

difficulty of arriving at such breakthroughs and the seductiveness of procedural substitutes.

We might allow, however, that the tough practical questions will not usually be settled at the theoretical, conceptual level, but worked out against the heat and weight of practical options, roads, dangers, and dead ends. (It was for this reason, after all, that Kelly was addressing himself to legislators.) In a noted book on casuistry, Albert Jonsen and Stephen Toulmin mention the National Commission. Surprisingly to the commissioners, while they were usually able to debate their way to consensus on practical recommendations, they inevitably disagreed when explaining their conclusions in relation to higher principles. The "locus of certitude," it turned out, did not lie in an intrinsically convincing set of general rules, but in "a shared perception of what was *specifically* at stake in particular kinds of human situations." In Jonsen and Toulmin's view, this demonstrates the difference between theory and practice—"between the demands of scientific understanding and those of practical good sense"—and displays "a capacity for 'practical wisdom' that Aristotle would have applauded."<sup>63</sup> Possible additional examples of prudent deliberation might be the committees convened by professional groups, provided that their membership is not only pluralistic but also serious about self-criticism toward consensus. (The spectre of interests which cloud "common sense" is rightly discerned by Fisher.) If genuinely representative national bodies could be one avenue of moral discernment, local activism and debate around legislative options should not be underplayed. As June O'Connor notes with regard to the Supreme Court's 1992 Pennsylvania abortion decision, local communal decision making may be more effective than national edicts in giving moral seriousness a practical profile.<sup>64</sup>

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#### CONFIDENTIALITY, DISCLOSURE, AND FIDUCIARY RESPONSIBILITY

Questions concerning the release of information have recently been raised in several areas, such as the Gulf war, the physical- and mental-health histories of public persons, the identification of rape victims, and the threat of AIDS. Ensuing discussions have been guided by an important insight: the responsibilities entrusted to particular professions contribute to the determination of whether release of information is considered right and proper. These responsibilities distinguish two

<sup>63</sup> Albert R. Jonsen and Stephen Toulmin, *The Abuse of Casuistry: A History of Moral Reasoning* (Berkeley: Univ., of California, 1988) 16–19.

<sup>64</sup> June O'Connor, "The Summer of Our Discontent," *Hastings Center Report* 22/5 (1992) 28–29.

kinds of professions. On the one hand, the news media, which serve the common good by enabling society access to information that belongs within the public domain. On the other hand, professions that care for the mental, physical, or spiritual well-being of individual persons, and which are obliged to protect the specific histories of those whom they serve. Generally speaking, the news media are obliged to report or disclose; therapists, physicians, and ministers are obliged to maintain confidentiality. These four professions will be considered in this note.<sup>1</sup>

Almost all the relevant controversies raised in 1992 concern whether these general obligations ought to admit any exceptions. These controversies offer us a rich opportunity: they invite us to face not only the thorny issues about information, but also the relationship of some particular professions to ethics. In addressing this relationship, the recent return of virtue ethics becomes helpful.<sup>2</sup> Three particular virtues emerge: prudence, which enables journalists and physicians to make right decisions;<sup>3</sup> fidelity, which grounds the priority of all confidences; and justice, which protects the common good. These three virtues guide us in determining when exceptions must be made to the general obligations.

### *The News Media*

Generally speaking, the news media's ethical debates for 1992 concerned whether journalists ought always to disclose. The debates dealt with three major areas of concern: security leaks, the private lives of public persons, and the naming of rape victims. But their central concern, disclosure, is itself bracketed by two other issues. First, prior to disclosure is the journalist's task to obtain information. In light of the Gulf war journalism's most important ethical question this year concerned not the release of information, but the antecedent obligation of getting privileged access to information. Censorship of war coverage concerned not what journalists could release, but what they could know: the Pentagon's policy of press pools during the Gulf War significantly restricted the press, and therefore, the public's access to information.<sup>4</sup> Second, subsequent to the three topics about disclosure is the

<sup>1</sup> Our treatment of professions which entail responsibility for confidentiality is necessarily selective, not all-inclusive. Lawyers, for example, are also required to maintain confidentiality; cf. n. 55 below for bibliography dealing with the legal profession.

<sup>2</sup> William Spohn, "The Return of Virtue Ethics," *TS* 53 (1992) 60-75.

<sup>3</sup> Daniel Nelson, *The Priority of Prudence* (University Park, Pa.: Penn State, 1992); see also the collection of essays entitled "Virtues and the New Casuistry" in *Thought* 67 (June 1992).

<sup>4</sup> William Boot, "The Pool," *Columbia Journalism Review* (May/June 1991) 24-26; Christopher Hanson, "The Pool," in *The Media and the Gulf War*, ed. Hendrick Smith,

question of whether a journalist is always obliged to keep a confidence. This year, in particular, the legal and moral rightness of naming one's sources was discussed in light of a Supreme Court ruling. Five issues, therefore, deserve our attention.

### Wartime Coverage

Press pools were a rare phenomenon before Grenada.<sup>5</sup> From World War I until Vietnam a cooperative relationship existed between the military and the press: reporters were allowed to the front but had to submit their reports to government censorship.<sup>6</sup> Since Vietnam was an undeclared war, the military, unable to censor the press, countered with its own propaganda program. Existing collaboration collapsed under the weight of profound mutual suspicion until finally Secretary of State Dean Rusk asked one questioning reporter, "Whose side are you on anyway?"<sup>7</sup> Vietnam's legacy of suspicion deprives the press of the unrestricted access to the battlefield it once enjoyed.

