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## **MR. PRINZO'S BREAKTHROUGH AND THE LIMITS OF CONFIDENTIALITY**

NANCY J. MOORE

Nancy J. Moore, "Mr. Prinzo's Breakthrough and The Limits of Confidentiality," 51 St. Louis University Law Journal 1059

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## **MR. PRINZO'S BREAKTHROUGH AND THE LIMITS OF CONFIDENTIALITY**

NANCY J. MOORE\*

### INTRODUCTION

Engaging students in the Professional Responsibility course is not always easy. They resent taking a required upper-level course,<sup>1</sup> they don't think the subject matter will be important to their professional or personal lives (except perhaps to help prepare them for the MPRE, which they also resent),<sup>2</sup> and they expect the material to be dry and boring.<sup>3</sup> There are many ways we attempt to overcome this resistance, including bringing in current events (particularly stories involving the ethics travails of successful lawyers or law firms),<sup>4</sup> emphasizing remedies other than lawyer discipline,<sup>5</sup> and making use of a

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\* Professor of Law and Nancy Barton Scholar, Boston University School of Law. My thanks to the editors of the *Saint Louis University Law Journal* for organizing this special edition on Teaching Professional Responsibility.

1. See, e.g., Steven H. Goldberg, *Bringing The Practice to the Classroom: An Approach to the Professionalism Problem*, 50 J. LEGAL EDUC. 414, 419 (2000).

2. *Id.*

3. See, e.g., David B. Wilkins, *The Professional Responsibility of Professional Schools to Study and Teach About the Profession*, 49 J. LEGAL EDUC. 76, 89 (1999). According to Wilkins, the Professional Responsibility course is "the most despised in the curriculum"; indeed, "the course is so despised that deans routinely have to dragoon faculty, clinicians, and practitioners to teach it." *Id.* Nevertheless, as a member of the Boston University Law School Committee on Appointments for six of the seven years I have been here, I note that an increasing number of law teaching applicants list Professional Responsibility among the courses they would happily teach.

4. See, e.g., Nathan Koppel, *Lawyer's Charge Opens Window on Bill Padding*, WALL ST. J., Aug. 30, 2006, at B1 (discussing a 42-year old partner who left a 1,200 lawyer firm because his own hours on a case had been inflated by the billing partner). I invite students to bring in newspaper clippings, which I will discuss that day regardless of where we are in the syllabus. I also email them links to news stories that I find on law.com, e.g., a story about Florida lawyers who were reprimanded for a commercial featuring "the image of a pit bull wearing a spiked collar and the phone number 1-800-PIT-BULL." Carl Jones, "*Pit Bull*" Lawyers Reprimanded by Fla. Bar, DAILY BUS. REV., Apr. 10, 2006, <http://www.law.com/jsp/article.jsp?id=1144414533046>.

5. For example, a lawyer's obligation to avoid impermissible conflicts is enforceable in contexts other than lawyer discipline, including fee forfeiture, lawsuits seeking damages for breach of fiduciary duties, and disqualification. See, e.g., Nancy J. Moore, *Restating the Law of Lawyer Conflicts*, 10 GEO. J. LEGAL ETHICS 541, 543 (1997). In this vein, I will often mention various cases in which I have consulted as a legal ethics expert, typically in legal malpractice and

number of currently available audio-visual aids, including clips from movies and television shows, as well as documentaries.<sup>6</sup>

Since the early 1980s, I have occasionally used a short story by Bruce J. Friedman entitled *Mr. Prinzo's Breakthrough*<sup>7</sup> when I teach the limits of the obligation of confidentiality. My students love the story (as do I), and I have found it to be an effective way to engage them in debating the different approaches states take to the confidentiality exceptions, including rules that severely restrict the circumstances when a lawyer is permitted to disclose information in order to prevent harm to others.

In the mid to late '80s, I demonstrated the teaching of this story to an Association of American Law Schools (AALS) Workshop on Teaching Professional Responsibility. Since then, I have several times started to turn my teaching notes into an article, in which I would use the story to illustrate my views of confidentiality and its limits,<sup>8</sup> but somehow that project never got finished. Imagine then how delighted I was that the editors of the *Saint Louis University Law Journal* organized this special edition on Teaching Professional Responsibility, thereby enabling me to polish up my teaching notes and get them published without having to finish that article!

