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## Cover Page Footnote

Special thanks to Bruce Green and Russell Pearce for their help and guidance.

# CONFIDENTIALITY, COUNSELING, AND CARE: WHEN OTHERS NEED TO KNOW WHAT CLIENTS NEED TO DISCLOSE

*Janine Sisak**

## INTRODUCTION

Matthew has recently been diagnosed HIV-positive.[1] Facing the possibility of developing a fatal and incurable disease,[2] he is obviously scared—not only of dying, but also of the radical impact the diagnosis will have on his life. Because of the stigma attached to the virus,[3] he fears discrimination at the workplace[4] and in his social circles. Because many people have an irrational fear of contracting the virus,[5] he

* Special thanks to Bruce Green and Russell Pearce for their help and guidance.

1. The results of Matthew's blood test indicated a presence of antibodies to the Human Immunodeficiency Virus ("HIV"). *See* Mary Ellen Hombs, AIDS Crisis in America: A Reference Handbook 62 (1992). HIV is a virus that damages the body's immune system, leaving it vulnerable to a wide variety of opportunistic infections and malignancies, which in turn produce an array of symptoms known as the acquired immunodeficiency syndrome ("AIDS"). *See* Jeffrey T. Huber, HIV/AIDS Community Information Services: Experiences in Serving Both At-Risk and HIV-Infected Populations 11 (1996).

2. AIDS is a debilitating disease that seems to kill without exception. Loretta McLaughlin, *AIDS: An Overview*, *in* The AIDS Epidemic: Private Rights and the Public Interest 15, 18 (Padraig O'Malley ed., 1989) [hereinafter AIDS Epidemic]. As of today, there is no cure. *See* Huber, *supra* note 1, at 24.

3. Although heterosexual transmission is rapidly increasing in the United States, AIDS disproportionately affects gay men and intravenous drug users. *See* Hombs, *supra* note 1, at 2; *see also* Ronald Bayer, Private Acts, Social Consequences: AIDS and the Politics of Public Health 21-22 (1989) (describing the beginnings of what was first labeled gay-related immune deficiency or GRID); McLaughlin, *supra* note 2, *in* AIDS Epidemic, *supra* note 2 at 15-16, 24 (same). Because the AIDS epidemic first hit these historically disadvantaged groups, a stigma developed, which was driven by social factors such as political disenfranchisment, homophobia, and racism. *See* Hombs, *supra* note 1, at 2. The effect of this intense stigma has been a further marginalization of already marginalized groups. *See* Robert T. Begg, *Legal Ethics and AIDS: An Analysis of Selected Issues*, 3 Geo. J. Legal Ethics 1, 9 (1989); *see also* McLaughlin, *supra* note 2, *in* AIDS Epidemic, *supra* note 2, at 24 (noting that the homosexual stigma attached to AIDS resulted in political neglect while encouraging "pseudo-religio-political prejudice and vindictiveness").

4. The myths and fears about the nature, cause, and transmission of the disease have led to widespread discrimination against people with HIV/AIDS. *See generally* ACLU, Epidemic of Fear: A Survey of AIDS Discrimination in the 1980s and Policy Recommendations for the 1990s (1990) (analyzing complainant population and discrimination types as well as national and state trends in discriminatory behavior); Lawrence O. Gostin, *The AIDS Litigation Project: A National Review of Court and Human Rights Commission Decisions, Part II: Discrimination*, 263 JAMA 2086 (1990) (reviewing highly litigated areas of AIDS discrimination including education, housing, employment, public accommodation, health care, and insurance).

5. An unreasonable fear of contracting AIDS continues despite substantial proof that HIV is not transmitted through normal, non-sexual social interaction or casual contact. *See* Hombs, *supra* note 1, at 7 (recounting findings that HIV is transmitted only through the direct exchange of blood, semen, or vaginal secretion). This fear is

fears being ostracized—in effect, quarantined from society.[6] Matthew faces the possibility of losing friends and loved ones at a time when he needs emotional support the most.

Amidst this emotional distress, Matthew realizes that he needs to consult with a lawyer about drafting a will and other estate planning issues.[7] Because confidentiality is his primary concern, he visits a not-for-profit legal services organization[8] dedicated to assisting people with HIV/AIDS.[9] He reasons that the attorney there will understand

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encouraged by "the nature of the disease, by inflammatory reporting of AIDS-related matters in the news media, and by the impact of powerful [sexual] taboos." *See* Begg, *supra* note 3, at 8.

6. *See* George A. Lamb & Linette G. Liebling, *The Role of Education in AIDS Prevention*, *in* The AIDS Epidemic, *supra* note 2, at 315 (noting "unprecedented hysteria and fear of contagion, leading to isolation of persons with AIDS and their friends and families").

7. For lawyers representing people with HIV, one of the most common tasks is drafting wills. Rhonda R. Rivera, *Lawyers, Clients, and AIDS: Some Notes from the Trenches*, 49 Ohio St. L.J. 883, 891 (1989); *see also* William A. Bradford, Jr., *Rendering Legal Aid to People with AIDS*, 37 Prac. Law., June 1991, at 23, 27 (listing wills, powers of attorney, living wills, and trusts as ways in which lawyers can organize clients' affairs to help them prepare for death).

8. People with HIV/AIDS often turn to public interest organizations for three reasons. First, contracting the virus frequently drives people into financial ruin. *See* Giovanni Anzalone, Note, *AIDS and Mandatory Pro Bono: A Step Toward the Equal Administration of Justice*, 8 Geo. J. Legal Ethics 691, 692-94 (1995) (describing the effect that AIDS has in drawing people into poverty as a consequence of the attached medical costs). The cost of the drugs used in treatment are prohibitively expensive, especially now that the new costly multi-drug therapies are proving to be most effective. *See* Robert Pear, *Expense Means Many Can't Get Drugs for AIDS*, N.Y. Times, Feb. 16, 1997, at A1. Insurance coverage, although somewhat helpful, does not cover much of these pharmaceutical expenses. *Id.* Accordingly, people with HIV must turn to legal services or not-for-profit organizations that charge on a sliding scale, if they charge at all.

Second, people with HIV/AIDS often need a wide range of legal services because contracting the virus often raises many legal issues. *See generally* Rivera, *supra* note 7, at 891-925 (discussing in detail the legal needs of people with HIV/AIDS). For instance, a person with HIV might need assistance navigating entitlement programs. *Id.* at 908. He also might want to bring a discrimination complaint if he feels that he was fired on the basis of his seropositivity. *Id.* at 912. Further, he likely will need estate planning services for drafting living wills, medical powers of attorney, and other documents. *Id.* at 891-903. He might even need help with a family law issue if he is involved in a divorce or a custody battle. *Id.* at 922. Public interest organizations provide this type of holistic service because they are situated to assist a population, rather than specialize in a particular area of law.

Finally, even if the person has money and desires assistance from a private firm or practitioner, he may consult with several lawyers and be denied legal representation on an "ethically" discriminatory basis. *See* Begg, *supra* note 3, at 18 (explaining that a lawyer has full discretion under the ethical rules to reject any client he wishes). If the person cannot find a lawyer who is willing to represent a person with HIV, the person may have no choice but to go to a public interest organization. For an excellent discussion of how attorney-based discrimination can lead to underrepresentation of people with HIV, see *id.* at 14-40.

9. Although a person with HIV can obtain appropriate services from general legal services organizations, he might feel more comfortable at a legal organization that specializes in providing a wide range of services to people with HIV. *See* Brad-

the importance of keeping his seropositivity[10] strictly confidential, considering the potential detriment that might result from disclosure.

Matthew meets his lawyer, Sarah, for the first time. In addition to describing his legal needs, he shares many personal facts with her. Although Sarah is not surprised when Matthew discloses his seropositivity, she is surprised when he states his expectation of strict confidentiality, and then specifically asks her to tell no one of his status, including his live-in partner, Ben. He explains that he loves Ben very much and that he cannot risk losing him. He even tells Sarah that he has engaged in unprotected sex since his diagnosis to keep Ben from suspecting that he is HIV-positive.

Sarah faces an ethical dilemma. She certainly recognizes the heightened need for confidentiality in representing people with HIV. In her experience, she has never disclosed the seropositivity of any client unless disclosure was necessary in the course of representation. Furthermore, Matthew has specifically asked for her strictest confidentiality based on reasonable fears that significant harm might result from disclosure. On the other hand, she has learned enough about his personal life to realize that Ben, an innocent third party, is at risk of contracting the virus. If she discloses, she may prevent Ben from contracting HIV by warning him of the risk.

This hypothetical is a challenging one for any lawyer. On one level, it requires the lawyer to analyze the confidentiality provisions of the Model Code of Professional Responsibility[11] ("Model Code") and the Model Rules of Professional Conduct[12] ("Model Rules") to see if Sarah has discretion to disclose. On another level, the hypothetical challenges Sarah to analyze her role as a lawyer, and more specifically, her role as a lawyer representing people with HIV. Identifying her lawyering role will be critical in the development of the representation.

