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To Tell or Not to Tell: Conflicts about Confidentiality

To make its research readily available to a broad audience, the Center for Philosophy and Public Policy publishes a quarterly newsletter: *QQ—Report from the Center for Philosophy and Public Policy*. Named after the abbreviation for “questions,” *QQ* summarizes and supplements Center books and working papers and features other selected work on public policy questions. Articles in *QQ* are intended to advance philosophically informed debate on current policy choices; the views presented are not necessarily those of the Center or its sponsors.

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“Three can keep a secret,” Benjamin Franklin once wrote, “if two of them are dead.” The urge to tell secrets is a powerful one, and pervasive practices of confidentiality have accordingly developed to keep it in check. The duty to keep secrets is a principal part of what friends owe one another, a cornerstone of most codes of professional ethics, and a charge placed upon workers and citizens in the name of loyalty to their employer and their country.

Philosopher Bruce Landesman of the University of Utah suggests that our ordinary duties of confidentiality are based in part on respect for the need all of us have at one time or another both to express information to others and to keep control over how that information is subsequently used. We need the reaction and response of another person — and so share a secret — but also need to retain a proprietary hold on the secret — and so swear our audience to confidentiality. Sissela Bok, writing in *Secrets: On the Ethics of Concealment and Revelation*, likewise justifies confidentiality in terms of our respect for individuals as capable of both *having* and *sharing* secrets, respect for both personal autonomy and interpersonal intimacy. Furthermore, once a promise of confidentiality is given, the duty to keep promises provides an additional reason not to tell.

Some secrets ought not to be kept, however. One has a *prima facie* duty to reveal certain sorts of information to the proper authorities: information about crimes committed or contemplated, for example, or concerning impending harm to innocent third parties. The obligation to keep a secret may have to be balanced against the obligation, in certain circumstances, to tell a secret, and Landesman argues that appeals to confidentiality provide no easy way

out of such moral dilemmas. The confidante "remains an autonomous moral being and thus free to deliberate about what to do with the information once it has been received. That it has been revealed in confidence is a powerful reason for keeping it secret, but cannot settle the issue. The hearer cannot remain a moral agent without retaining the right to consider the information in light of other factors that may, all things considered, provide even stronger reasons for revealing it."

This kind of moral conflict is heightened when the ordinary duty of confidentiality is buttressed by additional professionally grounded obligations to keep secrets. Doctors and lawyers, for example, are bound by the canons of their profession not to reveal the confidences of patients and clients. But when these confidences concern threats to third parties or to the public welfare, the professional duty of confidentiality clashes with the ordinary moral duty not to stand by as serious wrongs are committed. Employees are often under a special obligation to guard company secrets. But when these secrets threaten the health and safety of consumers or workers, private enterprise warrants public concern, and employees have to wrestle with the difficult decision of whether — and how loudly — to blow the whistle. Those who work in national defense matters face these dilemmas in their most extreme form. A certain degree of secrecy is essential for national security; but there are some secrets that can be kept only by endangering the democratic values that in the end are all that make national security matter.

What secrets should be kept? What secrets should be told? How do we balance these special duties of confidentiality against the possibly grave harms that a breach of confidentiality might avert?

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Client Confidentiality

Many codes of professional ethics are built around a principle of confidentiality. Doctors, lawyers, psychiatrists, social workers, accountants, priests, all assure those who come to them for assistance that their communications will be kept in confidence. Making good on that assurance is a matter both of professional obligation and professional pride. The confidentiality promised clients is not absolute, however, and there are broader and narrower restrictions on what falls within its scope: lawyers, according to the ABA's new code of ethics, are permitted — though not required — to reveal a client's intention to commit a criminal act resulting in imminent

death; psychiatrists have been required to reveal a serious danger of violence posed by their patients. But even given such restrictions, professionals bound by a duty of confidentiality may be obligated to keep secrets that they would otherwise be obligated to disclose.

What considerations justify a professional obligation of confidentiality and dictate its appropriate scope? Practitioners in many professions argue that success in achieving the underlying goal of their profession depends on how forthcoming the client is with her confidences, which in turn depends on the professional's promise of confiden-

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tiality. In evaluating the case for confidentiality in any profession, then, three questions need to be answered: (1) how important is the purpose to be achieved by that profession? (2) to achieve this purpose is it necessary that the client tell all to the professional? and (3) how strict a promise of confidentiality is needed in order for the client to feel free to tell all?

Psychiatrists claim, for example, that psychic healing takes place when their patients' darkest secrets are brought to the light of conscious rational scrutiny. Confidentiality is promised so that no hidden guilt or trauma will be withheld. But how extensive need such a promise be? Bok points out that "no evidence suggests that therapy will be imperilled if patients know that therapists have the duty to reveal . . . plans of violence." Some patients even hope that their plans will be thwarted.