So here's what I'm going to do. First, I'll give you a quick summary of the plot (but you really must read the story for yourselves, even if you have no intention of teaching it). Then I'll tell you a little bit about the background

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breach of fiduciary duty lawsuits and motions for disqualification. Students who cannot envision themselves as a subject of lawyer discipline can readily identify with lawyers being sued by former clients. Describing my role as an expert also reinforces for students that my knowledge derives from real world experience. I credit my daughter, Emily Moore Kanes, a fourth-grade teacher, for urging me to talk to my students about my own experiences in the field.

6. See, e.g., ROGER C. CRAMTON, AUDIOVISUAL MATERIALS ON PROFESSIONAL RESPONSIBILITY 1-166 (1987) (listing movies, documentaries, and educational films, with plot summaries and teaching notes); Memorandum from Deborah L. Rhode, Director Stanford University Keck Center on Legal Ethics and the Legal Profession (undated) (on file with author) (enclosing annotated bibliography on innovative legal ethics teaching materials); see also Goldberg, *supra* note 1 (discussing a course on professionalism centering on episodes from the television series *The Practice*). Several years ago, David Logan (Dean, Roger Williams University Law School), Bruce Green (Professor, Fordham University School of Law), and I had a contract with Aspen Publishing Co. for a new Professional Responsibility casebook that would use videoclips from *The Practice* to be purchased by students as part of the casebook materials. We thought we had all of the necessary copyright permissions (David E. Kelley, a BU Law School alumnus, was willing to give us his copyright permission at no charge, as were two of the four unions involved); however, at the last minute we discovered that we did not have and could not get the permission of Fox Television, and the project was scuttled.

7. BRUCE J. FRIEDMAN, *Mr. Prinzo's Breakthrough*, in FAR FROM THE CITY OF CLASS AND OTHER STORIES, 108-24 (1963).

8. See generally Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A "Philosophically Informed" and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RES. L. REV. 177 (1986).

material on confidentiality the students have read. Finally, I'll give you a list of questions I assign in advance to provide a framework for the class discussion, outlining the points I attempt to elicit in class with respect to each of those questions.

### I. MR. PRINZO'S BREAKTHROUGH—THE PLOT

This absurd, black humor short story is yet another masterpiece from Bruce J. Friedman, author of a short story that was turned into *The Heartbreak Kid*,<sup>9</sup> a movie starring Charles Grodin and Cybill Shepherd (as the unattainable shiksa goddess<sup>10</sup>). I have no idea what Friedman had in mind when he wrote *Prinzo*, but it was recommended to me many years ago by a medical ethicist as a useful tool for discussing ethical aspects of the professional obligation of confidentiality.<sup>11</sup> The fact that it involves a physician and not a lawyer is of no concern; indeed, I often use hypotheticals involving physicians (and other professionals) to make it easier for law students to adopt the consumer perspective.<sup>12</sup>

Prinzo has been in therapy for seven years.<sup>13</sup> He complains to Tobes, his analyst, that two of his friends have had their “breakthroughs” but he, Prinzo, is not yet cured of the “cringe” that initially brought him to therapy.<sup>14</sup> Searching for an explanation, Prinzo suggests that he has been “holding plenty back,” whereupon Tobes concedes that he has been deficient in not telling Prinzo about the “pure and sacred” compact of confidentiality—“the most inviolable compact known to the civilized world.”<sup>15</sup> Responding to Prinzo's

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9. THE HEARTBREAK KID (Palomar Pictures Corp. 1972). For the short story on which the movie is based, see BRUCE J. FRIEDMAN, *A Change of Plan*, in THE COLLECTED SHORT FICTION OF BRUCE JAY FRIEDMAN, 74–79 (1995).

10. A “shiksa” is “a non-Jewish woman.” Bubby Gram, <http://www.bubbygram.com/yiddishglossary.htm> (scroll down to glossary) (last visited May 20, 2007). “A ‘Shiksa Goddess’ is a blond beauty, the type of woman who instills a deep longing in dark, short, swarthy Jewish men, (probably because she is the polar opposite of his mother.) Grace Kelly was the quintessential ‘Shiksa Goddess.’” *Id.* Cybill Shepherd filled the bill of the shiksa goddess in *The Heartbreak Kid*, while Charles Grodin was brilliant as the Jewish newlywed who dumps his bride on their honeymoon to pursue his dream blond. See THE HEARTBREAK KID, *supra* note 9.