For the development of this policy journalists blame themselves. Quoting *Time's* Washington Bureau Chief, Peter Schmeisser reports: "Throughout the long evolution of the Department of Defense pool, the press willingly, passively, and stupidly went along with it. That is the original sin which got us where we are, and I don't blame anybody as much as I blame us."<sup>8</sup> Rather than forming a coalition of editors and reporters to reject emerging Pentagon policies, the press collaborated each time.<sup>9</sup> The fear that a protest by some networks could lead to coverage (albeit limited) by others undermined the journalists' ability to form a united policy of noncooperation: their failure to understand the effects of their profession's competitive "practice" of breaking the

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(Washington: Seven Locks, 1992) 128–35; Christopher Hedges, "The Unilaterals," *ibid.* 149–53; Winant Sidle, "Testimony Before U.S. Senate Committee," *ibid.* 105–11. For reports from outside the pools, see the section entitled "Baghdad: Reporting from the Other Side," *ibid.* 300–349; Michael Kelly, "Kiss of Victory," *New Republic* 204 (18 March 1991) 18–21; "Highway to Hell," *New Republic* 204 (1 April 1991) 11–14.

<sup>5</sup> Arthur Lubow, "Read Some About It: A Short History of Wartime Censorship," *New Republic* 204 (18 March 1991) 23–25.

<sup>6</sup> Malcolm Browne, "Testimony Before the U.S. Senate Committee on Governmental Affairs," in *The Media and the Gulf War* 136–42; Michael Dugan, "Generals Versus Journalists," *ibid.* 60–62; Herbert Sparrow, "The Military Versus the Media," *ibid.* 63–68.

<sup>7</sup> Bill Monroe, "Rusk to Scali: Whose Side are You On?" *ibid.* 81–83.

<sup>8</sup> Peter Schmeisser, "Shooting Pool: How the Press Lost Their Gulf War," *New Republic* 204 (18 March 1991) 21–23, at 23.

<sup>9</sup> See, e.g., Juan Vasquez, "Panama: Live from the Marriott," *Washington Journalism Review* 12 (March 1990) 44, 46–47; Stephen Komarow, "Pooling Around in Panama," *ibid.* 45, 49, 52–53; C. D. Jaco, "Military to Journalists: NOW HEAR THIS," *ibid.* 53.

story first sabotaged the ability to exercise their responsibility to get free access in the first place.<sup>10</sup>

Consensus emerges, however, on the need to reinstate the pre-Vietnam policy of allowing journalists to the front with subsequent military censorship. This policy engages three important interests: it lets the military protect its troops from "enemy" use of sensitive information; it places no burden on the press to censor themselves but rather secures them access so as to keep the citizenry informed; and, in light of the effect *dour* news could have on support of a military effort, it encourages the military and the press to debate the right and merits of the citizenry to know battlefield particulars. That really needed debate, on what entails prudential censorship in wartime, remains outstanding in the post-Vietnam history of wartime coverage.

### Security Leaks

Unlike pools, leaks are not a modern phenomenon: George Washington asked the members of the Constitutional Convention to "be more careful, lest our transactions get into the newspapers and disturb the public repose." Though Washington sought to prevent them, Lincoln found them handy when, for instance, he leaked his 1862 state-of-the-union address to the sympathetic *New York Herald*, so as to give it a better edge against the critical *New York World*.<sup>11</sup> Generally speaking, leakers are members of the government, not the press: the decision to release "sensitive" information is made precisely by those with the charge to withhold it and thus they break their fiduciary responsibility. Whether an official is right to break that trust<sup>12</sup> is different from whether the journalist is right to print the leak. Since the journalist's task is to inform, only the most urgent of situations, e.g. terrorist negotiations, justify an exceptional, prudential decision not to report a leak.<sup>13</sup> Nonetheless, whenever an informed leak is reported, scapegoating the press generally follows, as happened in the Anita Hill case.<sup>14</sup> Still, the press is not entirely innocent: its "obsession

<sup>10</sup> On practices, see Alasdair MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame, 1981) 169–89.

<sup>11</sup> John Wallach, "Leakers, Terrorists, Policy Makers, and the Press," in *The Media and Foreign Policy*, ed. Simon Serfaty (New York: St. Martin's, 1991) 81–94, at 81; see also Richard Burt, "The News Media and National Security," *ibid.* 137–50.

<sup>12</sup> Sissela Bok, *Secrets: On the Ethics of Concealment and Revelation* (New York: Vintage, 1983) 171–224.

<sup>13</sup> Michael Ledeen, "Secrets," in *The Media and Foreign Policy* 121–36; Robert Oakley, "Terrorism, Media Coverage, and Government Response," *ibid.* 95–108.

<sup>14</sup> Lyle Denniston, "Senate Says: Why Not Blame It on Nina?" *Washington Journal*-

with exclusivity—driven by fierce competition and a desire for recognition—compels an excessive reliance on leaks.”<sup>15</sup> Just as competition undermined a unified refusal to challenge the pools, so it contributes to an ethos that increases the probability of leaks. In both cases, the responsibility of the press to report is played out in tandem with supposedly necessary incentives that involve very competitive urges.