Part I of this Note explains the confidentiality provisions of both the Model Rules and Model Code and analyzes whether the ethical rules permit a discretionary departure from the general duty of confidentiality. Part I suggests that, assuming the rules permit discretion, a lawyer in Sarah's position should choose not to disclose. Part II contrasts two varying lawyering models that would influence this exercise of

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ford, *supra* note 7, at 24 (encouraging lawyers to work with AIDS service organizations because people with HIV are most likely to trust a lawyer affiliated with such groups). Specialized organizations might be better at addressing some of the common sensitive legal issues like discrimination and confidentiality. *See* Rivera, *supra* note 7, at 891 (suggesting that these organizations have experience in resolving common problems). They might also be better suited to offer HIV/AIDS-related social services in conjunction with legal assistance. *See* Bradford, *supra* note 7, at 24 (explaining that AIDS service organizations are often equipped to provide anonymous HIV testing, counseling, AIDS prevention education, medical referrals, and housing assistance).

10. Seropositivity means testing positive for HIV. Hombs, *supra* note 1, at 63.

11. Model Code of Professional Responsibility (1980) [hereinafter Model Code].

12. Model Rules of Professional Conduct (1994) [hereinafter Model Rules].

discretion in ultimately counseling the client to disclose on his own. Part III advances yet a third model, the ethic of care, that integrates a relationship-oriented dimension of moral reasoning into legal representation. This Note concludes that care reasoning would result in more influential, and thus more effective counseling.

## I. PROFESSIONAL DUTY OF CONFIDENTIALITY

In confronting this ethical dilemma, Sarah must first look to the ethical rules for guidance. Thus, this part introduces the relevant confidentiality provisions of the Model Rules and the Model Code.[13] It then analyzes whether the future crime exception to these rules applies here, thereby granting Sarah the discretion to disclose. This part concludes that, even assuming she has the discretion to disclose, Sarah should not disclose Matthew's seropositivity to his partner.

### A. *Confidentiality Provisions*

Both the Model Rules and the Model Code promote confidentiality subject to a few well-defined exceptions.[14] In essence, both confidentiality provisions set up a presumption of nondisclosure.[15] Model Rule 1.6[16] provides that an attorney "shall not" reveal any informa-

13. Although the professional duty of confidentiality is related to the attorney-client privilege, it is much broader in scope. Model Code, *supra* note 11, EC 4-4. First, the privilege only prevents the court from compelling the attorney to testify about his professional communications with a client. Model Rules, *supra* note 12, Rule 1.6 cmt. 5. The professional duty, in contrast, demands confidentiality at all times, preventing voluntary disclosures except when made in furtherance of legal representation. *Id.* cmt. 5, cmt. 7. Second, the duty protects more than privileged information; it also seems to protect most other information gained by the attorney in the professional capacity. *Id.* cmt. 5.

Here, the hypothetical does not require a lengthy discussion of the attorney-client evidentiary privilege because the lawyer is not asked to testify. This Note's analysis, therefore, will be limited to the professional duty of confidentiality.

14. Model Rules, *supra* note 12, Rule 1.6 cmt. 9; *see also* Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 Iowa L. Rev. 1091, 1147-54 (1985) (explaining the broad scope and the narrow exceptions contained in the confidentiality provisions).

15. Subin, *supra* note 14, at 1148, 1151.

16. Model Rules, *supra* note 12, Rule 1.6. This provision provides, in pertinent part:

> Rule 1.6 Confidentiality of Information
>
> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:
>
> (1) 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.*

tion about a client "relating to representation."[17] Likewise, Disciplinary Rule[18] ("DR") 4-101[19] requires that the lawyer "shall not knowingly" reveal confidences or secrets.[20] "Confidences" are those communications that would be protected under the attorney-client privilege, while "secrets" consist of any information acquired through the professional relationship that "the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client."[21]

The Model Rules and the Model Code both set limits to confidentiality in the form of exceptions.[22] These exceptions, which are referred to as future crime exceptions,[23] permit, rather than require, lawyers to disclose client confidences to the extent necessary to prevent a crime from occurring.[24] Model Rule 1.6(b)(1) allows the lawyer to disclose

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17. *Id.* Rule 1.6(a).

18. The Model Code consists of both Ethical Considerations and Disciplinary Rules. *See* Model Code, *supra* note 11, Preliminary Statement. While the Ethical Considerations are aspirational in nature, the Disciplinary Rules, by defining the minimum level of conduct necessary to avoid disciplinary action, are mandatory. *Id.*

19. *Id.* DR 4-101(A). This provision provides, in pertinent part:

> DR 4-101 Preservation of Confidences and Secrets of a Client.
>
> (A) "Confidence" refers to information protected by the attorney-client privilege under applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.
>
> (B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:
>
> (1) Reveal a confidence or secret of his client.
>
> (2) Use a confidence or secret of his client to the disadvantage of the client.
>
> (3) Use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.
>
> (C) A lawyer may reveal:
>
> (1) Confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them.
>
> (2) Confidences or secrets when permitted under Disciplinary Rules or required by law or court order.
>
> (3) The intention of his client to commit a crime and the information necessary to prevent the crime.

*Id.* (footnotes omitted).

20. *Id.* DR 4-101(B)(1).

21. *Id.* DR 4-101(A). In comparison to DR 4-101, Rule 1.6 provides broader protection, encompassing everything relating to representation regardless of whether it is embarrassing or detrimental. *See* Model Rules, *supra* note 12, Rule 1.6 Model Code Comparison.

22. *See* Model Rules, *supra* note 12, Rule 1.6(b)(1); Model Code, *supra* note 11, DR 4-101(C)(3).

23. The future crime exceptions of the professional duty of confidentiality were modeled after the future crime exceptions to the attorney-client privilege. *See* Subin, *supra* note 14, at 1146.

24. Much debate surrounded whether the Model Rules should make disclosure mandatory or discretionary in these circumstances. The debate began in 1979 when the ABA Commission, chaired by Robert J. Kutak, offered an early draft of the

to the extent she reasonably believes 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."[25] DR 4-101(C)(3) similarly permits attorneys to reveal their client's intention "to commit a crime and the information necessary to prevent the crime."[26] Thus, while the Model Code allows disclosure to prevent any crime, Rule 1.6(b) limits disclosure to prevent those crimes that threaten imminent death or substantial bodily harm. The Model Rules therefore provide more protection for client confidences.

### B. *Are Matthew's Communications Confidential?*

Under normal circumstances, Sarah would be required to keep Matthew's positive HIV status strictly confidential. It qualifies under the Model Rules as information "relating to representation"[27] because Sarah needs to know that he is positive to best advise him on estate planning issues. It also constitutes a "secret" under the Model Code because he specifically requested confidentiality.[28]

On the other hand, if Sarah believes that disclosure is necessary to prevent a crime from occurring, she might have discretion to disclose his seropositivity to his unsuspecting partner. This determination will be difficult for her to make. First, she must decide whether Matthew's possible future conduct would be considered criminal in the relevant jurisdiction.[29] If Matthew lives in one of fifteen states that has en-

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Model Rules, which were ultimately to replace the Model Code. *See* Ted Schneyer, *Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct*, 14 Law & Soc. Inquiry 677, 702-03 (1989). The early discussion draft recommended tougher disclosure rules, including one that required lawyers to disclose client information to prevent substantial bodily harm. *Id.* at 704-05, 712. This proposal instantly sparked heated controversy; in an outrage, the American Trial Lawyers Association ("ATLA") claimed that the proposed disclosure rules would ruin the traditional adversary system of justice. *Id.* at 711-12. In protest, ATLA instantly began drafting an alternative code. *Id.* at 710-11. Ultimately, in 1982, the Kutak Commission conceded and recommended in the final draft that attorneys be permitted, rather than required, to disclose client confidences when necessary to prevent a client from committing a criminal or fraudulent act likely to result in substantial bodily harm or injury to the financial interest or property of another. *See* Rule 1.6 (Revised Final Draft, June 30, 1982, *reprinted in* 1996 Selected Standards on Professional Responsibility 18, 18 (Thomas D. Morgan & Ronald D. Rotunda eds. 1996) [hereinafter Selected Standards].

25. Model Rules, *supra* note 12, Rule 1.6(b)(1). Fourteen states have adopted a version of this rule. *See* Selected Standards, *supra* note 24, app. A at 132-40 (State-by-State Analysis of Ethics Rules on Client Confidences).

26. Model Code, *supra* note 11, DR 4-101(C)(3). Twenty-five states have adopted a version of this rule. *See* Selected Standards, *supra* note 24, app. A at 132-37.

27. Model Rules, *supra* note 12, Rule 1.6(a).

28. Model Code, *supra* note 11, DR 4-101(A).

29. For a general discussion of the criminalization of HIV transmission and risky behavior, see Michael L. Closen et al., Discussion, *Criminalization of an Epidemic: HIV-AIDS and Criminal Exposure Laws*, 46 Ark. L. Rev. 921 (1994) (discussing criminalization of HIV transmission under both traditional crime statutes and specific HIV-transmission statutes); Karen E. Lahey, Note, *The New Line of Defense: Crimi-*

acted criminal HIV transmission statutes,[30] then his possible conduct likely would be criminal.[31] On the other hand, if he lives in one of the thirty-five other states, the result would be less clear—his conduct might, or might not, be considered unlawful under traditional criminal statutes.[32]

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*nal HIV Transmission Laws*, 1 Syracuse J. Legis. & Pol'y 85 (1995) (discussing criminal HIV transmission statutes as a new mode of public health policy).