11. My thanks to Edmund Erde, PhD, a philosopher and medical ethicist on the staff of University of Medicine and Dentistry of New Jersey—School of Osteopathic Medicine, with whom I worked on numerous occasions when I was teaching at Rutgers-Camden Law School in New Jersey.

12. For several efforts at comparing medical and legal ethics, see, for example, Nancy J. Moore, *Entrepreneurial Doctors and Lawyers: Regulating Business Activities in the Medical and Legal Professions*, in ROY G. SPECE, JR., ET AL, CONFLICTS OF INTEREST IN CLINICAL PRACTICE AND RESEARCH 171–96 (1996); Moore, *supra* note 8; Nancy J. Moore, *What Doctors Can Learn From Lawyers About Conflicts of Interest*, 81 B.U. L. REV. 445 (2001).

13. FRIEDMAN, *supra* note 7, at 108.

14. *Id.* at 109.

15. *Id.* at 109–11.

questioning, Tobes elaborates that even if Prinzo told him he had committed a murder, Tobes would break the compact only if he thought Prinzo's welfare was endangered: "That's the key to it, don't you see. *Your* life. *Your* welfare. Whatever's best for *you*, my patient."<sup>16</sup> Prinzo mutters, "If I could only believe that."<sup>17</sup>

Prinzo then goes out and commits a murder.<sup>18</sup> At his next therapy session, he announces that he has done so in order to "test the compact"<sup>19</sup> and that the woman he has murdered is Tobes's wife.<sup>20</sup> Tobes tries to keep his shock and grief under control and offers to "do some dreams."<sup>21</sup> But Prinzo demands that Tobes help him dispose of the body.<sup>22</sup> Tobes first declines, but Prinzo insists ("[a]nything that'll make me feel better. You said that's the key to it all."<sup>23</sup>), and Tobes reluctantly agrees.<sup>24</sup> He helps Prinzo toss the body in the ocean, agrees to let Prinzo spend the night at his house, helps Prinzo make arrangements to take a boat to Barbados, and sees Prinzo off at the dock.<sup>25</sup>

As he is boarding, Prinzo insists that Tobes agree to write him in Barbados and that he wave goodbye.<sup>26</sup> As Tobes waves, Prinzo lifts his head and notices that he is "standing up straight," out of his "cringe."<sup>27</sup> Tobes's eyes brighten.<sup>28</sup> Shouting, "You're cured! You've had your breakthrough," he grabs a patrolman and shouts, "And you're not my patient anymore."<sup>29</sup>

## II. BACKGROUND READING

Before having my students read the story, I assign the 2001 version of American Bar Association (ABA) Model Rule 1.6,<sup>30</sup> the current version of that rule,<sup>31</sup> and several state variations (including the New Jersey rules, which

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16. *Id.* at 111–12.

17. *Id.* at 112.

18. FRIEDMAN, *supra* note 7, at 115.

19. *Id.* at 115.

20. *Id.*

21. *Id.* at 116.

22. *Id.*

23. FRIEDMAN, *supra* note 7, at 116–17.

24. *Id.* at 117.

25. *Id.* at 117–23.

26. *Id.* at 123–24.

27. *Id.* at 124.

28. FRIEDMAN, *supra* note 7, at 124.

29. *Id.*

30. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2001). Adopted originally in 1983, this version of the rule permits disclosure to protect others only when necessary "to prevent the client from committing a criminal act that the lawyer believes is likely to result in imminent death or substantial bodily harm." *Id.* at R. 1.6(b)(1).

31. MODEL RULES OF PROF'L CONDUCT R. 1.6 (2007). As amended in 2002 in response to the recommendations of the Ethics 2000 Commission, and again in 2003 in response to the recommendations of the Task Force on Corporate Responsibility, the rule now permits disclosure:

require disclosure in some circumstances,<sup>32</sup> and the current Rhode Island rules, which follow the 2001 version of the ABA rule<sup>33</sup>). We discuss the fact that all of these rules adopt a prima facie obligation of confidentiality broadly covering all information relating to the representation<sup>34</sup> (in contrast with the attorney-client evidentiary privilege, which protects only confidential client communications<sup>35</sup>). We then note the significant differences in these rules regarding the attorney's ability (or obligation) to disclose information when necessary to protect other interests, including preventing physical or economic harm to third parties.