### Private Lives of Public Figures

The exclusive becomes particularly problematic in the matter of disclosing the private lives of public figures. The report that Arthur Ashe acquired AIDS through a blood transfusion engendered a sharp debate about whether the press should censor itself (while many editors defended the report, 95% of the public declared it inappropriate).<sup>16</sup> The clash here was not simply over a particular prudential judgment; rather, the dispute concerned the self-understanding of the professional and her/his practices. On this point Arthur Ashe noted:

I understand that the press has a watchdog role in the maintenance of our freedoms and to expose corruption. But the process whereby news organizations make distinctions seems more art than science. I wasn't then, and I am not now, comfortable with being sacrificed for the sake of the public's "right to know". . . After all, I am not running for some office of public trust, nor do I have stockholders to account to. It is only that I fall in the dubious umbrella of quote, public figure, end of quote.<sup>17</sup>

Among the many who responded to Ashe's charges,<sup>18</sup> Fred Bruning of *Newsday* gave a fairly common response:

Central to our notion of an unfettered media is that reporters and editors are merely custodians of the facts and must never be permitted proprietary interest. Journalists gather the news, protect it from corrupting influences and get it out to the people where it belongs.<sup>19</sup>

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*ism Review* 14 (April 1992) 55; "Senate Ends Fruitless Search for Leakers," *The News Media and the Law* 16 (Spring 1992) 4–5.

<sup>15</sup> Robert McCloskey, "The Care and Handling of Leaks," in *The Media and Foreign Policy* 109–20, at 119.

<sup>16</sup> Christine Spolar, "Privacy for Public Figures?" *Washington Journalism Review* 14 (June 1992) 20–22.

<sup>17</sup> Quoted in Debra Gersh, "Unclear Boundaries," *Editor and Publisher* 125 (18 April 1992) 7–8, 39, at 8.

<sup>18</sup> Many similar remarks are quoted in Gersh, Spolar, and Richard Cunningham, "Responsibility before Compassion," *The Quill* 80 (Jan./Feb. 1992) 6–7.

<sup>19</sup> Fred Bruning, "How a Private Citizen Lost His Privacy Rights," *Macleans*, 4 May 1992, 13.

Bruning argues that the determination of what ought to appear in print belongs not to the journalist's domain but rather to the public's. In determining *whether* something is to be printed there are no scientific or even artful distinctions: the public's right to know alone dictates the boundaries of disclosure. Bruning, then, does not abdicate a right to exercise prudence, but rather denies the journalist's right to the virtue in the first place.

Bruning's remarks are subject to a general and a specific critique. First, Alasdair MacIntyre would charge this vocational description as profoundly manipulative, precisely in its implicit denial of being manipulative. In making his case, MacIntyre considers two concepts. First, he proposes "characters" as embodied expressions of an era's particular ethos. The English headmaster and the German professor are examples of characters from Victorian England and Wilhelmine Germany. They "were not just social roles: they provided the moral focus for a whole cluster of attitudes and activities."<sup>20</sup> Today's characters, MacIntyre states, are the therapist and the manager; both deny having an agenda or aiming at a particular end and assert only that skills and techniques are the objects of their professions. Inescapably, however, the therapist and the manager move their clients toward desired results; the therapist's anthropology is as invested as the manager's network of social relations. Bruning's journalist is not unlike MacIntyre's therapist or manager: as a custodian of facts, the journalist purports to have no goal but to mediate data on the grounds of the public's right to know.<sup>21</sup> The journalist's public is affected, however, not only by the facts, but by the journalist's own hierarchy of values that guide decisions about what to report.

MacIntyre's second concept is the "fact." Contrasting an Aristotelian fact with the contemporary "mechanist" view, he writes: "On the former view the facts about human action include the facts about what is valuable to human beings (and *not* just the facts about what they think to be valuable); on the latter view there are no facts about what is valuable. 'Fact' becomes value-free."<sup>22</sup> The mechanist view, then, depersonalizes or dehumanizes facts. The journalist's subsequent description of all facts as public and value-free becomes the contemporary journalist's pass card to intrude into any personal life without discrimination.

On specific grounds, then, Bruning also denies the right to privacy. That right was introduced into American jurisprudence through an

<sup>20</sup> MacIntyre, *After Virtue* 28.

<sup>21</sup> Bok, *Secrets* 249–64.

<sup>22</sup> MacIntyre, *After Virtue* 81.

article by Samuel Warren and Louis Brandeis, precisely after intrusive journalists reported on the social habits of the Warren family.<sup>23</sup> Later, in a dissenting opinion in *Olmstead v. United States*, Brandeis further described the right as “the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.” The Ashe family’s right is not different from that of the Warrens.<sup>24</sup> Suzanne Garment concurs when she argues that the most serious threat to the press is its own abuse of privilege, particularly in its obtrusive entry during the 1980s into the private sphere: “In the process, the press came less and less to seem like a faithful surrogate for the public, whose alleged ‘right to know’ journalists used as a universal search warrant.”<sup>25</sup>

Bruning’s denial of journalistic decision making, coupled with his refusal to recognize any privacy for even a remotely public figure, eventually produces a professional profile showing little capacity for the virtue of prudence. Rejecting prudence on grounds of the public’s absolute right to know finds, however, its adversary<sup>26</sup> in an equally imprudential absolute right to secrecy. Public figures, particularly those in government, invoke privacy with growing frequency as a cloak for a multitude of sins.<sup>27</sup> The General Accounting Office reports that in a recent six-month period 143,531 federal employees signed obligations to secrecy and censorship.<sup>28</sup> Access to rightful information is blocked by the same blanket claims, not of access, but of privacy. Both sides, in developing absolute and indiscriminating interpretations of privacy or the right to know, fail to face the difficult prudential question: What exactly entails information that the public ought to know?<sup>29</sup>

<sup>23</sup> Samuel Warren and Louis Brandeis, “The Right to Privacy,” *Harvard Law Review* 4 (1890) 190–96.

<sup>24</sup> Brian Johnstone, “The Right to Privacy: The Ethical Perspective,” *American Journal of Jurisprudence* 29 (1984) 73–94; Alan Westin, *Privacy and Freedom* (New York: Atheneum, 1967).