30. For examples of states that have criminalized knowing transmission of HIV through sexual intercourse, see: Ark. Code Ann. § 5-14-123 (Michie 1993); Fla. Stat. Ann. § 384.24 (West Supp. 1997); Ga. Code Ann. § 16-5-60 (1996); Idaho Code § 39-608 (1993); Ill. Ann. Stat. ch. 720, paras. 5/12-16.2 (Smith-Hurd 1993); La. Rev. Stat. Ann. § 14:43.5 (West Supp. 1997); Md. Code Ann., Health-Gen. § 18-601.1 (1994); Mich. Comp. Laws Ann. § 333.5210 (West 1992); Mo. Ann. Stat. § 191.677 (Vernon 1996); Nev. Rev. Stat. Ann. § 201.205 (Michie Supp. 1995); N.D. Cent. Code § 12.1-20-17 (Supp. 1995); Okla. Stat. tit. 21 § 1192.1 (Supp. 1997); S.C. Code Ann. § 44-29-145 (Supp. 1996); Tenn. Code Ann. § 39-13-109 (Supp. 1996); Wash. Rev. Code Ann. § 9A.36.021 (West Supp. 1997).

For examples of statutes criminalizing other modes of transmission, see: Cal. Penal Code § 12022.85 (West 1992) (enhancing sentence of convicted felon who rapes with the knowledge that he or she has HIV); Colo. Rev. Stat. Ann. § 18-7-201.7, § 18-7-205.5 (West Supp. 1996) (criminalizing sexual conduct as a possible mode of transmission but only for prostitutes and their patrons); Ind. Code Ann. § 35-42-2-6 (Burns Supp. 1996) (criminalizing throwing blood or other bodily fluids on a law enforcement or corrections officer); Ky. Rev. Stat. Ann. § 529.090 (Michie/Bobbs-Merrill Supp. 1996) (criminalizing sexual conduct as a possible mode of transmission but only for prostitutes and their patrons); Ohio Rev. Code Ann. § 2927.13 (Anderson 1996) (criminalizing donating blood, blood plasma, or blood product with knowledge or constructive knowledge of seroposivity); Va. Code Ann. § 32.1-289.2 (Michie 1993) (criminalizing donating blood, body fluids, organs or tissues with knowledge of seropositivity).

31. Most statutes take the following form: "A person commits the offense of exposing another to [HIV] if the person knows he or she [is] positive for [HIV] and . . . engages in sexual penetration with another person without first having informed the other person of the presence of [HIV]." Ark. Code Ann. § 5-14-123(b). For similar examples, see Mich. Comp. Laws Ann. § 333.5210(1) ("A person . . . who knows that he or she is HIV infected, and who engages in sexual penetration with another person without having first informed the other person that he or she has [HIV] is guilty of a felony."); S.C. Code Ann. § 44-29-145(1) ("It is unlawful for a person who knows that he is infected with [HIV] to knowingly engage in sexual intercourse . . . ."); Tenn. Code Ann. § 39-13-109 ("A person commits the offense of criminal exposure of another to HIV when, knowing that such person is infected with HIV, such person knowingly . . . engages in intimate contact with another . . . .").

Most statutes would therefore criminalize Matthew's conduct if he engaged in sexual intercourse with his partner because he knows that he is positive.

32. Most commentators agree that, theoretically, certain risky behavior can be prosecuted under traditional criminal statutes such as homicide (murder, manslaughter, and negligent homicide), attempted murder, or assault. *See* Closen et al., *supra* note 29, at 924. They point out, however, that prosecutions for such behavior have been rare because of difficulties proving intent to kill or to transmit the virus. *Id.* at 926-27 (noting that risky behavior does not amount to intent to kill or transmit the virus). Thus, most cases prosecuted under traditional criminal statutes have involved defendants who expressed an intention to kill or transmit the virus. *Id.* at 937. Out of approximately thirty prosecutions for HIV-related conduct, only four or five cases involved a defendant who did not express such an intention. *Id.* at 938. *See generally* Jennifer Grishkin, Case Note, *Knowingly Exposing Another to HIV*, 106 Yale L.J. 1617 (1997) (arguing that the court's decision in Maryland v. Smallwood, 680 A.2d

After that deliberation, Sarah then must decide whether her state's ethical code includes a version of Rule 1.6(b)(1) or DR 4-101(C)(1).[33] Although DR 4-101(C)(1) grants the attorney discretion to reveal any crime, Rule 1.6(b)(1) limits discretion to reveal only those crimes likely to result in substantial bodily harm.[34] This additional obstacle is significant here because it is difficult, if not impossible, to know whether transmission will actually occur.[35] Furthermore, transmission alone may not constitute serious bodily harm because some HIV positive people may never develop symptoms and instead might live completely healthy lives.[36]

In sum, the interaction of the above factors would lead to different conclusions in different states. For instance, in states with a criminal HIV statute and a version of DR 4-101(C)(1), a lawyer likely would have discretion to disclose. In states with no criminal HIV statute and a version of Rule 1.6(b)(1), however, the conclusion would be less clear. For instance, in addressing a similar situation, the Delaware Bar Association concluded that the lawyer did not have discretion to disclose because Delaware does not have a criminal HIV statute, and the lawyer could not be certain that transmission, and thus substantial bodily harm, would occur.[37] Similar problems arise in those states that have adopted a version of DR 4-101(C)(1), but have not enacted a HIV transmission statute. In these states, a lawyer would have discretion only if she believed that negligent HIV exposure were a crime under traditional criminal statutes.

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512 (Md. 1996), demonstrated the inadequacy of traditional criminal homicide statutes in prosecuting the knowing exposure of another to HIV).

33. For instance, although more than half of the states follow the Model Rules, only fourteen states adopted Rule 1.6(b)(1). *See* Selected Standards, *supra* note 24, app. A. at 132-37. Ten states require disclosure either for any crime or for one likely to result in substantial bodily harm. *Id.* Finally, twenty-five states follow the Model Code which grants the lawyer the most discretion. *Id. See generally* Harris Weinstein, *Client Confidences and the Rules of Professional Responsibility: Too Little Consensus and Too Much Confusion*, 35 S. Tex. L. Rev. 727, 733-37 (1994) (analyzing the failure of the much-debated Model Rule 1.6 to create uniformity).

34. *See supra* note 25 and accompanying text.

35. *HIV Found in One of Five Semen Samples from HIV Infected Men*, AIDS Weekly, Sept. 11, 1995, at 14, 14-15 (citing a study that revealed that the live and infectious virus was found only 22% of the time).

36. *See* John W. Mellors et al., *Prognosis in HIV-1 Infection Predicted by the Quantity of Virus in Plasma*, 272 Science 1167, 1167 (1996) (noting estimates that 12% of infected individuals will remain free from AIDS for over twenty years). Recent studies suggest that combination drug therapies have been successful in frustrating the onset of AIDS. *See* Pear, *supra* note 8, at A1.

37. Delaware Bar Association Professional Ethics Committee, Op. 1988-2, at 4 (1988). In a footnote, the Delaware Bar mentioned that the criminalization of HIV transmission is rapidly evolving, but failed to speculate on how that might change the result. *Id.* By leaving this question unresolved, the Delaware Bar implied that a criminal HIV transmission statute, or a more developed common law, might have affected the result.

### C. *Sarah Should Maintain Confidentiality*

Assuming then that Sarah has discretion to disclose—that is, assuming that she lives in a jurisdiction that follows the Model Code and criminalizes HIV transmission, Sarah should exercise her discretion yet nonetheless maintain confidentiality.[38] As a lawyer for people with HIV, she should conclude that the benefits of confidentiality outweigh the benefits of disclosure.[39]

Sarah first should recognize the heightened need for confidentiality in representing people with HIV. Most importantly, confidentiality secures representation for a population in need of legal assistance. People with HIV might forego legal representation altogether if they suspected that HIV-related confidences would not be maintained.[40] In addition, lawyers representing people with HIV routinely need access to highly sensitive personal facts—such as the client's seropositivity, the course of the disease, and the medical prognosis—to fashion customized estate planning strategies.[41] Strict confidentiality, therefore, is necessary to ensure full disclosure and allow for appropriate representation.[42] Finally, confidentiality fosters trust. The stigma associated with carrying the virus makes those afflicted wary of trusting anyone.[43] Most clients will be emotionally overwhelmed by the possi-

38. For an empirical analysis of how different disclosure rules affect attorney behavior, see Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 Rutgers L. Rev 81 (1994). In her study of New Jersey lawyers, Levin finds that few lawyers have ever disclosed information in order to prevent the client from harming another. *Id.* at 128-30. Even lawyers required to disclose under the ethical rule were reluctant to do so; only about half actually disclosed. *Id.* at 129.

39. If lawyers in general are hesitant to breach confidentiality, lawyers for people with HIV may be even more hesitant due to their clients' heightened need for confidentiality. *See infra* notes 40-43 and accompanying text.

40. Significant harm can result from a breach of confidentiality. The stigma associated with the disease fosters hostility toward people with HIV, often resulting in ostracism and discrimination. *See supra* notes 3-6 and accompanying text.

41. For instance, in choosing the executor of a will, a lawyer must know the client's relationship to his partner vis-a-vis the client's relationship to his family. Often family members will harbor hostility toward the partner, believing him partially responsible for the client's life choices. Thus, to formulate an appropriate strategy, lawyers need to be apprised of such details. *See* Rivera, *supra* note 7, at 891-95.

