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# Against Confidentiality

Dru Stevenson\*

*Confidentiality rules enjoy a sacrosanct place in the ethical codes for lawyers. The conventional wisdom is that strict confidentiality rules are necessary to foster client-lawyer communication, thereby providing lawyers with information they need for effective representation. Yet this premise is demonstrably false — clients withhold information or lie to their lawyers, despite the rules. Using analytical tools from economics, including the Coase Theorem, this Article goes beyond previous piecemeal criticisms of the rules to analyze the social costs — and oversold benefits — of the ethical rules that compel lawyers to conceal client secrets, and finds that the rules do more harm than good. The social costs imposed by confidentiality rules are significant — direct externalities, lemons effects, and increased transaction costs. Perhaps most disturbingly, the rules facilitate wrongful convictions of innocent third parties, and allow physical injuries to occur unchecked. The current rules also undermine public trust in the legal system and diminish transparency and cooperation in society. In relation to the other ethical rules, confidentiality rules strain against rules designed to foster candor, fairness, and integrity. At the same time, the purported benefits of the rules merely duplicate the protections of clients provided by existing evidentiary doctrines and privileges, rules addressing conflicts of interest, and well-functioning market mechanisms. The Article provides specific normative proposals for revising or repealing the rules, and offers suggestions for lawyers to facilitate more disclosure in practice. The conclusion challenges other writers to answer the foregoing arguments with objective evidence (not mere anecdote), and to justify the rules in the face of these obvious externalities and social costs.*

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## INTRODUCTION

Confidentiality is ethics-speak for secrecy; in terms of strategy, secrecy provides its holder with the element of surprise. The early French philosopher Montaigne described an interesting difference in the strategies of ancient Greeks and Romans in this regard.<sup>1</sup> The Greeks thought the element of surprise was the most important aspect of victory. When it came to winning, the Greeks thought it was more glorious to win by trickery, illusion, or surprise rather than by brute force. The Romans took the opposite view — Romans and their imitators would announce to opponents in advance the day and time that they planned to attack, the number of their troops and type of weaponry, etc., and then would do exactly what they had said.<sup>2</sup> Romans prided themselves on winning by sheer force, organization, and preparation.<sup>3</sup>

Today, many lawyers believe that some element of surprise or secrecy is necessary to win in both the litigation and transactional settings<sup>4</sup> — that

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<sup>1</sup> MICHEL EYQUEM DE MONTAIGNE, *SELECTED ESSAYS* bk. I, ch. 5, at 11-13 (Blanchard Bates ed., Charles Cotton & W. Hazlitt trans., Random House, Inc. 1949) (1588); see also David Lewis Schaefer, *Montaigne and the Classical Tradition*, 8 INT'L J. CLASSICAL TRADITION 179, 181 (2001) (discussing Montaigne's views on the Greek-Roman distinction, and arguing that eventually Montaigne concluded the Romans lapsed into deceptive practices on a few occasions, contrary to their claims). *But see* J.E. Lendon, *Xenophon and the Alternative to Realist Foreign Policy: Cyropaedia 3.1.14-31*, 126 J. HELLENIC STUD. 82, 88 & n.28 (2006) (discussing early Greek distinctions between "fair and open" battle and trickery); Everett L. Wheeler, *Methodological Limits and the Mirage of Roman Strategy: Part II*, 57 J. MIL. HIST. 215, 236-39 (1993) (providing an example of a Roman surprise attack and the use of secret military plans).

<sup>2</sup> See F.W. Walbank, *Political Morality and the Friends of Scipio*, 55 J. ROMAN STUD. 1, 3 (1965) (discussing Romans and their aggressive tactics).

<sup>3</sup> See *id.*

<sup>4</sup> See Erin E. Barrett, *Who Is Patrolling the Border of Ethical Conduct?: The Convergence of Federal Immigration Attorneys, Benefit Fraud, and Model Rule 4.2*, 55 WM. & MARY L. REV. 2255, 2259 (2014) (discussing attorneys capitalizing on the element of surprise in immigration litigation); Lisa Bernstein, *Understanding the Limits of Court-Connected ADR: A Critique of Federal Court-Annexed Arbitration Programs*, 141 U. PA. L. REV. 2169, 2220-21 n.172 (1993) (stating that "the attorney may find it desirable to keep certain arguments secret until trial either to achieve an element of surprise"); Keith H. Beyler, *Witness Disclosure in Illinois*, 28 S. ILL. U. L.J. 225, 239 (2004) (noting that undisclosed opinions "eliminated the element of surprise on which trial lawyers often depend to get at the truth during cross-examination of an opponent's hired-gun experts"); Michaelbrent Collings, *Discoverability of Attorney Interview Notes*, L.A. LAW., Oct. 2006, at 12, 14 ("Nevertheless, attorneys should seek to avoid interviewing multiple witnesses at once. Otherwise, attorneys face the risk not only of finding that the information may be discoverable but also of losing the essential and important element of surprise."); Jon May & Carol Cohen, *Staying Luce*, CHAMPION, Nov. 2003, at 30, 32 ("Some lawyers will object that this gives up the element of surprise and gives the government a trial run at your client."); Mark Mermelstein & Mona S. Amer, *From*

a client's goals are unachievable without the information asymmetries<sup>5</sup> that the confidentiality rules create.<sup>6</sup> On this point, I side with the Romans.

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*Victim to Victor: Corporate Crime in the Internet Era*, BUS. L. TODAY, Nov. 2013, at 1, 2 (“While private attorneys do have some limited ability to seize assets via civil litigation, the government will typically have the element of surprise which is significant when trying to seize portable assets such as currency.”); Donna Shestowsky, *Improving Summary Jury Trials: Insights from Psychology*, 18 OHIO ST. J. ON DISP. RESOL. 469, 476 (2003) (discussing problems that arise when lawyers strategically withhold critical information to retain an element of surprise at trial).

<sup>5</sup> See Michael Eaton, *The Key to the Courthouse Door: The Effect of Ashcroft v. Iqbal and the Heightened Pleading Standard*, 51 SANTA CLARA L. REV. 299, 316 (2011) (“Furthermore, there may be ‘information asymmetries’ between the parties that significantly disadvantage certain types of plaintiffs.”); Mitchell London, *Resolving the Civil Litigant’s Discovery Dilemma*, 26 GEO. J. LEGAL ETHICS 837, 841 (2013) (discussing information asymmetries and strategic behavior in litigation); Laura A. McDonald, *Restoring the Balance After the Private Securities Litigation Reform Act of 1995*, 38 FLA. ST. U. L. REV. 911, 924 (2011) (discussing scenarios in which “the defendant, but not the plaintiff, knows if a suit is meritless, creating information asymmetries the defendant may use to its advantage.”); Robert H. Mnookin, *Strategic Barriers to Dispute Resolution: A Comparison of Bilateral and Multilateral Negotiations*, 8 HARV. NEGOT. L. REV. 1, 6 (2003) (“Information asymmetries of this sort open opportunities for strategic opportunism.”); Eric A. Posner, *Economic Analysis of Contract Law After Three Decades: Success Or Failure?*, 112 YALE L.J. 829, 833 (2003) (“In addition, parties might choose some terms or avoid others for strategic reasons, in order to exploit superior bargaining power or information asymmetries.”); David C. Vladeck, *Information Access — Surveying the Current Legal Landscape of Federal Right-to-Know Laws*, 86 TEX. L. REV. 1787, 1793 (2008) (discussing how “information asymmetries put agencies at a serious disadvantage in evaluating” certain litigation-generating claims”); see also Joshua Mitts, *Recoupment Under Dodd-Frank: Punishing Financial Executives and Perpetuating “Too Big to Fail,”* 122 YALE L.J. 507, 519 (2012) (stating that “information asymmetries likely place the FDIC at an evidentiary disadvantage when proving causation.”). See generally Lior Jacob Strahilevitz, *Information Asymmetries and the Rights to Exclude*, 104 MICH. L. REV. 1835, 1837 (2006) (discussing the assertion of property rights in the context of information asymmetries). But see Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss Is Pending*, 47 WAKE FOREST L. REV. 71, 72 (2012) (noting that mandatory disclosure “equalizes information asymmetries, thereby enhancing settlement prospects and also reducing surprises and gamesmanship at trial.”).

<sup>6</sup> See Stephen M. Bainbridge, *Community and Statism: A Conservative Contractarian Critique of Progressive Corporate Law Scholarship*, 82 CORNELL L. REV. 856, 869 n.53 (1997) (discussing “informational advantages enjoyed by management, which has direct access to confidential strategic plans and has no incentive to disclose them voluntarily to employees or other nonshareholder constituencies”); John B. O’Keefe, *Preserving Collective-Action Rights in Employment Arbitration*, 91 VA. L. REV. 823, 852 (2005) (discussing confidentiality and “the strategic advantages that attend superior knowledge”); Matthew A. Reiber, *Latching onto Laches: A Rules-Based Alternative for Resolving Questions of Waiver Following the Inadvertent Production of Privileged Documents in Federal Court Actions*, 38 N.M. L. REV. 197, 203 (2008) (discussing the need to keep certain documents confidential for strategic reasons); Janet Weinstein, *And Never the Twain Shall Meet: The Best Interests of Children and the Adversary System*, 52 U. MIAMI L. REV. 79, 136 n.195 (1997) (“Placing confidentiality at the core of the

The American legal profession today overvalues confidentiality, secrecy, and information asymmetries, at the cost of focusing on the merits of a case, the capabilities of counsel, and the courage to advocate with candor.

This Article challenges this mainstay of modern lawyering. Lawyers, courts, and commentators treat the confidentiality rules as sacrosanct, a sine qua non of the legal profession and of the legal systems. This duty to clients persists even after representation has ended — it is permanent — and requires lawyers to keep secret any information from or about a client, except what the client expressly or impliedly authorizes the lawyer to disclose. Confidentiality is merely a subset of secrecy, a euphemistic label for squelching truth. The baleful purposes of the confidentiality rules, however, are illusory — the rules are unnecessary.<sup>7</sup>

This minority view has support from some other commentators, who have also inveighed against the confidentiality rules<sup>8</sup> or expansive versions of the privilege doctrine.<sup>9</sup> The strongest of these attacks were a few decades ago when the rules were new,<sup>10</sup> and some of their best points provide a starting place for sections of the discussion that follows. None, to my knowledge, has attempted an economic analysis of the confidentiality rules as undertaken here: rethinking the rules in

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adversary system is essential because of the win/lose nature of the process which requires withholding information for strategic advantage.”).

<sup>7</sup> See *infra* Part II.D.

<sup>8</sup> See, e.g., David F. Chavkin, *Why Doesn't Anyone Care About Confidentiality? (And, What Message Does that Send to New Lawyers?)*, 25 GEO. J. LEGAL ETHICS 239, 264-65 (2012) (calling for amendments to Model Rule 1.6(b) to advance policy objective and adjust to the realities of practice); James E. Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another?*, 38 HASTINGS CONST. L.Q. 811, 823-24 (2011) (arguing for an exception to confidentiality rules to prevent the wrongful incarceration of an innocent third party); Jason Popp, *The Cost of Attorney-Client Confidentiality in Post 9/11 America*, 20 GEO. J. LEGAL ETHICS, 875, 882-84 (2007) (arguing for an amendment to Model Rule 1.6 to require disclosures of planned terrorist activities by clients).

<sup>9</sup> See, e.g., Notes and Comments, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962) [hereinafter *Functional Overlap*] (considering expansion of privilege to related professions and arguing against it). See generally Grace M. Giesel, *Upjohn Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV. 109 (2010) (arguing for an expansive privilege doctrine).

<sup>10</sup> See, e.g., Eric Paul Slotter & Anita Mae Sorensen, *Corporate Legal Ethics — An Empirical Study: The Model Rules, the Code of Professional Responsibility, and Counsel's Continuing Struggle Between Theory and Practice*, 8 J. CORP. L. 601, 622 (1983) (examining critiques about the impact of the Model Rules).

light of the Coase Theorem,<sup>11</sup> Coasean bargaining,<sup>12</sup> lemons effects,<sup>13</sup> and other externalities.<sup>14</sup> Nearly all the literature in this area in recent years has gone in the opposite direction — enthusiastically supporting the conventional view of confidentiality as being sacrosanct.<sup>15</sup>

Confidentiality rules are pointless from a Coasean perspective: clients and lawyers can easily bargain around the rules, wherever the defaults are set, and the transaction costs for such agreements are vanishingly small.<sup>16</sup> With the current defendants forbidding all disclosures, clients can (and do) authorize their lawyers to make disclosures. If the defendants were reverse and allowed disclosure, clients who place a premium on confidentiality could easily contract for it with a nondisclosure agreement. The confidentiality rules, in fact, provide a nice example of the Coase Theorem's point that legal rules are irrelevant when parties can easily bargain around the rules. This Article undertakes an economic analysis of the confidentiality rules.

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<sup>11</sup> Most law reviews simply cite Coase's entire article as the reference for the "Coase Theorem," as Coase does not actually use that moniker himself, but instead provides an extended argument for his idea encompassing the entire article. Coase argues that when the parties know the rule of law when they make their bargaining decisions, the final allocation of resources will be the same no matter how the legal rules would have resolved the issue. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 2-8 (1960); see also *Coltman v. Comm'r of Internal Revenue*, 980 F.2d 1134, 1137 (7th Cir. 1992) (applying a similar definition of the Theorem).

<sup>12</sup> For an excellent overview of the subsequent literature, see Daniel A. Farber, *Parody Lost/Pragmatism Regained: The Ironic History of the Coase Theorem*, 83 VA. L. REV. 397, 404-10 (1997).

<sup>13</sup> See George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488, 488-90 (1970) (describing the lemons effects by demonstrating that the presence of unidentifiable low-quality items in a market suppress the market prices for all similar items).

<sup>14</sup> See Steven L. Schwarcz, *The Limits of Lawyering: Legal Opinions in Structured Finance*, 84 TEX. L. REV. 1, 22-35 (2005) (discussing legal opinions, especially prepared for use by third parties, that create systemic externalities).

<sup>15</sup> See, e.g., Sande L. Buhai, *Confidentiality of Client Identity*, 2013 J. PROF. LAW. 195, 213 (arguing that the rules of confidentiality are fundamental to zealous representation and necessary to increase trust in the legal system); Alex DeLisi, *Employer Monitoring of Employee Email: Attorney-Client Privilege Should Attach to Communications that the Client Believed Were Confidential*, 81 FORDHAM L. REV. 3521, 3557 (2013) (arguing that the client's subjective expectation of confidentiality should be the dispositive factor in all cases); Anne Klinefelter, *When to Research Is to Reveal: The Growing Threat to Attorney and Client Confidentiality from Online Tracking*, 16 VA. J.L. & TECH. 1, 22-37 (2011) (warning against modern technology undermining confidentiality duties); Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477, 503-07 (2002) (arguing for robust, traditional confidentiality rules).

<sup>16</sup> See *infra* Part II.A.

Confidentiality rules for lawyers are destructive; the social costs of these rules outweigh the purported benefits, which are largely illusory. The most important confidentiality rule is Rule 1.6 of the ABA's Model Rules of Professional Conduct,<sup>17</sup> which furnishes the basis for most state confidentiality rules and the supervisory duties set forth in Model Rules 5.2–5.6. The following discussion will thus foreground Rule 1.6 — calling for its repeal or dilution — but the argument in this Article is against confidentiality rules in general. The argument stops short of attacking confidentiality's cousins in the rules of evidence — the privilege doctrine and the work product doctrine — because of the inherent differences between evidentiary rules and conduct rules.<sup>18</sup> Nevertheless, some of the arguments that follow would also be relevant to discussions about narrowing the application of the privilege doctrine.

In the absolute, client confidentiality is in tension with the other ethical rules for attorneys that mandate candor to the tribunal, fairness toward opponents and third parties, and integrity as a character trait of the lawyer.<sup>19</sup> Absolute confidentiality would be mutually exclusive with absolute honesty and fairness. Naturally, the ethical rules provide for specific trade-offs and compromises on each side, but favor client confidentiality over integrity most of the time. For example, the exceptions to the confidentiality rules in the ABA's Model Code are all permissive,<sup>20</sup> while the specific confidentiality exceptions to the rules of candor and fairness are nearly all mandatory<sup>21</sup> — a lawyer may break

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<sup>17</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 (2013).

<sup>18</sup> In addition, privilege is an ancient doctrine, while the confidentiality rules are newcomers by comparison, introduced on a broad scale only in the late 1960s and early 1970s. See CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.7.2, at 297 (1986) (describing the historical development of the rule). For discussion of how confidentiality rules are more expansive than the evidentiary privilege doctrine, see Buhai, *supra* note 15, at 205-10. Jeremy Bentham wrote an extended attack on the privilege doctrine in his day using some of the points raised in this article against confidentiality. See JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE 302-11 (1827) (attacking the attorney-client privilege).

<sup>19</sup> See *infra* Part I.B.

<sup>20</sup> See MODEL RULES R. 1.6(b). Even when a court holds that particular information is not privileged, a lawyer usually has an ethical requirement under the disciplinary rules to protect the information from disclosure in other contexts. See, e.g., *Newman v. State*, 863 A.2d 321, 331-32 (Md. 2004) (finding attorney-client privilege only protects communications between the client and the attorney; but confidentiality rule applies to all information relating to the representation); *Spratley v. State Farm Mut. Ins. Co.*, 78 P.3d 603, 608 n.2 (Utah 2003) (“[P]rivilege might be waived allowing compelled disclosure by an attorney while the duty of confidentiality is still in full force.”).

<sup>21</sup> See, e.g., MODEL RULES R. 8.1(b) (2013) (discussing bar admission and disciplinary matters); see also *id.* R. 3.3 cmt. 10 (2013); *id.* R. 4.1 cmt. 3 (2013).

confidences in certain extreme circumstances<sup>22</sup> but he *must* preserve confidences at the outer boundaries of the truthfulness rules.<sup>23</sup>

On a more general level, lawyer confidentiality interferes with transparency in our society, including transparency in government officials, financial institutions, and other power structures that affect our daily lives.<sup>24</sup> Even as transparency becomes an increasingly cherished value in our culture,<sup>25</sup> the legal profession clings to outdated norms of secrecy that seem to be vestiges of medieval class preservation.<sup>26</sup> Justice

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<sup>22</sup> See MODEL RULES R. 1.6(b) (listing seven narrow circumstances in which disclosures are permissible); see also *id.* R. 1.13(c)(2) (2013) (citing an additional exception that lawyers representing organizations whose directors will not heed warnings about subjecting the organization to serious legal liability).

<sup>23</sup> See, e.g., MODEL RULES R. 1.8(f)(3) (2013) (strictly applying Rule 1.6 to third-party payers, such as insurers); *id.* R. 1.13 cmt. 2 (“The lawyer may not disclose to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as otherwise permitted by Rule 1.6.”); *id.* R. 1.14(c) (2013) (lawyers representing clients who have diminished capacity); *id.* R. 2.3(c) (2013) (evaluations prepared for use by third parties); *id.* R. 2.3 cmt. 5 (“Information relating to an evaluation is protected by Rule 1.6.”); *id.* R. 3.3 cmt. 15 (“In connection with a request for permission to withdraw that is premised on a client’s misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.”); *id.* R. 4.1(b) (stating a lawyer shall not “fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.”); *id.* R. 5.7 cmt. 10 (2013) (stating a lawyer must take special care “to scrupulously adhere to the requirements of Rule 1.6 relating to disclosure of confidential information”); *id.* R. 8.1(b) (“[E]xcept that this rule does not require disclosure of information otherwise protected by Rule 1.6.”); *id.* R. 8.3(c) (2013) (“This Rule does not require disclosure of information otherwise protected by Rule 1.6.”).

<sup>24</sup> See generally WARREN BENNIS, DANIEL GOLEMAN & JAMES O’TOOLE, *TRANSPARENCY: HOW LEADERS CREATE A CULTURE OF CANDOR* 1-43 (2008) (emphasizing the importance of transparency for healthy institutional or corporate culture); *CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM* (Joseph W. Doherty, Robert T. Reville & Laura Zakaras eds., 2012) (arguing that recent trends in the legal system have been undermining transparency and therefore public trust in institutions); Tal Z. Zarsky, *Transparent Predictions*, 2013 U. ILL. L. REV. 1503, 1530-53 (2013) (arguing for greater transparency in the use of predictive coding and algorithms).

<sup>25</sup> See A. Michael Froomkin, *The Death of Privacy?*, 52 STAN. L. REV. 1461, 1539 (2000); Donald C. Langevoort, *The SEC, Retail Investors, and the Institutionalization of the Securities Markets*, 95 VA. L. REV. 1025, 1066 (2009); see also Joanna C. Schwartz, *A Dose of Reality for Medical Malpractice Reform*, 88 N.Y.U. L. REV. 1224, 1227 (2013); William H. Simon, *Transparency Is the Solution, Not the Problem: A Reply to Bruce Green*, 60 STAN. L. REV. 1673, 1683-84 (2008); cf. Miriam H. Baer, *Linkage and the Deterrence of Corporate Fraud*, 94 VA. L. REV. 1295, 1344 (2008) (noting there are “numerous arguments in favor of transparency”).

<sup>26</sup> See John C. Coffee, Jr., *Can Lawyers Wear Blinders? Gatekeepers and Third-Party Opinions*, 84 TEX. L. REV. 59, 62-63 (2005) (discussing the similarities medieval guilds



Brandeis famously quipped that sunlight is the best disinfectant.<sup>27</sup> Transparency brings accountability,<sup>28</sup> which in turn creates ex ante incentives to act righteously; transparency fosters trust and cooperation in society.<sup>29</sup> Secrecy does the opposite: it invites corruption, cloaks exploitation, and breeds suspicion between citizens.<sup>30</sup> The confidentiality rules undermine the public's confidence in the legal system (a severe problem for a democracy)<sup>31</sup> and produce unjust or erroneous outcomes in cases and transactions. In egregious cases, the confidentiality rules facilitate fraud, perjury, and acquittals for dangerous criminals; even worse, there are highly publicized cases in which lawyers knowingly allow the wrongful conviction and long-term incarceration of innocent people.<sup>32</sup> Far more evils result from secrecy than from transparency.

In light of the conflicts of interest rules, the confidentiality rules are mostly redundant. Confidentiality concerns are most legitimate when focused on preventing opportunism and exploitation of a client — using the clients' confidential information for the personal benefit of the lawyer or another client.<sup>33</sup> Betraying one's fiduciary duty to a client, however, is more properly the domain of the conflicts rules. The

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and bar associations both having sought to protect members from liability and competition); Richard A. Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1, 13 (1993) (comparing the modern legal profession to the medieval craft guilds); Harlan F. Stone, *The Public Influence of the Bar*, 48 HARV. L. REV. 1, 4-5 (1934) (discussing the traditional elite role of lawyers in society).

<sup>27</sup> LOUIS D. BRANDEIS, *OTHER PEOPLE'S MONEY AND HOW THE BANKERS USE IT* 62 (Richard M. Abrams ed., 1914).

<sup>28</sup> See Zarsky, *supra* note 24, at 1533 (“When discussing the specific objective that transparency might promote, the notion of accountability quickly comes to mind. Transparency renders government actors accountable for their actions and their outcome. Transparency is, at times, considered synonymous to accountability.”); see, e.g., Lynn M. LoPucki, *Court System Transparency*, 94 IOWA L. REV. 481, 528 (2009) (arguing for a requirement that “litigants . . . identify themselves by last four digits of [their] Social Security number[s] and year of birth to facilitate accountability”).

<sup>29</sup> See James D. Cox, *Coping in a Global Marketplace: Survival Strategies for a 75-Year-Old SEC*, 95 VA. L. REV. 941, 982 (2009); Inna Dexter, *Regulating the Regulators: The Need for More Guidelines on Prosecutorial Conduct in Corporate Investigations*, 20 GEO. J. LEGAL ETHICS 515, 530 (2007); Dalia Tsuk, *Corporations Without Labor: The Politics of Progressive Corporate Law*, 151 U. PA. L. REV. 1861, 1896-97 (2003); Zarsky, *supra* note 24, at 1538-40 (discussing the role of transparency in facilitating crowdsourcing).

<sup>30</sup> See *infra* Part I.C.