<sup>25</sup> Suzanne Garment, “Abuse of Privilege,” *Columbia Journalism Review* 30 (Nov./Dec. 1991) 44–45.

<sup>26</sup> William F. May, “Adversarialism in America and the Professions,” in *Community in America*, ed. Charles Reynolds and Ralph Norman (Berkeley: University of California, 1988) 185–201; Donald Phillips, “Physicians, Journalists, Ethicists Explore Their Adversarial, Interdependent Relationship,” *Journal of the American Medical Association* 260 (1988) 751–53.

<sup>27</sup> See examples in Ben Bagdikian, “Sheer Gutlessness,” *Columbia Journalism Review* 30 (Nov./Dec. 1991) 55; Andrei Codrescu, “Self-censorship,” *ibid.* 50; Jane Kirtley, “The Cloak of Privacy,” *ibid.* 46–47.

<sup>28</sup> Angus Mackenzie, “The Secrecy Obsession,” *ibid.* 51–52.

<sup>29</sup> Against absolute rule-making remains Josef Fuchs, “The Absoluteness of Behav-

The lack of prudential insight into these larger matters led then to the imprudent decision to print the Ashe story. A decision not to disclose the story would neither have undermined the press's duties nor suppressed socially significant facts, but it would have prevented hurtful effects to a family that had already suffered privately for many years.<sup>30</sup> Jonathan Yardley of the *Washington Post* agrees: "No public issues were at stake. No journalistic rights were threatened."<sup>31</sup>

### Naming Rape Victims

The publication of a rape victim's name takes the question of prudence further. In 1985 Ellen Fishbein argued, "the public has no First Amendment interest in the publication of a victim's name, whereas the victim and her family have a compelling privacy interest in preventing publication."<sup>32</sup> But after surveying more recent court decisions, Morgan Arant concludes that the "legal avenues recommended by advocates of protection of the identities of sexual assault victims face such constitutional and practical obstacles, the decision to publish or not seems to be left to the press as a matter of policy."<sup>33</sup> Arant adds that the press must still determine the method and content of their deliberations on this matter.

Michael Gartner, president of NBC News, argues, however, that years ago he concluded that "journalistically, it is usually right to name rape victims." He notes that he first raised the issue of releasing a rape victim's name in the Central Park rape: "I told some colleagues that if it were to become a continuing national story we should debate the question of naming the woman. As it turned out, it did not become a continuing national story." Gartner's position became even more influential when his network was the first to identify the woman who claimed she was raped at the Kennedy compound.<sup>34</sup>

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ioral Moral Norms," *Personal Responsibility and Christian Morality* (Washington: Georgetown Univ. 1983) 115-52.

<sup>30</sup> Lance Morrow, "Fair Game?" *Time*, 20 April 1992, 75; Anna Quindlen, "Journalism 2001," *New York Times*, 12 April 1992, E21.

<sup>31</sup> Gersh, "Unclear Boundaries" 39.

<sup>32</sup> Ellen Fishbein, "Identifying the Rape Victim," *John Marshall Law Review* 18 (1985) 1014.

<sup>33</sup> Morgan Arant, "Press Identification of Victims of Sexual Assault," *Journalism Quarterly* 68 (1991) 238-52, at 252.

<sup>34</sup> The *New York Times* also presented a profile on the woman; they released the story because NBC had already placed her name in the public forum; see Fox Butterfield and Mary Tabor, "Leap Up Social Ladder for Woman in Rape Inquiry," *New York Times*, 17 April 1991, A10, A17; Deirdre Carmody, "Debate is Intense on Naming Accuser," *ibid.* 18



Gartner gives four reasons: (1) "We are in the business of disseminating news, not suppressing it." (2) "In no other category of news do we give the newsmaker the option of being named." (3) "By not naming rape victims we are part of a conspiracy of silence and that silence is bad for viewers and readers . . . One role of the press is to inform, and one way of informing is to destroy incorrect impressions and stereotypes." (4) "[T]here is an issue of fairness. I heard no debate . . . on whether we should name the suspect . . . We are reporters; we don't take sides, we don't pass judgment." Though Gartner presents no arguments to the contrary, he writes, "if a vote had been taken, it probably would have been not to print the name." He concludes on a prudential note: "The position at NBC News is this: we will consider the naming of rape victims or alleged rape victims on a case-by-case basis."<sup>35</sup>

Gartner's first, second, and fourth reasons are the same: suppressing a rape victim's name is an exception from the norms of journalism. His logic, however, is tautological. Any exception, as Paul Ramsey pointed out, has to have validity in some rule other than the rule to which an exception is made.<sup>36</sup> The exceptional rule for suppressing a rape victim's name is based on a legitimate claim to privacy even when one is involved in a "public" event. That claim, like Ashe's, argues that the press ought to provide a cloak of anonymity to innocent and especially vulnerable persons, who will only suffer further by a disclosure, the suppression of which does no harm to society or to the duties of the press. These three reasons, then, do not address the exception.

Gartner's third argument, "the silence conspiracy," provides a possible reason to override the exceptional rule. Precisely by positing it as he does, Gartner appears to bring the debate to closure. Closure, however, is precipitous. Certainly, "professional ethics has ignored questions of power,"<sup>37</sup> but the prudential question here is precisely whether such disclosure empowers or harms. One feminist view of disclosure in today's society implicitly warns against Gartner's presumption: "For one thing, it is not correct to view publicity as always and unambiguously an instrument of empowerment and emancipation."<sup>38</sup>

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April 1991, A12, A22; Walter Goodman, "When Broadcast Material Is Deemed Offensive," *ibid.*, 12 December 1991, 12, 47.