42. *See* Model Rules, *supra* note 12, Rule 1.6 cmt. 2 (observing that confidentiality encourages the full development of the facts necessary for proper representation); Model Code, *supra* note 11, EC 4-1 (same). Some commentators suggest, however, that the added inducement of confidentiality is unnecessary to encourage client candor. *See* Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 Stanford L. Rev. 589, 614 (1985) [hereinafter Rhode, *Perspectives*] (positing that clients often have no choice but to consult a lawyer and offer relevant information); Subin, *supra* note 14, at 1163-64 (arguing that the complexities of the legal system sufficiently induce full disclosure because nondisclosure would jeopardize the client's goals). The potential harm from disclosure in the hypothetical scenario described here, however, suggests that confidentiality is vital to ensure full disclosure.

43. *See* Bradford, *supra* note 7, at 26 (noting that the stigma associated with the disease has made the AIDS community distrustful of service providers).

bility of developing a terminal illness. Accordingly, a client needs to trust his lawyer to handle his legal affairs in the most discreet manner possible.

In addition to the benefits of confidentiality, Sarah should also consider the risks of disclosure. Disclosure would not only subject Matthew to social stigma, it would also be highly inappropriate and possibly futile. First, because she represents a group often discriminated against on the basis of sexual orientation, Sarah should be hesitant about making decisions that might affect her clients' personal relationships. Disclosure here would be an unwelcome intrusion on Matthew's sex life. Further, Sarah should question whether disclosure will prevent any harm. For all she knows, Ben might have already contracted the disease; he might even already know that he is HIV positive. Disclosure then would destroy the attorney-client relationship for no reason.

Sarah instead should promise confidentiality to secure an opportunity to counsel Matthew.[44] She should concentrate on using effective counseling to persuade Matthew to disclose his seropositivity to Ben.[45] This approach seems to be the only way she can resolve her ethical dilemma while respecting her client's moral autonomy.[46]

The ensuing conversation will be challenging for Sarah because it will directly implicate issues of sexuality, disease, and death. She must therefore identify the most appropriate counseling strategy—that is, the strategy best suited to address this ethical problem set in a highly sensitive context. The next part offers Sarah two lawyering models that involve different forms of counseling. To determine their effectiveness, Sarah must anticipate the consequences of applying these models.

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44. Model Rules, *supra* note 12, Rule 1.6 cmt. 3 ("Almost without exception, clients come to lawyers in order to determine what their rights are and what is . . . deemed to be legal and correct. . . . Based upon experience, lawyers know that almost all clients follow the advice given, and the law is upheld.").

45. Levin, *supra* note 38, at 119 (noting that the surveyed lawyers believed that they had successfully counseled and dissuaded clients from committing wrongdoing).

46. Sarah could also withdraw from representation. *See* Model Rules, *supra* note 12, Rule 1.16(b) ("[A] lawyer may withdraw from representing a client if withdrawal can be accomplished without material adverse effect on the interests of the client . . . ."); Model Code, *supra* note 11, DR 2-110(C) (permitting a lawyer to withdraw if the client's conduct "renders it unreasonably difficult for the lawyer to carry out his employment effectively"). Here, Sarah arguably has discretion to withdraw under the Model Rules because such withdrawal would have no effect on his estate planning representation—Matthew could just go to another lawyer within Sarah's organization. Likewise, under the Model Code, Sarah arguably has discretion to withdraw if she feels that her moral beliefs make it impossible for her to effectively represent Matthew. Despite this discretion, Sarah likely will decide against withdrawal. Instead, she will accept representation and promise confidentiality, hoping that she can persuade Matthew to disclose for himself.

## II. Two Lawyering Models

This part analyzes two lawyering models Sarah could adopt in representing her client. The first, the neutral partisan model, encourages her to counsel in a purely advisory capacity. The second, the moral activist model, directs Sarah to engage Matthew in a more interactive moral deliberation aimed at securing disclosure.

### A. *The Neutral Partisan*

This section presents the "standard conception of the lawyer's role,"[47] that is, the neutral partisan model. The neutral partisan model is grounded in justifications for the adversary system and the client-centered approach to lawyering. This section concludes that if Sarah adopted this model as her guide, she would inform Matthew of the legal and moral consequences of any possible future conduct as a means to persuade him to disclose.

#### 1. Neutral Partisan Model

The standard conception of the lawyer's role is based on two principles, zealous advocacy and moral nonaccountability. Both principles are considered necessary to foster human autonomy and dignity by securing access to the adversary system.[48] Both principles are evidenced in the ethical rules.

The Model Code strongly advances zealous advocacy on behalf of the client. Lawyers, as "guardians of the law,"[49] have a duty to assist members of the public in securing and promoting their individual legal rights and benefits.[50] In fulfilling this duty, a lawyer must exercise his judgment "solely for the benefit of his client."[51]

The Model Rules, despite an attempt to depart from the client-centered values of the Model Code,[52] likewise highlight the importance of client self-determination.[53] Although the Model Rules treat decision-

47. The term "the standard conception of the lawyer's role" was coined by Gerald Postema. *See* Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. Rev. 63, 73 & n.26 (1980).

48. *See* Model Code, *supra* note 11, pmbl. ("[J]ustice is based . . . in respect for the dignity of the individual and his capacity through reason for enlightened self-government."); *see also* Monroe H. Freedman, Understanding Lawyers' Ethics 13-14 (1990). The adversary system generally seeks to protect human dignity and individual rights. *Id.* at 15-17. It works to protect a core set of basic rights such as personal autonomy, trial by jury, the right to call and confront witnesses, the right against self-incrimination, and a general right to due process of law. *Id.* at 13. The right to effective counsel potentially is the most fundamental right as it serves as a threshold to the other basic rights. *Id.*

49. Model Code, *supra* note 11, pmbl.

50. *Id.* EC 7-1.

51. *Id.* EC 5-1.

52. Freedman, *supra* note 48, at 10.

53. *See* Model Rules, *supra* note 12, Rule 1.2(a) ("A lawyer shall abide by a client's decisions concerning the objectives of representation . . . .").

making as a joint undertaking of both client and lawyer, the Rules conclude that lawyers should take responsibility for technical and tactical issues, while clients should govern issues such as concern for third persons who might be adversely affected.[54]

The Model Rules also explicitly provide for moral nonaccountability, asserting that a lawyer's representation of a client does not constitute an endorsement of the client's moral views or activities.[55] This concept is based on the reasoning that a lawyer who is morally responsible for the views of a client would not be able to represent his client zealously, thus denying the client access to the only system that protects his individual rights.[56]

Defenders of the traditional approach[57] argue that zealous advocacy and nonaccountability are essential to the proper execution of a lawyer's role, which is to protect client autonomy.[58] If lawyers cannot make moral choices for clients, the client appropriately maintains his right to make his own moral choices rather than have them made for him.[59] As the argument is commonly made: "The job of a lawyer . . . is not to approve or disapprove of the character of . . . her client. . . . The lawyer's task is, instead, to provide that competence which the client lacks and the lawyer, as professional, possesses."[60]

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54. *Id.* Rule 1.2 cmt. 1.

55. *Id.* Rule 1.2(b) cmt. 3 ("[R]epresenting a client does not constitute approval of the client's views or activities.").

56. Freedman, *supra* note 48, at 50 ("Once the lawyer has chosen to accept responsibility to represent a client, however, the zealousness of that representation cannot be tempered by the lawyer's moral judgments of the client or of the client's cause.").

57. *See generally id.* ch. 3 (defending nonaccountability as necessary to client autonomy); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 4 Am. B. Found. Res. J. 613 (1986) (presenting moral justifications for the amoral role of lawyering); Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 Ohio St. L.J. 551 (1991) (defending the current law of lawyering by arguing that, despite criticism to the contrary, it does allow lawyers to foster their own integrity).

58. Freedman, *supra* note 48, at 48 ("[H]uman autonomy is a fundamental moral concept that must determine, in substantial part, the answers that we give to some [of] the most difficult issues regarding the lawyer's role."); *see also* Pepper, *supra* note 57, at 615-19 (suggesting that the values of autonomy and equality demand that the client's conscience be superior to that of the lawyer's).

59. Pepper, *supra* note 57, at 617; *see also* Stier, *supra* note 57, at 565 ("A lawyer, within limits, must refrain from judging the morality . . . [of] a client out of regard for that client's own autonomy as a moral agent and as an affirmation of the lawyer's own moral independence within the circumstances of the lawyer-client relationship.").

60. Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 Human Rights 1, 8 (1975). Wasserstrom was one of the first to critically examine the "role-differentiated behavior of lawyers," in which a lawyer's role makes it both appropriate and desirable for a lawyer to put aside moral considerations that would otherwise be relevant if not decisive. *Id.* at 3. For defenses of role-differentiated behavior, see Freedman, *supra* note 48, at 44-47 (pointing out that role-differentiated behavior has its own moral force). *See generally* Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 Yale L.J. 1060 (1976) (arguing that it is morally right for a lawyer to show favoritism for a client because of the special rela-

### 2. Sarah as a Neutral Partisan

In fulfilling her role as a neutral partisan, Sarah would render candid legal advice so that Matthew could make an informed choice about whether to disclose his seropositivity.[61] First, Sarah would review with Matthew the legal consequences of nondisclosure such as possible criminal penalties of possible harmful conduct.[62] If legal advice were inadequate, she would then refer to the moral consequences of nondisclosure, that is, the harm to an innocent party.[63]

Thus, the neutral partisan model would allow for some moral deliberation, but only to the extent that such deliberation would facilitate client decision-making and foster client autonomy.[64] Sarah would be reserved in identifying moral considerations, exercising caution to avoid imposing her moral preference on her client.[65] In recognizing the limit to her moral input, she would respect Matthew as a moral being, who possesses distinct yet equally valid capacity for moral conduct.[66] To do otherwise would result in Sarah's moral choice trumping Matthew's. Sarah, as a neutral partisan, would reject this result as elitist and paternalistic.