Nor does the end achieved by psychotherapy seem weighty enough to justify the failure to breach confidentiality where serious harms to third parties are at stake. Thus the California Supreme Court held in *Tarasoff v. The Regents of the University of California* that the psychotherapists whose patient murdered Tatiana Tarasoff breached a duty overriding that of confidentiality in failing to warn the victim of his violent threats against her. The "public interest in effective treatment of mental illness" is outweighed by "the public interest in safety from violent assault," the court concluded. "The protective privilege ends where the public peril begins."

The end sought by the legal profession, however, may seem to be a weightier one: justice for all. If lawyers can make a case that confidentiality is necessary to secure this end, the duty of confidentiality within the legal profession will have a stronger justification. Accordingly, lawyers argue that they cannot represent their clients effectively if any relevant information is withheld from them. And in our highly complex and complicated legal system, justice requires that all parties to a proceeding be represented ef-

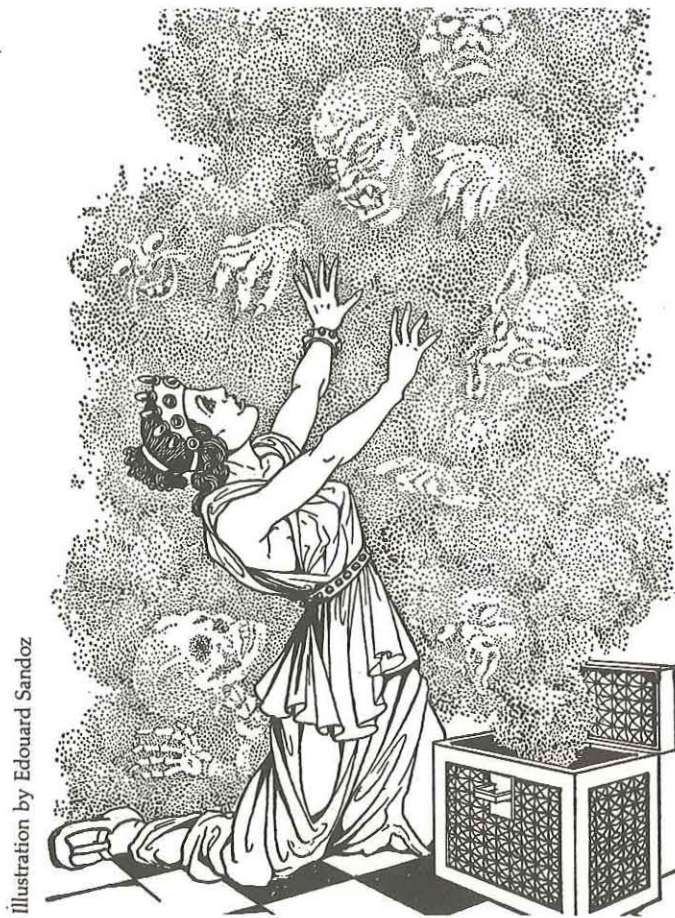


Illustration by Edouard Sandoz

From *Greek Myths*, by Olivia Coolidge, © 1949 by Olivia E. Coolidge

"Pandora's box . . . is one of the many tales of calamities befalling those who uncover what is concealed. . . ." — Bok

fectively by counsel. Confidentiality is, then, a means to justice.

Or is it? Jeremy Bentham objected in 1827 that justice in criminal cases is not in fact served by holding lawyers to a pledge of confidentiality. Justice is done when the innocent are acquitted and the guilty are convicted, and confidentiality assists neither goal. The innocent have no reason to fear that disclosure of their secrets will lead to conviction; the guilty have no right to hope that concealment of their secrets will lead to acquittal.

Bentham's argument faces two challenges. The first questions the assumption that innocent clients will be able to tell all even if no promise of confidentiality is given. Innocent clients may not be legally sophisticated enough to be aware that they are innocent. Monroe Freedman, author of *Lawyers' Ethics in an Adversary System*, gives the example of a battered wife who shoots her husband in self-defense: she may falsely believe herself guilty of murder and so deny the shooting altogether — thus jeopardizing her lawyer's best defense strategy. Such extremely ignorant and timid clients are likely to be rare, however, and it can be argued that confidentiality protects this very special subset of innocent clients at the cost of letting a far greater number of guilty clients go free.