<sup>35</sup> Michael Gartner, "Document," *Columbia Journalism Review* 30 (July/Aug. 1991) 54–55. See also his "The Thought Police Among Us," *The Quill* 79 (1991) 45–47.

<sup>36</sup> Paul Ramsey, "The Case of the Curious Exception," in *Norm and Context*, ed. Gene Outka and Paul Ramsey (New York: Charles Scribner's Sons, 1968) 67–135.

<sup>37</sup> Karen Lebacqz, *Professional Ethics: Power and Paradox* (Nashville: Abingdon, 1985) 150.

<sup>38</sup> Nancy Fraser, "Sex, Lies, and the Public Sphere," *Critical Inquiry* 18 (1992) 595–612, at 610.

Sustained reflection on disclosing the name of a rape victim, therefore, cannot be settled primarily by the public's right to know. In debating whether disclosure empowers or harms a victim, the journalists are called to exercise prudential decision making: they can no longer argue, at least in these exceptional instances, that they ought not to judge.

Prudence allows the decision maker to reflect on conflicting concerns, in this case a concern to cloak the vulnerable versus a concern to empower the victim. In dealing with conflict, however, prudence does not address only the more pressing concern while entirely eliminating the other concern from consideration; rather, it keeps the two concerns in tension while recognizing and emphasizing the more urgent one. If a stronger argument can be made for naming the rape victim rather than concealing the victim's identity, prudence still requires the journalist to consider how the victim's own violated and vulnerable integrity can now be safeguarded.

Being a virtue, moreover, prudence requires the self-understanding of the agent: in order to judge rightly, the prudent person must know her or his strengths, weaknesses, and limits in assessing material. In this light, journalists note both the complex impact competitiveness has on the profession and the particular role that instincts, hunches, and intuitions play in their judgments.<sup>39</sup> Rightly, then, a direct question can be posed about their ability to assess a policy regarding the naming of a rape victim: Is the news media already in a situation to appreciate the trauma and self-understanding of a woman who charges someone with rape? This question is antecedent to, and therefore much more urgent than, the question of disclosing the name of a rape victim. Along these lines, Nancy Fraser remarks that "the feminist project aims in part to overcome gender hierarchy that gives men more power than women to draw the line between public and private."<sup>40</sup> As journalists turn to policy, prudence urges an examination of their own ability to judge.

These questions do not place in doubt either the press's responsibility to disclose or the importance of the First Amendment. Rather, they

<sup>39</sup> See Sandra Braman, "Public Expectations of Media Versus Standards in Cases of Ethics," *Journalism Quarterly* 65 (1988) 71-77, 240; Clifford Christians, "Fifty Years of Scholarship in Media Ethics," *Journalism of Communication* 27 (1977) 19-29; Janet Malcolm, "The Morality of Journalism," *New York Review of Books*, 1 March 1990, 19. In a study of two newspapers David Pritchard and Madelyn Peroni Morgan conclude that there is "no support for the assumption that ethics codes directly influence the decisions journalists make" ("The Impact of Codes on Judgments by Journalists," *Journalism Quarterly* 66 [1989] 934-41).

<sup>40</sup> Fraser, "Sex, Lies, and the Public Sphere" 610.

ask whether the rights of individuals or societies are ever protected against the rights of the press to disclose. The questions are, however, somewhat distinct. Through power the military constrains the press's right to access information. On ethical, professional grounds the press responds to the military with appeals for prudential reform. Yet, Ashe, like rape victims, asks the press whether privacy, accorded to a judge like Warren, is ever granted to victims. Without access to power, Ashe appeals to journalists, asking whether they too appreciate the science of prudence.

### Revealing One's Sources

Recently the press moved not only to extend its prerogatives about disclosure, but also to expand its options concerning confidentiality. While journalists seek protection behind shield laws to prevent forced disclosure of sources originally promised confidentiality,<sup>41</sup> they also name with greater frequency sources equally promised confidentiality.<sup>42</sup> As a result the press is described as wanting "it both ways constitutionally, protection from having to disclose sources and from monetary penalty if it chooses to reveal them."<sup>43</sup>

A case in point concerns Dan Cohen, the public-relations executive for a political campaign, who supplied incriminating information about an opponent to a reporter, who promised him confidentiality. Later, her editors overruled her promise, declaring Cohen's actions just as newsworthy as the information revealed. The next day, the stunned Cohen was fired. Subsequent litigation led to a recent Supreme Court 5-4 decision (*Cohen v. Cowles Media Company*) that ruled that the newspaper had an implied contract it was obliged to keep.<sup>44</sup>

### *Confidentiality and the Caring Professions*

#### In Therapy

The Court's decision that confidential agreements must be upheld presents an important social norm for the treatment of confidentiality

<sup>41</sup> See the many reports in *The News Media and the Law* (Summer 1991) 12–16, and (Winter 1992) 3–12.

<sup>42</sup> Monica Langley and Lee Levine, "Broken Promises," *Columbia Journalism Review* 27 (July 1988) 21–24.

<sup>43</sup> Louise Sommers, "Confidential Sources," *Editor and Publisher* 124 (16 March 1991) 32.