### 3. Critique of the Neutral Partisan Approach

Despite the neutral partisan's consideration of client autonomy, Sarah should question whether the approach is appropriate here. Although she admits that her role is not morally passive,[67] she should

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tionship between them); Pepper, *supra* note 57 (offering a moral-based justification for the lawyer's amoral role based on autonomy, equality, and diversity); Stier, *supra* note 57 (arguing that making lawyers morally accountable would be morally wrong as a violation of client autonomy).

61. Model Rules, *supra* note 12, Rule 2.1.

62. 1 Geoffrey C. Hazard, Jr. & W. William Hodes, The Law of Lawyering § 1.6:304 (2d ed. Supp. 1993).

63. *See* Model Rules, *supra* note 12, Rule 2.1; Model Code, *supra* note 11, EC 7-8 ("[I]t is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible."); *see also* Model Rules, *supra* note 12, Rule 2.1 cmt. 2 ("Although a lawyer is not a moral advisor as such, moral and ethical considerations impinge upon most legal questions . . . .")

64. Freedman, *supra* note 48, at 51 (arguing that the lawyer has responsibility to provide the client with the fullest legal and moral advice so that the client can make the most informed choice possible).

65. Stier, *supra* note 57, at 567. In her study, Levin also found that, despite the encouragement from the ethical rules, lawyers are hesitant to use moral reasons to dissuade their clients from engaging in harmful or criminal conduct. *See* Levin, *supra* note 38, at 117-18. As one lawyer explained, "discussions of morality can sound pompous (and)/or condescending . . . thereby breaking down the channel of communication." *Id.* at 118 (citations omitted).

66. Stier, *supra* note 57, at 567.

67. *See* Freedman, *supra* note 48, at 57 (asserting that lawyers act morally by counseling clients about their moral responsibilities); Pepper, *supra* note 57, at 630-32 (arguing that the lawyer's duty to counsel involves a moral element); Stier, *supra* note 57, at 596 (same); *see also* Robert P. Lawry, *Damned and Damnable: A Lawyer's Moral Duties with Life on the Line*, Loy. L.A. L. Rev. 1641, 1643-44 (1996) (rejecting the

recognize that it is morally reserved. First, the model only permits her to refer to moral considerations as a complement to legal consequences.[68] Second, the model encourages counseling only as a necessary part of informed decision-making, rather than as a mode of moral deliberation.[69] Thus, this model de-emphasizes moral considerations in order to respect client autonomy. Sarah should doubt whether a lawyer should promote self-determination and reject moral deliberation in the face of possible harm to an innocent third party.

Sarah also should be concerned about stunting her own moral development. Limiting her moral input to those considerations that only go to Matthew's decision-making process would show a lack of moral integrity.[70] Continued moral detachment might result in moral atrophy, encouraging Sarah to be decreasingly sensitive to issues that normally require the utmost sensitivity.[71] This desensitizing might hinder her ability to adequately perform her function as a lawyer,[72] as well as thwart her potential for personal growth.[73]

### B. *Moral Activist*

In contrast to the neutral partisan model's moral restraint, the moral activist model suggests that Sarah should not deny moral responsibility by appealing to her role as a lawyer. Instead, Sarah should more actively prevent harm to others as her common morality demands. This section concludes that Sarah, acting as a moral activist, would enter into a moral dialogue aimed at convincing Matthew that disclosure is the only morally right choice.

#### 1. Moral Activist Model

Moral activism demands accountability from lawyers for their actions and tends not to accept professional role expectations as justifications for lawyers' conduct.[74] In doing so, it denies the premise that

notion of role-differentiated behavior and instead accepting that both the lawyer and the client are morally involved in the decision-making process).

68. *See supra* notes 61-62 and accompanying text.

69. *See supra* notes 63-64 and accompanying text.

70. Reed E. Loder, *When Silence Screams*, 29 Loy. L.A. L. Rev. 1785, 1796 (1996) [hereinafter Loder, *Silence*] (arguing that one's profession should not require moral indifference).

71. Postema, *supra* note 47, at 79-80.

72. *Id.* at 79 ("[C]ut off from sound moral judgment, the lawyer's ability to do his job well—to determine the applicable law and effectively advise his clients—is likely to be seriously affected.").

73. *Id.* at 78-79 (arguing that neutral partisanship results in severe impoverishment of the lawyer's moral experience—a kind of moral prostitution); Loder, *Silence*, *supra* note 70, at 1796 ("Professions cannot survive on sanctions and rules. They require ideals and professional commitment to those ideals. Such allegiance springs from personal integrity.").

74. David Luban offers the most extensive defense of the moral activist approach in his book *Lawyers and Justice: An Ethical Study*. *See* David Luban, Lawyers and

resolving a conflict between role morality and common morality requires lawyers to favor role morality without questioning the institutional justification for the role.[75] Moral activism instead supports the notion that a lawyer's role carries no special privileges.[76] "Anything . . . that is morally wrong for a non-lawyer to do on behalf of another person is morally wrong for a lawyer to do as well."[77]

Thus, when common morality conflicts with role morality, a lawyer cannot simply favor the role without considering the moral price of choosing the role. Instead, a lawyer must balance the moral reasons for accepting that role against the moral reasons for breaking that role according to common morality.[78] "In forming [this] all things considered judgment, the reasons for acting in role will sometimes outweigh the reasons for breaking the role; but sometimes they will not."[79]

Situations where nondisclosure might result in harm to an innocent third party demand that a lawyer consider this balance. Although most moral activists respect a client's right to self-determination, they agree that one's autonomy right may be compromised to prevent harm to another.[80] The reasoning is: No one is granted autonomy when it comes to doing violence to others.[81]

Thus, when clients threaten harm to innocent third parties, moral activists shift the moral balance in favor of the victim.[82] In doing so,

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Justice: An Ethical Study pt. I (1988). He questions whether the adversary system offers sufficient justification for role-differentiated behavior. *Id.* at 56. Although Luban admits that such behavior might be justified in the criminal paradigm, he posits that the adversary system fails to justify role-differentiated behavior in the civil paradigm. *Id.* at 58-59. In coming to this conclusion, Luban doubts that the adversary system effectively ferrets out the truth or is the best method of defending legal rights. *Id.* at 68-78. He ultimately suggests that the adversary system exists because there is no better alternative. *Id.* at 92-93. *See generally* Rhode, *Perspectives*, *supra* note 42 (arguing that an attorney should not be able to avoid moral responsibility by simply appealing to a role that allows client interests to trump all others); Paul R. Tremblay, *Practiced Moral Activism*, 8 St. Thomas L. Rev. 9 (1995) (illustrating how the moral activist approach would apply in a poverty law setting).

75. Luban, *supra* note 74, at 116; *see also* Rhode, *Perspectives*, *supra* note 42, at 643 ("And a retreat into role fails even to confront, let alone resolve, the moral difficulties it raises.").

76. Luban, *supra* note 74, at 154.

77. *Id.*

78. *Id.* at 125.

79. *Id.*

80. *See* Rhode, *Perspectives*, *supra* note 42, at 613 (identifying the critical issue as the extent to which autonomy interests are "reconcilable with fundamental interests in protecting innocent third parties"); *see also* Sissela Bok, Secrets: On the Ethics of Concealment and Revelation 128 (1982) (arguing that the autonomy argument fails when secrets result in harm to others).

81. *See* Subin, *supra* note 14, at 1162 (asserting that although the client may have power to subvert the process, he has no right to do so); *see also* Loder, *Silence*, *supra* note 70, at 1793 ("Safeguarding the client's autonomy to do manifest evil is hardly a good reason to justify professional silence.").

82. *See* Subin, *supra* note 14, at 1159-60 (arguing that the moral balance should shift because the rationalizations for strict confidentiality are unsubstantiated);

they make all efforts to ensure that the human dignity of the client does not outweigh that of the potential victim.[83]

### 2. Sarah as a Moral Activist

As a moral activist, Sarah would conclude that her common morality requires her to intervene rather than stand idly by while her client exposes another to a lethal virus.[84] Moreover, she would feel obligated to interfere, especially because she has the exclusive power to prevent the harm.[85] Thus, she would enter into a moral dialogue aimed at convincing Matthew that disclosure is the only morally right choice.[86]

Sarah would consider this an exercise of moral activism—that is, in disagreeing with Matthew's ends, she will try to influence him for the better.[87] On first blush, this approach seems identical to the counseling approach used by the neutral partisan: Sarah is counseling Matthew on the moral consequences of his potential conduct.[88] Moral activism, however, represents more than an attempt to save the client from the consequences of his conduct; it is also an attempt to transform and redeem him.[89] Furthermore, in engaging in such a moral encounter, the lawyer is also transformed.[90] Thus, the moral activist approach refuses to let the lawyer deny responsibility for immorality exposed within the attorney-client relationship.