<sup>31</sup> See Zarsky, *supra* note 24, at 1530.

<sup>32</sup> See *infra* Part I.A.

<sup>33</sup> See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.7 cmts. 18, 31 (2013) (noting that “[w]hen representation of multiple clients in a single matter is undertaken, the information must include the implications of the common representation, including possible effects on loyalty, confidentiality and the attorney-client privilege and the advantages and risks involved”).

detailed conflicts rules, such as Model Rules 1.7, 1.8, 1.9, and 1.10, do the real work (instead of the confidentiality rules) in protecting clients from predatory practitioners. It is hard to imagine a scenario that would make client confidentiality necessary in which the conflicts rules would not already cover the situation and noted the client. Similarly, numerous evidentiary rules — not only privilege and work product doctrines, but also the inadmissibility of past crimes, irrelevant material, hearsay rules, and the Fifth Amendment — already prevent unduly prejudicial disclosures from influencing a judge or jury, making confidentiality rules superfluous.<sup>34</sup>

Natural market incentives for lawyers also make these rules redundant.<sup>35</sup> Litigators like to win, and transactional lawyers like to please their clients — in both cases, guarding the client's secrets serves the desired end. A rule requiring the conduct that people are inclined to choose anyway would be superfluous. Lawyers have plenty of personal and marketplace incentives to guard clients' confidential information and would do it without the rule.<sup>36</sup> The rules requiring candor and fairness are counter-instinctive, placing a check on the natural tendency for lawyers to take their zealous representation too far.<sup>37</sup> These rules are evidence, in fact, that the confidentiality rules are unnecessary. Rules should provide a check against some bad decisions we might otherwise make; confidentiality rules merely provide a rationalization for what lawyers would automatically feel inclined to do.

Even the premise for the confidential rules is a fiction. The standard justification for the rules is that the legal system completely depends on clients being able to trust their lawyers to keep secrets.<sup>38</sup> Without such trust, the argument goes, clients would hesitate to tell their lawyers the

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<sup>34</sup> See *infra* Part II.B.

<sup>35</sup> See Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 117 (1998) (“Lawyers know that harming a client to protect the superior interest of a third party will lead to the termination of the lawyer-client relationship, probable non-payment of fees, client bitterness and recrimination, and possible loss of repute with other lawyers and clients.”).

<sup>36</sup> See *infra* Part II.C–D.

<sup>37</sup> See *infra* Part II.A.

<sup>38</sup> See MODEL RULES R. 1.6 cmt. 2 (2013) (“A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct.”).

truth and then the lawyers could not provide effective representation.<sup>39</sup> Yet clients regularly lie to their lawyers or withhold relevant information, without crashing the entire legal system.<sup>40</sup> Many sophisticated lawyers abstain from questioning their client about certain matters, or otherwise avoid having their clients tell them the truth, to preserve possible deniability, avoid subconscious demotivation, and so on.<sup>41</sup> Most clients do not know or understand the confidentiality rules,<sup>42</sup> so it is unreasonable to talk of clients relying on the rules that clients do not know, rules on which they should not rely if they did know them.<sup>43</sup>

This Article takes a radical contrarian position and argues that we should abandon the confidentiality rules. I argue against Model Rule 1.6, as well as its fifty state counterparts; in doing so, I recognize this will be an unpopular suggestion,<sup>44</sup> unlikely to gain traction in the short term. In

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<sup>39</sup> See *id.*; Monroe H. Freedman, *Lawyer-Client Confidences and the Constitution*, 90 YALE L.J. 1486, 1492-95 (1981) (reviewing MARVIN E. FRANKEL, *PARTISAN JUSTICE* (1980)); see also Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1953-54 (1988).

<sup>40</sup> See DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 244-45 (5th ed. 2009) (“Public defenders report that many clients commonly lie and withhold information despite the privilege; indigent defendants often are unpersuaded that an appointed lawyer works for them and not the state. White collar defenders similarly report that clients are often unwilling to supply damaging facts even though they have no reason to question their counsel’s loyalty.”); Frederick Miller, “*If You Can’t Trust Your Lawyer . . . ?*,” 138 U. PA. L. REV. 785, 785 (1990) (“And, of course, clients lie to their lawyers.”); Harry I. Subin, *The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125, 152 (1987) (“[T]hat clients lie to their lawyers is well-known now, as the great volume of literature on client perjury reflects.”); Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1164 (1985) [hereinafter *The Lawyer as Superego*] (“It also is highly debatable whether the rule of confidentiality results in fuller disclosure than would occur without it. Lawyers have reported both client reluctance to tell the lawyer all, and client lying.”).

<sup>41</sup> See Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 380-83 (1989) [hereinafter *Rethinking Confidentiality*] (stating many lawyers never tell their clients about confidentiality or privilege rules, many clients misunderstand the nature and scope of the rules, and 70% of clients would have made the same disclosures regardless of the rules).

<sup>42</sup> See Cramton & Knowles, *supra* note 35, at 115.

<sup>43</sup> See *D’Amario v. United States*, 403 F. Supp. 2d 361, 373 (D.N.J. 2005) (finding defendant’s mistaken belief that attorney-client privilege and attorney’s attendant ethical duty of confidentiality would prevent disclosure of threat against federal judge made in a letter sent to attorney was not a legally feasible defense to charge of threatening federal judge); Cramton & Knowles, *supra* note 35, at 115-16; *Functional Overlap*, *supra* note 9, at 1232-34 (noting clients are generally unaware of attorney-client privilege and confidentiality rules, and thus do not base disclosure decisions on the rules).

<sup>44</sup> For example, my encouragement of occasional civil disobedience runs directly counter to the views set forth in W. Bradley Wendel, *Civil Obedience*, 104 COLUM. L.

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the meantime, I suggest that lawyers disregard the rule in a few cases, to break confidences even when forbidden to do so. Instead, lawyers should err on the side of disclosure in cases where the rules permit it. Contrary to the dire predictions of the rules' faithful adherents, I believe this could enhance, rather than hurt, the lawyer's professional reputation.

Part I explains the destructiveness of the confidentiality rules: first in terms of how they undermine the ethical rules for lawyers, and then in terms of undermining the public confidence in the legal system. The inquiry proceeds into a discussion of some extreme harms caused by these rules, such as wrongful convictions, as well as the general tendency for secrecy to foster corruption and transparency to foster accountability and trust. Part II turns from harms to the reasons the confidentiality rules are unnecessary and redundant. The analysis begins with Coasean bargaining and the irrelevance of default rules in this setting and introduces the concept of Coasean redundancy. The discussion then moves on to the overlap of the confidentiality rules with other ethical and evidentiary rules. The fact that the rules track the predisposition or existing incentives of lawyers also makes the confidentiality rules largely superfluous. Part II also attacks the premise of the confidentiality rules, which seems incongruous with reality for the reason sketched out above.

Normative proposals comprise Part III. Ideally, there are reasons to push for the repeal of the confidentiality rules, or at least broader adoption of the ABA's newer exceptions to confidentiality that help dilute the rule. In addition, this Article offers advice for individual lawyers to favor disclosure whenever permitted to do so, and even to ignore the rules under special circumstances.

## I. COSTS OF CONFIDENTIALITY

### A. Egregious Examples

In extreme cases (egregious though not necessarily rare), the confidentiality rules have resulted in horrific injustices, such as the long-term incarceration of innocent people and other erroneous verdicts. In 2008, *60 Minutes* brought national attention to the case of Alton Logan,<sup>45</sup> a man who spent twenty-six years in prison because two local public defenders refused to disclose that their own client, already

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REV. 363, 382-88 (2004) (insisting that lawyers should follow the rules rather than their own moral intuitions).

<sup>45</sup> See *60 Minutes: 26-Year Secret Kept Innocent Man in Prison* (CBS television broadcast Mar. 9, 2008), available at <http://www.cbsnews.com/news/26-year-secret-kept-innocent-man-in-prison>.

servicing two life sentences, had bragged to them about committing the murder.<sup>46</sup> The lawyers obtained their client's permission to disclose the facts only after his death; only then did Alton Logan obtain his release.<sup>47</sup> Similarly, Lee Wayne Hunt spent years incarcerated after a wrongful conviction because another lawyer refused to disclose that his client had confessed to the crime.<sup>48</sup> When the lawyer did come forward, after his client's death, the judge in the case reported the lawyer to state disciplinary authorities who unsurprisingly dismissed the complaint.<sup>49</sup>

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<sup>46</sup> See Andrew B. Ayers, *What If Legal Ethics Can't Be Reduced to a Maxim?*, 26 GEO. J. LEGAL ETHICS 1, 47-48 (2013); Bruce A. Green, *Ethically Representing a Lying Cooperator: Disclosure as the Nuclear Deterrent*, 7 OHIO ST. J. CRIM. L. 639, 645 n.23 (2010); Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391, 391 (2008); Louis M. Natali, Jr., *Should We Amend or Interpret the Attorney-Client Privilege to Allow for an Innocence Exception?*, 37 AM. J. TRIAL ADVOC. 93, 95-97 (2013); Inbal Hasbani, Comment, *When the Law Preserves Injustice: Issues Raised by a Wrongful Incarceration Exception to Attorney-Client Confidentiality*, 100 J. CRIM. L. & CRIMINOLOGY 277, 278 (2010).

<sup>47</sup> See Ayers, *supra* note 46, at 49 ("Logan was finally free, at the age of 54, after 26 years in prison."); Moliterno, *supra* note 8, at 818-19 (describing in detail the procedural measures taken to reopen Logan's case and obtain his release); Natali, *supra* note 46, at 97 (describing Logan's eventual release from prison); Susan Poll-Klaessy, *The Role of Attorney Ethics and Witness Misidentification in the 26 Year Incarceration of an Innocent Man*, 14 PUB. INT. L. REP. 25, 26 (2008) (stating Logan's eventual release); Harold J. Winston, *Learning from Alton Logan*, 2 DEPAUL J. FOR SOC. JUST. 173, 186 (2009) (describing Logan's eventual release); Hasbani, *supra* note 46, at 278 (describing Logan's eventual release from prison).

<sup>48</sup> See Miller, *supra* note 46, at 391-92; Natali, *supra* note 46, at 97-99. See generally Hasbani, *supra* note 46, at 279 (providing a succinct summary, including the dismissal of the disciplinary charges by the North Carolina bar). Similarly, Staple Hughes, a North Carolina lawyer, revealed his client's confession in 2004, hoping to free Lee Wayne Hunt from his life sentence in prison. See *id.* Hughes claimed that twenty-two years earlier, his now-dead client confessed that he acted alone in committing a double murder for which another man, Lee Wayne Hunt, was serving a life sentence. See *id.* Hughes claimed that after his own imprisoned client died, he felt it was "ethically permissible and morally imperative" that he come forward with the exonerating information. *Id.* The law, however, binds attorneys to remain silent even after their clients' deaths, and Hughes did not receive his client's consent to reveal the confidential information. See *id.* Judge Jack Thompson of the Cumberland County Superior Court in Fayetteville refused to consider Hughes' testimony during a hearing in 2007 in response to Hunt's request for a new trial, claiming, "Mr. Hughes has committed professional misconduct." *Id.* Although Hughes was referred to the North Carolina Bar for violating attorney-client privilege, the complaint was dismissed in January 2008 in a confidential decision. See *id.* Meanwhile, Lee Wayne Hunt remains in jail despite the apparently exonerating information. *Id.*

<sup>49</sup> See Miller, *supra* note 46, at 392; Natali, *supra* note 46, at 99; Hasbani, *supra* note 46, at 279.

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It seems likely that the Illinois State Bar Association could have done the same thing in the Alton Logan case, even if the lawyers had not been too cowardly to risk discipline in order to save an innocent man from spending decades in prison. It would be a public relations nightmare for a state bar to discipline lawyers for what most would consider a heroic, or at least virtuous, deed. If they had disciplined them, it would probably have been a token reprimand, which makes the lawyers' trepidation about disclosing the truth hard to understand. In the almost unimaginable case that the Illinois bar would have disbarred the lawyers for saving Alton Logan, it still would have been a mere inconvenience compared to what Logan suffered because of their silence. Yet, the lawyers hid behind the confidentiality rules, claiming (absurdly) that they had no choice. It is ironic that public defenders, who spend their careers arguing that the law is subject to interpretation and should not apply to their individual clients, would suddenly treat the legal ethical rules as some kind of inviolable moral absolute. The potential harm to their own client (the actual murderer, not Alton Logan) was minimal, as he was already serving two life sentences.

These are recent cases, but the problem has been going on for some time — at least since the advent of the confidentiality rules in the late 1960s and early 1970s,<sup>50</sup> and probably to a lesser extent in previous eras under the aegis of the attorney-client privilege. Colin Miller describes a case from the nascent days of the confidentiality rules that involved future Presidential candidate John Kerry:

In 1967, [George] Reissfelder and William Sullivan were convicted of first degree murder and armed robbery in connection with a payroll holdup in Boston. Years later, as Sullivan was on his deathbed, he confessed to a jailhouse priest that Reissfelder was not involved in the holdup. Reissfelder's court-appointed attorney, Roanne Sragow, and her associate, future Presidential candidate John Kerry, later uncovered that Sullivan previously made a similar confession to his attorney, who felt duty bound to keep silent for over a decade. Indeed, even after Sragow and Kerry moved to release Sullivan's former attorney from his obligation of confidentiality, the judge denied the motion, and it took a waiver from Sullivan's family before

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<sup>50</sup> See WOLFRAM, *supra* note 18, at 297 (explaining how the confidentiality-secrecy rules appeared as an abrupt change in the 1969 Code, greatly expanding on traditional privilege doctrine, and how subsequent revisions expanded the scope of the confidentiality rules even further and eliminated some exceptions).

Reissfelder was freed from the cell at Walpole State Prison that housed him for fifteen years.<sup>51</sup>

Other commentators have used such examples to argue in favor of an “innocence” or “incarceration” exception to the confidentiality rules,<sup>52</sup> which Massachusetts<sup>53</sup> and Alaska<sup>54</sup> have already adopted, and which the (non-binding) Restatement of Lawyers adopted in its comments.<sup>55</sup> However, even these three path breakers make disclosure only permissive and the other 48 states still *prohibit* disclosing client information even to keep an innocent man from a wrongful conviction and incarceration.<sup>56</sup>

One could argue that the current — permissive — exception to Rule 1.6 for serious bodily injury should cover incarceration,<sup>57</sup> given that incarceration means a high likelihood of suffering a physical assault in prison.<sup>58</sup> At least one commentator, however, has argued that the serious injury exception to Rule 1.6 could not, in fact, apply to incarceration.<sup>59</sup> In addition, even though a committee of the ABA Criminal Justice Section submitted a proposal in 2008 to add another

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<sup>51</sup> Miller, *supra* note 46, at 392.

<sup>52</sup> See Natali, *supra* note 46, at 124-27 (advocating for amendments to the ethical rules); Hasbani, *supra* note at 46, 288-92 (encouraging changes to the ethical rules). See generally Miller, *supra* note 46, (discussing the proposition for amending confidentiality Model Rule 1.6(b)(1) to allow for a wrongful incarceration/execution exception).

<sup>53</sup> MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2009) (allowing disclosures “to prevent the wrongful execution or incarceration of another”).

<sup>54</sup> ALASKA RULES OF PROF'L CONDUCT R. 1.6(b)(1)(C) (2009) (allowing disclosures “to prevent reasonably certain . . . wrongful execution or incarceration of another”).

<sup>55</sup> RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 cmt. c (2000) (interpreting “serious bodily harm” to include “the consequences of events such as imprisonment for a substantial period”); see also Green, *supra* note 46, at 645 n.23 (quoting RESTATEMENT § 66 cmt. c).

<sup>56</sup> See *infra* Part III.A and sources cited therein.

<sup>57</sup> See Miller, *supra* note 46, at 393.

<sup>58</sup> See *id.* at 397 (“First, in comparison to the non-incarcerated, inmates face an increased risk of physical violence based upon factors such as the concentration of violent individuals, overcrowding, prison culture, the inability of prisoners to physically separate themselves, the prevalence of drug use, and prison guard brutality.”); see also Elaine Ellis, *The Cost of Freedom: Tax Treatment of Post-Exoneration Compensation Awards*, 65 TAX LAW. 119, 129-30 (2011) (discussing the high rate of injuries and illness within prisons, and lasting deleterious health effects of incarceration even after release); Craig Haney, *Psychology and the Limits to Prison Pain: Confronting the Coming Crisis in Eighth Amendment Law*, 3 PSYCHOL. PUB. POL'Y & L. 499, 533-34 (1997) (discussing the high statistical incidence of physical and mental injuries that result from incarceration); Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 462-65 (1993) (citing studies showing the high incidence of physical attacks and rapes within prisons).

<sup>59</sup> See Snyder, *supra* note 15, at 506.

exception to Model Rule 1.6 for disclosing client confidences to exonerate a third party,<sup>60</sup> the National Association of Criminal Defense Lawyers (“NACDL”) attacked the proposal,<sup>61</sup> insisting that confidentiality “is too important to justify yet another exception.”<sup>62</sup>

The problem is that lawyers are hiding behind Rule 1.6 while doing something immoral — allowing a major injustice to occur: the loss of another individual’s life, rights, or freedom. The book of Leviticus, held as scripture by Jews and Christians alike, strictly forbids keeping silent when one holds information that could rescue an innocent person from a wrongful conviction.<sup>63</sup> Even from a non-religious, strictly utilitarian ethical viewpoint, nondisclosure in such egregious cases is inexcusable. Lawyers should disregard the confidentiality rules in such cases.<sup>64</sup> Legislatures or state bars should amend the rules to require (not merely permit) disclosure in such situations. Even in jurisdictions with the old rules, disciplinary authorities should simply refuse to punish lawyers who do the noble thing in these situations. The decision of the North Carolina State Bar in Hughes’ case,<sup>65</sup> where the lawyer breached his deceased client’s confidence to free an innocent man from prison, is commendable. This should serve as an example to other state disciplinary bodies and courts.<sup>66</sup>

The destructive power of the confidentiality rules does not confine itself to wrongful imprisonment of innocent third parties. Lawyers sometimes

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<sup>60</sup> See Green, *supra* note 46, at 645 & n.23 (citing Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, CRIM. JUST., Summer 2008, at 46, 46-47).

<sup>61</sup> See *id.*

<sup>62</sup> *Id.*

<sup>63</sup> Leviticus 5:4 (New International) (“If anyone sins because they do not speak up when they hear a public charge to testify regarding something they have seen or learned about, they will be held responsible.”).

<sup>64</sup> See Robert M. Palumbos, *Within Each Lawyer’s Conscience a Touchstone: Law, Morality, and Attorney Civil Disobedience*, 153 U. PA. L. REV. 1057, 1092-94 (2005).

<sup>65</sup> See Hasbani, *supra* note 46, at 279.

<sup>66</sup> In *State v. Macumber (Macumber I)*, 544 P.2d 1084, 1086-87 (Ariz. 1976), a client confessed on his deathbed to his lawyers that he had committed some murders for which another innocent person was then standing trial. The lawyers attempted to do the right thing — to testify for the wrongly accused man about this confession — but the prosecutor in the case invoked privilege on behalf of the lawyers’ deceased client, and the judge agreed. See *id.* The Arizona Supreme Court affirmed. See *State v. Macumber (Macumber II)*, 119 Ariz. 516, 524 (Ariz. 1978). The innocent accused, Macumber, received a guilty verdict, but the appellate courts found other grounds to reverse his conviction. See *Macumber I*, 544 P.2d at 1087. Although this is a privilege case, and therefore only tangentially related to the confidentiality discussion in this Article, it illustrates the unfortunate fanaticism of many in the legal profession and judiciary for compelling lawyers to preserve client secrets, regardless of the consequences for others or the lack of injury to the client. For more discussion, see RHODE & LUBAN, *supra* note 40, at 248-49.



withhold medical information in tort cases about life-threatening conditions afflicting opposing parties, of which the victim remains unaware. A notorious example is the case of *Spaulding v. Zimmerman*,<sup>67</sup> in which a victim in a traffic accident suffered a life-threatening aneurysm of the aorta,<sup>68</sup> which his treating physicians overlooked but which the defendant's expert, a physician who also examined the victim, had detected.<sup>69</sup> The physician who detected the injury informed defense counsel in the case but no one else, including the victim, and the lawyers then kept this information secret, as they thought it would be adverse to the defendant to divulge it.<sup>70</sup> The lawyers also did not inform their own client (the defendant) about the plaintiff's latent injury, so the client had no chance to participate in the decision about whether to inform the victim.<sup>71</sup> The case settled with the plaintiff receiving a very small sum.<sup>72</sup> The victim, Spaulding, lived for two years not knowing that he had this serious condition.<sup>73</sup> Eventually, during a medical examination for serving in the military reserves, doctors discovered the aortic aneurysm and performed immediate surgery. Spaulding sued to reopen his earlier settled accident case.<sup>74</sup> The court allowed the reopening of the case for the new evidence on damages, but simultaneously held that the lawyers had no ethical duty to disclose the information.<sup>75</sup> Although this case occurred in the 1950s, the current version of Rule 1.6 would produce the same result — lawyers would have to violate the rule in order to disclose a medical report to an adverse party, even if the contents of the undisclosed report were a matter of life and death for the other person.<sup>76</sup> Similarly, lawyers in the 1970s representing the manufacturer of the defective Dalkon Shield IUD, A.H. Robins, concealed information from consumers and from the Food and Drug Administration about the dangerousness of the devices.<sup>77</sup>

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<sup>67</sup> 116 N.W.2d 704, 707-08 (Minn. 1962). Professor David Luban has called this "an easy case" in which lawyers should disregard the rule and disclose the information. See David Luban, *Misplaced Fidelity*, 90 TEX. L. REV. 673, 689 (2012).

<sup>68</sup> Cramton & Knowles, *supra* note 35, at 64.

<sup>69</sup> See *id.* at 64.

<sup>70</sup> See *id.* at 69-70.

<sup>71</sup> See *id.*

<sup>72</sup> See *id.* at 70.

<sup>73</sup> See *id.* at 71.

<sup>74</sup> See *id.*

<sup>75</sup> See *Spaulding v. Zimmerman*, 116 N.W.2d 704, 708-09 (Minn. 1962); Cramton & Knowles, *supra* note 35, at 71-72.

<sup>76</sup> See Cramton & Knowles, *supra* note 35, at 80-81.

<sup>77</sup> See RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 97-100 (1999).

This nondisclosure put the health of thousands of women at risk.<sup>78</sup> The lawyers rationalized their complicity using privilege and the confidentiality rules.<sup>79</sup>

### B. Undermining the Other Rules

It is commonplace to have conflicts of laws between jurisdictions, between state and federal regulations, or even between separate acts of a legislature at different times and addressing different subjects. More unusual is having a contradiction at the core of a single code of rules, while at the same time, addressing the same subject. Yet, such a contradiction lies at the heart of Rules of Professional Conduct, starting with its earlier versions the 1909 “canons” which then became the Code and eventually today’s Model Rules.<sup>80</sup> Many of the rules mandate candor,<sup>81</sup> integrity,<sup>82</sup> truthfulness,<sup>83</sup> and fairness<sup>84</sup> and include some affirmative duties to disclose the truth or correct misperceptions. At the same time, the Model Rules require lawyers to guard client confidences<sup>85</sup> and to monitor employees and outside contractors to ensure that client information be kept secret.<sup>86</sup> Observing that there is a tension here is nothing new, but calling for an end to the tension is apparently a novel suggestion in the academic literature. The Rules and attendant Comments are themselves self-conscious of the tension — there are frequent cross-references to the primary confidentiality rule (Rule 1.6), usually mentioning that the rule sets the outer bounds for the truthfulness rules or trumps the disclosure rules.

The following discussion in this subsection argues that robust application of the confidentiality rules undermines the truth rules and thwarts the policy goals behind them. Any conflict of laws or rules

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<sup>78</sup> See *id.*

<sup>79</sup> See *id.*

<sup>80</sup> See WOLFRAM, *supra* note 18, at 297-98.

<sup>81</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.3 (2013) (duty of candor to tribunal).

<sup>82</sup> See *id.* R. 7.6 (2013) (political contributions to obtain appointments by judges); *id.* R. 8.1 (2013) (bar admission); *id.* R. 8.2 (2013) (judicial officials).