In addition to the rules themselves, I assign material that elaborates on the policy rationales underlying both the prima facie obligation of confidentiality and the various exceptions.<sup>36</sup> With respect to the prima facie obligation of confidentiality, we discuss both utilitarian justifications (encouraging a client to disclose information to enable the attorney to effectively provide the legal services requested) and deontological justifications (protecting a client's right to privacy).<sup>37</sup> These perspectives may already have been introduced, in a section of the course in which we discuss the dilemma of a lawyer asked to help a client in a morally noxious but lawful scheme.<sup>38</sup>

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"to prevent reasonably certain death or substantial bodily harm"; "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services"; and "to prevent mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services." *Id.* at R. 1.6(b)(1)–(3).

32. See N.J. RULES OF PROF'L CONDUCT R. 1.6(b) (2006), available at <http://www.judiciary.state.nj.us/rules/apprpc.htm> (requiring disclosure of crimes or frauds threatening either death or substantial bodily harm or substantial economic harm).

33. See R.I. RULES OF PROF'L CONDUCT R. 1.6 (2006), available at <http://www.courts.state.ri.us/supreme/disciplinary/rulesofprofessionalconduct.htm>.

34. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007) (providing that a lawyer may not "reveal information relating to the representation of a client" except in certain circumstances).

35. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 68 (2000).

36. See Moore, *supra* note 8, at 187–91, 196–245 (discussing well-developed philosophical justifications for the principle of medical confidentiality and then applying these justifications to the principle of legal confidentiality).

37. See *id.*

38. See, e.g., Symposium, *The Lawyer's Amoral Ethical Role*, 1986 AM. B. FOUND. RES. J. 613 (1986).

## III. DISCUSSING THE STORY

The most obvious message of *Prinzo* is the absurdity of an *absolute* obligation of professional confidentiality.<sup>39</sup> I point out this fact; then I ask whether either the medical or the legal profession seeks to impose such an absolute obligation. Students might not be familiar with the American Medical Association's (AMA) Principles of Medical Ethics (which require doctors to "safeguard patient confidences within the constraints of the law"),<sup>40</sup> but they are usually aware of statutory obligations to report gunshot wounds<sup>41</sup> and suspected child abuse.<sup>42</sup> As for lawyers, even the most restrictive of the current state rules (based on the 1983 version of the Model Rules) permits lawyers to disclose client information in order to prevent imminent death or physical harm as a result of a threatened client crime (as well as to collect their fees).<sup>43</sup> I also have my students point out other "mistakes" in the story, including the apparent assumption that the obligation of confidentiality ends with the termination of the professional relationship<sup>44</sup> and the suggestion that professionals are permitted, perhaps even required, to engage in illegal acts such as disposing of bodies.<sup>45</sup> (More on that shortly.) The story *is* absurd. Nevertheless, I suggest that the story might help us evaluate the proper limits of professional confidentiality by illustrating (in a highly exaggerated way) some of the difficulties of extremely client-centered ethics, such as those espoused by some commentators.<sup>46</sup>

In addition to the background material and the story itself, I assign a study sheet that asks students to think about the relevance of the story in determining the proper limits of confidentiality. The sheet contains five questions (or series of questions) that I use to provide a framework for the class discussion. Here, I will outline that framework by setting out each of the five questions, followed

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39. Tobes tells Prinzo that there are "a few" circumstances in which the compact can be broken, but the only example he gives is if Prinzo were to commit suicide. FRIEDMAN, *supra* note 7, at 111.

40. AM. MED. ASS'N., COUNCIL ON ETHICAL & JUD. AFF., CODE OF MEDICAL ETHICS: CURRENT OPINIONS WITH ANNOTATIONS xiv (2000).

41. *See, e.g.*, MASS. GEN. LAWS ANN. ch. 112, § 12A (2006).

42. *See, e.g., id.* at ch. 119, § 51A (2006).