Instead, Sarah would consider her lawyer role as embodying more moral insight than the average person.[91] She would argue that her legal education provided her with superior practical judgment that should be used in helping clients see the legal, social, and moral consequences of their actions.[92] Counseling then provides Sarah a unique opportunity to discuss with Matthew the rightness and wrongness of his options. In exploring the morality of those options, Sarah would

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Luban, *supra* note 74, at 203-04 ("The existence of the injured party expands our concern for human dignity from one person . . . to two . . . .").

83. Luban, *supra* note 74, at 203-04 (arguing that to favor the perpetrator of the harm over the victim would be to say that "the victim's injury is less important than the [client's] honor").

84. *See* W. James Ellison, *Legal Ethics Condones AIDS Transfer: A Disclosure Dilemma*, 12 Whittier L. Rev. 327, 348 (1991).

85. *See* Loder, *Silence*, *supra* note 70, at 1785-86.

86. *See generally* Reed E. Loder, *Out from Uncertainty: A Model of the Lawyer-Client Relationship*, 2 S. Cal. Interdisciplinary L.J. 89, 134 (1993) [hereinafter Loder, *Out from Uncertainty*] (arguing for more moral dialogue within the lawyer-client relationship).

87. *See* Luban, *supra* note 74, at 160.

88. See *supra* notes 60-62 and accompanying text.

89. Luban, *supra* note 74, at 163.

90. *Id.* at 165.

91. *See id.* at 169-70 (discussing Brandeis's vision of *phronesis*, or "practical wisdom," that makes lawyers different from others).

92. *See id.* at 171.

try to make Matthew a better person by "steer[ing him] in the direction of the public good."[93]

### 3. Critique of the Moral Activist Model

In one respect, Sarah should prefer this model to the neutral partisan model because it does not escape moral deliberation by exclusively appealing to one's role. On the other hand, she should be skeptical about simply selecting a moral good according to her moral preference, and then imposing it on the client in a paternalistic manner.[94] Although law school sharpened her legal reasoning, she may not believe that law school truly encouraged her moral development.[95] She therefore should doubt whether her moral choice is at all superior to Matthew's.

Furthermore, Sarah should question the applicability of moral activism in public interest law settings. Moral activism is a client-unfriendly approach because it encourages the lawyer to value her own moral judgments over those of her client.[96] In private law settings, this poses no problem because the client can always terminate representation and go to another lawyer with less moral discernment.[97] In public interest settings, however, there is no economic protection from moral overreaching because the client may have no other place to go. Thus, moral activism poses a serious risk of harm to poor and unpopular clients by undervaluing the importance of client loyalty and client autonomy.[98]

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93. *Id.*

94. *See* Stier, *supra* note 57, at 567.

95. As discussed above, the standard conception of lawyering may actually thwart moral development.

96. Tremblay, *supra* note 74, at 56 (arguing that the moral activist approach is particularly problematic when the client is powerless).

97. *Id.* at 55-56 (explaining that financial incentives deter lawyers from questioning the morality of clients' goals).

98. Luban himself recognizes this risk and agrees that certain civil matters, particularly those between powerless individuals and private megaliths, demand the protections of the adversary system. *See* Luban, *supra* note 74, at 65. He accordingly reformulates the "criminal defense paradigm" to include:

> any litigation context in which zealous advocacy on behalf of relatively weak clients is justified by virtue of the fact that we have political reasons to aim at prophylactic, or preemptive, overprotection of the individual from powerful institutions (including the state, but also including private institutions), even at the expense of justice.

*Id.*; *see also* Rhode, *Perspectives*, *supra* note 42, at 606 (noting that some civil cases are characterized by the same disparity of power between parties as criminal proceedings).

Although Luban accounts for weak clients, he only does so in litigation contexts where the client is clearly overpowered; in what Deborah Rhode calls the "David and Goliath paradigm." *Id.* at 607. This situation, where Sarah acts in a non-litigation context for her powerless client, would fall outside of Luban's exception despite the particular importance of client loyalty and autonomy. *See* Tremblay, *supra* note 74, at

## III. THE ETHIC OF CARE

To summarize, Sarah should reject both of the above models as unacceptable. The neutral partisan model, in forcing her to act according to her role, requires her to restrain her moral convictions.[99] Instead, she should accept more moral responsibility in preventing harm to an innocent person.[100] On the other hand, the moral activist model, in evaluating moral considerations, too easily allows the lawyer's moral values to trump those of the client. In doing so, it characterizes lawyers as the moral elite. Although the moral activist approach may reach for the correct moral outcome, Sarah rightfully should question the validity of the process. Instead, she should look beyond the two models described above for yet a third model.[101]

### A. *The Ethic of Care Model*

Sarah should look to the ethical approach termed the "ethic of care,"[102] which seems to lend the most flexibility by focusing less on

58 (suggesting that one would need a much broader exception to encompass such matters but questioning whether a broad exception could be justified).

99. *See* Loder, *Silence*, *supra* note 70, at 1796.

100. *Id.* at 1792.

101. Naomi R. Cahn, *Styles of Lawyering*, 43 Hastings L.J. 1039, 1059-60 (1992) (encouraging lawyers to value difference, to challenge existing structure, change the understanding of what lawyers do, and recognize the importance of methods that have historically been overlooked or excluded).

102. This alternative form of moral reasoning was identified by Carol Gilligan in her ground-breaking book, *In a Different Voice*. *See* Carol Gilligan, In a Different Voice: Psychological Theory and Women's Development (1989) [hereinafter Gilligan, Different Voice]. Gilligan performed three psychological studies to observe the relationship between judgment and action in situations of moral conflict and choice. *Id.* at 2. In one study where a boy and a girl are asked to consider a moral dilemma, Gilligan observes that the boy addresses the problem using deductive logic to differentiate morality from the law. *Id.* at 26-27. The girl, however, sees "a world comprised of relationships rather than of people standing alone, a world that coheres through human connection rather than through systems of rules." *Id.* at 29. Although both children see a need for resolution, he sees it "impersonally through systems of logic and law" while "she personally through communication in relationship." *Id.* On this and similar results, Gilligan concludes that women's moral development is not inferior to that of men's; instead, it is fully developed, but simply different. She sees the contrasting images of hierarchy and network as two distinct, yet complimentary views of morality. *Id.* at 33.

In writing this book, Gilligan hoped to expand the understanding of human moral development by including women, whose absence from the psychological literature has generally been interpreted as indicating inferior moral development in women. *Id.* at 1-2. Despite this feminist purpose, Gilligan has received much criticism from other feminists who fear that labeling certain attributes as "female" only reinforces limiting stereotypes about women. *See* Cahn, *supra* note 101, at 1051 ("[By labeling styles as male or female], we risk perpetuating the very subordination of 'the female voice' that many of us, as feminists, are trying to overcome."); Carrie Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 Berkeley Women's L.J. 39, 41 (1985) [hereinafter Menkel-Meadow, *Portia*] ("Attributing behavior characteristics to a particular gender is problematic, because . . . we risk perpetuating the conventional stereotypes that prevent us from seeing the qualities as

"abstract rights and duties, but rather on the connections between people."[103] The ethic of care involves a form of moral reasoning that "eschews sweeping principals in favor of sincere effort to respond to the particular context in which moral choice must be made."[104] It also involves a form of moral responsibility that seeks to minimize harm by taking steps according to the particular concrete setting.[105] The ethic of care rejects the neutral partisan approach because the care perspective considers moral detachment morally problematic;[106] it likewise rejects moral activism in that moral activism supports a hierarchy of moral truths, whereas the ethic of care tries to elicit understanding

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qualities without their gendered context."); Deborah L. Rhode, *Gender and Professional Roles*, 63 Fordham L. Rev. 39, 42 (1994) [hereinafter Rhode, *Gender*] (warning that the celebration of gender differences risks both oversimplifying—because there is no "generic woman"—and overclaiming—because such sweeping sex-based dichotomies do not exist).

Nevertheless, this largely academic debate has resulted in some agreement. Most, even Gilligan, agree that the ethic of care does not characterize all women, and is characteristic of some men. Gilligan, Different Voice, *supra*, at 2 (stating that the different voice is characterized not by gender but by theme); *see* Cahn, *supra* note 101, at 1053 (suggesting that many men and most women actually combine aspects of each moral orientation); Menkel-Meadow, *Portia*, *supra*, at 48 (arguing that any mature person should be able to consider both types of moral analyses); Rhode, *Gender*, *supra*, at 42 (noting that recent research generally finds "few attributes on which the sexes consistently vary"). Thus, the ethic of care has been recast as a form of moral reasoning inherent to every mature person, woman or man.