A deeper challenge to Bentham's argument denies that the fundamental goal of providing defendants with legal representation is to maximize the number of correct verdicts rendered. More important even than justice is respect for individual rights and human dignity. Freedman writes, "Before we will permit the state to deprive anyone of life, liberty, or property . . . we require that certain processes be duly followed which ensure regard for the dignity of the individual, irrespective of the impact of those processes upon the determination of truth." No defendant, innocent or guilty, is required to stand alone against a hostile world without a legal advocate as his champion.

But the question now arises: how much confidentiality must be promised in order to ensure respect for every client's human dignity? Freedman argues that a client who cannot trust his lawyer to keep confidences can enjoy his right to effective counsel only at the cost of jeopardizing his right against self-incrimination. For if he tells all, he risks incriminating himself through his own lawyer's testimony against him. But Alan Donagan, professor of philosophy at the California Institute of Technology, objects that respect for human dignity cannot license a sweeping duty of silence. It is true that a society that respects human dignity will recognize a legal right against self-incrimination. "But a legal right, even one that society is morally obliged to grant, is not necessarily a moral right. A murderer has no moral right whatever to escape incrimination by concealing the victim's body, although it would be wrong to compel him to reveal where it is." And what the defendant has no moral right to do, he has no moral right to enlist professional help in doing — and no one has a moral right to provide that help.

Proposals to weaken the scope of confidentiality have been forcefully resisted by the legal profession, however. Take away the right of confidentiality in the name of social utility, caution many lawyers, and you open the way to totalitarianism. (Under Nazism, lawyers were authorized to reveal client confidences on behalf of goals supported by "healthy folk feeling.") As a society we have so far been willing to err on the side of respecting the con-



Illustration by Gordon Kibbee

From *Once There Was and Twice There Wasn't*
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In a Turkish fairy tale, the hero loses his magic donkey by forgetting the genie's warning: "Part with your head, but not your secret."

fidences of the accused individual, and to pay the costs of providing that respect.

Individuals vs. Groups

The arguments we have been considering so far concern obligations of confidentiality owed to individuals — both simply as persons and as clients, patients, and so on. Sissela Bok takes as one of our bedrock assumptions that individuals should have a certain amount of control over

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how private to keep their own private lives. "Without a premise supporting a measure of individual control over [the degree of secrecy and openness about] personal matters, it would be impossible to preserve the indispensable respect for identity, plans, action, and belongings that all of us need and should legitimately be able to claim." This presumption of the legitimacy of individual control underlies our ordinary moral duties of confidentiality and lends additional plausibility to professional duties of confidentiality owed to vulnerable human beings in need of assistance. It is an argument based on human dignity.

But when confidentiality is instead owed to a group that wields any considerable amount of power over individual lives, Bok believes that the presumption shifts. "When those who exercise power of [this kind] claim control over secrecy and openness, it is up to them to show why giving them such control is necessary and what kinds of safeguards they propose."

What reasons support practices of collective secrecy and place upon individuals an obligation to keep group secrets? In general, it would be difficult for most groups to function cohesively if members felt no bonds of loyalty to one another to keep group secrets. Within specific group contexts, additional rationales for secrecy apply, which generate corresponding obligations of confidentiality.

Corporations often ask their employees to promise not to reveal trade formulas to competitors — without some such protection, it is argued, businesses would have no incentive to invest their resources in technological innovation. Some measure of secrecy is justified in the administrative and bureaucratic context as well. "If administrators had to do everything in the open," Bok notes, "they might be forced to express only safe and uncontroversial views, and thus to bypass creative or still tentative ideas." It is neither fair nor fruitful to expose early stages of planning to the glare of publicity. The case for military secrecy is particularly powerful, since every state requires considerable secrecy in order to defend itself against enemy forces, and so to ensure its very survival.

There is thus a battery of reasons supporting some ex-

tent of collective, as well as individual, confidentiality. But collective confidentiality can derive no support from most of the arguments that proved persuasive at the individual level. David Luban, Research Associate at the Center for Philosophy and Public Policy, argues, for example, that lawyers who represent corporate clients cannot justify keeping shady secrets by appeal to the human dignity argument. "A corporation does not have human dignity, because it is not human. It is an abstract entity which is considered a person only in a technical sense. Corporate personality is a legal fiction." Nor will it work to argue that while the corporation itself is not human, the particular employees who manage its affairs *are*. Such maneuvers, Luban charges, "attempt to blur the distinction between corporate entities and the people who work for them; to transfer the human individuality of the latter to the former. . . . We are rightly skeptical when Madison Avenue describes a mammoth multinational as 'People building widgets to help people.'"