43. *See supra* notes 30–35 and accompanying text.

44. Lawyers continue to owe a duty of confidentiality to former clients, with no exception for deceased clients. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.9(c) (2007).

45. Lawyers are not permitted to counsel or assist a client in conduct the lawyer knows is either criminal or fraudulent. *See, e.g., id.* at R. 1.2(d).

46. For examples of what I characterize as extremely client-centered ethics, see Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613 (1986).

by the points I try to elicit in class with respect to each. Although I do this here in terms of my own observations, I try in class to get the students to bring out these and other points.

*Question 1.* In the initial discussion of doctor/patient confidentiality, both Prinzo and Tobes appear to agree that Prinzo's failure to achieve a "breakthrough" may have been the result of Prinzo's failure to be completely candid, which is in turn attributed to Tobes's failure to advise him of the virtually absolute rules of professional confidentiality.<sup>47</sup> Is it likely that Prinzo's failure to achieve his breakthrough was a result of his failure to be completely candid with Tobes? Is it likely that his failure to be completely candid was a result of Tobes's failure to discuss confidentiality? What *did* cause Prinzo's breakthrough? What other factors might have discouraged Prinzo from confiding in his therapist?

The point here is to question the utilitarian assumptions that (1) assurances of confidentiality are necessary to encourage clients to confide in attorneys (or patients to confide in doctors) *and* (2) such confidences are necessary to achieve results as to which it can be concluded that the benefits of confidentiality outweigh the harms of non-disclosure. These are *empirical* assumptions for which we might demand some evidence.

It is not uncommon for either doctors or lawyers to omit any discussion of confidentiality or its limits.<sup>48</sup> (When was the last time any doctor of theirs spoke to them about confidentiality?<sup>49</sup>) Nevertheless, Prinzo's friends got their breakthroughs, other patients get cured, and many clients achieve their desired results. Prinzo himself revealed a number of intimate details *before* he got the assurance of confidentiality, including the fact that he was "a toenail muncher."<sup>50</sup> (Even *after* the murder, Prinzo almost spilled the beans to his sister-in-law whom he encountered on the beach.<sup>51</sup>) Most of us generally have some understanding of the obligation of professional confidentiality, and although some might mistakenly believe that confidentiality is absolute, it is probably true that more believe that disclosure is permitted in some instances (although we might not be sure exactly when).<sup>52</sup> With that store of imprecise

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47. FRIEDMAN, *supra* note 7, at 109–11.

48. See, e.g., Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 382–83 (1989) (reporting that 22.6% of lawyers surveyed "almost never" informed their clients about the obligation of confidentiality).

49. Doctors are now required by the federal Health Insurance Portability and Accountability Act (HIPAA) regulations to post notices regarding their privacy policies. 45 C.F.R. § 164.520(a)(1) (2004). I doubt many patients actually read the notices or that many doctors discuss them with their patients. That is certainly my own experience.

50. FRIEDMAN, *supra* note 7, at 110.

51. *Id.* at 120.

52. See Zacharias, *supra* note 48, at 383 (reporting that less than half of clients surveyed believed that lawyer confidentiality is absolute, while the remainder were split between those who believed that confidentiality exceptions are limited to particular types of information and those

knowledge, it is entirely likely that patients and clients typically reveal private information because they recognize that the professional cannot do an effective job without that information (and, in some cases, because of their own psychological needs).<sup>53</sup>

Why didn't Prinzo reveal more? What *does* create trust in professional relationships? In Prinzo's case it certainly was not the verbal assurance of confidentiality because Prinzo felt he had to test that assurance by committing a murder. Obviously, he didn't trust Tobes. Why not? There are hints. Tobes was distant and formal and wouldn't even call Prinzo by his first name.<sup>54</sup> As Robert Burt has explained, trust in interpersonal relationship depends more on interpersonal dynamics than on any verbal formulas.<sup>55</sup>

What *did* cure Prinzo's cringe? I always hope that some student will answer that what cured Prinzo was revealing to Tobes the confidential information that Prinzo had committed the murder and that, as a result, confidentiality was clearly the key to Prinzo's cure. At this point, I ask them to look very carefully for the first sign of the absence of the cringe. In fact, it is the *murder* itself that permits Prinzo to stand "erect" and not the subsequent disclosure.<sup>56</sup> Using utilitarian reasoning, is curing a cringe worth the loss of an innocent life? Clearly not. Do we have any assurance that the long-run benefits of nearly absolute confidentiality are worth the harm that is neither prevented nor rectified?<sup>57</sup> Who should bear the burden of proof?