<sup>44</sup> In dissent, Justice Souter wrote, "The state's interest in enforcing a newspaper's promise of confidentiality was insufficient to outweigh the interest in unfettered publication of the information revealed in this case." Souter minimalizes the prima facie obligatory force of promise keeping in the practice of journalism; see Debra Gersh, "Implied Contract with Sources Upheld," *Editor and Publisher* 124 (29 June 1991) 9.

in the professional care of persons. The social significance of private, professional confidences was recently addressed in a collection of articles in *Society* which invited eight psychologists, psychiatrists, and social scientists to discuss Dr. Martin Orne's release of records including 300 audio tapes from eight years of psychiatric counselling of the poet, the late Anne Sexton. The records and tapes were offered by Orne to Sexton's biographer, Diane Middlebrook, with the poet's daughter and the estate's executor, Linda Sexton, having the option to withhold their release. Orne's release of the records prompted a debate in which professionals generally disapproved of Orne's actions, while the poet's friends did not. Orne presented two reasons, beneficence and autonomy: an account of Sexton's successful therapy would encourage others; and Sexton would have agreed to the disclosure.

Since such beneficence is negligible in comparison to this unprecedented breach of confidentiality, considerable speculation concerned whether Sexton would actually have granted Orne permission to disclose the confidential records.<sup>45</sup> An unexamined presumption here was that Orne's responsibility to confidentiality was contingent on some act of the will from Sexton. This presumption is false, however; the therapist's duty to confidentiality is not founded on an individual client's consent or request, but on the social nature of the profession. Graduated from an academic institution, licensed by the state, and inducted into a society of peers, the therapist adopts a series of rights and duties which belong to members of that profession. Regardless of Sexton's acts of the will, Orne was bound by his profession to maintain confidentiality.<sup>46</sup>

Professional therapy recognizes how essential a role confidentiality plays in providing a client with a context for entrusting another with one's own personal history. As a result, confidentiality is nearly absolutely protected; in fidelity to one's client, a therapist could break a confidence only for more urgent claims. These claims are distinguished by whether or not the patient consents to the breach. Thus, a therapist might break a confidence when a patient asks the therapist to certify that he or she is capable of getting custody of a child. In this instance,

<sup>45</sup> Allesandra Stanley, "Poet Told All," *New York Times*, 15 July 1991, A1, C13; Martin Orne, "The Sexton Tapes," *ibid.*, 23 July 1991, A11, A21; Erica Jong, "Anne Sexton's River of Words," *ibid.*, 17 Aug. 1991, 13, 21; Linda Sexton, "A Daughter's Story," *New York Times Book Review*, 18 Aug. 1991, 20; Lisa Tompson and Mary Ford, "Anne Sexton's Vision of Reality," *ibid.*, 25 August 1991, 4.

<sup>46</sup> From *Society* 29 (1992) 5–26, see esp. Barbara Lewin, "The Anne Sexton Controversy" 9–11; Paul Roazen, "Privacy and Therapy" 14–17; Moisy Shopper, "Breaching Confidentiality" 24–26. See also James Keenan, "Sexton's Last Tapes," *Commonweal* 118 (1991) 635–37.

the patient's authorization is required not because the therapist's duty is based on the patient's desires, but because the community, through the institution of psychiatry, recognizes that a client should initiate such breaches in confidentiality. Thus, a therapist may break confidentiality if three conditions are met: the client makes a request, for a matter of urgency, that benefits the client. The exception is provided precisely as an extension of the faithful relationship between the therapist and the client.

Justice, not fidelity, grounds those instances where there is a duty to break confidentiality without the client's consent. These cases find their roots in a court decision, *Tarasoff v. Board of Regents of the University of California* (1976), that ruled that a therapist must warn third parties when the client may cause them harm. Later court decisions expanded that duty to warn, making therapists more likely to break confidentiality and warn others.<sup>47</sup>

Though the therapist's primary responsibility is to be faithful to her/his client, the claim of justice broadens the therapist's professional responsibilities. That extension is analogous to the argument that journalists consider their responsibilities beyond the singular task of disclosing information to the public. Professional ethics recognizes not only the primary duty that each profession has to its clients, but also its implicit responsibilities to others: a journalist may be obliged to protect the interests of some victimized private citizen, even though her/his general and primary responsibility is to an informed public. In the name of justice a therapist may have to warn a stranger of foreseeable harm, though the therapist has a prior and primary claim of fidelity to a client.

Rather than emphasizing that all persons are and ought to be treated equal as justice does, fidelity acknowledges that existing relationships make special and unequal claims on us. Despite justice's claim that we should treat all alike, fidelity claims that we should not: fidelity requires that the therapist should give her/his client preferential treatment. Justice requires, however, that in being faithful to one's client, one cannot jeopardize the welfare of others. In considering the legitimacy of Orne's decision to breach confidentiality, the two virtues of fidelity and justice guide deliberations and they each offer grounds for an exception: Is the client requesting a breach to better her/his well-being or is another's well-being endangered? These criteria provide the grounds for any exceptions to the rule of confiden-

<sup>47</sup> Paul Appelbaum, "Tarasoff and the Clinician," *American Journal of Psychiatry* 142 (1985) 425-29; James Beck, ed. *Confidentiality versus the Duty to Protect* (Washington: American Psychiatric, 1990).

tiality in the care of persons and clearly demonstrate how illegitimate Orne's action was.

The priority of confidentiality in therapy is considerably tested in family therapy because "fidelity to the client" involves far more than one individual and because competitive justice claims also arise among the parties.<sup>48</sup> As a result, the grounds for waiving confidentiality here are numerous and they in turn clearly wear down the force of the general obligation. In this light, Joyce Harris's suggestion that the rules for confidentiality for members of religious communities who undergo therapy ought to be based on the family therapy model, rather than on the individual client model, is at best peculiar. She writes: "The most critical assumption in this paradigm is that both the religious client and the community representative are equal participants in the therapeutic relationship."<sup>49</sup> Obvious problems with the analogy make the proposal untenable: the relationship between members and their superiors is not a spousal one; the superior does not undergo therapy.<sup>50</sup> More importantly, since confidentiality is extraordinarily problematic in family therapy, it cannot serve as a worthy paradigm for determining exceptions to the general rule.