<sup>83</sup> See MODEL RULES R. 4.1 (2013) (truthfulness in statements to others); see also *id.* R. 2.3 (2013) (evaluations for use by third parties); *id.* R. 3.4(b) (2013) (falsifying evidence); *id.* R. 7.1 (2013) (advertising); *id.* R. 7.3 cmt. 6 (2013) (prohibiting any form of solicitation involving false or misleading information).

<sup>84</sup> See MODEL RULES R. 3.4 (fairness to opposing party and counsel); *id.* R. 3.6 (trial publicity).

<sup>85</sup> See MODEL RULES R. 1.6 (2013) (mandating confidentiality).

<sup>86</sup> See, e.g., *id.* R. 5.7 cmt. 10 (2013) (outside service providers); Kathleen Maher, *Screen Test: Nevada Is the Latest State to Let Firms Screen Nonlawyers to Avoid Disqualification*, A.B.A. J., July 2004, at 28, 28 (discussing confidentiality rules for paralegals and other support staff).

requires lawyers to attempt some sort of harmonization, but the harmonization nearly always favors one rule over the other to varying extents.<sup>87</sup> The confidentiality rules have an overall effect of forcing lawyers to diminish the rules of candor, fairness, and integrity when the duties are in tension.<sup>88</sup> Interpreting the confidentiality rules broadly necessarily means construing the candor, fairness, and integrity rules narrowly.<sup>89</sup> A lawyer with unfavorable confidential client information will disclose to a tribunal no more than absolutely or explicitly required, even under a court order.<sup>90</sup>

Apart from information that would already come under the anti-prejudice rules of evidence, the suppression of information necessarily reduces the accuracy of a decision-maker such as a tribunal.<sup>91</sup> The rules of evidence deem certain categories of information inadmissible because they could be unduly prejudicial, that is, likely to mislead, confuse, or distort the analysis of the decision maker.<sup>92</sup> Some confidential

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<sup>87</sup> See, e.g., Douglas Glen Whitman, *Evolution of the Common Law and the Emergence of Compromise*, 29 J. LEGAL STUD. 753, 756-61 (2000) (explaining the inherent necessity of favoring one rule over the other in resolving conflicts); see also Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961, 1117 (2001) [hereinafter *Fairness*] (mentioning the tendency for policy objectives to lead courts to favor one rule over another).

<sup>88</sup> See, e.g., Stuart Watt, *Confidentiality Under the Washington Rules of Professional Conduct*, 61 WASH. L. REV. 913, 914 (1986) (“The lawyer’s duty of confidentiality under Rule 1.6 limits other ethical duties of the lawyer under the [ethical rules].”).

<sup>89</sup> See *id.*

<sup>90</sup> See MODEL RULES R. 1.6 cmt. 16 (“Paragraph (b) permits disclosure only to the extent the lawyer reasonably believes the disclosure is necessary to accomplish one of the purposes specified.”).

<sup>91</sup> See Louis Kaplow & Steven Shavell, *Accuracy in the Determination of Liability*, 37 J.L. & ECON. 1, 12-13 (1994) (discussing inherent tradeoffs between accuracy and fact suppression).

<sup>92</sup> Federal Evidence Rule 403 serves as a safeguard against unduly prejudicial evidence: “The court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.” FED. R. EVID. 403; see *Sprint/United Mgmt. Co. v. Mendelsohn*, 552 U.S. 379, 384 (2008) (“This is particularly true with respect to Rule 403 since it requires an ‘on-the-spot balancing of probative value and prejudice, potentially to exclude as unduly prejudicial some evidence that already has been found to be factually relevant.’”); *United States v. Schatzle*, 901 F.2d 252, 257 (2d Cir. 1990) (noting that under the Federal Rules of Evidence “a district court may exclude ultimate issue testimony . . . when it may be unduly prejudicial”); see also Linda J. Demaine, *In Search of an Anti-Elephant: Confronting the Human Inability to Forget Inadmissible Evidence*, 16 GEO. MASON L. REV. 99, 130-32 (2010) (discussing the influence of unduly “prejudicial” evidence); Joan L. Larsen, *Of Propensity, Prejudice, and Plain Meaning: The Accused’s Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404 (B)*, 87 NW. U. L. REV. 651, 653 (1993) (arguing

information would fall under such evidentiary rules and be inadmissible, but much suppressed by the confidentiality rules would be material, relevant, and helpful in producing accurate results.<sup>93</sup>

Admittedly, Rule 1.6(b)(6) contains an exception for explicit orders of disclosure from a tribunal,<sup>94</sup> but this exception places the burden on the tribunal to issue the order and risk a dilatory interlocutory appeal.<sup>95</sup> Judges who are convinced of the absolute value of lawyer confidentiality will use disclosure orders sparingly, if at all. One normative application of this Article would be that judges should issue such orders more freely, if indeed the confidentiality rules are overrated.<sup>96</sup>

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that “the prohibition on the use of specific acts evidence codified in Rule 404(b) was intended only to protect the accused from the undue prejudicial effects of specific acts evidence offered by the prosecution”); Elijah Lawrence, *Victim Opinion Statements: Providing Justice for Grieving Families*, 12 J.L. & FAM. STUD. 511, 521-22 (2010) (discussing restrictions on undue prejudicial evidence); Jody Lyneé Madeira, *Lashing Reason to the Mast: Understanding Judicial Constraints on Emotion in Personal Injury Litigation*, 40 UC DAVIS L. REV. 137, 147 (2006) (discussing “the rubric of evidentiary restrictions on undue prejudicial materials”); Michael M. Martin, *Inherent Judicial Power: Flexibility Congress Did Not Write into the Federal Rules of Evidence*, 57 TEX. L. REV. 167, 178 (1979) (discussing federal rules about prejudicial evidence); Miguel A. Méndez, *Crawford v. Washington: A Critique*, 57 STAN. L. REV. 569, 570 (2004) (mentioning the statutory ban on prejudicial evidence); Mary Mikva, *An Indelicate Balance: Rule 403 of the Federal Rules of Evidence*, 30 LITIG. 36, 36 (2003) (discussing suppression of prejudicial evidence from litigators’ standpoint); Cylinda C. Parga, *Legal and Scientific Issues Surrounding Victim Recantation in Child Sexual Abuse Cases*, 24 GA. ST. U. L. REV. 779, 794-99 (2008) (discussing federal evidentiary rules against evidence that is undue prejudicial); L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 FORDHAM L. REV. 1707, 1714 (2007) (discussing evidentiary rules accounting for undue prejudicial evidence); Joseph Spadola, *An Ad Hoc Rationalization of Employer Wrongdoing: The Dangers of the After-Acquired Evidence Defense*, 102 CALIF. L. REV. 691, 722 (2014) (discussing the “unduly prejudicial” standard in the rules of evidence); Michael S. Vitale, *Damaged Goods: Why, in Light of the Supreme Court’s Recent Punitive Damages Jurisprudence, Congress Must Amend the Federal Rules of Evidence*, 58 VAND. L. REV. 1405, 1428-33 (2005) (discussing the “unduly prejudicial” standard in the rules of evidence).

<sup>93</sup> See ROBERT P. BURNS, *A THEORY OF THE TRIAL* 84 (1999) (noting that the “lawyer’s duty of confidentiality goes far beyond the attorney-client privilege”).

<sup>94</sup> See MODEL RULES R. 1.6(b)(6).

<sup>95</sup> The official comment to this exception actually requires the lawyer to object to the order (if nonfrivolous grounds exist for an objection) and to confer with the client about appealing the order. *Id.* R. 1.6 cmt. 15. (“A lawyer may be ordered to reveal information relating to the representation of a client by a court or by another tribunal or governmental entity claiming authority pursuant to other law to compel the disclosure. Absent informed consent of the client to do otherwise, the lawyer should assert on behalf of the client all nonfrivolous claims that the order is not authorized by other law or that the information sought is protected against disclosure by the attorney-client privilege or other applicable law. In the event of an adverse ruling, the lawyer must consult with the client about the possibility of appeal.”).

<sup>96</sup> See Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*,

A similar undermining effect applies to the fairness and integrity rules. The fairness rules require truthfulness toward opposing parties, witnesses, and third parties,<sup>97</sup> but this duty clashes with the duty of confidentiality. The harmonization of the duties takes the form of forbidding lies or half-truths designed to create misunderstandings (and some affirmative duties to correct such misunderstandings).<sup>98</sup> Harmonization also takes the form of withholding information that would help uninformed third parties make better decisions.<sup>99</sup> The rules purportedly show concern for reliance by others on correct information, but ignore reliance that regularly occurs on uninformed optimism or misinformation from other sources.<sup>100</sup> I argue that confidentiality rules generally leave a lawyer to adopt a minimalist, narrow construction of the fairness and integrity rules.

Arguably, the confidentiality rules also dilute the candor, fairness, and integrity rules due to the asymmetric strength of the exceptions to each. Where the candor, fairness, and integrity rules have exceptions allowing lawyers to preserve client confidences or adhere to Rule 1.6, the exceptions are nearly absolute, trumping the regular duty of truthfulness. Conversely, the few exceptions to confidentiality are mostly narrow and persuasive.

For example, the main fairness-truthfulness rule, Rule 4.1 (“Truthfulness in Statements to Others”), concludes with a caveat that Rule 1.6 trumps the duty of truthfulness and fairness to others:

In the course of representing a client a lawyer shall not knowingly: (a) make a false statement of material fact or law to a

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105 HARV. L. REV. 427, 500-01 (1991) (“Thus, unless strong evidence exists that a litigant did not rely on the existence of a protective order during discovery (for example, when the party continued to resist reasonable discovery requests) or that no legitimate interest exists in maintaining confidentiality, the balancing of the competing values that led the initial trial court to issue the order should not be undermined in a later proceeding.”).

<sup>97</sup> See MODEL RULES R. 3.4(a)–(b) (2013) (fairness to opposing party and counsel); *id.* R. 4.1 (2013) (truthfulness in statements to others).

<sup>98</sup> See, e.g., *id.* R. 4.3 (2013) (“When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.”); see also *id.* R. 8.1 cmt. 1 (2013) (“Paragraph (b) of this Rule also requires correction of any prior misstatement in the matter that the applicant or lawyer may have made and affirmative clarification of any misunderstanding on the part of the admissions or disciplinary authority of which the person involved becomes aware.”).

<sup>99</sup> See MODEL RULES R. 4.1 cmt. 2 (“Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are ordinarily in this category, and so is the existence of an undisclosed principal except where nondisclosure of the principal would constitute fraud.”).

<sup>100</sup> See generally MODEL RULES (2013) (containing no provisions that address these problems).

third person; or (b) fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.<sup>101</sup>

The accompanying comment emphasizes this point with regard to preventing fraud: “If the lawyer can avoid assisting a client’s crime or fraud only by disclosing this information, then under paragraph (b) the lawyer is required to do so, unless the disclosure is prohibited by Rule 1.6.”<sup>102</sup> James Alfini has described how this huge caveat in the comment to Rule 4.1 actually came from Professor James White at the University of Michigan.<sup>103</sup> The Kutak Commission, which had originally worked on revisions to Rule 4.1, had drafted an absolute truthfulness requirement for bargaining in the rule, but Professor White’s “caveat emptor” approach to bargaining carried the day instead.<sup>104</sup>

Similarly, the official Comments to Rule 3.3 contain an exception by which the duty of candor yields to Rule 1.6:

In connection with a request for permission to withdraw that is premised on a client’s misconduct, a lawyer may reveal information relating to the representation only to the extent reasonably necessary to comply with this Rule or as otherwise permitted by Rule 1.6.<sup>105</sup>

The same is true for the fairness and integrity rules. For example, in the fairness rule regarding former judges working as mediators (Rule 1.12), the official comments note that even though the mediator may not have information about the parties that would fall under Rule 1.6, they still owe 1.6-like confidentiality for any information that they actually obtain.<sup>106</sup> Similarly, Rule 2.1, a fairness-integrity rule governing evaluations for reliance by third parties, includes an exception that says Rule 1.6 trumps 2.1’s provisions except where there is client authorization,<sup>107</sup> which is the boundary of Rule 1.6 already.

In the candor rule for lawyers representing organizations (Rule 1.13), the stated exception to Rule 1.6 for disclosures to save the corporation

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<sup>101</sup> *Id.* R. 4.1.

<sup>102</sup> *Id.* R. 4.1 cmt. 3.

<sup>103</sup> See James J. Alfini, *Settlement Ethics and Lawyering in ADR Proceedings: A Proposal to Revise Rule 4.1*, 19 N. ILL. U. L. REV. 255, 266-68 (1999).

<sup>104</sup> See *id.*; see also James Alfini, *E2K Leaves Mediation in an Ethics “Black Hole,”* DISP. RESOL. MAG., Spring 2001, at 3, 7.

<sup>105</sup> MODEL RULES R. 3.3 cmt 15 (2013).

<sup>106</sup> See *id.* R. 1.12 cmt. 3 (2013).

<sup>107</sup> See *id.* R. 2.3(c) (2013) (“Except as disclosure is authorized in connection with a report of an evaluation, information relating to the evaluation is otherwise protected by Rule 1.6.”).

from self-destruction by its managers has a narrowing provision: “but only if and to the extent the lawyer reasonably believes necessary to prevent substantial injury to the organization.”<sup>108</sup> The comments to Rule 1.13 go further and instruct lawyers to favor the confidentiality rules over the disclosure requirements in close cases.<sup>109</sup> A later comment seems to say simultaneously that Rule 1.13(c) is an additional exception to Rule 1.6, but also that the exception is merely redundant of the exceptions already found in Rule 1.6:

Paragraph (c) of this Rule supplements Rule 1.6(b) by providing an additional basis upon which the lawyer may reveal information relating to the representation, but does not modify, restrict, or limit the provisions of Rule 1.6(b)(1)–(6) . . . If the lawyer’s services are being used by an organization to further a crime or fraud by the organization, Rules 1.6(b)(2) and 1.6(b)(3) may permit the lawyer to disclose confidential information. In such circumstances Rule 1.2(d) may also be applicable, in which event, withdrawal from the representation under Rule 1.16(a)(1) may be required.<sup>110</sup>

The candor-to-the-tribunal rules embodied in Rule 3.3 have limiting commentary requiring “actual knowledge,” merely permitting disclosure for any level of confidence below 100%:

Because of the special protections historically provided criminal defendants, however, this Rule does not permit a lawyer to refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client’s decision to testify.<sup>111</sup>

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<sup>108</sup> *Id.* R. 1.13(c)(2) (2013).

<sup>109</sup> *See id.* R. 1.13 cmt. 2 (“When one of the constituents of an organizational client communicates with the organization’s lawyer in that person’s organizational capacity, *the communication is protected by Rule 1.6*. Thus, by way of example, if an organizational client requests its lawyer to investigate allegations of wrongdoing, interviews made in the course of that investigation between the lawyer and the client’s employees or other constituents *are covered by Rule 1.6*. This does not mean, however, that constituents of an organizational client are the clients of the lawyer. The lawyer *may not disclose* to such constituents information relating to the representation except for disclosures explicitly or impliedly authorized by the organizational client in order to carry out the representation or as *otherwise permitted by Rule 1.6*.” (emphasis added)).

<sup>110</sup> *Id.* R. 1.13 cmt. 6.

<sup>111</sup> *Id.* R. 3.3 cmt. 9 (2013).

The main integrity rule for lawyers is Rule 8.1, pertaining to bar admission and disciplinary matters.<sup>112</sup> Here again, there is an exception that gives confidentiality supremacy over integrity.<sup>113</sup> This applies to lawyers or law professors writing recommendation letters for graduates seeking bar admission, and to lawyers who represent others in disciplinary hearings.<sup>114</sup> Along the same lines, a subsequent integrity rule, Rule 8.3 (mandating reporting of misconduct) explicitly states that Rule 1.6 trumps the duties of this integrity rule.<sup>115</sup>

Rule 1.14(c) includes another apparent exception to Rule 1.6 for clients with diminished capacity who obviously need protective action,<sup>116</sup> but then adds narrowing language: “but only to the extent reasonably necessary to protect the client’s interests.”<sup>117</sup> Somewhat remarkably, Rule 1.6 is the only rule (along with its corollary within Rule 1.18) that receives specific mention for emphasis in the official Preamble to the American Bar Association’s Model Rules of Professional Conduct (“MRPC”).<sup>118</sup>

Even the few delineated exceptions to Rule 1.6 are subject to equivocation and narrowing in the official comments. For example, the seemingly significant “other law” exception to Rule 1.6(b)(6) has an associated comment that hedges with the statement: “Whether such a law supersedes Rule 1.6 is a question of law beyond the scope of these Rules.”<sup>119</sup> The asymmetry is also evident in the exceptions to Rule 1.6 for knowledge that the client will kill or seriously injure another, or where the lawyer knows the client is using the lawyer’s services to commit crimes:

- (b) A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
  - (1) to prevent reasonably certain death or substantial bodily harm;
  - (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial

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<sup>112</sup> See *id.* R. 8.1 (2013) (“Bar Admission and Disciplinary Matters”).

<sup>113</sup> *Id.* R. 8.1(b) (“[E]xcept that this rule does not require disclosure of information otherwise protected by Rule 1.6.”).

<sup>114</sup> See *id.* R. 8.3 cmt. 3 (2013).

<sup>115</sup> *Id.* R. 8.3(c) (“This Rule does not require disclosure of information otherwise protected by Rule 1.6.”). The associated comments emphasize the point: “A report about misconduct is not required where it would involve violation of Rule 1.6.” *Id.* R. 8.3 cmt. 2.

<sup>116</sup> See *id.* R. 1.14(c) (2014).

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* pmb. para. 17 (2013).

<sup>119</sup> *Id.* R. 1.6 cmt. 12 (2013).



interests or property of another and in furtherance of which the client has used or is using the lawyer's services . . . .<sup>120</sup>

Note that these exceptions are merely permissive.<sup>121</sup> In other words, a lawyer may know (in detail) that his client has plans to commit a murder, rape, terrorism, or other brutal act of violence and, under Rule 1.6, still has no duty to disclose the information, take preventative measures, or warn the authorities.<sup>122</sup> The harm must be “reasonably certain”<sup>123</sup> — Rule 1.6(b) does not permit disclosure, for example, if the lawyer thinks there is a 50% likelihood that the client will fail in his attempt at the crime.<sup>124</sup> Nearly as troubling is the milquetoast exception in 1.6(b)(2): when a lawyer has actual knowledge that a client intends to commit a nonviolent crime or fraud, the confidentiality rule enshrined in Rule 1.6 does not permit disclosure *unless the client is actually using the lawyer's services*.<sup>125</sup> In other words, regardless of the scale of potential harm or the number of innocent people that could suffer injuries, a lawyer may *not* notify authorities or potential victims if the client merely explains the plan in detail to the lawyer but does not involve the lawyer in the execution of the crime.

Overall, the Model Rules use sweeping language for the confidentiality rules<sup>126</sup> and restrained language for the exceptions.<sup>127</sup> Wherever there is tension between the confidentiality rules and the candor, fairness, or integrity rules, the various exceptions and associated comments generally favor confidentiality over truthfulness. From a law and economics standpoint, the net effect of this rule

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<sup>120</sup> *Id.* R. 1.6(b) (emphasis added).

<sup>121</sup> As the reader can see in the excerpts quoted above, the wording in these sections is “may” rather than “shall.” In the Preamble to the Model Rules, the drafters explain: “Some of the Rules are imperatives, cast in the terms ‘shall’ or ‘shall not.’ These define proper conduct for purposes of professional discipline. Others, generally cast in the term ‘may,’ are permissive and define areas under the Rules in which the lawyer has discretion to exercise professional judgment.” *Id.* pmb. para. 14; *see also* UNIF. STATUTE & RULE CONSTR. ACT § 4 (Construction of “Shall,” “Must,” and “May”). For an excellent, brief discussion of the historical usage of “may” versus “shall,” *see generally* Nora Rotter Tillman & Seth Barrett Tillman, *A Fragment on Shall and May*, 50 AM. J. LEGAL HIST. 453 (2010).

<sup>122</sup> MODEL RULES R. 1.6 cmt. 17 (“Paragraph (b) *permits* but does not *require* the disclosure of information relating to a client’s representation to accomplish the purposes specified in paragraphs (b)(1) through (b)(6).” (emphasis added)).

<sup>123</sup> *Id.* R. 1.6(b)(1) (allowing a lawyer to reveal information relating to client representation “to prevent reasonably certain death or substantial bodily harm”).

<sup>124</sup> *See id.* R. 1.6(b).

<sup>125</sup> *See id.*

<sup>126</sup> *See, e.g., id.* R. 1.6(a)–(b) (affirmatively mandating that a lawyer “shall not” reveal client information).

<sup>127</sup> *See, e.g., id.* R. 1.6(b) (requiring an attorney to be “reasonably certain” as a prerequisite to disclosure).

configuration will be overdeterrence at the margins<sup>128</sup> — lawyers will tend to err on the side of nondisclosure in close cases, even in situations where the rulemakers would have preferred the opposite.<sup>129</sup> All legal rules and regulations present some problems with overdeterrence at the margins,<sup>130</sup> but the configuration, ambiguity, or wording of some rules can make this problem more acute.<sup>131</sup> Structurally, the Model Rules tilt in favor of confidentiality at the expense of the others, which would tend to generate overdeterrence of disclosures in marginal cases.<sup>132</sup>

Relatedly, the preferential treatment of confidentiality throughout the Model Rules creates moral hazard problems<sup>133</sup> for lawyers who skirt or shirk their duties in situations that trigger the candor, fairness, or integrity rules.<sup>134</sup> Lawyers can justify their noncompliance with these

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<sup>128</sup> For discussions of overdeterrence, see David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 427-28 (1990); Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625, 638 n.29 (1984); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471, 1526 (1998); Ariel Porat & Eric A. Posner, *Aggregation and Law*, 122 YALE L.J. 2, 16 (2012); Dru Stevenson, *The Function of Uncertainty Within Jury Systems*, 19 GEO. MASON L. REV. 513, 532 n.100 (2012); Dru Stevenson, *Toward A New Theory of Notice and Deterrence*, 26 CARDOZO L. REV. 1535, 1539 (2005) [hereinafter *New Theory of Notice*]; Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1193, 1303 (1982).

<sup>129</sup> Cf. John E. Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 VA. L. REV. 965, 965 (1984) (arguing that uncertainty overdeters and underdeters the wrong people).

<sup>130</sup> See Richard A. Posner, *Economics, Politics, and the Reading of Statutes and the Constitution*, 49 U. CHI. L. REV. 263, 280 (1982) [hereinafter *Reading of Statutes*] (“Every statute overdeters to a certain extent, because its bounds are uncertain and fear of inadvertent liability causes some people to steer well clear of those bounds. The harsher the sanctions for violation, the greater the overdeterrence and the resulting costs in socially beneficial conduct forgone.”); see also Colin S. Diver, *The Optimal Precision of Administrative Rules*, 93 YALE L.J. 65, 78 (1983).

<sup>131</sup> Posner, *Reading of Statutes*, *supra* note 130 (“Overdeterrence can be reduced by careful specification of the statutory limits. If a statute is intended to be specific, courts should not construe it broadly.”); see also Louis Kaplow, *Optimal Deterrence, Uninformed Individuals, and Acquiring Information About Whether Acts Are Subject to Sanctions*, 6 J.L. ECON. & ORG. 93, 95-106 (1990) (suggesting sanctions be set to reflect the relative uncertainty in the minds of would-be offenders, to balance between overdeterrence of desirable activities and underdeterrence of undesirable ones).

<sup>132</sup> See Posner, *Reading of Statutes*, *supra* note 130, at 281 (“A statute can underdeter as well as it can overdeter, and if overdeterrence is the characteristic vice of broad construction, underdeterrence is the characteristic vice of narrow construction.”).

<sup>133</sup> See Tom Baker, *On The Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 237-44 (1996).