A good example to test the limits of confidentiality using utilitarian reasoning is the AIDS epidemic. Assurances of confidentiality might be important in getting some patients to see a doctor, but the doctor's failure to

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who believed that more liberal disclosure is permitted). According to Professor Zacharias's survey, the clients "overwhelmingly stated" that lawyers *should* be able to disclose information to prevent harm to third persons in a variety of situations. *Id.* at 400-01.

53. If assurances of confidentiality are essential in order to persuade patients or clients to disclose information relevant to treatment or representation, then surely the professionals are obligated to simultaneously provide information concerning the possible exceptions to confidentiality, even though that might deter the disclosure of relevant information. *See generally* Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits of Confidentiality*, 39 CATH. U. L. REV. 441 (1990).

54. FRIEDMAN, *supra* note 7, at 110.

55. *See* Robert A. Burt, *Conflict and Trust Between Attorney and Client*, 69 GEO. L.J. 1015 (1981).

56. "A little later [after the murder], Mr. Prinzo lifted [the victim's] lifeless form behind the counter of the deserted Carvel stand and propped her up against an old sundae machine. He stood erect, flexed his arms and said, 'Violence inhabits the meek, too.'" FRIEDMAN, *supra* note 7, at 115. He is not seen cringing again.

57. *See* Nancy J. Moore, "In the Interests of Justice": *Balancing Client Loyalty and the Public Good in the Twenty-First Century*, 70 FORDHAM L. REV. 1775, 1779-81 (2002) (concluding that, given the lack of empirical evidence supporting the utilitarian assumptions of the proponents of nearly absolute confidentiality, the ABA Ethics 2000 Commission was justified in urging the adoption of a rule permitting more disclosure to prevent harm to others).

advise sexual partners who might contract the disease could cause more harm in the long run.<sup>58</sup> Students will often point to the “wrongful” act of an AIDS patient who refuses to warn a sexual partner, thus leading to a discussion of the deontological reasoning underlying confidentiality rules.

*Question 2.* What right did Prinzo have to commit a murder to test the limits of confidentiality? Didn't Mrs. Tobes have a right not to be murdered (and Prinzo a duty not to murder her)? Did Prinzo's right to privacy override the victim's rights?

Under deontological (i.e., non-utilitarian) approaches, the limits of confidentiality are determined by balancing the patient's or client's right to privacy against equal or more basic rights or duties.<sup>59</sup> For example, the general obligation of physicians to report contagious diseases is justified by the physician's duty to prevent serious bodily harm.<sup>60</sup> Similarly, the lawyer's duty to prevent intentionally false testimony (even when doing so requires the lawyer to reveal client perjury) is justified by the lawyer's duty to protect the integrity of the trial process.<sup>61</sup> According to a moral theologian, a person who intentionally subjects others to unwarranted risks or harms is an “unjust aggressor” who forfeits his or her right to privacy.<sup>62</sup>

Using this reasoning, it is not difficult to conclude that Prinzo forfeited his right to privacy when he deliberately violated Mrs. Tobes's right to live for no better reason than to test her husband's assurance of confidentiality. On the other hand, if he had already committed a murder when he first sought psychiatric or legal advice, then his right to privacy would not have been overridden by any rights of the victim.<sup>63</sup>

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58. This is precisely the empirical disagreement between the majority and dissenting opinions in *Tarasoff v. Regents of the University of Cal.*, in which the majority argued that more lives would be saved by requiring psychotherapists to reveal death threats, while the dissent argued that more lives would be saved by maintaining confidentiality, which would encourage patients to seek therapy and thereby be dissuaded from engaging in violence. 551 P.2d 334 (1976).

59. See Moore, *supra* note 8, at 194.

60. *Id.*

61. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3), (b), cmts. (2007).

