her obligation to her client.

The obligation and practice of confidentiality in various professions, e.g., law, medicine, psychotherapy, and religion, is typically justified on grounds that the particular professional relationship is a valuable one in society and confidentiality is essential to the functioning of that relationship. This justification has been shown not to be a justification for an absolute obligation of confidentiality.

Here, however, the similarity of the practice of confidentiality in various professional relationships ends. Each of these professions serves a different function and works with different people under different circumstances. Each profession considers information revealed to the particular professional by its clients to be confidential, but the sorts of information revealed vary according to the profession. Thus we cannot give specific guidelines on when to violate confidentiality which will apply to all professions. As my discussion of the issue of child abuse showed, the obligations of the professional varied: lawyers, physicians,
and priests who are not trained in psychotherapy have an obligation to report suspected cases of child abuse, even if doing so means violating confidentiality, while psychotherapists have an obligation to report only those child abusers who are not sincere in their desire to change.

A general rule can be provided stating conditions under which professionals have an obligation to violate confidentiality: confidentiality ought to be violated when not doing so would result in great harm befalling others. Humans are only partially rational beings, so rigid rules cannot be provided stating exactly when someone will cause great harm to another. If we were completely rational, and functioned like Turing machines, then such exact prediction would be possible. Since we are not, the best we can do is give general guidelines as to when someone constitutes danger to another. Thus we will not be able to create general rules such as "A person constitutes a danger to others when he is mad at them". It is up to the professional to bring her skills and training to bear in interpreting the general guidelines. The guidelines will vary from profession to profession, as each profession encounters different problems: a psychotherapist may worry about a homicidal maniac, a physician may worry about the spread of bubonic plague, and a lawyer may worry about a case of perjury.

The training and experience of professionals in the professions discussed in this dissertation serve to ensure that they will be able to decide when someone constitutes a danger to others and they will do so with expertise not available to ordinary folk. Within each discipline are guidelines which assist the professional in his attempt to separate
dangerous clients from non-dangerous clients. The guidelines for physicians are probably the clearest as physicians typically are concerned with conditions and diseases which can be tested for and have criteria which allow for fairly easy identification. The guidelines for priests and psychotherapists, who are concerned with sometimes irrational human psyche, are more difficult to create as it is difficult to test for psychological disturbances with certainty.

This discussion of the conditions under which a professional is obligated to violate confidentiality is not to be taken to mean that confidentiality is permitted to be violated on a frequent basis. All the arguments given above which purported to show that confidentiality is an absolute obligation serve to show, instead, that confidentiality is a strong prima facie obligation, not to be overridden lightly. Professionals should take care that they treat this obligation seriously as it may be easier, in many cases, to ignore it and talk freely with colleagues, friends, and family. Care should also be taken to secure client records, especially in this age of computers which are easily accessed by unauthorized others.

The purpose of the dissertation was to make clear the nature of the obligation of confidentiality in the "helping" professions of law, medicine, psychotherapy and religion. As can be seen in the bulk of this work, the professionals were not clear as to the nature of the obligation: their assessment of it ranged from declaring it to be an empty obligation to believing it to be an absolute obligation. A philosopher is able to do what the members of these professions could not: to canvas the literature in
search of all the disparate arguments in all the professions, and to examine the arguments, probing for flaws where they exist.

One unusual feature of the arguments and their criticisms in this undertaking is their empirical nature. Philosophers, generally, are unused to working with empirical data; it is due to the nature of much of philosophy that discussions of empirical matters are irrelevant.

However, this is not the case in applied ethics, which is the study of moral problems in the actual world. When one examines the behavior of persons in the world to determine their obligations for particular problems, one must be at least somewhat empirical in gathering information about the problem.

Many of the arguments which I examined had a strong empirical content: many made claims about the way people behave. To show that these arguments do not work, it is necessary to show how people actually behave, which necessitates an empirical content to my evaluation of many of the arguments.

A philosopher cannot solve many of the moral problems of the world by emulating Descartes, sitting by the fire and attempting to reason solely through the use of reason and a priori principles. Instead, she must learn about the world as it is. Only then can she bring her philosophical skills to bear on the problem and attempt to solve it.
BIBLIOGRAPHY


Adler, Barry, "The Ethics of Perjury," 71 ABA Journal 76 (Nov. 1985)


*Confidentiality and Privileged Communication in the Practice of Psychiatry*. Group for the Advancement of Psychiatry, 1960

DeKraai, Mark B. and Sales, Bruce D., "Privileged Communications of Psychologists," *Professional Psychology* 13 (June 1982) 372-388


"Functional Overlap Between the Lawyer and Other Professionals," Notes and Comments, 17 *Yale Law Journal* 1226 (1962)

Gellman, Robert. "Divided Loyalties: A Physician's Responsibilities in an Information Age," Social Science and Medicine. 23, no.8


Hatton v. Robinson, 31 Mass. (14 Pick.) 416 (1833)


Kurtscheid, Rev. Bertrand. The Seal of Confession. St. Louis: B. Harder Book Co., 1927


Margolin, Gayla, "Ethical and Legal Considerations in Marital and Family Therapy," American Psychologist 37 (July 1982) 788-780

Masters, N.C. and Shapiro, H.A. Medical Secrecy and the Doctor-Patient Relationship Cape Town: AA Balkema, 1966

Mayo, David J. "Confidentiality in Crisis Counselling: A Philosophical Perspective," Suicide and Life Threatening Behavior 14 (Summer 1984)


Natta v. Hoganm 392 F.2d 686,691 (10th Cir.1968)


Siegert, Paul, "Professional Ethics - For Whose Benefit?" Journal of Medical Ethics 8 (1982) 25-32


Tarasoff v. Regents of the University of California, 17Cal.3d 425 Cal. Rptr. 131(1976)


Thompson, Andrew. *Ethical Concerns in Psychotherapy and Their Legal Ramifications* Lanham, MD: University Press of America, 1983


United States v. United Shoe Machinery Corp., 89 F.Supp. 357