#### In Ministry

These needs for professional standards in therapy have prompted religious ministers to recognize similar needs, particularly in respect to confidentiality.<sup>51</sup> Unlike the therapist who testifies for a client's ability to take custody of a child or to resume work, however, the minister does not seem to entertain exceptions to confidentiality as an extension of the faithful relationship.<sup>52</sup> The preference for confidentiality in the ministerial care of persons is particularly evident in accounts of securing rights against any attempts by the state to intrude into these confidences. As a result, ministers and the courts acknowl-

<sup>48</sup> Sallie Watkins, "Confidentiality: An Ethical and Legal Conundrum for Family Therapists," *American Journal of Family Therapy* 17 (1989) 291-302; "Confidentiality and Privileged Communications," *Social Work* 34 (1989) 133-36.

<sup>49</sup> Joyce Harris, "Therapy for Religious," *Review for Religious* 51 (1992) 282-88, at 285. William Barry also suggests problems with the individual model in "A Superior's Relationship with a Therapist," *Human Development* 10 (1989) 11-13.

<sup>50</sup> James Keenan, "Confidentiality: Erosion and Restoration," *Review for Religious* 51 (1992) 882-94; Mary Moore, "Therapist, Client and Superior in Relationship," *ibid.* 49 (1990) 539-44.

<sup>51</sup> Joseph Allen, "Recent Books on Ministerial Ethics," *Interpretation* 45 (1991) 406-11, 414; Margaret Battin, *Ethics in the Sanctuary* (New Haven: Yale University, 1990).

<sup>52</sup> Paul Dechant, "Confidentiality and the Pastoral Minister," *Journal of Pastoral Care* 45 (1991) 61-69; John Thomas, "Confidentiality and the Clergy," *Journal of Pastoral Counseling* 23 (1988) 108-16.

edge a hierarchy of degrees of confidentiality in the ministerial care of persons: "the more formal the setting, the more likely the privilege is to attach."<sup>53</sup>

Exceptions to confidentiality in ministerial service then are strictly on grounds of justice, that is, when the welfare of others is endangered. In light of the degrees of confidentiality, however, is there a context for confidentiality that is absolute? That is, granted that advising or spiritual direction may require a breach in confidentiality because the common good is threatened, could some context hold a priority for fidelity even in light of justice? Margaret Battin asks precisely that question when examining the "most formal setting," confession to a Catholic priest. Using the case of preventable murder, she engages pros and cons and concludes with a question rather than a statement: Ought not the priest prevent what he believes will be a serious harm to another person?<sup>54</sup> But when does this claim of justice arise? To the extent that the confessional is generally a final refuge for actions already done, the priest-penitent context remains, with the possible exception of the lawyer-client relationship,<sup>55</sup> the closest expression of a near to absolute, if not actually absolute, duty to maintain confidentiality.

Ministry has provided, then, a paradigm for upholding faithful relationships, particularly in maintaining confidences from confession and spiritual direction. Recent disclosures of the sexual abuse of children by clergy have tarnished that long-standing paradigm. These disclosures tell stories of betrayal that concern not only those priests who abused children but also those who did not protect the common good. Children and their families (and the priesthood) have been profoundly hurt by these abuses, but the institution of confidentiality itself has also been damaged. As bishops like Cardinal Bernardin<sup>56</sup> provide clear, responsible guidelines for treating this scandalous conduct, they must also lead us in reflecting on what happens to confidentiality and the quality of fidelity when claims of injustice are not

<sup>53</sup> Michael Smith, "The Pastor on the Witness Stand," *Catholic Lawyer* 29 (Winter 1984) 1–21, at 17. See William Rankin, *Confidentiality and the Clergy* (Harrisburg: Morehouse, 1990); William Tiemann and John Bush, *The Right to Silence: Privileged Clergy Communication and the Law* (Nashville: Abingdon, 1983).

<sup>54</sup> Battin, *Ethics in the Sanctuary*, 53.

<sup>55</sup> On confidentiality and the legal profession, see Sissela Bok, "Can Lawyers Be Trusted?" *University of Pennsylvania Law Review* 138 (1990) 913–33; Arthur Miller, "Confidentiality, Protective Orders, and Public Access to the Courts," *Harvard Law Review* 105 (1991) 427–502; Daniel Ortiz, "Privacy, Autonomy, and Consent," *Harvard Journal of Law and Public Policy* 12 (1989) 91–97.

<sup>56</sup> "Clerical Sexual Misconduct with Minors," *Origins* 22 (1992) 273, 275–281; "Statement Announcing Policy on Clerical Sexual Misconduct with Minors," *ibid.* 282–84.

adequately heeded. Serious attention to this question is required if ministry is to continue rightfully to serve as a paradigm for upholding confidences entrusted to it.

### In Medicine

In medicine, confidentiality has had a peculiar history. In 1982, Roger Higgs presented a case, in an English journal, that in the last two years has often been reconsidered.<sup>57</sup> In the case, a man confidentially informs the family physician that his wife has a terminal disease and requires him not to disclose the information to her. The case has been critiqued from a variety of viewpoints, from a debate over whether one can distinguish lying from deception (the physician can do the latter, not the former) to an assertion of patient autonomy and the right to know. More recent comments attest to the claim fidelity makes on the physician: confidentiality with family members can never undermine the fidelity between a patient and physician, since professional confidentiality is rooted precisely in that virtuous relationship.