Bok provides a particularly egregious example of the fallacious transposition of the confidentiality rightly owed to individuals to the collective level. "Consider . . . the prolonged collaboration between asbestos manufacturers and company physicians to conceal the risks from exposure to asbestos dust. These risks were kept secret . . . even from those workers found in medical checkups to be in the early stages of asbestos-induced disease. When a reporter approached a physician associated with the concealment as consultant for a large manufacturer, the physician turned down his request for an interview on grounds of confidentiality owed as a matter of 'the patient's rights,' and explained, when the astonished reporter inquired who the 'patient' was, that it was the *company*."

Employees entrusted with knowledge of corporate practices that endanger workers' or consumers' health or pollute the environment may find themselves obligated to betray that trust and become whistleblowers.

Where appeals to human dignity, or patient and client rights, are inappropriate, as they are here, it is more difficult to justify keeping secrets that pose serious harms to innocent third parties. The arguments for collective secrecy and confidentiality may be persuasive enough to warrant a good amount of individual inconvenience, or even hardship, in their service. But they will not by and large be able to outweigh counter-balancing moral considerations. Employees entrusted with knowledge of corporate practices that endanger workers' or consumers' health or pollute the environment may find themselves obligated to betray that trust and become whistleblowers.

Bok cautions, however, that whistleblowing, with its destructive repercussions, is not a first resort solution to group malfeasance, nor a course to be taken lightly.

"Potential whistleblowers must first try to specify the degree to which there is genuine impropriety and consider how imminent and how serious the threat is which they perceive. [They must] consider whether the existing avenues for change within the organization have been sufficiently explored. It is disloyal to colleagues and employers, as well as a waste of time, to sound the loudest alarm first." Further, "openly accepted responsibility for blowing the whistle should . . . be preferred to the secret denunciation or the leaked rumor" to provide those accused a fair opportunity to defend themselves. But when these conditions are met, Luban concludes that employees must follow Lauren Bacall's instructions: "You know how to whistle, don't you? Just put your lips together and blow."

Military secrecy is obviously more strongly justified

norance about what should be the public's business above all else."

One striking breach of confidentiality regarding military matters in recent years was the decision of Daniel Ellsberg and Anthony Russo to give the classified Pentagon Papers to *The New York Times*, thereby exposing the record of ineptitude, deceit, and concealment that told the story of U.S. involvement in Vietnam. Bok applauds their very difficult decision: "The information about the origins and conduct of the war in Vietnam should never have been kept secret in the first place. This information was owed to the people, at home and abroad, who were bearing the costs and the suffering of the war; keeping them in the dark about the reasons for fighting the war was an abuse of secrecy. The extent of the secrecy could be justified neither on military nor administrative grounds. It

U.S. Air Force Photo



With excessive military secrecy, "citizens lose ordinary democratic checks on precisely those matters that can affect them most strongly."

than corporate or administrative secrecy. When it comes to national security, the values at stake in guarding secrecy may seem weightier than anything that can be put in the balance against them. If disclosing military secrets jeopardizes national security — or even national survival — then there is a powerful case against disclosure, even to avert some grave harm.

Too seldom noticed, however, is that secrecy can also endanger national security. Bok observes that the failure of the 1980 hostage rescue mission in Iran has been blamed on overly restrictive secrecy measures that prevented participants from coordinating plans and cooperatively reassessing those plans when conditions deteriorated.

We must also ask what all our defense efforts are supposed to be defending — presumably our system of democracy, whose highest ideal is active citizen participation in all vital issues. With excessive military secrecy, Bok holds, "citizens lose ordinary democratic checks on precisely those matters that can affect them most strongly." She doubts that "democratic processes can persist in the face of current amounts of secrecy, of public ig-

demonstrated, rather, the extraordinary danger to society that endemic secrecy represents."

Conclusion

Each of us owes respect to the secrets others confide in us, because we all recognize in ourselves the need to confide secrets in others. But obligations of confidentiality are weaker as the secrets concealed belong to large collectivities rather than lone individuals, and as concealment threatens danger to others. Here, as elsewhere in ethics, individuals may face hard choices, which no law, code, or promise can settle for them.

The views of Bruce Landesman and Alan Donagan are taken from their chapters in The Good Lawyer: Lawyers' Roles and Lawyers' Ethics, edited by David Luban, Maryland Studies in Public Philosophy (Totowa, N.J.: Rowman and Allanheld, 1984); Sissela Bok's views are quoted from Secrets: On the Ethics of Concealment and Revelation (New York: Pantheon Books, 1982); Monroe Freedman is quoted from Lawyers' Ethics in an Adversary System (Indianapolis: Bobbs-Merrill, 1975) and "Wrong? Silence Is Right," The New York Times, February 14, 1983; David Luban's views will appear in his forthcoming book A Nation of Lawyers.