<sup>134</sup> See Elisabeth M. Sperl, *Here Today, Possibly Gone Tomorrow: An Examination of Incentive Awards and Conflicts of Interest in Class Action Litigation*, 23 GEO. J. LEGAL ETHICS 873, 886 (2010) (discussing moral hazard effects in multiple representation contexts).

other ethical duties by hiding behind the confidentiality rules.<sup>135</sup> The confidentiality rules reduce the risk of discipline for violations of candor, fairness, or integrity rules, so in theory lawyers have more incentive to take their chances and ignore those rules.<sup>136</sup>

### C. Undermining Public Confidence in the Legal System

The confidentiality rules undermine public confidence in the legal system by creating a perception that lawyers are sneaky and duplicitous, that courts have abandoned the truth-seeking component of justice, and that parties use their lawyers to spin a false narrative or a phony persona.<sup>137</sup> This is not to suggest that most of the public knows about

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<sup>135</sup> See Eric Gippini-Fournier, *Legal Professional Privilege in Competition Proceedings Before the European Commission: Beyond the cursory Glance*, 28 *FORDHAM INT'L L.J.* 967, 982 (2005) (“By denying privileged status to these communications, courts are implicitly acknowledging the moral hazard problem inherent in protecting confidentiality.”); William W. Park, *Arbitrator Integrity: The Transient and the Permanent*, 46 *SAN DIEGO L. REV.* 629, 688 (2009) (noting “the moral hazard implicit in any hidden in-group complicity and facilitated by the confidential nature of deliberations”); see also, e.g., J. Schuchardt, *Walking a Thin Line: Distinguishing Between Research and Medical Practice During Operation Desert Storm*, 26 *COLUM. J.L. & SOC. PROBS.* 77, 112 (1992) (stating that “[s]ecrecy, coupled with the demands of patriotism, has long posed a moral hazard for those performing medical activities”).

<sup>136</sup> This is an inference I am drawing from a strictly textualist approach to the Model Rules — that the actual language of the Rules subtly encourages lawyers to take their chances in favor of nondisclosure when facing a dilemma. A contrafactual scenario seems to support this inference: Maura Strassberg has argued that a “nontextual” interpretive approach to the Rules (ignoring the text in favor of moral intuitions) would allow lawyers instead to take their chances in favor of disclosure. Maura Strassberg, *Taking Ethics Seriously: Beyond Positivist Jurisprudence in Legal Ethics*, 80 *IOWA L. REV.* 901, 948 (1995) (“Without an interpretive approach which permits, indeed requires, nontextual principles to be considered in the interpretation of positive ethical law, advisory committees who are either unwilling or unable to manipulate the text without reference to nontextual principles may suggest to attorneys that they should take their chances with ethical disobedience. That is precisely what advisory committees in Wisconsin and Delaware have done.”). Strassberg then concedes, as I am asserting here, that the text will tend to trump lawyers’ moral qualms; she refers to this as “the unlikely occurrence of disclosure when it is viewed as definite ethical disobedience.” *Id.* For more discussion of moral hazard effects of other portions of the Model Rules, see generally Michael McKee, Rudy Santore & Joel Shelton, *Contingent Fees, Moral Hazard, and Attorney Rents: A Laboratory Experiment*, 36 *J. LEGAL STUD.* 253 (2007).

<sup>137</sup> Some empirical researchers have concluded that increased transparency would bolster public confidence in the legal system, especially confidence in the courts. See Stephen Carroll & Joseph Doherty, *Expectations, Outcomes, and Fairness: Lessons from the Civil Justice Reform Act Evaluation*, in *CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM*, *supra* note 24, at 60, 60-74. It seems that the converse would therefore also be true, that is, diminished transparency would undermine public confidence in the courts and the legal system and its leading participants (lawyers).

the confidentiality rules or attributes perceived corruption to the rules. All the evidence suggests that most non-lawyers are unaware of ethical duties like Rule 1.6. Even if they are vaguely aware of the privilege rule, what the public sees instead are the behaviors that the confidentiality rules encourage — lawyers apparently assisting clients in cover-ups, courts tolerating the suppression of relevant information, and so on.<sup>138</sup>

Yet a functioning democracy depends heavily on the rule of law, and the public's confidence that the legal system upholds the rule of law.<sup>139</sup> When the citizenry comes to view the courts as corrupt, it sets off a cascade of deleterious effects: they will not trust the judicial branch to keep the other branches in check, thereby fostering a perception that the Executive and the Legislature are veering towards tyranny.<sup>140</sup> Citizens suffering various forms of oppression and abuse stop seeking redress in courts that they believe to be corrupt.<sup>141</sup> More victims will resort to self-

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<sup>138</sup> See generally Palumbos, *supra* note 64, at 1083 (discussing attorney civil disobedience and decline of client trust, adding, “[A]s trust of lawyers erodes, the legal system becomes more unstable. Clients must depend on attorneys to honor their duty of zealous representation; judges must rely on lawyers to act as upright ‘officers of the court’ who will play fair while serving their clients. The judicial process depends on the trust that all sides place in attorneys to uphold their duties.”).

<sup>139</sup> See Aharon Barak, *Foreword: A Judge on Judging: The Role of a Supreme Court in a Democracy*, 116 HARV. L. REV. 16, 62 (2002) (“Public confidence in the judiciary increases when the public is told the truth.”); Amnon Reichman, *The Dimensions of Law: Judicial Craft, Its Public Perception, and the Role of the Scholar*, 95 CALIF. L. REV. 1619, 1638 (2007) (stating that the “public confidence in the judiciary relies, at least in part, on maintaining the symbols associated with the judicial role”).

<sup>140</sup> See Raymond J. McKoski, *Judicial Discipline and the Appearance of Impropriety: What the Public Sees Is What the Judge Gets*, 94 MINN. L. REV. 1914, 1952-54 (2010) (discussing the importance of public confidence in the judiciary); Leita Walker, *Protecting Judges from White’s Aftermath: How the Public-Employee Speech Doctrine Might Help Judges and the Courts in Which They Work*, 20 GEO. J. LEGAL ETHICS 371, 381-82 (2005) (“Without public confidence in an independent Judiciary, court orders and judgments would be rendered meaningless, legislative intent would be undermined, chaos would reign, and our system of government would surely deteriorate.”); Michael D. Schoepf, Note, *Removing the Judicial Gag Rule: A Proposal for Changing Judicial Speech Regulations to Encourage Public Discussion of Active Cases*, 93 MINN. L. REV. 341, 341 (2008) (“Diminished public confidence in the judiciary has become one of the most important issues facing American courts.”).

<sup>141</sup> See Sarah M.R. Cravens, *In Pursuit of Actual Justice*, 59 ALA. L. REV. 1, 11-12 (2007) (discussing the effects of public confidence in the judiciary); cf. Justin Hansford, *Cause Judging*, 27 GEO. J. LEGAL ETHICS 1, 53 (2014) (discussing the relation between transparency and public confidence in the judiciary and arguing more judicial transparency would increase public confidence). See generally Charles Gardner Geyh, *Roscoe Pound and the Future of the Good Government Movement*, 48 S. TEX. L. REV. 871, 875-76 (2007) (discussing the “concern for flagging public confidence in the courts dominates contemporary discourse on the administration of justice.”).

help and vigilantism, raising the level of violence in society.<sup>142</sup> Moreover, a widespread perception that lawyers help clients perpetrate various types of fraud will create an adverse selection effect, with a disproportionate number of those seeking legal services being those who can exploit the information asymmetries in a situation opportunistically.<sup>143</sup> As one

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<sup>142</sup> See Kelly D. Hine, *Vigilantism Revisited: An Economic Analysis of the Law of Extra-Judicial Self-Help or Why Can't Dick Shoot Henry for Stealing Jane's Truck?*, 47 AM. U. L. REV. 1221, 1243-44 (1998) (discussing incentives for self-help and vigilantism); Neal Katyal, *Community Self-Help*, 1 J.L. ECON. & POL'Y 33, 60 (2005) ("They sidestep difficulties such as lengthy prosecutions, thorny jurisdictional matters, technologically unsophisticated juries, and slow courts."); Eric A. Posner, *Law, Economics, And Inefficient Norms*, 144 U. PA. L. REV. 1697, 1727 (1996); Justice Tankebe, *Self-Help, Policing, and Procedural Justice: Ghanaian Vigilantism and the Rule of Law*, 43 LAW & SOC'Y REV. 245, 246-47 (2009). See generally Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (discussing the economic costs of criminal acts).

<sup>143</sup> Corporations (especially banks and insurance companies), along with a few governmental or quasi-governmental entities, are the largest consumers of legal services. See Stephen Gillers, *Caveat Client: How the Proposed Final Draft of the Restatement of the Law Governing Lawyers Fails to Protect Unsophisticated Consumers in Fee Agreements with Lawyers*, 10 GEO. J. LEGAL ETHICS 581, 617 (1997) (stating ALI clients are mostly "sophisticated consumers of legal services"); Herbert M. Kritzer, *The Commodification of Insurance Defense Practice*, 59 VAND. L. REV. 2053, 2059 (2006) ("Insurance companies are large consumers of legal services."); Herbert M. Kritzer, *The Professions Are Dead, Long Live the Professions: Legal Practice in a Postprofessional World*, 33 LAW & SOC'Y REV. 713, 714 n.1 (1999) ("Within the practice of law, an ever increasing portion of legal services is consumed by large corporate enterprises."); Rachel J. Littman, *Training Lawyers for the Real World*, 82 N.Y. ST. B.J. 20, 22 (2010) (discussing "major corporate clients, the largest consumers of legal services"); Chad G. Marzen, *Can (and Should) an Insurance Defense Attorney Be Held Liable for Insurance Bad Faith?*, 7 VA. L. & BUS. REV. 97, 99 (2012) ("[I]nsurance companies typically are large consumers of legal services"); James R. Maxeiner, *Educating Lawyers Now and Then: Two Carnegie Critiques of the Common Law and the Case Method*, 35 INT'L J. LEGAL INFO. 1, 25 (2007) (describing corporate entities as "the biggest consumers of legal services"); Robert A. Rowland III & R. Bruce Menke, *The Practice of Law in Houston — Yesterday and Today*, HOUS. LAW., Jan.–Feb. 1997, at 10, 13 (explaining that large corporations were the largest consumers of legal services during the seventies and eighties). Various authors over the years have claimed particular corporate or governmental entities as the single largest consumer of legal services. See, e.g., Timothy A. Canova, *The Transformation of U.S. Banking and Finance: From Regulated Competition to Free-Market Receivership*, 60 BROOK. L. REV. 1295, 1333 n.127 (1995) ("[T]he RTC also has become the nation's largest consumer of private legal services."); William V. Luneburg, *Contracting by the Federal Government for Legal Services: A Legal and Empirical Analysis*, 63 NOTRE DAME L. REV. 399, 459 (1988) ("The FSLIC is now the largest consumer of private legal services in the federal government based on available data."); William G. Ross, *An Ironic and Unnecessary Controversy: Ethical Restrictions on Billing Guidelines and Submission of Insurance Defense Bills to Outside Auditors*, 14 NOTRE DAME J.L. ETHICS & PUB. POL'Y 527, 532 n.21 (2000) (noting that the insurance industry "remains one of the world's largest consumers of legal services."). For the point that sophisticated users of legal services benefit disproportionately from confidentiality, see Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 647 (1990) [hereinafter *Rethinking*

commentator recently noted, “[T]ransparency is related to market forces (when set in the private context); markets will punish those acting improperly. Therefore, it is important for as many market participants as possible to be informed so to assume the market dynamic noted moves forward.”<sup>144</sup>

Lawyers may be quick to object that they do not, in fact, aid clients in perpetrating fraud or other crimes, and that other rules prohibit such aiding and abetting.<sup>145</sup> Even apart from the fact that the confidentiality rules undermine and dilute the anti-fraud rules, discussed above, there is a separate issue of the public’s perception of lawyers that we cannot ignore. As one commentator has noted, “Shared social values and norms of conduct, such as the role of mutual trust in interactions among individuals and economics entities, reduce some of the structural uncertainties and contribute to reduction of transaction costs.”<sup>146</sup> Democracy depends on trust and on confidence in the virtue and representativeness of the government.<sup>147</sup> The confidentiality rules, in

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*Confidentiality II*] (“Sophisticated clients and those with the most to hide would insist on strict confidentiality. The most unethical lawyers would be quickest to agree.”). On the subject of exploiting legal loopholes, see Kaplow, *supra* note 131, demonstrating that there is a social cost in the availability of legal counsel because of the increased awareness of loopholes. See also RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 809 (8th ed. 2011) (“Or the lawyer may be aware of loopholes that allow the client by a slight restructuring of his proposed course of action to comply with the letter while flouting the spirit of the law.”); Michael F. Ferguson & Stephen R. Peters, *But I Know It When I See It: An Economic Analysis of Vague Rules* 7 (Mar. 22, 2000) (unpublished manuscript), available at [http://papers.ssrn.com/paper.taf?abstract\\_id=218968](http://papers.ssrn.com/paper.taf?abstract_id=218968) (“More complex rules provide a greater advantage to those skilled in creating loopholes.”).

<sup>144</sup> Zarsky, *supra* note 24, at 1536.

<sup>145</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.16(a) (2013) (mandating withdrawal when “the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent” or when “the client has used the lawyer’s services to perpetrate a crime or fraud”); *id.* R. 1.2(d) (2013) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent.”); *id.* R. 3.3(b) (2013) (“A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.”); *id.* R. 4.1(b) (2013) (sanctioning lawyers who “fail to disclose a material fact when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client”); *id.* R. 8.4 (2013) (forbidding “conduct involving dishonesty, fraud, deceit or misrepresentation”).

<sup>146</sup> P.K. RAO, *THE ECONOMICS OF TRANSACTION COSTS: THEORY, METHODS AND APPLICATIONS* 92 (2003).

<sup>147</sup> See Zarsky, *supra* note 24, at 1530 (“The acts of a liberal and democratic government must, categorically, be as transparent as possible. Such a result is derived from the notion of democracy. Scholars note that transparency is essential for democracy to function. In doing so, they make reference to an abundance of sources,

other words, have significant externalities.<sup>148</sup> The rules supposedly foster trust between the client and advocate, but externalize mistrust and its destructive efforts in the process.

Commentators up to now have generally ignored these externalities,<sup>149</sup> but it seems clear that the confidentiality rules produce a serious negative externality by eroding the public's confidence in their legal system.<sup>150</sup> For too long, it seems, we have analyzed the downsides of confidentiality solely in terms of the zero-sum game of two adverse parties.<sup>151</sup> Disclosure under this view advantages the opposing party and disadvantages the client.<sup>152</sup>

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drawing from Kant, Locke, Mill, Rousseau, Bentham, and James Madison.”).

<sup>148</sup> See Schwarcz, *supra* note 14, at 27-33 (discussing systemic externalities from lawyers preparing skewed legal opinions for use by third parties).

<sup>149</sup> See *id.* at 22 (noting how there is little precedent upon which to build a systematic framework for analysis).

<sup>150</sup> See, e.g., Carroll & Doherty, *supra* note 137, at 73-74 (arguing that the details of settlements and verdicts should be readily available for similar cases).

<sup>151</sup> See, e.g., Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 17 (1998) (“But clients as a class derive no benefit, by definition, from wealth transfers to attorneys that have no effect other than to alter the results in a zero-sum game. So long as the ex post gain to one party from confidentiality is exactly offset by the ex post loss to the other, as will be the case in a zero-sum game, parties as a class obtain no benefit. Indeed, due to these offsets and the fee-increasing nature of the privilege, parties pay for the privilege. Attorneys are the only beneficiaries.”); see also Anthony V. Alfieri, *Law Firm Malpractice Disclosure: Illustrations and Guidelines*, 42 HOFSTRA L. REV. 17, 39-40 (2013) (discussing situations in which a client perceives disclosure as advantageous to the lawyers but injurious to the client); Roy M. Sobelson, *Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing Without Listening*, 1 GEO. J. LEGAL ETHICS 703, 713-17 (1988) (discussing the ways that disclosures can disadvantage a client).

<sup>152</sup> Several sources discuss the contexts in which the client-lawyer relationship becomes a zero-sum game. See, e.g., Charles N. Geilich, *Rich Man, Poor Man, Beggar Man, Thief: A History and Critique of the Attorney Billable Hour*, 5 CHARLESTON L. REV. 173, 181 (2011) (“This is a zero-sum game, however, if one considers that taking longer on one task decreases the lawyer’s ability to bill other clients--assuming, of course, that the lawyer is not double-billing.”); Jeffrey L. Harrison, *Reconceptualizing the Expert Witness: Social Costs, Current Controls and Proposed Responses*, 18 YALE J. ON REG. 253, 312 (2001) (“This is because the choice between an immunity or liability rule appears to be a zero-sum game — extra income for experts and attorneys equals extra expenditures by clients.”); Robert W. Hillman, *Professional Partnerships, Competition, and the Evolution of Firm Culture: The Case of Law Firms*, 26 J. CORP. L. 1061, 1067 (2001) (“Not surprisingly, however, the partners enjoying the client loyalties to be realigned will perceive this as a zero sum game and resist efforts to assign new lawyers to their clients.”); Melanie B. Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31, 82 (“But because no client can predict in advance whether it or its adversary will have the most to hide, clients as a class will lose. Thus, eliminating the [confidentiality] requirement would primarily constitute a wealth transfer to attorneys.”); D. Theodore Rave, *Governing the Anticommons in Aggregate Litigation*, 66 VAND. L. REV. 1183, 1255 (2013) (“Certainly it is true that a lawyer

Yet the exercise of confidentiality does not occur in a vacuum — each set of adverse partners is a subset of the total activity within the legal system. The confidentiality rules may be party-neutral, that is, nondisclosure requirements in the abstract harm one party no more than it helps the other,<sup>153</sup> but they foist unquantifiable costs on the rest of the system.<sup>154</sup>

We should not suppose that this undermining of confidence pertains solely or even primarily to litigation. It is hard to imagine why this would not apply equally to transactional work.<sup>155</sup> The modern discovery and production rules provide a significant offset to the pernicious effects of the confidentiality rules in the courtroom.<sup>156</sup> The public is presumably

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representing a group of clients that must allocate a limited fund among themselves in a zero-sum game cannot simultaneously zealously represent the interests of each individual.”); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541, 557 (1992) (“This means that parties in the asbestos litigation are competing with their own lawyers for access to the same rapidly shrinking fund. Behind the rhetoric of the lawyer-client relationship lies a grim reality: the lawyers and their clients are engaged in a tragic, zero-sum game.”); Charles W. Sorenson, Jr., *Disclosure Under Federal Rule of Civil Procedure 26(a) — ‘Much Ado About Nothing?’*, 46 HASTINGS L.J. 679, 792 n.394 (1995) (“[I]t is more important that [sic] ever that [lawyers] work to keep document production no worse than a zero-sum game for themselves and their clients.”) (citation omitted).

<sup>153</sup> That is, the confidentiality rules generally treat all present clients of a lawyer the same.

<sup>154</sup> See John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563, 572 (1994) (“Erosion of trust and confidence in lawyers will lead to declining public acceptance of the judicial branch overall.”); Douglas R. Richmond, *The Ethics of Zealous Advocacy: Civility, Candor and Parlor Tricks*, 34 TEX. TECH L. REV. 3, 58 (2002) (“Lawyers’ violations of their duty of candor may lessen public confidence and trust in the legal system, may lead to unjust results, and may further burden a judicial system that in many jurisdictions is already overburdened.”).

<sup>155</sup> See George M. Cohen, *When Law and Economics Met Professional Responsibility*, 67 FORDHAM L. REV. 273, 296 n.109 (1998); Deborah L. Rhode, *The Professionalism Problem*, 39 WM. & MARY L. REV. 283, 298 (1998) (“As private practice becomes more competitive, specialized, and transactional, lawyers face intense pressures to satisfy clients’ short term desires at the expense of other values.”).

<sup>156</sup> See Joseph F. Anderson, Jr., *Hidden from the Public by Order of the Court: The Case Against Government-Enforced Secrecy*, 55 S.C. L. REV. 711, 714-15 (2004) (responding to Arthur Miller’s arguments about the tension between the confidentiality rules and the discovery rules); Cohen, *supra* note 155, at 296 n.109 (“Critics of confidentiality rules seem to assume that it is easy for lawyers to suppress bad information, but at least in civil litigation, this is not so given liberal discovery rules.”); Miller, *supra* note 96, at 447 (“Nonetheless, the expanded scope of discovery under the Federal Rules and the increased amounts of information they generated created side effects outside the adjudicatory system — it posed a threat to privacy and confidentiality.”); Michael D. Moberly, *The Discoverability of Severance Agreements in Wrongful Discharge Litigation*, 20 HOFSTRA LAB. & EMP. L.J. 1, 6-8 (2002) (discussing impact of discovery rules on confidentiality); Fred C. Zacharias, *Harmonizing Privilege and Confidentiality*, 41 S. TEX. L. REV. 69, 77 (1999) (discussing the relationship between production requirements and confidentiality rules).



less aware of the mandatory discovery rules than they are about lawyers being secretive, and if so, the net result would still be a public perception that suppression of information dominates in adjudication.<sup>157</sup>

Transactional legal work has no such offsets. Confidentiality rules could undermine public trust in the transactional part of our legal system as well<sup>158</sup> — contracts and sales, stock offerings, estate planning, even the procurement of licenses, permits, grants, and loans. The adult public in America is aware that lawyers are involved (usually are required) for the estate planning, major business deals, property purchases or leases, and for interacting with regulatory authorities. The confidentiality rules can give the lawyers in these settings the veneer of secrecy and subterfuge.<sup>159</sup> To the extent that the public perceives a prevalence of opportunism and exploitation via information asymmetries, they could attribute this to the fact that the lawyers were involved.<sup>160</sup>

There is no way around the fact that confidentiality rules safeguard information asymmetries, and the public correlates information asymmetries with taking advantage of another (usually less sophisticated) person.<sup>161</sup> This public perception problem, especially when combined with the other problems described herein, is a reason to depreciate the confidentiality rules. The occasional egregious examples (wrongful convictions, etc.) reinforce their doubts and nothing offsets this.

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<sup>157</sup> See, e.g., Johanna M. Ogdon, Comment, *Washington's New Rules of Professional Conduct: A Balancing Act*, 30 SEATTLE U. L. REV. 245, 262 (2006) (“During one of its meetings, the Confidentiality Subcommittee discussed striking a balance in crafting rules that foster a strong attorney-client relationship without increasing the negative perception of lawyers hiding behind the confidentiality protection when a client intends to commit a crime.”).

<sup>158</sup> See Ronald J. Gilson, *Value Creation by Business Lawyers: Legal Skills and Asset Pricing*, 94 YALE L.J. 239, 255 (1984) (calling transactional lawyers “transaction cost engineers”).

<sup>159</sup> See generally Don A. Moore, *Myopic Prediction, Self-Destructive Secrecy, and the Unexpected Benefits of Revealing Final Deadlines in Negotiation*, 94 ORGANIZATIONAL BEH. & HUM. DECISION PROCESSES 125, 138-39 (2004) (finding negotiators chose not to reveal information because of myopic views on concealing information).

<sup>160</sup> See Marc Galanter, *The Faces of Mistrust: The Image of Lawyers in Public Opinion, Jokes, and Political Discourse*, 66 U. CIN. L. REV. 805, 808-10 (1998) (describing several surveys that show decreasing public trust in lawyers and the legal system).

<sup>161</sup> See Joan MacLeod Heminway, *Martha Stewart and the Forbidden Fruit: A New Story of Eve*, 2009 MICH. ST. L. REV. 1017, 1028 (“In other words, the public perception may be that the broad form of unfairness — that created by general information asymmetries — is the basis for insider trading liability.”).

D. *Raising the Costs of Coasean Bargaining, Lemons Effects, and Other Externalities*

Apart from public perceptions about the legal system, the confidentiality rules have a second set of externalities: the rules interfere with transparency in our society overall. The rules indirectly undermine trust between individuals and especially between individuals and institutions outside the legal arena. In part, this is because all our interactions in society (both individually and institutionally) occur in the shadow of the legal system.<sup>162</sup> People and institutions rely on the backdrop of the legal system for accountability and recourse when carrying on daily activities.<sup>163</sup> As they perceive the legal system to play favorites based on information asymmetries, they will tend to cultivate those information asymmetries — increased secrets — in order to have a larger stock of undisclosed information should a dispute or high-stakes transaction arise.<sup>164</sup> Yet, democracy depends on interpersonal and institutional trust, even apart from trust in the legal system.<sup>165</sup> Increased suspicion leads to a general breakdown, with exploitation and opportunism becoming more commonplace.<sup>166</sup> Mistrust has a chilling effect on commerce, civic activity, and other relationships.<sup>167</sup>

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<sup>162</sup> See, e.g., Robert H. Mnookin & Lewis Kornhauser, *Bargaining in the Shadow of the Law: The Case of Divorce*, 88 YALE L.J. 950, 959-77 (1979) (discussing development of framework to consider how rules and procedures used in court affect the bargaining process outside the courtroom).