Legal scholars have since introduced the ethic of care as an alternative model of legal ethics. *See* Stephen Ellmann, *The Ethic of Care as an Ethic for Lawyers*, 81 Geo. L.J. 2665 (1993). Ellmann's article offers a provocative account of how the ethic of care might transform the lawyering process. Similarly, Naomi Cahn, Carrie Menkel-Meadow, and Deborah Rhode have addressed how an ethic of care might affect lawyering and the legal profession. *See generally* Cahn, *supra* note 101 (analyzing different lawyering methods as a way to transform the legal practice); Menkel-Meadow, *Portia*, *supra* (focusing on how the inclusion of women's voices will expand our understanding of the lawyering process); Rhode, *Gender*, *supra* (seeking to advocate a vision of professionalism that includes women's experiences as based on feminist commitments rather than biological categories). For a study documenting the ethic of care as it is used by both women and men lawyers, see Rand Jack & Dana Crowley Jack, Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers (1989).

103. Ellmann, *supra* note 102, at 2665; *see* Gilligan, Different Voice, *supra* note 102, at 30, 32 (setting up two different moral approaches—the boy uses a hierarchy of rights while the girl considers a network of relationships).

104. Ellmann, *supra* note 102, at 2668; *see* Gilligan, Different Voice, *supra* note 102, at 32, 38 (noting that the boy abstracts the moral problem from the interpersonal situation whereas the girl contextually sees the resolution as depending on the characters and circumstance).

105. Ellmann, *supra* note 102, at 2668; *see also* Jack & Jack, *supra* note 102, at 126-27 (describing caring lawyers as those who infuse concepts of avoidance of harm and preservation of relationships into the rights-oriented legal system).

106. *See* Carol Gilligan, *Moral Orientation and Moral Development*, *in* Women and Moral Theory 19, 30-31 (Eva Feder Kittay & Diana T. Meyers eds., 1987) [hereinafter Gilligan, *Moral Orientation*] (criticizing justice reasoning for considering detachment as the hallmark of mature moral thinking); *see also* Rhode, *Gender*, *supra* note 102, at 49 (arguing that the feminist perspective demands that lawyers accept moral responsibility rather than reflexively retreating into roles).

among people.[107] In sum, the ethic of care resists following rules, prefers to make decisions in context, tries to maintain relationships, and centers on a responsibility to others.[108]

Despite its unique nature, the ethic of care, like the above approaches, identifies certain moral considerations that deserve more weight than others.[109] Client loyalty is one such consideration,[110] and thus, caring lawyers can acknowledge greater responsibility to those they represent than to anyone else in the situation.[111] Accordingly, caring lawyers can empathize with the client by trying to see the situation as the client sees it.[112]

On the other hand, a lawyer operating under the ethic of care might be willing to compromise client loyalty in situations where the client seeks to harm others or to otherwise act uncaringly.[113] Knowing that the stakes are high, the ethic of care asks whether the lawyer should really do what her client wants when he threatens harm to another.[114] If she pursues the client's objectives, the caring lawyer may further such uncaring ventures, thereby inflicting harm on people who also deserve her care.[115] On the other hand, if she does not pursue the client's objectives, she may betray her client, thereby damaging the attorney-client relationship.[116]

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107. Ellmann, *supra* note 102, at 2668; *see* Gilligan, *Moral Orientation*, *supra* note 106, at 31 (characterizing justice reasoning as the quest for agreement, whose risk is the tendency to confuse one's perspective with an objective truth).

108. Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 Va. J. Soc. Pol'y & L. 75, 94 (1994) [hereinafter Menkel-Meadow, *Portia Redux*].

109. Ellmann, *supra* note 102, at 2669-70. Ellmann rejects the argument that the ethic of care, by focusing on connection, posits that no claim is more important than another. *Id.* at 2676-77. He instead argues that the ethic of care does involve making value judgments; it simply "resists treating moral issues as mathematical equations, stripped of context and resolved by abstraction." *Id.* at 2676.

110. *See* Menkel-Meadow, *Portia*, *supra* note 102, at 57 (arguing that the ethic of care allows a lawyer to enter the client's world and understand more fully what the client desires).

111. Ellmann, *supra* note 102, at 2682; *see also* Jack & Jack, *supra* note 102, at 127-28 (noting that caring lawyers recognize that their role includes legal and emotional responsiveness to clients).

112. Ellmann, *supra* note 102, at 2694. *See generally* Stephen Ellmann, *Empathy and Approval*, 43 Hastings L.J. 991, 991-93 (1992) (discussing the meaning and elements of empathy in the context of the lawyer-client relationship).

113. *See* Gilligan, Different Voice, *supra* note 102, at 65 (noting that a common theme in care reasoning is the wish not to hurt others); Menkel-Meadow, *Portia*, *supra* note 102, at 46 (describing the girl's hopes to "find a resolution that will hurt least the one who can least bear the hurt").

114. Ellmann, *supra* note 102, at 2713.

115. *Id.*

116. *Id.*

Finally, the ethic of care allows a caring lawyer to consider her own needs for self-care.[117] As Stephen Ellmann suggests:

> At this most mature stage of care reasoning, the caring person recognizes herself as one of the legitimate objects of her care, and weighs her needs in the balance with those of others. On the basis of her own needs, then, a caring person—a person who wishes to avoid hurting others when possible—will sometimes, deliberately, hurt them. Such hurt is sometimes unavoidable . . . .[118]

Thus, a caring lawyer must sometimes accept the moral costs involved in meeting one caring responsibility at the expense of another.[119]

This notion of self-care further highlights the dynamic nature of the ethic of care. Because the details of particular situations are central to the identification of the moral responsibility, care reasoning does not result in one "right" answer.[120] Instead, in any given scenario, caring lawyers could apply the ethic of care to the moral problem and come up with radically different conclusions about the implications of that ethic for their behavior as lawyers.[121] This variability is consistent with the ethic of care. As Carol Gilligan eloquently writes in defense of contextual particularity: "Only when substance is given to the skeletal lives of hypothetical people is it possible to consider the social injustice that their moral problems may reflect and to imagine the individual suffering their occurrence may signify or their resolution engender."[122]

### B. *The Ethic of Care—A More Textured Lawyering Approach*

Sarah should feel that the ethic of care is a necessary component of moral deliberation. Left to its own devices, the neutral partisan model strongly discourages connection or even association with clients.[123] The moral activist model allows some connection to the client, but only to the extent necessary for the lawyer to decide on the moral and legal merits of the client's claim. In contrast to these models, the ethic of care envisions a more engaged interaction. As Naomi Cahn explains:

> Feeling approval of the client's goals is different from feeling connected to the client and [his] needs. Indeed, the very process of judging a client's worthiness involves the application of universal

117. *Id.* at 2684; *see* Gilligan, Different Voice, *supra* note 102, at 74 (arguing that self-care is essential to the ethic of care because to not care for oneself would blur the line between self-sacrifice and mere caring).

118. Ellmann, *supra* note 102, at 2684 (citations omitted).

119. *Id.* at 2684-85; *see also* Jack & Jack, *supra* note 102, at 110-20 (defining the experience of moral cost as the sacrifice of one legitimate moral end so that another might be accomplished).

120. Ellmann, *supra* note 102, at 2671.

121. *Id.* at 2672.

122. Gilligan, Different Voice, *supra* note 102, at 100.

123. Cahn, *supra* note 101, at 1063.

> principles in a broad context. That is, to judge any individual client's claim, the attorney refers to broad, community-based norms *that she determines* . . . rather than focusing on the more immediate, and obvious, needs of the individual client . . . .
>
> The resulting connection is not necessarily to individual people, but to abstract principles of justice.[124]

Sarah should find the ethic of care much more appealing in that it requires her to truly connect with her client.[125] She should use this connection to improve her attorney-client relationship, making it more worthwhile for both parties involved.[126] In doing so, Sarah should employ care reasoning as a complement to traditional rights-based moral reasoning.[127] This additional perspective would diversify her lawyering process by including another level of moral consciousness.[128] Her clients might benefit from a more textured approach.[129]

Recognizing these benefits, Sarah should act as a caring lawyer in counseling Matthew to disclose. Although the ethical rules seem to forbid such care reasoning, she should indulge herself nevertheless because care reasoning might help her become a better lawyer and a better person. As Carrie Menkel-Meadow suggests: "Collective grappling with ethical problems as they are happening [is] far more enriching . . . than resolving difficult problems through a priori rules that one can then argue do not apply or can be distinguished."[130] Care reasoning therefore might encourage moral discernment.

### C. *The Care Assessment*

As a caring lawyer then, Sarah is prepared to consider both the substance and the particularities of this situation to resolve the moral conflict in a way that best maintains the relationships involved.[131] As in the neutral partisan model and the moral activist model, Sarah will have to counsel Matthew to disclose. Unlike those two models, how-

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124. *Id.* at 1064-65.

125. *Id.* at 1065.

126. *Id.* at 1067.

127. *But see* Minna J. Kotkin, *Professionalism, Gender and the Public Interest: The Advocacy of Protection*, 8 St. Thomas L. Rev. 157, 171 (1995) (arguing that the "drive" to take care of people is entirely consistent with traditional notions of zealous representation).

128. *See* Menkel-Meadow, *Portia Redux*, *supra* note 108, at 84; Jack & Jack, *supra* note 102, at 93-94 (differentiating between rights and care but concluding that using both approaches "creates the possibility that the concerns of both . . . will be weighed").

129. Menkel-Meadow, *Portia*, *supra* note 102, at 85 (arguing that a care-oriented approach might enable a lawyer to minimize harm by encouraging more textured analyses, rather than by enumerating the factors to be considered); *see also* Rhode, *Gender*, *supra* note 102, at 49 (encouraging lawyers to consider a realistic social and economic landscape instead of resolving the situation by reference to some abstract principle).