62. ROBERT E. REGAN, THE MORAL PRINCIPLES GOVERNING PROFESSIONAL SECRECY WITH AN INQUIRY INTO SOME OF THE MORE IMPORTANT PROFESSIONAL SECRETS, 104-06 (1943); see also Moore, *supra* note 8 at 194 n.80 (discussing Regan's view).

63. Students generally agree that the lawyers in the famous “buried bodies” case were not morally obligated to reveal their client's confession merely to relieve the suffering of the victims' parents. Cf. *People v. Belge*, 372 N.Y.S.2d 798 (N.Y. County Ct. 1975), *aff'd*, 376 N.Y.S.2d 771 (N.Y. App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976) (overturning indictment of one of the lawyers for violating the public health code on the ground that the attorney-client privilege justified his silence). If, however, the victims were still alive, most students believe that the lawyers should have disclosed their whereabouts. The defendant might or might not be an “unjust aggressor” in that case, but shouldn't the victims' right to live outweigh the defendant's

*Question 3.* What is the significance of Prinzo's statement to Mrs. Tobes (then a nameless woman) that he might not have murdered her if she had been the woman he wanted her to be?<sup>64</sup> Did Prinzo have responsibilities to others? To himself? Where might Prinzo have gotten the idea that everyone is to blame but him?

In his statement to Mrs. Tobes, Prinzo expressed an attitude of extreme egoism and narcissism. He refused to accept any responsibility for what he was doing. He blamed the victim herself. This statement echoes the earlier scene in which he blamed Tobes for his (Prinzo's) failure to achieve a breakthrough, refusing to accept any responsibility for his failure to reveal the intimate details that might have assisted Tobes in the therapy.<sup>65</sup> Although the professional-client relationship is typically one of dependency, don't both clients and patients bear *some* responsibility for their own care?<sup>66</sup>

Prinzo maintained his narcissistic attitude throughout the story. Even at the end, Prinzo demanded that Tobes mail him postcards and letters, claiming that if he didn't, Prinzo wouldn't get his breakthrough and it would be Tobes's fault.<sup>67</sup> Of course, neither doctors' nor lawyers' ethical rules require or even permit a professional to assist or cover up a crime.<sup>68</sup> Nevertheless, Prinzo's assumption is an obvious extension of the position espoused by Tobes when describing the compact of confidentiality. (Recall: "That's the key to it, don't you see. *Your* life. *Your* welfare. Whatever's best for *you*, *my* patient."<sup>69</sup>) The connection between Prinzo's attitude that he is entitled to *anything* that will make him feel better (including involving his therapist in covering up the crime and the confidentiality "compact") is also suggested in Prinzo's following statement, as the two of them walk along the beach: "I'd like to go down below and get my feet wet, as long as we're out here. One thing that has come through in these last seven years is that I'm to just sally forth and grab

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right to privacy? What about a client who confesses to a crime for which another person has been convicted and sentenced to death? See generally Symposium, *Executing the Wrong Person: The Professionals' Ethical Dilemmas*, 29 LOY. L.A. L. REV. 1543 (1996). These are not necessarily easy cases, just as the proper policy for maintaining the confidentiality of AIDS patients is by no means obvious.

64. FRIEDMAN, *supra* note 7, at 114.

65. *Id.* at 109–110.

66. *Cf.* Moore, *supra* note 8, at 220–21, n.204 ("[T]here is no violation of 'human dignity' when a criminal defendant is deterred from full disclosure" to his attorney because he believes the disclosure will disadvantage his case, particularly when the attorney has advised the defendant "that while he cannot permit the client to commit perjury, he will be in a better position to make an effective defense if the client is completely candid").

67. FRIEDMAN, *supra* note 7, at 123.

68. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2007); see also *supra* text accompanying note 40 (explaining that the AMA Principles of Medical Ethics require the doctor to respect confidentiality "within the limits of the law").

69. FRIEDMAN, *supra* note 7, at 112.

my pleasures where I may.”<sup>70</sup> Perhaps Tobes’s failure to put any limits on his willingness to do whatever it takes to effect a cure encouraged Prinzo to develop this attitude.

*Question 4.* After the murder, Prinzo and Tobes appear to have switched roles. Prinzo was assertive and in control; Tobes was passive and compliant (perhaps even “cringing”). How do you feel towards Tobes at this point? Why? Do professionals have rights, too? What about their responsibilities? Do professionals have obligations to third persons? What “sacred compact” did Tobes violate?