<sup>163</sup> Cf. Zarsky, *supra* note 24, at 1533-35 (discussing how “[t]ransparency renders government actors accountable for their actions and their outcome”).

<sup>164</sup> Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 634 (2011) (“Consistent with the adage that ‘knowledge is power,’ the bargaining context puts a premium on the confidentiality of information, because a party unilaterally possessing information can use it to advantage.”); see also Colin S. Diver, *The Assessment and Mitigation of Civil Money Penalties by Federal Administrative Agencies*, 79 COLUM. L. REV. 1435, 1473-74 (1979) (“The object of each party is to obtain as much knowledge about the other’s position while concealing as much as possible about its own position.”).

<sup>165</sup> See Zarsky, *supra* note 24, at 1530.

<sup>166</sup> See Frank B. Cross, *Law and Trust*, 93 GEO. L.J. 1457, 1521 (2005) (“Clearly, there is an association of law with economic development, which itself depends on trust.”); Susan Daicoff, *Articles Lawyer, Know Thyself: A Review of Empirical Research on Attorney Attributes Bearing on Professionalism*, 46 AM. U. L. REV. 1337, 1418 (1997) (discussing “the adversarial legal system in which lawyers work, which causes them to suspect everyone of ulterior motives, and encourages secretiveness, manipulateness, and selfishness” (citation omitted)).

<sup>167</sup> See Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 724 (2013) (“Modern capitalism depends on high levels of trust among strangers. Without such trust, it is impossible for a large-scale economy to operate.” (citation omitted)); Ethan J. Leib, *Friendship & The Law*, 54 UCLA L. REV. 631, 666 (2007) (“This decline [in friendships] leads to a culture of depression, and market inefficiencies follow.”); Lynn A. Stout, *The Investor Confidence Game*, 68 BROOK.

Some of the costs of confidentiality are actually quantifiable. A recent empirical study by Eric Helland and Gia Lee found a “secrecy premium” related to confidential settlements in medical malpractice suits.<sup>168</sup> States that passed laws mandating public disclosure of medical malpractice settlements saw settlement amounts for non-surgeons fall 17%, mostly attributable to the secrecy premium defendants pay when settlements are confidential.<sup>169</sup> Similarly, Professor James Anderson reports that in the litigation over the drug Cerivastatin, Bayer (the manufacturer) found that settling claims without confidentiality reduced their aggregate costs, as plaintiffs were willing to settle for amounts that they could determine to be comparable to the payouts received by others in similar circumstances.<sup>170</sup>

From a Coasean perspective, information asymmetries are one of the primary transaction costs that encumber Coasean bargaining.<sup>171</sup>

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L. REV. 407, 409 n.3 (2002) (citing many sources for the idea that mistrust has a chilling effect on commerce); see also Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1753-59 (2001) (emphasizing the importance of trust in functioning of securities market); Marilyn Friedman, *To Bail Out or Not to Bail Out: Moral Hazard and Other Ethical Considerations*, 11 GEO. J. L. & PUB. POL’Y 411, 422 (2013) (discussing “the trust that the [free market] system depends on”); Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 578-79 (describing the “trust upon which capitalist economies essentially depend”).

<sup>168</sup> See Eric Helland & Gia Lee, *Secrecy, Settlements, and Medical Malpractice Litigation*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM, *supra* note 24, at 3, 3-19.

<sup>169</sup> See *id.* at 17-19.

<sup>170</sup> See James Anderson, *Understanding Mass Tort Defendant Incentives for Confidential Settlements: Lessons from Bayer’s Cerivastatin Litigation Strategy*, in CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM, *supra* note 24, at 101-02, 110-17; see also Richard A. Zitrin, *The Case Against Secret Settlements (or, What You Don’t Know Can Hurt You)*, 2 J. INST. FOR STUDY LEGAL ETHICS 115, 118 (1999) (“Therefore, it is reasonable to speculate that the *amount* of settlement may decrease somewhat when there is no premium paid for secrecy.”).

<sup>171</sup> See Ian Ayres & Eric Talley, *Solomonic Bargaining: Dividing a Legal Entitlement to Facilitate Coasean Trade*, 104 YALE L.J. 1027, 1051 (1995) (“Coasean bargains are made in the presence of asymmetric information, which adds some (though not prohibitive) friction to bilateral bargaining.”); Victor Fleischer, *Regulatory Arbitrage*, 89 TEX. L. REV. 227, 263 (2010) (“Counterparty risk, in turn, depends on Coasean transaction costs such as asymmetric information and the risk of opportunistic behavior.”); Keith N. Hylton, *An Economic Theory of the Duty to Bargain*, 83 GEO. L.J. 19, 49-50 (1994) (“Second, informational asymmetry is itself a source of transaction costs that stand in the way of Coasean bargaining.”); Jeanne L. Schroeder, *The End of the Market: A Psychoanalysis of Law and Economics*, 112 HARV. L. REV. 483, 530 (1998) (“Coase’s startling insight allowed economists and legal scholars to identify a wide variety of things as costs which were heretofore invisible — such as time, asymmetric information, etc. Coase’s point, however, is not that these ‘transaction costs’ are unique, but that they are *just like any other costs*.” (emphasis added)).

Coasean bargaining is present in every conceivable negotiation or transaction and agreements become less likely (and both parties worse off) where transaction costs rise.<sup>172</sup> Confidentiality rules inherently foster information asymmetries and force transaction costs upward.<sup>173</sup> Worse, because of the Type II errors that result from lack of information, parties do not even know when another party (through their lawyer as an intermediary) is withholding crucial information. This externality of confidentiality could disperse widely across society. Overall, non-disclosure raises the specter of Knightian Uncertainty and accentuates Knightian Risk,<sup>174</sup> both of which can deter valuable agreements and compromises.<sup>175</sup>

This is not to suggest that mandatory disclosures should be a default rule in most contexts, merely to facilitate Coasean bargaining. In fact, coerced disclosures can also constitute a type of transaction cost. The point instead is that a great deal of Coasean bargaining occurs through or with lawyers present whenever the stakes are high and the confidentiality rules inherently foster information asymmetries and, therefore, impose significant transaction costs.<sup>176</sup> Some of these costs are not truly necessary, given the goals of the respective parties, and

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<sup>172</sup> For purposes of the discussion here, the most relevant rules are Rule 1.6 (confidentiality) and Rule 4.1 (truthfulness in statements to others). As noted above, the Comment to Rule 4.1 allows not only nondisclosure during bargaining, but outright lying, as long as it is not “material.” See MODEL RULES OF PROF'L CONDUCT R. 4.1 & cmts. 1-2 (2013); *supra* notes 101–102 and accompanying text.

<sup>173</sup> See RAO, *supra* note 146, at 92 (“Mutually beneficial exchanges can be undertaken at significantly lower [transaction cost] and in larger numbers in a social structure of mutual trust relative to situations with least trust or shared values of conduct.”).

<sup>174</sup> See, e.g., Ronald J. Gilson et al., *Contracting for Innovation: Vertical Disintegration and Interfirm Collaboration*, 109 COLUM. L. REV. 431, 433-35 & n.2 (2009) (referring to innovating industries using risk and uncertainty when making decisions to pursue either vertical integration or contractual relationships); Stevenson, *New Theory of Notice*, *supra* note 128, at 1575 n.180 (exemplifying risk and uncertainty in contexts of bets, lotteries, raffles, sweepstakes, and criminal law and noting that “[K]nightian uncertainty . . . involve[s] a finite set of reasonable possibilities where it is impossible to ascertain beforehand which is more likely, or how much more likely”); see also DANIEL ELLSBERG, RISK, AMBIGUITY AND DECISION 4 (2001) (discussing the claim “that for a reasonable man all ‘uncertainties,’ in Knightian terms, may be expressed numerically as ‘risks’”). “Knightian uncertainty” in economic theory refers generally to unquantifiable risks or changes; it originated with economist Frank Knight. See generally FRANK H. KNIGHT, RISK, UNCERTAINTY AND PROFIT (1921) (introducing Knight’s theory). Knight drew a distinction between “uncertainty” (unknowable odds or range of possibilities) and “risk” (known probabilities) for purposes of illustrating the difference between net revenues and windfall profits for entrepreneurs. See *id.* at 19-20. The distinction between risk and uncertainty has become a useful analytical tool in a number of fields.

<sup>175</sup> See RAO, *supra* note 146, at 17-19.

<sup>176</sup> See *id.* at 92 (“Lack of trust can induce some costs.”).

therefore become a deadweight loss in society. In other words, confidentiality rules create a lemons problem — parties cope with the uncertainty about what another party is hiding (whether in transactional bargaining or settlement bargaining) by lowering the value they place on the other party's offer.<sup>177</sup> In the aggregate, this systemic devaluation would normally translate into welfare losses for society as a whole under a traditional lemons-problem paradigm.

As Professor Daniel Fischel observed:

For this reason, confidentiality penalizes clients with nothing to hide. Such clients would like their attorneys to communicate credibly that nothing is being hidden from the decisionmaker — but confidentiality makes this impossible. Civil litigants with competing claims have to convince the uninformed decisionmaker to believe them over their adversaries. The result resembles a lemons market, where clients with nothing to hide attempt to signal the merit of their case by using attorneys as reputational intermediaries to overcome informational asymmetries between themselves and the decisionmaker.<sup>178</sup>

Sunlight is the best disinfectant.<sup>179</sup> That is, transparency is the most effective way to deter corruption in institutions, whether private or public.<sup>180</sup> Transparency encourages accountability, forethought about the consequences of proposed actions, and fair dealings.<sup>181</sup> Secrecy works in the opposite direction: cloaking corruption, obscuring actors' true motivations, and creating an environment conducive toward exploitation and opportunism.<sup>182</sup>

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<sup>177</sup> See generally Akerlof, *supra* note 13, at 489-90 (describing and illustrating lemons problems in automobile market context); Justin P. Johnson & Michael Waldman, *Leasing, Lemons, and Moral Hazard*, 53 J.L. & ECON. 307, 325 (2010) (expanding on Akerlof's analysis of asymmetrical information in economic theory and the lemons problems); Walter Kamiat, *Labor and Lemons: Efficient Norms in the Internal Labor Market and the Possible Failures of Individual Contracting*, 144 U. PA. L. REV. 1953, 1957-60 (1996) (applying lemons problems to employment contracting).

<sup>178</sup> Fischel, *supra* note 151, at 18-19. This lemons effect is, of course, the mirror image of the halo effect described in Part III.C.

<sup>179</sup> See BRANDEIS, *supra* note 27, at 92.

<sup>180</sup> See Seth F. Kreimer, *Sunlight, Secrets, and Scarlet Letters: The Tension Between Privacy and Disclosure in Constitutional Law*, 140 U. PA. L. REV. 1, 11-12 (1991); see also *id.* at 12 (specifying that “[t]he attraction of sunlight is strongest within a relatively narrow set of boundaries: where the activities disclosed are matters of public trust, where the prospects of concrete retaliation are small, and where the freedom of intimate self-definition is not implicated.”).

<sup>181</sup> See Zarsky, *supra* note 24, at 1533-38.

<sup>182</sup> Blackmail depends on secrecy in order for the threat of disclosure to have an

The point here is not that all exercises of the confidentiality rules are aiding in a fraud or some wrongdoing, though that is sometimes (too often) the case. Rather, the point is that the presence of confidentiality rules yields a negative externality that impacts the larger society by reducing transparency and trust in the aggregate.<sup>183</sup>

An anticipated objection is that many secrets are not only convenient (avoiding embarrassment or reputational loss) but actually create value,<sup>184</sup> especially in the areas of trade secrets and similar types of intellectual property.<sup>185</sup> Admittedly, secrets sometimes create value, but

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extortionate effect. For a similar point (not about ethical rules, but rather other aspects of the adversary system) regarding systemic costs, perverse incentives, and information asymmetries in litigation, see London, *supra* note 5, at 841 (“Instead of incentivizing litigants to disclose relevant factual information so that cases can be adjudicated on the merits, the adversary system incentivizes litigants to exploit information asymmetries to gain an advantage over their adversaries. Because litigants are aware that there is informational asymmetry and that the opposing litigant is similarly incentivized to hide the truth, civil litigation without regulation leads to the worst outcome of the classic prisoner’s dilemma: though cooperation (i.e. settlement) would be less costly than defection (i.e. trial), litigants are driven to defect because of information asymmetries and the fear that their adversary is wielding unknown information to its advantage.” (citations omitted)).

<sup>183</sup> Cf. ARCHON FUNG, MARY GRAHAM & DAVID WEIL, *FULL DISCLOSURE: THE PERILS AND PROMISE OF TRANSPARENCY* 106-18 (2008) (discussing transparency requirements as providing diffuse benefits pit against the costs to the disclosers).

<sup>184</sup> See S. Todd Brown, *Plaintiff Control and Domination in Multidistrict Mass Torts*, 61 CLEV. ST. L. REV. 391, 421 (2013) (“[Ruinous revelations] may allow counsel to increase the aggregate settlement amount by some portion of the monetary value of secrecy to the defendant”); Janet J. Higley, Robert C. Jones, Jr. & Peter C. Buck, *Confidentiality of Communications by In-House Counsel for Financial Institutions*, 6 N.C. BANKING INST. 265, 274 (2002) (“[C]ourts and commentators have frequently expressed the concern that the privilege not be used by corporations to create a large ‘zone of secrecy’ for communications whose probative value could be important to a fair resolution of disputes.”); David F. Tamaroff, *Bottling the Free Flow of Information: A Comparative Analysis of U.S. and EU Database Protection*, 12 WAKE FOREST J. BUS. & INTELL. PROP. L. 1, 11 (2011) (noting that business information is only eligible for trade secret protection if the information’s “secrecy adds to its value”); Note, *The Military and State Secrets Privilege: Protection for the National Security or Immunity for the Executive?*, 91 YALE L.J. 570, 586 n.86 (1982) (“Acknowledgment of judicial expertise in comparing the value of disclosure versus secrecy is implicit in the judicial power to create evidentiary privileges.”).

<sup>185</sup> See Vincent Chiappetta, *Myth, Chameleon or Intellectual Property Olympian? A Normative Framework Supporting Trade Secret Law*, 8 GEO. MASON L. REV. 69, 139 n.369 (1999) (“[T]he incentive to create trade secrets is their intrinsic market value.”); Jeff Danley, *Cadence v. Avant!: The UTSA and California Trade Secret Law*, 19 BERKELEY TECH. L.J. 289, 303 (2004); Karl F. Jorda, *Patent and Trade Secret Complementariness: An Unsuspected Synergy*, 48 WASHBURN L.J. 1, 11 (2008) (noting that trade secrets “can increase the value of a license for the licensee and the licensor up to 3 to 10 times the value of the deal if no trade secrets are involved”) (quoting Melvin F. Jager, *The Critical Role of Trade Secret Law in Protecting Intellectual Property Assets*, in LICENSING BEST PRACTICES: THE LESI GUIDE TO STRATEGIC ISSUES AND CONTEMPORARY REALITIES 127)

such scenarios are far rarer than those where secrecy produces unfair outcomes. Moreover, in the aggregate, secrets add less value to society (positive externalities) than the value transparency and trust add to society. Conversely, transparency causes far fewer harms than will secrecy non-disclosure. On balance, the positive externalities or added value of secrets offset the baleful effects of increased transparency. This is not to say we should ban all secrets or private information (which would be infeasible in any case), but rather a depreciation of the confidentiality rules for lawyers. Lawyers and clients can still agree to keep certain matters confidential, but we could change the default rule. Confidentiality rules are certainly not the only societal factor weighing in favor of corruption and mistrust, but it is a factor on that side of the societal balance.

## II. THE UNNECESSARY RULES

Part I explored the costs of confidentiality — egregious instances of unfairness or injustice, undermining of the public trust in the legal system, and declining transparency in society overall.<sup>186</sup> Yet all rules have downsides: overdeterrence and underdeterrence at the margins,<sup>187</sup> marginal situations that pose conflicts with other rules, and a risk of abuse or increased public cynicism as the rules serve as pretexts for opportunistic behavior. The foregoing sections have argued that these problems are inherently more robust with secrecy rules than with transparency rules,<sup>188</sup> but for purposes of argument, we can concede that all rules present tradeoffs between costs and benefits. The value of a rule, therefore, comes from its net benefits — the extent to which its upsides outweigh its downsides (costs).

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(Robert Goldscheider ed., 2002)); Andrew J. Maas, *Valuation & Assessment of Intangible Assets, and How the America Invents Act Will Affect Patent Valuations*, 94 J. PAT. & TRADEMARK OFF. SOC'Y 300, 312-16 (2012) (discussing how secrets create value); Andrea M. Matwyshyn, *Imagining the Intangible*, 34 DEL. J. CORP. L. 965, 975 (2009) (“Trademarks, trade secrets, copyrights, patents, customer relationships, contract rights, and goodwill can each increase in value across time.” (citations omitted)).

<sup>186</sup> See *supra* Part I.

<sup>187</sup> See Posner, *Reading of Statutes*, *supra* note 130, at 280-81; see also Michael Abramowicz & Omer Alper, *Screening Legal Claims Based on Third-Party Litigation Finance Agreements and Other Signals of Quality*, 66 VAND. L. REV. 1641, 1664-65 (2013); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 354 (1996); Kaplow & Shavell, *Fairness*, *supra* note 87, at 1100-01; Louis Kaplow & Stephen Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 592 n.66 (1989); Porat & Posner, *supra* note 128, at 25-30.

<sup>188</sup> See *supra* Part I.

Such cost-benefit analysis should apply to rules of professional conduct just as much as it applies to penal statutes or regulations for financial institutions.<sup>189</sup> In the case of the confidentiality rules, the positive side of the ledger sheet comes up short. The confidentiality rules provide little benefit to offset the costs they impose on society. As the following paragraphs will argue, these rules are largely unnecessary in that they present numerous redundancies: bargaining redundancies, redundancies with other ethical and evidentiary rules, and redundancies with venial marketplace incentives. The primary supposed benefit of the rules (indeed, the ABA's leading justification for Rule 1.6) is that confidentiality rules create trust and transparency between clients and their counsel, but this seems to rest on a false premise. Each of these points deserves explanation, and this Part addresses each of these issues in turn.

#### A. *Coasean Redundancy and the Confidentiality Rules*

The Coase Theorem postulates that where transaction costs are zero, legal default rules (assignment of rights or liabilities) have little or no effect on the final allocation of resources, as parties can (and will) bargain around the rules to achieve their private goals.<sup>190</sup> Of course, transaction costs are never zero,<sup>191</sup> and even though parties engage in Coasean bargaining constantly, such bargaining always occurs within an encumbrance of transaction costs.<sup>192</sup> Coasean bargaining thus always

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<sup>189</sup> See Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ. L. REV. 425, 444-52 (2011) (arguing that cost-benefit analysis is necessary when state bars seek to amend their ethical rules for lawyers); McKoski, *supra* note 140, at 1950-52 (applying cost-benefit analysis to rules of judicial conduct); Yuzhe Zhao, *Rules, Morality, and Legal Ethics: Searching for the Underlying Principle of Lawyer Regulation*, 25 GEO. J. LEGAL ETHICS 857, 858-59 (2012) (stating that “[c]onceptualizing rules of professional conduct through the lens of law and economics leads to a picture of calculating lawyers doing cost-benefit analyses”).

<sup>190</sup> See Coase, *supra* note 11, at 2-8. See generally Yun-chien Chang & Henry E. Smith, *An Economic Analysis of Civil Versus Common Law Property*, 88 NOTRE DAME L. REV. 1, 31 (2012) (relating Coase Corollary to transaction costs and rights in either an incomplete or complete property system); Thomas W. Merrill & Henry E. Smith, *Making Coasean Property More Coasean*, 54 J.L. & ECON. 577 (2011) (discussing Coase Corollary's effect on property law and property rights).

<sup>191</sup> See Coase, *supra* note 11, at 15-19; see also RAO, *supra* note 146, at 45-51.

<sup>192</sup> See R.H. COASE, *THE FIRM, THE MARKET, AND THE LAW* 178 (1988) (“The same approach which, with zero transaction costs, demonstrates that the allocation of resources remains the same whatever the legal position, also shows that, with positive transaction costs, the law plays a crucial role in determining how resources are used. But it does more than this. With zero transaction costs, the same result is reached because contractual arrangements will be made to modify the rights and duties of the parties so as to make it in their interest to undertake those actions which maximize the



occurs within the shadow of the law.<sup>193</sup> In other recent articles,<sup>194</sup> I have proposed a commonsense sliding-scale application of the Coase Theorem — legal rules have diminishing effect on outcomes as transaction costs decrease, and conversely, high transaction costs give laws and rules their verve.<sup>195</sup> To extend the shadow-of-the-law metaphor, Coasean bargaining occurs in the shadow of the law, but law's shadow is darker and longer when transaction costs are at their apex, and the shadow largely dissipates as transaction costs approach zero, even if we never reach zero.

Turning to the topic of lawyer confidentiality rules, it would be useful for this discussion to coin the new term “Coasean redundancy” to describe the minimal effect of legal default rules when transaction costs are at their lowest possible point. Coasean redundancy occurs when parties can easily bargain to achieve their goals that the rules at issue become irrelevant.<sup>196</sup> To return once more to the classic metaphor, the parties should be bargaining in the shadow of the law, but the shadow is so faint that it makes little or no difference to the parties or on the outcome.<sup>197</sup>

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value of production. With positive transaction costs, some or all of these contractual arrangements will become too costly to carry out.”).

<sup>193</sup> See, e.g., Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463, 2470-72 (2004) (discussing nonjudicial aspects of the legal system, particularly the career incentives of lawyers that overshadow plea bargaining); Jim Rossi, *Bargaining in the Shadow of Administrative Procedure: The Public Interest in Rulemaking Settlement*, 51 DUKE L.J. 1015, 1017-18 (2001) (discussing the overshadowing of administrative law on certain types of bargaining); see also Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CALIF. L. REV. 1471, 1517 (1993). See generally Mnookin & Kornhausert, *supra* note 162, at 959-77 (discussing development of framework to consider how rules and procedures used in court affect the bargaining process outside the courtroom).

<sup>194</sup> See Dru Stevenson, *Costs of Codification*, 2014 U. ILL. L. REV. 1129, 1150-52; Dru Stevenson, *Jury Selection and the Coase Theorem*, 97 IOWA L. REV. 1645, 1646-47 (2012) [hereinafter *Jury Selection*].

<sup>195</sup> See Stevenson, *Jury Selection*, *supra* note 194, at 1655.

<sup>196</sup> Coase posited that there were indeed situations where transaction costs were vanishingly small or insignificant, but did not use the term “redundancy.” See COASE, *supra* note 192, at 172-75. Coase elsewhere postulated that firms exist in the business world primarily to minimize transaction costs, as it is often efficient for a company to get individual tasks done, like billing, shipping, or payroll, without having to negotiate a contract or agreement each time. See R.H. Coase, *The Nature of the Firm*, 4 *ECONOMICA* 386, 390-92 (1937); see also Herbert Hovenkamp, *Coase, Institutionalism, and the Origins of Law and Economics*, 86 *IND. L.J.* 499, 530-51 (2011) (situating Coase's theories within the context of neoclassical economics and intuitionism).

<sup>197</sup> Situations with minimal or vanishing transaction costs are what we could call Coasean Noon — the instance where the law casts the smallest shadows.