Again in 1982, in an American journal, Mark Siegler presented another angle on the topic: "Medical confidentiality, as it has traditionally been understood by patients and doctors, no longer exists."<sup>58</sup> Siegler's argument concerned the frequent institutional access to confidential records; if a physician's fidelity to a patient's well-being requires the physician to share the patient's records, then reasonable limits must be set that are in keeping with that fidelity. While physicians and ethicists examined the extent of institutional access to confidential records, they noted that it was the patient who had least access to the records. The seeds of these early complaints have grown into full advocacy for "patient-held records".<sup>59</sup> This position is grounded in both practical arguments that the patient-held records are

<sup>57</sup> Roger Higgs, "Truth at the Last—A Case of Obstructed Death?" *Journal of Medical Ethics* 8 (1982) 48–50. See recently in the same journal: David Bakhurst, "On Lying and Deceiving," 18 (1992) 63–66; Peter Byrne, "Comments on an Obstructed Death," 16 (1990) 88–89; Scott Dunbar, "An Obstructed Death and Medical Ethics," 16 (1990) 83–87; Ranaan Gillon, "Deceit, Principles and Philosophical Medical Ethics," 16 (1990) 59–60; Roger Higgs, "An Obstructed Death and Medical Ethics," 16 (1990) 90–92; Jennifer Jackson, "Telling the Truth," 17 (1991) 5–9.

<sup>58</sup> Mark Siegler, "Confidentiality in Medicine—A Decrepit Concept," *New England Journal of Medicine* 307 (1982) 1518–21; H. E. Emson, "Confidentiality: A Modified Value," *Journal of Medical Ethics* 14 (1988) 87–90; M. H. Kottow, "Medical Confidentiality," *ibid.* 12 (1986) 117–22.

<sup>59</sup> The argument is by Mary Gilhooly and Sarah McGhee, "Medical Records: Practicalities and Principles of Patient Possession," *ibid.* 17 (1991) 138–43. See also Douglas Black, "Personal Health Records," *ibid.* 18 (1992) 5–6; Ranaan Gillon, "Should Patients Be Allowed to Look After Their Own Medical Records?" *ibid.* 17 (1991) 115–16.



more secure, better maintained, and more easily accessible than present methods and in ethical arguments that patient autonomy and the trusting relationship between physician and patient are better served.

Whether fidelity to the patient is always furthered by giving the patient greater access to health records has been questioned in the area of genetics: Is one faithful to a patient in disclosing information about the likelihood of a genetic disorder to a patient who does not want to know? Does fidelity respect a "right not to know?"<sup>60</sup> This question finds its parallel in one concerning justice: When a genetic disorder is discovered in a patient, to what extent is a physician obliged to inform a relative who also may be a carrier of the disorder?<sup>61</sup> These new questions arise from a field that brings with it new information and, likewise, new questions about the release of information.<sup>62</sup>

Justice raises a final question about confidentiality in the case of AIDS. Does the Tarasoff case, which argued that the duty to protect a stranger from harm overrides the therapist's confidential bond with the patient, equally apply to the physician treating a patient with AIDS? Respondents note that the case of the menacing patient does not compare with that of the menacing disease for two reasons: the public has already been warned, and the scope of the epidemic precludes any practical ability to contact those specifically imperilled. Moreover, the fact that many victims of the disease are already reluctant to contact a physician leads many to conclude that overriding confidentiality will not, in this instance, promote the common good. Nonetheless, prudence requires physicians to continue to find ways of helping patients inform those who are or may be in danger.<sup>63</sup>

<sup>60</sup> Rita Kielstein and Hans-Martin Sass, "Right Not to Know or Duty to Know," *Journal of Medicine and Philosophy* 17 (1992) 395–405; Evert Van Leeuwen and Cees Hertogh, "The Right to Genetic Information," *ibid.* 381–93.

<sup>61</sup> Jean Adams, "Confidentiality and Huntington's Chorea," *Journal of Medical Ethics* 16 (1990) 1996–99; Ranaan Gillon, "Genetic Counselling, Confidentiality, and the Medical Interests of Relatives," *ibid.* 14 (1988) 171–72; Richard West, "Ethical Aspects of Genetic Disease and Genetic Counselling," *ibid.* 194–97.

<sup>62</sup> Dorothy Wertz and John Fletcher argue that a new ethical method is also needed; see their "Privacy and Disclosure in Medical Genetics Examined in an Ethics of Care," *Bioethics* 5 (1991) 212–31.

<sup>63</sup> Michael Adler, "HIV, Confidentiality, and a Delicate Balance," *ibid.* 17 (1991) 196–98; Keith Boyd, "HIV Infection," *ibid.* 16 (1990) 173–78; Troyen Brennan, "AIDS and the Limits of Confidentiality," *Journal of General Internal Medicine* 4 (1989) 242–46; Leone Risdale, "When Keeping Secrets May Cause Harm," *Journal of Medical Ethics* 16 (1990) 81–82; William Spohn, "The Moral Dimension of AIDS," *TS* 49 (1988) 89–109.

*Conclusion*

Applying the science of moral reasoning to cases of disclosure and confidentiality highlights both the need for prudence and the role of fidelity and justice in guiding us to right conclusions. This exercise of moral reasoning within the context of professional responsibility enables us better to appreciate the essential insight that what one ought to do follows from who one is. That fundamental point helps us to determine what constitutes the right release of information and, more importantly, the right care for one another.

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