Tobes was pathetic, failing to adequately assert himself in his right to cry, to mourn the loss of his wife, and to break off the therapy.<sup>71</sup> Prinzo kept harkening back to the earlier description of the obligation of confidentiality: “There are no limits . . . I’m your patient and the only thing in the world that counts is how I feel.”<sup>72</sup> Getting Tobes to stop crying, Prinzo said, “Do try to be strong . . . If you get flustered, I’ll be all upset, and you’re not allowed to let me be that way.”<sup>73</sup> Prinzo won’t let Tobes exhibit any of the normal human responses to his wife’s death: “YOU MUSTN’T BE STERN.”<sup>74</sup>

We might feel sorry for Tobes for his weakness. A deontological view of the professional-client relationship should emphasize the mutuality of a relationship between two persons. Professionals have rights, too (including the right to collect their fees), and they ought to be able to assert them.<sup>75</sup> On the other hand, we also condemn Tobes not only for his *inability* to assert himself, but also for his *unwillingness* to do so, thereby encouraging Prinzo in his selfishness.

Moreover, Tobes had responsibilities to others, as well as himself. Didn’t he have responsibilities to his wife? After all, marriage is also a “sacred compact,” arguably more sacred than the doctor-patient or lawyer-client “compact.” Didn’t Tobes violate his duty to bring her murderer to justice, or at least to ensure her a proper burial?<sup>76</sup> Prohibitions on lawyer disclosure might encourage clients to assume that the lawyer approves of the client’s conduct. At the same time, lawyers often assume that clients cannot be persuaded to

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70. *Id.* at 119.

71. *Id.* at 117–24.

72. *Id.* at 122.

73. *Id.* at 118.

74. FRIEDMAN, *supra* note 7, at 118.

75. *Cf.* Moore, *supra* note 57, at 1781–82 (explaining that the Ethics 2000 Commission’s proposal to permit more lawyer disclosure of a client’s economic crimes and frauds—but only when the lawyer’s services have been used—was based not on “an affirmative duty of lawyers to further the public good, but rather as limitations on lawyers’ obligations of loyalty to their clients, thereby freeing them to act as independent moral agents”).

76. One of my students contributed his own moment of black humor when he quipped, “But it’s only ‘til death do us part.”)

renounce their illegal plans, and as a result, lawyers don't even bother to express their disapproval—hardly an ideal relationship.

*Question 5.* What sort of “breakthrough” did Prinzo really achieve? Was he really cured when he set forth for Barbados?

Prinzo's failure to achieve any “breakthrough” during his seven years of analysis might be partially explained by the depersonalized, distancing attitude arguably encouraged by an excessively patient-centered rule of confidentiality. Ironically, an unquestioning adherence on the part of professionals to “what's best” for patients or clients might not actually further their best interests. It certainly did not cause Tobes to *care* for Prinzo in a way that might have encouraged more trust and an eventual cure.

Committing a murder might have permitted Prinzo to stand up straight; however, his ability to stand up straight and assert himself aggressively might not gain him happiness in the long run. Was he really better off after the murder than before? He thought he was, but of course he was at risk of having his crime exposed.<sup>77</sup> More important, we are left with the impression that when things do not work out just as he envisions, he will once again blame Tobes (or somebody else) for all his problems. With this attitude, he is unlikely to form the sorts of relationships he will need in order to live a fulfilling life.

#### CONCLUSION

Rereading my notes, my only qualm is that I appear to be pushing my own agenda a bit too much, which ordinarily I don't like to do. In class, I do try to remain open to students with different views, including those who argue for a stronger role for confidentiality than I personally think is justified. In any event, the students love the story, and the debate is lively, whether we're focusing on lawyers or doctors. Now, if I can only figure out a way to make *The Heartbreak Kid* relevant to legal ethics.

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77. Remember, his sister-in-law saw him on the beach where Tobes and Prinzo threw the body into the ocean. He introduced her to “Gar Tobes” and said to her, “We're just out here doing something. How come you didn't ask me what?” FRIEDMAN, *supra* note 7, at 120. Sounds to me like there was a fairly good chance his crime would be detected even if Tobes hadn't turned him in at the end of the story.