The confidentiality rules are a prime example of Coasean redundancy. Clients and lawyers can (and do) easily bargain to achieve their optimal level of confidentiality, regardless of where we set the default rules. In these one-to-one, in person, hire-for-service settings, the Coasean transaction costs are vanishingly small.<sup>198</sup> With the current regime, in which default rules prohibit disclosures, clients may, and presumably do, authorize their lawyers, explicitly and implicitly, to make innumerable disclosures anyway.<sup>199</sup> In a many situations, in fact, there should be virtually no secrets for the lawyer to keep, and the confidentiality rules become irrelevant.<sup>200</sup> Conversely, were the default

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<sup>198</sup> See RAO, *supra* note 146, at 144-45 (discussing transaction costs, the design of incentives, and private ordering).

<sup>199</sup> The Model Rules discuss authorized disclosures (both express and implied) in detail. E.g., R. 1.6 cmt. 5 (“In some situations, for example, a lawyer may be impliedly authorized to admit a fact that cannot properly be disputed or to make a disclosure that facilitates a satisfactory conclusion to a matter.”); see also Bruce L. Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 487-88 (1994) (“The costs of silence [in litigation] may often be enough to induce disclosure. If so, discovery rules have no effect here; they simply require what the defendant would do anyway.”).

<sup>200</sup> See, e.g., Fischel, *supra* note 151, at 18-19 (describing situations in which clients have nothing to hide, and would prefer to signal that fact to a court or the other party); Bradley G. Johnson, *Ready or Not, Here They Come: Why the ABA Should Amend the Model Rules to Accommodate Multidisciplinary Practices*, 57 WASH. & LEE L. REV. 951, 979 (2000) (“Some clients might find such a waiver attractive as a way of indicating to regulators and investors that they have nothing to hide.”); Keith Kendall, *The Economics of the Attorney-Client Privilege: A Comprehensive Review and a New Justification*, 36 OHIO N.U. L. REV. 481, 485 (2010) (discussing the client who wants to signal that there is nothing to hide); Craig S. Lerner, *Conspirators’ Privilege and Innocents’ Refuge: A New Approach To Joint Defense Agreements*, 77 NOTRE DAME L. REV. 1449, 1472 (2002) (“In his *Rationale of Judicial Evidence*, [Jeremy Bentham] argued that it was not necessarily socially beneficial to foster candid communications between the client and attorney. To be sure, society wants the ‘honest’ client — the client with nothing to hide — to receive competent legal advice but such a client would make a full disclosure to his attorney regardless of whether the communication was privileged.”); Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 251-52 (1995) (describing scenarios in which clients have nothing to hide); Larry E. Ribstein, *Lawyers As Lawmakers: A Theory of Lawyer Licensing*, 69 MO. L. REV. 299, 308 n.35 (2004) (“It is not clear that either licensing or mandatory lawyer disclosure of client dishonesty is better than relying on private ordering, since clients have an incentive to signal that they have nothing to hide by hiring lawyers who pledge to disclose client wrongdoing.”); William H. Simon, *The Professional Responsibilities of the Official’s Lawyer: A Case Study from The Clinton Era*, 77 NOTRE DAME L. REV. 999, 1017 (2002) (“The suspicion that fueled the very hearing where Nussbaum was testifying was evidence of the costs of asserting confidentiality. A client confident that she has nothing to hide often has a strong interest in demonstrating that fact. And when the client is a public official, there will sometimes be an important public value in demonstrating that nothing of public significance is being concealed.”).

rules the opposite — permitting disclosure — clients who place a premium on secrecy could contract for it with a standard nondisclosure agreement.<sup>201</sup> In fact, the confidentiality rules currently have a few exceptions permitting disclosure, and there is no reason clients cannot bargain with their lawyers for their optimal level of nondisclosure. For example, the disclosing client in the Alton Logan case — the man who actually committed the murder — easily made an agreement with his lawyers authorizing them to tell the truth after his death. While this might have been an instance of contracting around a prohibition rather than a permission under Illinois ethical rules at the time, it illustrates the easy type of transaction that can occur regardless of the default rules.

In other words, the transaction costs are so low in the Coasean bargaining between lawyers and clients that the confidentiality rules do not affect the outcome most of the time.<sup>202</sup> The level of disclosure seems to be the same regardless of which default rule we use. The confidentiality rules are an instance of Coasean redundancy.<sup>203</sup>

Three anticipated objections to this idea merit discussion. First, Cass Sunstein and Richard Thaler, along with other behavioral economists, argue in *Nudge*<sup>204</sup> and other writings that default rules do matter because of predictable irrationalities. Prohibition versus permission, or opt-in versus opt-out default rules, have a significant impact on individual and aggregate choices,<sup>205</sup> at least in many contexts such as organ donation<sup>206</sup> and availing oneself of employee benefits.<sup>207</sup> Sunstein and others offer

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<sup>201</sup> See Zacharias, *Rethinking Confidentiality II*, *supra* note 143, at 646-48 (discussing the option of using nondisclosure contracts and the fact that clients with the most to hide would readily use them).

<sup>202</sup> See Painter, *supra* note 200, at 251-52.

<sup>203</sup> For application of this redundancy concept in the area of debtor-creditor rules, see Robert R. Niccolini, Note, *The Voidability of Actions Taken in Violation of the Automatic Stay: Application of the Information-Forcing Paradigm*, 45 VAND. L. REV. 1663, 1685 (1992), stating, “Since a debtor can effectively protect itself from creditors by its own action, application of an immutable rule seems both redundant and wasteful.”

<sup>204</sup> For an excellent review of *Nudge* and another similar book, see On Amir & Orly Lobel, *Stumble, Predict, Nudge: How Behavioral Economics Informs Law and Policy*, 108 COLUM. L. REV. 2107-08 (2008) (reviewing DAN ARIELY, *PREDICTABLY IRRATIONAL: THE HIDDEN FORCES THAT SHAPE OUR DECISIONS* (2008); RICHARD H. THALER & CASS R. SUNSTEIN, *NUDGE: IMPROVING DECISIONS ABOUT HEALTH, WEALTH, AND HAPPINESS* (2008)). See generally THALER & SUNSTEIN, *supra* (discussing how framing choices for consumers or citizens biases their decisions).

<sup>205</sup> See THALER & SUNSTEIN, *supra* note 204, at 34-35.

<sup>206</sup> See *id.* at 178-79.

<sup>207</sup> See *id.* at 107-17.

several instances where the default rules do, in fact, affect outcomes by “nudging” people’s decisions one way or the other.<sup>208</sup>

The *Nudge* thesis runs counter to the Coase Theorem generally, and more specifically contradicts the concept of Coasean redundancy proposed here.<sup>209</sup> Of course, one could defend the Coase Theorem by including within the broad set of “transaction costs” the very irrationalities described by the behavioral economists — endowment effects, hyperbolic discounting, salience heuristics, and various mental framing issues — as well as the acute information deficits that attend the favorite *Nudge* scenarios.<sup>210</sup> In other words, all of the decision-making handicaps that make default rules matter, such as opt-in versus opt-out, are merely species of transaction costs. To return to my sliding-scale version of the Coase Theorem, I would contend that legal default rules tend to have their greatest import, or verve, in situations with high transaction costs, and this includes situations where people tend to be irrational (high salience effects, discounting, framing problems, and so on). A sliding scale Coase Theorem would support the argument that a “nudge” is appropriate when rational decision-making is at its nadir.

In regards to the concept of Coasean redundancy, it is not clear that every situation is a *Nudge* situation. For purposes of the discussion here, lawyers are sophisticated participants in the Coasean bargaining about the nature of their representation,<sup>211</sup> and frankly, most clients who can afford to use legal services are sophisticated as well<sup>212</sup> — those seeking services outside the three areas of indigent defense, personal injury, and non-employment immigration law. In addition, there is an efficient, highly competitive market for legal services; clients dissatisfied with one lawyer’s preferences regarding disclosures can easily find another lawyer.<sup>213</sup>

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<sup>208</sup> See *id.* at 11-14.

<sup>209</sup> See Pierre Schlag, *Nudge, Choice Architecture, and Libertarian Paternalism*, 108 MICH. L. REV. 913, 920-21 (2010) (discussing the problems of the “Nudge” theory in a “post-Coase world”).

<sup>210</sup> See, e.g., Anuj C. Desai, *Libertarian Paternalism, Externalities, and the “Spirit of Liberty”*: How Thaler and Sunstein Are Nudging Us Toward an “Overlapping Consensus,” 36 LAW & SOC. INQUIRY 263, 290 (2011) (making a similar observation).

<sup>211</sup> Firms and other entities employing attorneys often establish internal policies to safeguard client’s non-confidential, albeit sensitive, information from disclosure. See Joshua Landau & Kate Willcox, *Within the Law: Dealing with Non-Confidential Sensitive Information in the Age of Online Legal Tabloids*, 23 GEO. J. LEGAL ETHICS 667, 682-84 (2010). In the past, law firms used internal policies and procedures to supplement the Model Rules when the Rules did not provide adequate guidance for the disclosure of sensitive information. See *id.* at 684.

<sup>212</sup> See Cramton & Knowles, *supra* note 35, at 115-16.

<sup>213</sup> See Diane Lourdes Dick, *Legal Ethics, Commercial Practice, and the Certainty Imperative: A Cautionary Note*, 40 N. KY. L. REV. 279, 291 (2013) (describing the

Moreover, the classic *Nudge* scenarios all involve public policy issues (such as organ donation) in which most people seem to be making the “wrong” choices under the current default rules, at least in the opinion of Sunstein and other behavioral economists. The *Nudge* thesis is implicitly paternalistic. Paternalism, including Sunstein’s “libertarian paternalism,”<sup>214</sup> may be defensible in situations where employees are forfeiting benefits and unwittingly subjecting themselves to higher costs or losses down the road. It is less clear what paternalism would counsel about individual clients and the information asymmetries created by the confidentiality rules. The paternalistic nudge is, in my opinion, less defensible in this situation. In fact, one could argue that the nudge should push in the other direction, toward more transparency and disclosure. Up-front disclosures, for example, reduce uncertainty in transactional settings and preempt many potential disputes later on.

A second major objection to the application of Coasean redundancy to the confidentiality rules could be that this approach seems incongruous with the discussion in Part I about the detrimental

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“realities of today’s complex and highly competitive market for legal services” (citations omitted)); Robert W. Hillman, *The Impact of Partnership Law on the Legal Profession*, 67 *FORDHAM L. REV.* 393, 393 (1998) (“The law firm is the principal vehicle through which lawyers associate, pool their professional and financial capital, and participate in the highly competitive market for legal services.”); James W. Jones & Anthony E. Davis, *In Defense of a Reasoned Dialogue About Law Firms and Their Sophisticated Clients*, 121 *YALE L.J. ONLINE* 589, 597 (2012) (“The suggestions set out in the Law Firm Proposals are grounded in the realities of today’s complex and highly competitive market for legal services.”); Peggy Kubicz Hall, *I’ve Looked at Fees from Both Sides Now: A Perspective on Market-Valued Pricing for Legal Services*, 39 *WM. MITCHELL L. REV.* 154, 158 (2012) (“My in-house search for better ways to explain to my internal business clients the value and cost of the array of global legal services they required coupled with immersion in a fast-paced, cost-down, price-down, highly competitive market space colors my perspective on market-valued pricing.”); John C. Moorehouse, *An Economic Explanation of the Dual Contingent Fee*, 3 *FLA. ST. U. BUS. REV.* 43, 43 (2003) (“In the United States, dual contingent fees are emerging in highly competitive markets for legal services.”); Manuel R. Ramos, *Legal Malpractice: The Profession’s Dirty Little Secret*, 47 *VAND. L. REV.* 1657, 1711 (1994) (noting the highly competitive market for legal services); Milton C. Regan, Jr., *Law Firms, Competition Penalties, and the Values of Professionalism*, 13 *GEO. J. LEGAL ETHICS* 1, 70 (1999) (“[Clients] gain advantages from the flexibility and responsiveness that firms familiar with the client are able to provide through team production. They also, however, see themselves as benefiting from a highly competitive market for legal services that minimizes their dependence on any given firm.”).

<sup>214</sup> See Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 *U. CHI. L. REV.* 1159, 1162 (2003); see also Cass R. Sunstein, *The Storrs Lectures: Behavioral Economics and Paternalism*, 122 *YALE L.J.* 1826, 1860-61 (2013). For a critique, see generally Dru Stevenson, *Libertarian Paternalism: The Cocaine Vaccine as a Test Case for the Sunstein/Thaler Model*, 3 *RUTGERS J.L. & URB. POL’Y* 4 (2005).

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systemic effect of the rules on Coasean bargaining.<sup>215</sup> There, I argued that the confidentiality rules are costly or problematic because they encumber bargaining by increasing information asymmetries and creating lemons effects.<sup>216</sup> In this section, I have argued that Coasean bargaining often cancels out any hypothetical salutary effects of the same rules. Any apparent contradiction here is only superficial — Part I addressed externalities of the rules, between potential bargainers, while this section has focused on the endogenous effects of the rules on the lawyer and client. The externalities of the rules can occur even where individual clients and lawyers do not apply the rule to aspects of their particular representation. The fact that low transaction costs make a rule irrelevant to the lawyer-client relationship does not prevent the same rules from creating externalized transaction costs for other parties. On an individual (lawyer-client) level, Coasean bargaining nullifies the rules; on a systemic level, the rules hinder Coasean bargaining outside the context of lawyer-client agreements.

A final possible objection is that default rules themselves, regardless of which way they are set, can lower transaction costs by streamlining the bargaining or taking unnecessary items off the table. Admittedly, it is true that bright-line rules can streamline bargaining by narrowing the negotiations and reducing uncertainty. Yet, this principle applies more to procedural rules than to substantive ones, and it is not clear that the default rule in the lawyer-client confidentiality context is doing much useful work, which is the subject of the remainder of this Part.

In sum, from a Coasean perspective, the confidentiality rules offer little benefit or value for the lawyer-client relationship. To the extent that the rules are unnecessary, there is little to offset the social costs that the rules impose.

### B. Rule Redundancy

The useful features of the confidentiality rules overlap significantly with the conflicts of interest rules (concentrated mostly in Model Rules 1.7–1.13) and certain evidentiary rules, making the confidentiality rules largely redundant to the extent that they provide any value to the legal system. This redundancy makes the confidentiality rules rather unnecessary.<sup>217</sup> Confidentiality concerns are most legitimate when

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<sup>215</sup> See *supra* Part I.D.

<sup>216</sup> See *supra* Part I.

<sup>217</sup> See, e.g., Michael S. McGinniss, *Virtue and Advice: Socratic Perspectives on Lawyer Independence and Moral Counseling of Clients*, TEX. A&M L. REV., Fall 2013 at 1, 9-10 (describing similar problems of rule redundancy within the ABA's Model Rules arise

focused on preventing opportunism and exploitation of a client (using the clients' confidential information for the personal benefit of the lawyer or another client). Betraying one's fiduciary duty to a client, however, is more properly the domain of the conflicts rules. The detailed conflicts rules, such as Model Rules 1.7, 1.8, 1.9, and 1.10, carry the water in protecting clients from predatory practitioners, not the confidentiality rules. It is hard to imagine a scenario that would make client confidentiality necessary in which the conflicts rules would not already cover the situation and protect the client.

Rule 1.6(a) states, "A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b)."<sup>218</sup> This merely echoes the conflicts provision in Rule 1.8(b): "A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent, except as permitted or required by these Rules."<sup>219</sup> In other words, Rule 1.6 is mostly a restatement of Rule 1.8(b) with only slight differences.<sup>220</sup> There may also be a question of whether 1.6(a)'s use of the word "reveal" and 1.8(b)'s word "use" are interchangeable, but to date, the distinction has received little or no attention. The main point here is that if we were to repeal Rule 1.6 entirely, Rules 1.7 and 1.8 could still generally provide clients with the protection they need from lawyers misusing their confidential information to their detriment, either from self-interest or to subordinate one client's interest to another's. The prohibitions in Rule 3.7<sup>221</sup> (against lawyers serving as witnesses in cases where they represent a party) provide additional protections for clients that make the confidentiality rules duplicative.

Rule redundancy can have pernicious effects besides wasting ink in the printing of codes.<sup>222</sup> Commentators have observed, for example,

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with Rule 2.1 that requires lawyers to exercise independent judgment and the loyalty and diligence rules).

<sup>218</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2013).

<sup>219</sup> *Id.* R. 1.8(b) (2013).

<sup>220</sup> Rule 1.6(a) forbids revealing information relating to the representation of the client, while Rule 1.8(b) only forbids revealing information relating to the representation of a client to the client's disadvantage. *See id.* R. 1.6(a). The fact 1.8(b)'s requirement that the information proscribed was disadvantageous to the client, means that 1.8(b) covers less information than 1.6(a) which is any information relating to the representation whether it is disadvantageous or not. *See id.* R. 1.8(b).

<sup>221</sup> *See id.* R. 3.7 (2013).

<sup>222</sup> *See ER News: AAAS Panel Considers Role of Scientist in Policy Making*, 1 EDUC. RESEARCHER, Feb. 1972, at 17, 17-18 (defining "legislative redundancy" as "the tendency

that redundancy in the federal criminal code provides prosecutors with a means to ratchet up penalties for individual defendants, and in extreme cases, to redefine crimes.<sup>223</sup> Penal code redundancies translate into a delegation of legislative power to executive branch officials, such as prosecutors.<sup>224</sup> Rule redundancy in other areas of the lawyers' ethical codes have created problems with courts straining to read differentiable substance into each separate but redundant provision beyond the intent of the rulemakers.<sup>225</sup> In the context of the ethical rules of lawyers, the redundancy results in overkill as far as protecting lawyers who protect their clients. Broadly construing the confidentiality rules exacerbates the redundancy effect.<sup>226</sup> Commentators usually lament rule redundancy when it occurs in other fields of law.<sup>227</sup>

Some commentators have argued that rule redundancy is valuable in that it contributes to diversity within the legal system.<sup>228</sup> There is a

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to pass yet another bill rather than synthesize the variables in a comprehensive program . . . [that] produces simplistic answers to complex issues.”); see also 146 CONG. REC. 16,057 (2000) (statement of Rep. Conyers) (“[I]t has been said that legislative redundancy is a common sin on the House floor but this bill makes that sin unusually self-indulgent.”).

<sup>223</sup> See Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879, 886, 908 (2005) (discussing the effects and remedies to the continued expansion of the federal criminal code).

<sup>224</sup> See *id.* at 923.

<sup>225</sup> See Lester Brickman, *Contingent Fees Without Contingencies: Hamlet Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 60-62 (1989) (explaining that ethical rules about excessive fees are redundant and stating, “The revisers’ innocent use of redundancy for emphasis and their failure to state that fee agreements would be unrestrained only by statutory law breathed new life into the moribundity. Though section 258 and its progeny no longer had substantive meaning, some courts in New York and the other jurisdictions that adopted the Field Code failed to understand the legislative history and regarded the codified repeal statute as substantively meaningful.” (footnotes omitted)); see also T.D. 37,927, 36 Treas. Dec. Customs & Other Laws 180 (1919) (stating that “[w]e are of opinion that the amendment was not a purposeless bit of legislative redundancy, but was the result of a long experience which justified Congress in concluding that litigation would be best avoided”).

<sup>226</sup> See Smith, *supra* note 223, at 908.

<sup>227</sup> See John C.P. Goldberg & Robert H. Sitkoff, *Torts and Estates: Remediating Wrongful Interference with Inheritance*, 65 STAN. L. REV. 335, 338-39 (2013); David Paul Horowitz, *Disclosure*, 58 SYRACUSE L. REV. 905, 945 (2008); Nancy Staudt, *Redundant Tax and Spending Programs*, 100 NW. U. L. REV. 1197, 1230 (2006); Comment, *Unions As Juridical Persons*, 66 YALE L.J. 712, 734 (1957); see also Bennett I. Deutsch, *The Tax Treatment of Illegal Payments After Alex v. Commissioner*, 79 COLUM. L. REV. 589, 596 n.48 (1979); Eduardo M. Peñalver, *The Illusory Right to Abandon*, 109 MICH. L. REV. 191, 218 (2010) (discussing redundancy in the laws of abandonment).

<sup>228</sup> See Robert M. Cover, *The Uses of Jurisdictional Redundancy: Interest, Ideology, and Innovation*, 22 WM. & MARY L. REV. 639, 674-78 (1981). For a recent discussion of Robert M. Cover’s thesis, see Anthony V. Alfieri, *The Fall of Legal Ethics and the Rise of*



difference, however, between systemic or jurisdictional redundancy (which can make a system more flexible) and endogenous redundancy between sections of a unified code.

Apart from the conflicts of interest rules, numerous evidentiary rules — not only privilege<sup>229</sup> and work product doctrines, but also the inadmissibility of past crimes, irrelevant material, hearsay rules, and the Fifth Amendment — already prevent unduly prejudicial disclosures from influencing a judge or jury, making confidentiality rules superfluous. Many of the arguments in this Article would also warrant a narrow application of the attorney-client privilege rules (and a few of the arguments here actually borrow from articles about the privilege doctrine). Even so, the privilege rule has a different function as an evidentiary exclusionary rule rather than an affirmative ethical duty for lawyers — the privilege doctrine is actually a rule for judges to follow (regarding admissibility decisions and compelling disclosures) rather than lawyers. It is important to emphasize here, though, that privilege would remain intact even if we abolished or repealed the confidentiality rules; privilege doctrine dates back to Roman times,<sup>230</sup> while the confidentiality rules are a trendy novelty introduced in the 1970s.<sup>231</sup>

Apart from being an evidentiary-admissibility rule rather than an ethical rule, privilege is narrower than the confidentiality rules — the confidentiality rules extend to information and situations not covered by the attorney-client privilege.<sup>232</sup> In contrast to both the attorney-client

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*Risk Management*, 94 GEO. L.J. 1909, 1932 (2006). For an opposing view, see Todd J. Zywicki, *A Unanimity-Reinforcing Model of Efficiency in the Common Law: An Institutional Comparison of Common Law and Legislative Solutions to Large-Number Externality Problems*, 46 CASE W. RES. L. REV. 961, 1006 (1996).

<sup>229</sup> FED. R. EVID. 501.

<sup>230</sup> See Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CALIF. L. REV. 487, 488 (1928) (discussing origins of attorney-client privilege in early Roman law); Nathan Swinton, *Privileging a Privilege: Should the Reporter's Privilege Enjoy the Same Respect as the Attorney-Client Privilege?*, 19 GEO. J. LEGAL ETHICS 979, 980 (2006) (“The concept of the privilege, however, first arose in Roman law, which stated that slaves could not reveal their masters’ secrets. Perhaps somewhat unceremoniously grouped with slaves and servants, attorneys too, were not permitted to testify against their ‘masters,’ so as to avoid corruption and promote notions of confidence and trust within a master’s family.” (citations omitted)); Joel D. Whitley, *Protecting State Interests: Recognition of the State Government Attorney-Client Privilege*, 72 U. CHI. L. REV. 1533, 1533 (2005).

<sup>231</sup> See WOLFRAM, *supra* note 18, at 297-98.

<sup>232</sup> See, e.g., *Banner v. City of Flint*, 99 F. App’x 29, 36 (6th Cir. 2004) (“The ethical rule of confidentiality is closely related to the evidentiary rule of attorney-client privilege. The difference is that confidentiality applies to virtually all information coming into a lawyer’s hands concerning a client, and forbids virtually all disclosures. The privilege is narrow in scope, invoked in response to an attempt to compel

privilege, Rule 1.6 contains no exception permitting disclosure of information previously disclosed or publicly available.<sup>233</sup> Billing information, fee agreements, and client identity are generally not protected by the evidentiary attorney-client privilege (with rare exceptions),<sup>234</sup> while the confidentiality rules compel lawyers to keep such information secret.

The first objection to repealing the confidentiality rules (or even diluting them with more exceptions) always centers on trial scenarios

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testimony, where the testimony sought is about information passed between lawyer and client.” (citations omitted)); Port Wash. Teachers’ Ass’n v. Bd. of Educ. of Port Wash. Union Free Sch. Dist., 361 F. Supp. 2d 69, 80 (E.D.N.Y. 2005) (“In addition, the Court must remind the parties that a testimonial privilege is not the same animal as a general ethical obligation of confidentiality.”); *Elijah W. v. Superior Court*, 216 Cal. App. 4th 140, 151 (2013) (“In addition to this statutory privilege, an attorney owes to his or her client an ethical duty of confidentiality. This duty of confidentiality is broader than the lawyer-client privilege and protects virtually everything the lawyer knows about the client’s matter regardless of the source of the information.” (citations omitted)); *Iowa Supreme Court Attorney Disciplinary Bd. v. Marzen*, 779 N.W.2d 757, 766 (Iowa 2010) (“[T]he ethical requirement of confidentiality is broader than the narrowly interpreted attorney-client privilege.”); *State v. Gonzalez*, 290 Kan. 747, 758-61 (2010) (“In contrast to the attorney-client privilege, which is a rule of evidence and applies only when the attorney may be called as a witness or otherwise required to produce evidence concerning a client, the attorney’s ethical duty of confidentiality under the disciplinary rules applies in all situations other than those where evidence is sought from the lawyer through compulsion of law. Further, in contrast to the narrow scope of the attorney-client privilege, the ethical duty of client confidentiality applies broadly to all information related to representation of a client.” (citations omitted)).

<sup>233</sup> See, e.g., *In re Bryan*, 275 Kan. 202, 202, 211 (2003) (finding lawyer violated Rule 1.6 by disclosing, in court documents, existence of defamation suit against former client); *State ex rel. Okla. Bar Ass’n v. Chappell*, 93 P.3d 25, 28-29 (Okla. 2004) (finding lawyer in fee dispute with former employer violated Rule 1.6 by filing motion referring to criminal charges that had been filed and later dismissed against former client); *In re Harman*, 628 N.W.2d 351, 361 (Wis. 2001) (finding lawyer violated Rule 1.6(a) by disclosing to prosecutor his former client’s medical records that he obtained during prior representation and it was irrelevant whether those records “lost their ‘confidentiality’” by being made part of former client’s medical malpractice action).

<sup>234</sup> See, e.g., *DiBella v. Hopkins*, 403 F.3d 102, 120-21 (2d Cir. 2005) (finding time records and billing statements are not privileged when they do not contain detailed accounts of legal services rendered); *United States v. BDO Seidman*, 337 F.3d 802, 810-12 (7th Cir. 2003) (requiring disclosure of information regarding identity of accounting firm’s clients who consulted with firm regarding their participation in potentially abusive tax shelters); *Alexiou v. United States (In re Subpoena to Testify Before Grand Jury)*, 39 F.3d 973, 976-77 (9th Cir. 1994) (holding that a lawyer must testify about the identity of client who paid with counterfeit \$100 bill; client’s name not considered confidential unless “intertwined” with confidential information or last link tying client to crime); *United States v. Naegele*, 468 F. Supp. 2d 165, 171 (D.D.C. 2007) (finding billing statements that were general and did not reveal any litigation strategy or other specifics of representation are not protected by attorney-client privilege).

where critics imagine a lawyer would have to forfeit his client's case without the confidentiality rules. Yet those litigation scenarios would remain mostly unaffected if the confidentiality rules disappeared, because privilege would remain for judges as both a conduct rule and a decision rule about admissibility and court orders.<sup>235</sup> Work product doctrine would also remain and would protect private preparatory documents lawyers use leading up to trial. Both privilege doctrine and work product doctrine, however, have significant (socially beneficial) limitations that the confidentiality rules are lacking, so privilege and work product doctrines present fewer externalities and pernicious effects.

Other evidentiary rules also shoulder the burden for protecting clients from inappropriate lawyer disclosures. Suppose a client informs a lawyer about past crimes or convictions. These are already inadmissible (with a few rare exceptions<sup>236</sup>) under a relevant evidentiary rule,<sup>237</sup> making a confidentiality rule that protects this same information superfluous. Relevancy,<sup>238</sup> materiality,<sup>239</sup> and hearsay<sup>240</sup> rules also exclude from trials a portion of information that lawyers learn during representation,<sup>241</sup> further contributing the confidentiality's irrelevance. Fifth Amendment protections against self-incrimination also prevent trial testimony about certain matters that the confidentiality rules supposedly protect on a parallel track. Overall, the longstanding, traditional protections afforded to parties during trials mean that we should confine our analysis of the need or usefulness of confidentiality rules mostly to non-litigation contexts.

Discovery rules play a particularly complicated role in the analysis of costs and benefits of the ethical confidentiality rules. On the one hand,

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<sup>235</sup> In fact, even where a lawyer may permissibly disclose information under an exception to the confidentiality rules, the privilege doctrine may protect the client from the information being admissible as evidence in court proceedings. *See, e.g., Newman v. State*, 863 A.2d 321, 331-33 (Md. 2004) (holding that although lawyer had, pursuant to Rule 1.6, properly informed the court presiding over custody matter of client's threat to murder her husband and child, lawyer's testimony about those statements at subsequent criminal proceeding was barred by attorney-client privilege); *In re Grand Jury Investigation*, 902 N.E.2d 929, 931-33 (Mass. 2009) (holding that ethical permissibility of lawyer informing judge of client's threat to kill her not inconsistent with finding that client's statements were protected from compelled disclosure by attorney-client privilege).

<sup>236</sup> *See* FED. R. EVID. 609(a) (allowing for use of previous convictions for impeachment purposes under limited circumstances).

<sup>237</sup> *See id.* 404 (prohibiting use of crimes or other acts as character evidence).

<sup>238</sup> *See id.* 401-402 ("Relevance and Its Limits").

<sup>239</sup> *See id.* 401(b) ("[T]he fact is of consequence in determining the action.").

<sup>240</sup> *See id.* 802 ("The Rule Against Hearsay").

<sup>241</sup> *See id.* 103(d) ("Preventing a Jury from Hearing Inadmissible Evidence").

confidentiality rules are often in tension with the rules mandating discovery and production, undermining the policy goals underpinning the modern discovery requirements.<sup>242</sup> Lawyers face unfortunate dilemmas about complying with clear-cut discovery and production requests while trying to apply the clumsy confidentiality rules. On the other hand, the discovery rules are robust and the confidentiality exception for disclosures required by law or court order generally subordinates confidentiality's purported protections to discovery's entrenched objectives (fostering settlement, avoiding disruptive ambushing during trial, etc.). Discovery rules make the confidentiality rules somewhat pointless in the litigation context because the opposing party will normally request and obtain the information that it would actually find useful. The discovery rules are a further reason that confidentiality rules need to find their justification primarily apart from the litigation arena, because the combination of discovery's mandates with the existing admissibility protections of the evidentiary rules mean that confidentiality rules do almost nothing useful in the adjudicatory context.<sup>243</sup>

### C. Market Redundancy

Functionally, legal rules should be essentially counterfactual: they mandate (or coerce) actions that the governed would not otherwise do. These would be no reason for a government to require what everyone would do regardless of the law.<sup>244</sup> A rule or law is unnecessary, at least, when its requirements are redundant with strong incentives already in place.<sup>245</sup>

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<sup>242</sup> See, e.g., John M. Barkett, *Evidence Rule 502: The Solution to the Privilege-Protection Puzzle in the Digital Era*, 81 *FORDHAM L. REV.* 1589, 1590 (2013) (discussing "subject matter" waiver concerns and remedies related to the current trend of electronic document production); Nathan M. Crystal, *Inadvertent Production of Privileged Information in Discovery in Federal Court: The Need for Well-Drafted Clawback Agreements*, 64 *S.C. L. REV.* 581, 591-92 (2013) (discussing how confidentiality rules apply to inadvertent disclosures of privileged information during discovery); Ronald D. Rotunda, *Applying the Revised ABA Model Rules in the Age of the Internet: The Problem of Metadata*, 42 *HOFSTRA L. REV.* 175, 227-29 (2013) (discussing metadata included in documents produced during discovery and the associated confidentiality issues).

<sup>243</sup> But see Miller, *supra* note 96, at 499-501.

<sup>244</sup> This is truer of deterrence or utilitarian based laws that retributive laws, which may assume ex ante that there will be some violations and thus seek to punish or take vengeance on the noncompliant. This also does not account for the "forbidden fruit" phenomenon, but these subtle qualifications are outside our scope here.

<sup>245</sup> See Randy E. Barnett, *Forward: Can Justice and the Rule of Law Be Reconciled?*, 11 *HARV. J.L. & PUB. POL'Y* 597, 597-98 (1988); Randy E. Barnett, *Unenumerated*

The previous section explored how all the most useful works of the confidentiality rules are merely duplicative of the effects of the conflict of interest rules and various evidentiary rules. Yet once we remove these functions, what remains of the confidentiality rules is redundant with the pre-existing marketplace incentives of attorneys.<sup>246</sup> Litigators like winning, and transactional lawyers like closing the deal. As mentioned in the Introduction, a prevailing view among many practitioners is that surprise and secrecy are strategic necessities, so those practitioners would safeguard unfavorable client information even without rules like 1.6.<sup>247</sup> Lawyers also need to keep clients, creating a natural disincentive to carry out a client's wishes about disclosures. Lawyers have marketplace reputational interests as well — for most lawyers, keeping current or prior clients happy with the handling of confidential information is essential for attracting new clients in the future.

Again, this Article is not talking about lawyers exploiting client information for their own advantage or to the disadvantage of those clients, as such opportunism and betrayal already comes under the conflicts rules and the rules against lawyers testifying as witnesses.<sup>248</sup> Nor is this Article talking about using client information to distort tribunal's perceptions or disrupt proceedings; the evidentiary rules carry the water in those scenarios. This section is about everything else — the cases where the disclosure does not arise from a conflict of interest, nor a desire to distort or disrupt — and in these remaining instances, a rule permanently prohibiting disclosure merely affirms what the lawyers already intended to do. In such a case, rather than serving a restraining influence, a redundant rule merely serves as a justification for the lawyer acting out of self-interest.

The existence of the candor and fairness rules<sup>249</sup> reinforces this point: those rules clearly are counterfactual, and clearly prohibit abuses of the system that many lawyers would otherwise perpetrate. The candor and fairness ethical rules, along with the discovery and procedural production rules, imply that lawyer's incentives often run in the

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*Constitutional Rights and the Rule of Law*, 14 HARV. J.L. & PUB. POL'Y 615, 616 (1991) (“From the perspective of justice, rules are either redundant or pernicious. They are redundant when they reach the same result as substantive justice requires; they are pernicious when they yield a different result.”).

<sup>246</sup> Given that other rules address lawyers' occasional temptations to use the client's information for the lawyer's own interests (or for other clients' interests), all that remains are situations in which the lawyer has nothing to gain personally (nor for other clients) by making disclosures.

<sup>247</sup> See *supra* INTRODUCTION.

<sup>248</sup> See MODEL RULES OF PROF'L CONDUCT R. 3.7 (2013).

<sup>249</sup> See *id.* R. 3.3–3.6, 4.1–4.4 (2013).

opposite direction: overweening, inappropriate use of secrecy and surprise. These rules suggest that the remainder of the confidentiality rules' effects (excluding conflicts distortions, and disruptions) are merely redundant with attorney's natural or market incentives. To the extent that the confidentiality rules are unnecessary, they fail to offer a benefit to offset the social costs they impose. The fact that the confidentiality rules are so rarely the basis of disciplinary actions suggests, pragmatically, that clients rarely have complaints about their lawyers in this regard.<sup>250</sup> Impliedly, state disciplinary authorities could impose a reprimand, suspension, or disbarment (the only three sanctions at their disposal), but the rules give zero guidance about

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<sup>250</sup> It is very difficult to find disciplinary cases focusing on a lawyer's disclosure of client information, except as an ancillary part of a conflicts of interest complaint, information used to harass or embarrass a third party, or violations of other rules (unreasonable fees, etc.). I could find only five reported cases. See *In re Goebel*, 703 N.E.2d 1045, 1047-49 (Ind. 1998) (regarding case where, in an effort to convince a criminal client who threatened to murder a guardianship client that the lawyer did not know latter's whereabouts, the lawyer showed criminal client returned envelope containing incorrect address for her; unfortunately, the criminal client was able to guess the mistake in address, go to her home, and murder her husband); *In re Harding*, 223 P.3d 303, 310-11 (Kan. 2010) (regarding case where a city attorney disclosed confidential information about mayor and other city officials to others in failed whistleblowing attempt); *In re Holley*, 729 N.Y.S.2d 128, 131 (N.Y. App. Div. 2001) (regarding case where respondent, in violation of his firm's internal policy and in his duty to his client, did not take ordinary precautions to determine if he was acting in the best interest of his client when he turned over the document without any inquiry); *Disciplinary Counsel v. Cicero*, 982 N.E.2d 650, 654-55 (Ohio 2012) (regarding case where attorney disclosed information received from prospective client to third party); *In re Disciplinary Proceedings Against O'Neil*, 661 N.W.2d 813, 815-16 (Wis. 2003) (regarding case where attorney violated disciplinary rule regarding confidentiality of client information by disclosing to police contents of attorney's conversation with client and by forwarding to police investigators client's divorce file, and thus public reprimand was warranted).

I could find only three reported cases about threatening to disclose confidential information to coerce payment of fees from client. See *Fla. Bar v. Carricarte*, 733 So. 2d 975, 977-78 (Fla. 1999) (regarding former corporate counsel who threatened to reveal client's trade secrets after his employment was terminated unless the company gave him "severance pay"); *State ex rel. Counsel for Discipline v. Wilson*, 634 N.W.2d 467, 474-75 (Neb. 2001) (regarding case where lawyer threatened to disclose client information to INS and to the court unless client paid for services lawyer previously provided at no charge); *In re Chatarpaul*, 706 N.Y.S.2d 714, 715-17 (N.Y. App. Div. 2000) (regarding case where lawyer threatened to reveal confidential information to obtain attorneys' fees); AMES & GOUGH, *Lawyers' Professional Liability Claims Trends: 2013*, at 6 (2013), available at <https://www.estateworks.com/home/marketing/site/data/AmesGough2013.pdf> (insurer survey). But see *In re Lim*, 210 S.W.3d 199, 201-04 (Mo. 2007) (holding that there is no violation when lawyer threatened to report client to collection agency and then to report client's debt to INS if bill not paid). Similarly, unauthorized disclosures are surprisingly absent from the lists of grounds for legal malpractice actions.

which sanction (if any) is appropriate for which rule violations, or how much weight authorities should give to one rule as opposed to another in terms of seriousness or gradations of infringement. Judges can impose disqualification in an individual case, but almost never do so solely for violations of the confidentiality rules.<sup>251</sup>

An anticipated objection is that the market will punish a lawyer too severely for making such disclosures — that future clients will eschew a lawyer who disregarded the confidentiality rules for a previous client. This objection does not account for the phenomenon of halo effects, an unspoken assumption that the lawyer's other clients must have nothing serious to hide.<sup>252</sup> Some lawyers may take a long view and strategically

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<sup>251</sup> See, e.g., Keith Swisher, *The Practice and Theory of Lawyer Disqualification*, 27 GEO. J. LEGAL ETHICS 71, 77-88, (2014) (charting cases involving bases for disqualification where receipt of opposing party's confidential information formed a basis, but not disclosure by lawyer of his own client's information).

<sup>252</sup> Halo effects refer to the natural tendency of people to attribute extra credibility or capability to an individual based on positive associations (sometimes rather attenuated). Even though lawyers have an immediate marketplace incentive to keep client secrets, a game-theoretical look at the long term might suggest that lawyers and clients might be better off if the lawyers sometime made unauthorized disclosures, especially to prevent injustices to other parties. The eventual halo effect would attend the rest of that lawyer's representation (of that client and others). See, e.g., Sheldon J. Lachman & Alan R. Bass, *A Direct Study of Halo Effect*, 119 J. PSYCHOL. 535, 535-36 (1985) (stating that "the extent to which a rater's evaluations of another individual on a series of individual traits are influenced by the rater's overall liking for the individual"); Richard E. Nisbett & Timothy DeCamp Wilson, *Telling More than We Can Know: Verbal Reports on Mental Processes*, 84 PSYCHOL. REV. 231, 244-45 (1977) (demonstrating that manipulated warmth or coldness of an individual's personality had a large effect on ratings of attractiveness, speech, and mannerisms); Richard E. Nisbett & Timothy DeCamp Wilson, *The Halo Effect: Evidence for Unconscious Alteration of Judgments*, 35 J. PERSONALITY & SOC. PSYCHOL. 250, 250-52 (1977) (studying the awareness of the halo effect); Edward L. Thorndike, *A Constant Error in Psychological Ratings*, 4 J. APPLIED PSYCHOL. 25, 25-27 (1920) (coining the term "halo effect").

Suppose, for example, that the lawyers who knew of Alton Logan's actual innocence had disclosed their own (already incarcerated) client's guilt. Alternatively, suppose that a lawyer tells the authorities where to find numerous other buried victims of a client, or that a lawyer warns the other party to a transaction about information that suggests an appraisal value was now wildly inaccurate, though not fraudulent. Probably the lawyer would face only token official consequences besides the client's ire. As word spread of the incident, judges, other lawyers, and opposing parties would tend to assume that the loose-lipped lawyer must have nothing to hide (at least nothing serious) in the remainder of the client's case or in other client's cases. A client with nothing to hide would actually prefer a lawyer with a reputation for disclosing detrimental information when the situation called for it because of this transferrable halo effect. See, e.g., Barrett J. Anderson, *Recognizing Character: A New Perspective on Character Evidence*, 121 YALE L.J. 1912, 1934-36 (2012) (discussing halo effects in relation to character evidence in trials); Pan-Lin Chi, *Statistical Analysis of Personality Rating*, 5 J. EXPERIMENTAL EDUC.

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make disclosures, essentially prejudicing a current client to subsidize a species of social capital for all future clients, or even for the current client's ongoing matters. Only in this sense could we avoid the remainder-redundancy problem — I argue that the rules are counterfactual to the lawyer's long-term strategic incentives when we consider potential halo effects.

The confidentiality rules duplicate lawyer's incentives if one excludes conflicts, distortion, and disruption. This particular redundancy problem remains, therefore, and weighs against the legitimacy of the confidentiality rules.

#### D. *Predicated on a False Premise*

The standard justification for the confidentiality rules is the presumed need for forthrightness between a client and the lawyer. The presumption is that lawyers cannot effectively represent their clients without full client disclosure of all relevant information. This presumption — that lawyers absolutely need as much information as possible — relies on an argument from the counterfactual that an uninformed lawyer would more likely make mistakes or misunderstand the client's true situation. The counterfactual is certainly compelling, but it rests on an unstated false premise: that clients protected by a robust confidentiality will indeed be forthcoming with their counsel. The ABA explains the need for the confidentiality rules in the official comment to Rule 1.6:

A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer

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229, 236-44 (1937) (discussing the halo effects based upon the ratings of sixth grade teachers of their students on nineteen traits); Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Contrition in the Courtroom: Do Apologies Affect Adjudication?*, 98 CORNELL L. REV. 1189, 1217 (2013) (discussing halo effects with jury verdicts caused by physical attractiveness of parties or their lawyers).

Such a self-selection effect by clients would actually reinforce or bolster the halo effect, as the lawyers' new clients would screen themselves for forthrightness and transparency, and a belief that they can prevail on the strength of their facts rather than by obfuscation or surprise. See, e.g., Neil E. Beckwith & Donald R. Lehmann, The Importance of Halo Effects in Multi-Attribute Attitude Models, 12 J. Marketing Res. 265, 266 (1975) (defining the halo effect); Rick Jacobs & Steve W.J. Kozlowski, A Closer Look at Halo Error in Performance Ratings, 28 Acad. Mgmt. J. 201, 207 (1985) (indicating that as opportunities to observe ratee behavior increased, so did the magnitude of halo effects); Marie Jahoda & Stuart W. Cook, Security Measures and Freedom of Thought: An Exploratory Study of the Impact of Loyalty and Security Programs, 61 Yale L.J. 295, 323-24 (1952) (discussing halo effects pertaining to review boards).



must not reveal information relating to the representation. See Rule 1.0(e) for the definition of informed consent. This contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. The lawyer needs this information to represent the client effectively and, if necessary, to advise the client to refrain from wrongful conduct. Almost without exception, clients come to lawyers in order to determine their rights and what is, in the complex of laws and regulations, deemed to be legal and correct. Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.<sup>253</sup>

There are four problems with this, each of which has received some mention by other commentators: (1) Clients do not tell the lawyers the truth;<sup>254</sup> (2) Lawyers often avoid hearing the whole story from clients, either to maintain plausible deniability for later or to shut out demoralizing information;<sup>255</sup> (3) Most clients do not know the confidentiality rules, so they cannot rely on them;<sup>256</sup> (4) If clients really

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<sup>253</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 (2013).

<sup>254</sup> See RHODE & LUBAN, *supra* note 40, at 244-45 ("Public defenders report that many clients commonly lie and withhold information despite the privilege; indigent defendants often are unpersuaded that an appointed lawyer works for them and not the state. White-collar defenders similarly report that their clients are often unwilling to supply damaging facts even though they have no reason to question their counsel's loyalty.").

<sup>255</sup> See e.g., Zacharias, *Rethinking Confidentiality*, *supra* note 41, at 380-83 (stating that many lawyers never tell their clients about confidentiality or privilege rules, many clients misunderstand the nature and scope of the rules, 70% of clients would have made the same disclosures regardless of the rules).

<sup>256</sup> See *Functional Overlap*, *supra* note 9, at 1236-37 (empirical study showing that clients are usually unaware of the confidentiality rules); Elisia M. Klinka & Russell G. Pearce, *Confidentiality Explained: The Dialogue Approach to Discussing Confidentiality with Clients*, 48 SAN DIEGO L. REV. 157, 167 (2011) ("Existing empirical studies have shown both that clients are generally unaware of the specific exceptions to confidentiality rules and that many lawyers do not accurately explain confidentiality to clients."); Snyder, *supra* note 15, at 505 ("It is highly unlikely that clients understand the rules given the complexity of the issue and the wide variation among the states."); Rachel Vogelstein, *Confidentiality vs. Care: Re-Evaluating the Duty to Self, Client, and Others*, 92 GEO. L.J. 153, 163 (2003) ("Finally, strict confidentiality rules are not justified because, in practice, most clients are not aware of, nor do they comprehend, the confidentiality provisions themselves."); Kassie Hess Wiley, *To Disclose or Not to Disclose, That Was the Question — Until Now: Tennessee's New Rule of Professional Conduct 1.6 Mandates Disclosure of Confidential Client Information to Prevent Physical Injury or Death to Third Parties*, 34 U. MEM. L. REV. 941, 970 (2004) ("Most clients do

understood the exceptions to the confidentiality rules, they would not (or should not) rely on them.<sup>257</sup>

When the confidentiality rules first appeared in the 1960s and 1970s, empirical studies published soon thereafter demonstrated that clients do not rely on privilege or confidentiality in deciding whether to disclose information to their lawyers.<sup>258</sup> Clients often lie to their own lawyers, usually in the form of exaggerating favorable facts and understating the unfavorable ones, and that clients routinely omit critical facts or share half-truths with their lawyers.<sup>259</sup> This is not surprising, given that doctors experience the same problem: patients lie, leave out embarrassing facts, and so on, despite the severe consequences that result from tampering the diagnosis or treatment suggestions of one's physician.<sup>260</sup> Empirical studies also indicate that therapist-patient

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not know about the exceptions to the confidentiality rules, and attorneys do not go out of their way to inform them.”).

<sup>257</sup> See *supra* note 43 and sources cited therein.

<sup>258</sup> See *Functional Overlap*, *supra* note 9, at 1232; L. Harold Levinson, *Making Society's Legal System Accessible to Society: The Lawyer's Role and Its Implications*, 41 VAND. L. REV. 789, 793 (1988); Slotter & Sorensen, *supra* note 10, at 622 (“It was found that there was no statistically significant association at the 5% level between how often the attorney raises the issue of confidentiality and whether the employee shows concern over the issue.”).

<sup>259</sup> See generally Miller, *supra* note 40, at 785 (“And, of course, clients lie to their lawyers.”).

<sup>260</sup> See Method for the Monitoring of Smoking Cessation Compliance and Recovery, Therapeutic Intervention, and Risk Management, U.S. Patent. No. 13,903,809 (filed May 28, 2013), available at <http://www.google.com/patents/US20130316926> (“Patient management during the smoking cessation process is difficult for the healthcare provider because a substantial number of patients lie to their physicians about their health habits, including their smoking habits. In a 2004 WebMD survey conducted on 1500 participants, 45% of respondents admitted to overtly lying or stretching the truth when talking to their doctors about their health habits and lifestyle. In the survey, 22% of the survey respondents admitted that they lied to their doctors about smoking, 38% lied about following the doctors' orders to take medications, and 32% lied about their diet and exercise habits. In another study of smokers who were ordered to quit by their doctors, 17% smoked while denying doing so. Among men, the percentage was 21%, and among ex-smokers, the figure was 27%. The highest value, 34%, was found among patients with chronic obstructive pulmonary disease (COPD).”); Richard D. Friedman, *The Conundrum of Children, Confrontation, and Hearsay*, 65 LAW & CONTEMP. PROBS. 243, 245 (2002) (discussing “the frequency with which patients lie to their doctors”); Charles Pless, *Should Family Physicians Treat Members of the Same Family?: No*, 57 CANADIAN FAM. PHYSICIAN 403, 403 (2011) (“But patients lie to their doctors for all sorts of reasons.”); Nicolas P. Terry, *Personal Health Records: Directing More Costs and Risks to Consumers?*, 1 DREXEL L. REV. 216, 225 (2009) (“It is known that patients routinely lie to their doctors.”); Sujan Bhaheetharan et al., *Medication Adherence 2* (Dec. 13, 2006) (working paper), available at [http://homepages.cae.wisc.edu/~bme200/medication\\_adherence\\_f06/reports/Medication\\_Adherence-final.pdf](http://homepages.cae.wisc.edu/~bme200/medication_adherence_f06/reports/Medication_Adherence-final.pdf) (“Patients often lie to their

privilege is insignificant to patients in deciding what to disclose to psychotherapists.<sup>261</sup> In fact, it has become current topic of concern in medical ethics that doctors increasingly turn to searching social networking sites to learn accurate information about their patients, due to the high incidence of patient untruthfulness.<sup>262</sup>

It is an act of self-delusion for professionals like lawyers or doctors to assume their clients or patients are being truthful, accurate, and complete in the information they provide, or to think that confidentiality rules change the behavior of clients. There are numerous reasons for clients to withhold information or even misrepresent things to their lawyers that have nothing to do with a fear that the lawyer will disseminate the information to others.<sup>263</sup> Faulty memories and self-deception among the clients are easily foreseeable problems. Nevertheless, lawyers may underestimate the internal urge clients feel to try to impress a professional, such as their lawyer, or the need they feel to save face and avoid admitting their failures or shortcomings.<sup>264</sup> The ABA drafters seem to think that clients will view their lawyers as trusted confidants. Yet for many clients, the lawyer is from a higher socioeconomic class;<sup>265</sup> in fact, the lawyer might be the wealthiest, most

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physicians in order to be perceived as an “ideal patient.”); *Patients Lie to Doctors — and Suffer for It*, NBCNEWS.COM (Feb. 16, 2007, 5:02 PM), <http://www.nbcnews.com/id/17188153>; see also Jennifer Jackson, *On the Morality of Deception — Does Method Matter? A Reply to David Bakhurst*, 19 J. MED. ETHICS 183, 186 (1993) (stating that “[p]atients sometimes lie to their doctors that they have been taking their medication as instructed”).

<sup>261</sup> See Daniel W. Shuman & Myron S. Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C. L. REV. 893, 894-95, 925 (1982) (concluding that the existence of the therapist-patient privilege is of consequence to few patients in few cases).

<sup>262</sup> See Brian K. Clinton, Benjamin C. Silverman & David H. Brendel, *Patient-Targeted Googling: The Ethics of Searching Online for Patient Information*, 18 HARV. REV. PSYCHIATRY 103, 110-11 (2010); Haider Javed Warraich, *When Doctors ‘Google’ Their Patients*, N.Y. TIMES BLOG (Jan. 6, 2014, 1:59 PM), <http://well.blogs.nytimes.com/2014/01/06/when-doctors-google-their-patients-2/>.

<sup>263</sup> See *O’Connor v. Chrysler Corp.*, 86 F.R.D. 211, 217 (D. Mass. 1980) (finding that defendant employers may have significant deterrents to candid self-evaluations regardless of the possibility of discovery).

<sup>264</sup> See Wadi Muhaisen, *Effective Representation of the Arab Client*, COLO. LAW., Dec. 2005, at 47, 50 (“Although Arab clients are usually reluctant to share what they deem to be embarrassing personal information, they are very open with personal information that is positive and of which they are proud, including social connections and family.”).

<sup>265</sup> See GREGORY CLARK, *THE SON ALSO RISES: SURNAMES AND THE HISTORY OF SOCIAL MOBILITY* 20, 46, 59, 60-62 (2014) (using attorneys along with physicians and other elite professions to track intergenerational social status); John P. Heinz, *The Power of Lawyers*, 17 GA. L. REV. 891, 908 (1983) (“Laumann and I found that the composition of the Chicago bar is becoming no less exclusive or socially elite, in terms of the

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educated, best dressed individual with whom the client has ever conversed. It should not be surprising that clients feel an irresistible impulse to make a good impression, and this means selectively relating the facts of their case to their lawyer. Confidentiality rules will not override the desire to save face.

Moreover, many clients are likely to think that misleading the lawyer will help their case.<sup>266</sup> The extreme version of this phenomenon is the client who tells his lawyer outright lies (a false alibi, falsified documents, or even a falsely corroborating witness), so that the lawyer will actually believe their rendition of events. More commonplace, however, would be the simple fear that the lawyer will give up on the case if he knew everything or a desire to “help” the lawyer construct a winning argument by exaggerating some favorable points.

Whatever the reason, the foregoing evidence suggests that clients regularly lie to their lawyers and withhold information,<sup>267</sup> and lawyers take more risk by likely assuming their client is truthful than by glibly assuming that their client is truthful than by accounting for the likelihood that they are working with some incomplete and incorrect information. Proceeding under uncertainty is not impossible, and pretending that we can eliminate the uncertainty is unhelpful. The fact is that lawyers are currently providing effective and often successful representation, despite the fact that their clients are lying to them or withholding information. The ABA’s premise that the system would not work without client forthrightness is simply false.

Lawyers usually do not fully explain the confidentiality rules to their clients, and many lawyers avoid asking their clients for information that

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socioeconomic class origins of the lawyers. Indeed, our finding was that younger lawyers come from privileged family backgrounds in even greater disproportion than do older lawyers.”); Michael Lamb, *It’s No Joke . . . Slurs Against Lawyers May Offend Us, but We Are a Respected Profession Despite Our ‘Image Problem,’* MONT. LAW., Mar. 1999, at 1, 11 (citing recent study in which “[t]hose most likely to hold favorable views of attorneys were women, those in the lower socioeconomic classes and younger people”); Steven Zeidman, *Sacrificial Lambs or the Chosen Few?: The Impact of Student Defenders on the Rights of the Accused*, 62 BROOK. L. REV. 853, 891 n.135 (1996) (“Defense attorneys are often of different social classes and racial and ethnic backgrounds from their clients.”).

<sup>266</sup> See Subin, *The Lawyer as Superego*, *supra* note 40, at 1164-65 (“Many clients, particularly when revealing the kinds of illicit behavior under discussion here, probably disbelieve the lawyer. Even if clients believe their confidences will be kept, they may doubt whether the attorney, knowing the awful truth, will continue to represent the client enthusiastically. Clients in such situations may lie or distort the truth according to their view of how the truth will sound to the lawyer; discretion may seem the better part of candor.”).

<sup>267</sup> See *id.*

could be incriminating.<sup>268</sup> Lawyers are aware that the mandatory disclosures (client betrayal) of the Model Rules are contingent on actual knowledge that the client intends to perpetrate a fraud or perjury. The lawyer with suspicions about the client's veracity may be better off not trying to find the underlying cause of the matter. Attorneys also know that in rare cases, a lawyer can face liability as an accomplice, somewhat inadvertently, if it appears in hindsight to a later tribunal that the lawyer knew of facts that in retrospect appear to fit together into the elements of a crime. In some cases, a lawyer would have a duty to withdraw if they had actual knowledge of wrongdoing, so the lawyer who wants to stay in the case may limit his inquiries.

In other situations, a lawyer may simply want to guard herself from the subconscious demotivation, disillusionment, or doubt that would ensue were she to know that her client was guilty of wrongdoing.<sup>269</sup> Such knowledge could cause the advocate to be less zealous or forceful, to hesitate at critical moments.

On a much more mundane level, a lawyer may simply find it awkward to ask a client embarrassing questions, or to appear to be doubting or even accusing a client of lying. Asking too many questions could create tension or undermine the clients trust in the lawyer's loyalty. Timidity in such situations is commonplace.

All of these are reasons why lawyers often choose intentional ignorance. This matters for our discussion because the ABA premised Rule 1.6 on the idea that lawyer's needed full information in order to provide effective representation, and that a guarantee of confidentiality was necessary to ensure that lawyers could elicit complete and accurate information from client. Yet even with the confidentiality regime in place, lawyers often find it better to have less, rather than more information. The premise for the confidentiality rules is weak.<sup>270</sup>

Studies suggest that clients do not know the confidentiality rules.<sup>271</sup> This is unsurprising, as the rules are part of a required course in law school, which implies that most lawyers would not know the rules

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<sup>268</sup> See Slotter & Sorensen, *supra* note 10, at 622; Zacharias, *Rethinking Confidentiality*, *supra* note 41, at 380-83.

<sup>269</sup> See Levinson, *supra* note 258, at 793 ("Some lawyers at this point may engage in selective ignorance or self-delusion designed to protect them from any certainty about the falsity of the requested documents.").

<sup>270</sup> See Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015, 1033-35 (1981) (describing how expanded exceptions to confidentiality rules might actually raise trust between clients and lawyers, rather than reducing it); see also Cramton & Knowles, *supra* note 35, at 114-16.

<sup>271</sup> See Slotter & Sorensen, *supra* note 10, at 622; Zacharias, *Rethinking Confidentiality*, *supra* note 41, at 380-83.

unless they were a mandatory part of the law school curriculum. If clients do not understand the confidentiality rules, they cannot rely on them. The ABA's chain of salutary effects depends on client knowledge at the outset. If clients are not relying on the rules, then the rules are not influencing their decisions or level of disclosure. In that case, the primary benefit that the rules are supposed to provide are not actually present; there is nothing good to offset the social costs of the confidentiality rules.

Even if the clients knew the confidentiality rules, the exceptions to the rule should give them pause.<sup>272</sup> In litigation settings, lawyers will have to turn over most of the information they receive from clients pursuant to discovery and production orders.<sup>273</sup> Should a dispute arise between the client and lawyer later, such as over fees or alleged malpractice, the lawyer can (and probably will) make numerous disclosures of confidential client information.<sup>274</sup> In spite of the ABA's expectation that rules such as 1.6 will induce client disclosures and thereby boost lawyer's effectiveness, the ABA's exceptions to Rule 1.6 can easily leave a client vulnerable to exposure. The touted benefit of the confidentiality rules is simply unrealistic.<sup>275</sup>

Despite all these problems with the confidentiality rules — the social costs and the illusory nature of the touted benefits — the legal profession clings to the rules as sacrosanct and indispensable. It is time for a change.

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<sup>272</sup> See Subin, *The Lawyer as Superego*, *supra* note 40, at 1165 (“But imagine a client’s reaction if his attorney were to advise him of the attorney’s right to self-defense — that is, that his communications will be kept confidential so long as the lawyer is not sued, or subjected to official scrutiny for actions taken on the client’s behalf. How, moreover, might the client’s willingness to confide be affected if the client were told that confidential communications can be aired if the client accuses the attorney of poor performance, or if he simply does not pay his fee? And what might the client decide about revealing information after being told that despite the attorney’s pledge of absolute confidentiality some of what is disclosed might have to be disclosed in court under the law of the attorney-client privilege if a formal demand is made for the information? Finally, would a client decide to reveal questionable plans or actions if told that the lawyer might be compelled or at least permitted to withdraw after hearing about them?”).

<sup>273</sup> See *id.*

<sup>274</sup> See *id.*

<sup>275</sup> See *id.* at 1165-66.

## III. NORMATIVE SUGGESTIONS

A. *Abolition or Repeal*

Ideally, rules that pose net costs on society should succumb to repeal—rules whose negative externalities and effects dwarf the purported benefits, especially where the benefits are largely illusory. The foregoing sections have explained how the confidentiality rules fit this description, so the logical conclusion is to recommend abolition or repeal.

Yet repeal seems unlikely. I recognize that the thesis of this Article will be controversial and unpopular among lawyers and academics, especially those in the (surprisingly entrenched) field of Professional Responsibility. The popularity of confidentiality rules among lawyers is rational in the sense of maximizing their self-interest — the existing rules align with lawyers' personal and marketplace incentives, the costs mostly fall upon other parties or society as a whole in the form of externalities,<sup>276</sup> and the rules are easy to work around through Coasean bargaining between each lawyer and client. Moreover, at times the rules provide a convenient, Nuremberg-like justification for lawyers to shirk their moral responsibilities and aid clients in keeping secrets. Further, there is no one-stop option for repeal — it would have to occur state by state, with seemingly insurmountable aggregate transaction costs. Nevertheless, there are some faint glimmers of hope.

Twelve states (Arizona, Connecticut, Florida, Illinois, New Jersey, New Mexico, North Dakota, Tennessee, Texas, Vermont, Virginia, and Wisconsin)<sup>277</sup> go further than the ABA's current permissive disclosure for preventing serious bodily crime and actually require disclosure in these circumstances. Moreover, of these twelve states, five (Connecticut, Florida, New Jersey, Vermont, and Wisconsin)<sup>278</sup> also mandate disclosure where the ABA's Model Rules would merely permit it to prevent non-criminal fraud. Strangely, the rules in Hawaii and Ohio mandate disclosure to rectify past crimes and fraud using the lawyer's services, but not to prevent future harms, even death.<sup>279</sup>

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<sup>276</sup> See Schwarcz, *supra* note 14, at 22-35 (discussing systemic externalities from lawyers preparing skewed legal opinions for use by third parties).

<sup>277</sup> See JOHN S. DZIENKOWSKI, PROFESSIONAL RESPONSIBILITY STANDARDS, RULES, & STATUTES 112-19 (2013-2014 ed. 2013) (providing a tabular comparison of each state's confidentiality rules and exceptions in a "Confidentiality Chart").

<sup>278</sup> See *id.*

<sup>279</sup> See *id.*

Yet much work remains. Most states still forbid disclosure even where the ABA rules would permit it to prevent non-criminal fraud<sup>280</sup> or to rectify past crime or fraud when the lawyer's services were used.<sup>281</sup> Other states have adapted ABA's newer permissive disclosure rule for these two categories.<sup>282</sup> Massachusetts is the only state that allows disclosure to prevent wrongful execution or incarceration of third parties.<sup>283</sup> If thirty-one states have not even adopted the ABA's permissive exceptions,<sup>284</sup> it seems unlikely that they will go beyond the ABA and make permissive disclosures the default rule in all situations not covered by the conflicts or evidentiary rules, as advocated by this author. The twelve states that have stepped ahead of the ABA by requiring disclosures in life-threatening situations have not seen a collapse of their legal system, nor have the nineteen states that adopted the ABA's other permissive disclosure exceptions. To the extent that states serve as laboratories of democracy (an admittedly debated point), defenders of traditional of strict confidentiality rules should look to these examples to see that no dire consequences actually occur when the confidentiality rules give way to newly-adopted exceptions.

Another piecemeal change has been the Sunshine in Litigation Acts,<sup>285</sup> which forbid confidential settlements that cover up risks to the public; this type of legislation began in Florida and is now law in Louisiana, South Carolina, Washington, and Texas.<sup>286</sup> Federal

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<sup>280</sup> See *id.* (Connecticut, D.C., Florida, Georgia, Kansas, Kentucky, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oklahoma, Oregon, Pennsylvania, Rhode Island, South Dakota, and Virginia).

<sup>281</sup> See *id.* (Alabama, Alaska, California, Colorado, Tennessee, Vermont, Washington, West Virginia, and Wyoming).

<sup>282</sup> See *id.*

<sup>283</sup> See *id.*

<sup>284</sup> See *id.*

<sup>285</sup> See Katherine Sullivan, *Letting the Sunshine in: Ethical Implications of the Sunshine in Litigation Act*, 23 GEO. J. LEGAL ETHICS 923, 923-24 (2010) (quoting FLA. STAT. § 69.081 (2009)) ("A host of legislation has been introduced to curb what is increasingly seen as an abuse of confidentiality by the courts. In 1990, Florida enacted the Sunshine in Litigation Act, which prohibits a court from entering an order that has the 'effect of concealing a public hazard,' and voids 'any portion of an agreement or contract which has the purpose or effect of concealing a public hazard.' States such as Louisiana, South Carolina, Washington, and Texas have adopted similar anti-secrecy laws.").

<sup>286</sup> See *id.*; see also Elizabeth Torphy-Donzella, *Products Liability Litigation and Third-Party Harm: The Ethics of Nondisclosure*, 5 GEO. J. LEGAL ETHICS 435, 436 (1991) (recommending that "Rule 1.6 of the ABA Model Rules of Professional Conduct, governing the confidentiality of client information, be rewritten and that the manner in which courts grant protective orders be refined so that mechanisms within the legal system do not inappropriately shield information about harm from dangerous products



legislation along these lines has started and failed in Congress repeatedly; the failure appears to be attributable to strident opposition from the ABA (lobbying Congress), which treats confidentiality rules as sacrosanct.<sup>287</sup> Instead of opposing these measures, the legal academy should be supporting them.

*B. Optimizing Within the Current Regime*

Repeal or amendment of the confidentiality rules may be far off in the future. In the meantime, another normative implication of the arguments in the Article would be that lawyers should at least consistently avail themselves of their state's permissive disclosure exceptions whenever they apply. Attorneys whose clients intend to commit crimes of fraud using the lawyers' services (in the nineteen states) or who have done so in the past (as twenty-seven states allow) should automatically make the disclosures; there is no moral duty to client in these situations; the moral duty is to the party whose injuries the lawyer could prevent or rectify. Lawyers availing themselves of these permissive exceptions more consistently would reshape the dysfunctional norms of the legal community, and would lessen the lemons problem and other externalities described in Part I.<sup>288</sup>

Law professors have a role to play as well. Professor William Simon recently sparked a controversy by arguing that law professors who work as experts in trials should refuse to keep their work confidential, and instead should discuss their work as experts in their published academic research.<sup>289</sup> Professor Simon's point is perfectly valid: the legal academy has a leadership role to play in fostering more transparency in our legal system. Other law faculty members should heed his injunctions and take seriously the moral duties he sets forth for those teaching in our law schools.

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from the public").

<sup>287</sup> See Letter from Thomas M. Susman, Dir., ABA Governmental Affairs Office, to Hon. John Conyers, Jr., Chairman, House Judiciary Comm. (Apr. 13, 2009), available at [http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/tortlaw/2009apr14\\_sunshineh\\_1.authcheckdam.pdf](http://www.americanbar.org/content/dam/aba/migrated/poladv/letters/tortlaw/2009apr14_sunshineh_1.authcheckdam.pdf).

<sup>288</sup> See *supra* Part I.

<sup>289</sup> William H. Simon, *The Market for Bad Legal Advice: Academic Professional Responsibility Consulting as an Example*, 60 STAN. L. REV. 1555, 1574-76 (2008) (arguing that law professors working as experts in litigation should refuse to keep their work confidential).

C. *Civil Disobedience and the Confidentiality Rules*

A final normative implication here is that lawyers should sometimes overstep the rules in favor of disclosure.<sup>290</sup> In extreme cases, such as preventing the wrongful incarceration of an innocent third party or even a devastating fine or asset seizure wrongfully executed on the innocent party, an attorney should engage in civil disobedience against the confidentiality rules. As mentioned in Part I, it is unlikely that the state disciplinary authorities would punish a lawyer in such a scenario, and if they did, it would likely be with a token private reprimand. Defying the rules in extreme instances to avoid a manifest-injustice could also help draw attention to the need for reform (repeal) of the rules and could raise public awareness (as the media covers it) of the conundrums imposed by the current regime.

As discussed in Part II, a lawyer who occasionally turns in a client when circumstances truly call for it accrues an eventual reputational benefit for future clients in the form of a halo effect — an unspoken assumption that the lawyer's other clients must have nothing serious to hide.<sup>291</sup> The selection effect on future clients would also predictably raise the lawyer's success rate in representation. For example, it is easier to win for a client who is factually innocent of wrongdoing. A lawyer with a higher win rate, in turn, attracts more clients and can be more selective about which clients to represent, (the most meritorious) further ratcheting up the halo effect. This upward cycle benefits not only the lawyer and his clients, but also provides valuable signaling and sorting effects within the legal system.

CONCLUSION

The lawyer-client confidentiality rules entered our legal system relatively late (in the 1960s and 1970s), unlike the more limited attorney-client privilege in evidence, which has a long historical pedigree. Like any other rules or laws, the confidentiality rules should be subject to scrutiny to compare the actual benefits of the rule with the social costs that the rule imposes.

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<sup>290</sup> See Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 GEO. L.J. 2665, 2718-22 (1993) (arguing that moral philosophy sometimes requires disclosure even when this would constitute a rule violation); Palumbos, *supra* note 64, at 1067-70 (“In such instances, disobeying the law may be the most ethical course of action because it is the only way to prevent the legal system from committing a grave injustice.”). For a strongly contrary view, see generally Wendel, *supra* note 44, arguing lawyers should adhere to the model rules.

<sup>291</sup> See discussion *supra* Part II.C.

In this regard, the confidentiality rules fall short. On the benefits side, the rules seem largely unnecessary and the touted benefits mostly illusory. The conflict of interest rules and various evidentiary protections (including privileges) do almost all the work in protecting clients, leaving only a small gap for the purported benefits of the confidentiality rules to fill. In this remainder set of situations where the confidentiality rules might apply, the rules turn out to be redundant of existing market incentives and easy bargaining options. The primary purported benefit of the rule — fostering forthrightness by clients toward their lawyers — rests on a false premise. Most clients do not know or rely on the confidentiality rules, most have other reasons not to be forthcoming with their lawyers, most would remain untruthful if they did know the rule and its exceptions, and many lawyers would prefer not to have their clients volunteer more information than necessary in their interviews.

On the social costs side of the ledger, the downsides of the confidentiality rules add up quickly. The rules undermine the other ethical rules that call for candor, integrity, and fairness; they undermine public confidence in the legal system;<sup>292</sup> and they undermine transparency and trust in general through lemons effects.<sup>293</sup> In addition to these intangible externalities, the confidentiality rules have produced numerous instances of unacceptable injustices, such as lawyers knowingly allowing innocent third parties to serve lengthy prison sentences for crimes the lawyers' clients actually committed, or failing to disclose serious medical risks that affect the opposing party.

It is fashionable today for law review articles to conclude by characterizing their contents as strongly descriptive and modestly normative; this Article, admittedly, is modestly descriptive and robustly normative. The confidentiality rules bring severe costs with no clear benefits. Repeal seems appropriate, but, unfortunately, unlikely in the near term. Yet more states could (and should) adopt the ABA's newer exceptions to the confidentiality rules and should add additional exceptions or exemptions. On an individual level, lawyers should seek client authorization to make disclosures to prevent harms to others, avail themselves of exceptions and allowances under the current rule regime, and occasionally disregard the rules and accept the consequences. While attorney-client privilege must remain as an

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<sup>292</sup> See Carroll & Doherty, *supra* note 137, at 60-74.

<sup>293</sup> See, e.g., Akerlof, *supra* note 13, at 488-90 (discussing lemons effects in pricing); T. Markus Funk & Daniel D. Polsby, *Distributional Consequences of Expunging Juvenile Delinquency Records: The Problem of Lemons*, 52 WASH. U. J. URB. & CONTEMP. L. 161, 177-83 (1997) (applying the lemons concept to juvenile record expungements).

evidentiary rule in litigation, the arguments here also weigh in favor of a narrow application of the privilege.

This Article runs counter to the conventional view of the legal ethics academy, and lays down a challenge to other writers: answer the foregoing arguments with objective points or evidence and justify the rule in the face of its obvious externalities and social costs. We need to move beyond the anecdotal and sentimental rationalizations and confront the reality of the rules.