130. Menkel-Meadow, *Portia Redux*, *supra* note 108, at 110.

131. *See supra* notes 103-04 and accompanying text.

ever, Sarah must consider the connection of relationships rather than a hierarchy of rights or moral goods.[132]

Thus, in embarking on care counseling, Sarah will consider her relationships with Matthew and with Ben, and the relationship between Matthew and Ben themselves. She also will consider her client's needs and her own. Finally, she will consider the particulars of this situation that affect all the relevant parties.

### 1. Care for Matthew

Sarah will first consider her relationship with Matthew. In doing so, she must try to empathize with him, try to put herself in his position.[133] Matthew is gay and HIV positive in a discriminatory world. He faces a fatal illness that could potentially manifest itself on any given day. Although he legitimately fears losing his job, his health insurance, and ultimately his health, his greatest fear is losing his longtime partner.[134]

Sarah will place great importance on Matthew's need and expectation of support.[135] He seeks legal assistance in order to reclaim some semblance of order over his life. He comes to Sarah's organization because it can offer both specialized legal and social services to help him cope.[136] Because Matthew is morally troubled by his situation, he needs someone who will act as a friend and a confident. In this respect, Matthew deserves a sympathetic listener.[137]

Furthermore, Sarah is ideally situated to render care to Matthew. Her work experience has trained her to understand the complicated and sensitive issues of sexuality, illness, and death. She knows that she can offer specialized assistance to Matthew in the form of her estate planning expertise, thus helping him to organize his personal matters on a long-term basis. She also knows that her organization can provide support services for him, including services that counsel clients on how to best disclose seropositivity to loved ones.

### 2. Care for Ben

On the other hand, Sarah will question her loyalty to Matthew because he threatens to perpetrate uncaring acts on an innocent third

132. *See supra* notes 101-02 and accompanying text.

133. *See* Ellmann, *supra* note 102, at 2681-82 (arguing that client loyalty is consistent with the ethic of care).

134. Sarah must expect the worst in this situation. If Matthew discloses to Ben, Ben might leave Matthew if not for Matthew's positive status alone, then for Matthew's lack of candor. Losing such stability in the face of a fatal disease might threatens Matthew's well-being, on an emotional and possibly even a physical level.

135. *See* Ellmann, *supra* note 102, at 2685 (positing that caring lawyers should consider the extent of the client's need in choosing clients).

136. *See supra* note 9.

137. *See* Ellmann, *supra* note 102, at 2699-700 (encouraging empathetic understanding as a means to win client cooperation).

party.[138] In doing so, Sarah must consider the serious nature of his threatened behavior. Here Matthew does more than threaten "one" with an "uncaring" act; instead, in thinking only about his own needs, he selfishly threatens harm to his closest companion. Furthermore, he threatens to inflict harm through the most intimate of human interactions—sex itself. This act of selfishness violates autonomy in very much the same way that rape does. Few acts are more selfish and uncaring than this.[139]

Moreover, Sarah has a responsibility to save Ben from contracting the virus. Although she herself does not have a personal relationship with Ben, she will recognize the singular importance of saving one person from the virus. First, her common morality demands that she care for Ben as much as she cares for Matthew. The sooner he knows, the sooner he can protect himself. Even if Ben already has the virus, he would still benefit from disclosure because he would be alerted and thus could seek medical treatment immediately.[140] Second, her professional commitments also encourage such care. Sarah decided to work for an organization that helps people fight against the AIDS epidemic. To disregard a risk of transmission would manifest an indifference to the cause she cares most deeply about.

#### 3. Care for Herself

Sarah will also consider her own needs. Here, Sarah must recognize that one of her professional goals is to represent people with HIV in a compassionate manner. She knows that developing connections with people is essential in achieving this goal for two reasons. First, connection displays respect for her clients which encourages them to assert control over their lives at a time when many feel powerless and overwhelmed. Second, connection earns her clients' trust, thus allowing Sarah to help and care for them. Without such trust, Sarah would be rendered useless and completely ineffective as a lawyer for people with HIV.

### D. *The Special Importance of Moral Dialogue*

To reconcile these competing interests, Sarah will initiate moral deliberation to convince Matthew to disclose. The ethic of care vision,

138. *See id.* at 2712 (noting the potential conflict between caring for one's client and caring for others).

139. This evaluation is, of course, for Sarah to make. When considering whether to further a client's goals, she must consider the extent to which they compromise her own needs. *See id.* at 2713.

140. Studies suggest that certain treatments strategies may postpone the onset of AIDS if administered as early as possible. *See* Huber, *supra* note 1, at 9; Kenneth H. Mayer, *The Clinical Spectrum of HIV Infections: Implications for Public Policy*, *in* AIDS Epidemic, *supra* note 2, 37, 37 (suggesting that individuals treated with Azidothymidine (AZT) at early stages might remain asymptomatic for a longer period than without such treatment).

though, is neither reserved like the neutral partisan approach, nor paternalistic like the moral activist approach. Rather, the ethic of care suggests an engaging moral dialogue that demands equal participation from the lawyer and the client.[141] In this open setting, she will better understand the needs of the client as the client sees them.[142] Seeing the client's situation in a similar light, Sarah might not be tempted to trump the client's assessment of his own needs because she will understand how he came to make that assessment.[143]

On the other hand, Sarah's empathy does not require her to simply defer to Matthew's wishes for nondisclosure. She will instead concentrate her efforts on using the trusting relationship between them to "legitimately influence by guidance and suggestion from within the circle of intimacy, rather than by directive from without."[144] She must engage herself, both to empathize with Matthew and also to act as an outside observer.[145] Therefore, she will initiate the dialogue, framing the discussion in terms of his psychological, physical, and emotional needs,[146] yet reminding him of the health consequences and the moral implications of his actions.

Although Sarah will exert her professional influence to persuade him to disclose, she must be careful not to manipulate him.[147] Like the moral activist model, a caring dialogue poses a risk of paternalistic intervention. This can occur in three ways. First, a lawyer could assimilate the client's goals into her own, using the client to fulfill her own agenda.[148] Second, the lawyer might over-empathize and lose her sense of self, thus reverting to the role of a hired gun.[149] Third, connection may become an illusion, a convenient term to mask the typical inequality between lawyer and client.[150]

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141. *See* Gilligan, Different Voice, *supra* note 102, at 30 (observing that the ethic of care uses communication as the primary mode of conflict resolution); *see also* Loder, *Out from Uncertainty*, *supra* note 86, at 138 (arguing for a moral dialogue that most resembles one of care).

142. Menkel-Meadow, *Portia*, *supra* note 102, at 57. *But see* Ellmann, *supra* note 192, at 2704 (arguing that a caring lawyer can not so easily refrain from paternalistic intervention).

143. Menkel-Meadow, *Portia*, *supra*, note 102, at 57 (arguing that lawyer domination is of little concern because the lawyer enters the world of the client and submerges herself).

144. Ellmann, *supra* note 102, at 2707.

145. Cahn, *supra* note 101, at 1066.

146. *Id.* at 1065; *see also* Katharine T. Bartlett, *Feminist Legal Methods*, 103 Harv. L. Rev. 829, 864-65 (1990) (characterizing the ethic of care dialogue as "consciousness raising" in that it values honesty over consistency, teamwork over self-sufficiency, and personal narrative over abstract analysis).

147. Cahn, *supra* note 101, at 1065.

148. *Id.* at 1066-67.

149. *Id.*

150. *Id.*; *see also* Ellmann, *supra* note 102, at 2703-08 (rejecting Menkel-Meadow's suggestion that caring lawyers will refrain from paternalistic intervention).

These risks, however, are not fatal to caring counseling. Sarah needs to be acutely aware of the inherent unequal power dynamic.[151] This self-awareness and questioning will help her maintain perspective both inside and outside of the relationship, thus minimizing the opportunity for exploitation.[152]

### E. *Sarah as a Caring Counselor*

Counseling Matthew to disclose will be extremely difficult for Sarah. Because she seeks to directly influence his most personal relationship, she must proceed with caution. On the one hand, she must initiate a meaningful conversation that involves emotional, psychological, and moral dimensions. On the other hand, she must respect her client's privacy and autonomy in conducting his sex life. This concern is particularly relevant in this situation. Because Matthew belongs to a group whose sexual practices have been historically considered immoral,[153] Sarah might choose to temper her moral insights.

With this paternalistic risk identified, Sarah will initiate the dialogue. First, she might express her empathy with Matthew. In understanding his fear of loss and the emotional difficulty of disclosure, she might reassure him that these are common feelings among others with HIV. They then might speak at length about Matthew's relationship with Ben. For Matthew, Sarah should try to highlight the supportive aspects of their relationship, reminding him of their long-term commitment. For herself, Sarah should try to assess whether their relationship will be able to sustain this blow. Because Sarah is trying to persuade him to disclose, she must reflect, for Matthew's sake, on what the consequences of his disclosure might be.

Sarah then might speculate on the consequences of nondisclosure. As a preface, she might couch her moral concerns in terms of public health advice. She could remind him that he is aware of the risks of transmission and that safe sex is the only way to save people from the virus.[154] Then, she could explore his feelings about exposing Ben to the virus; perhaps even asking whether Ben is at risk of contracting the virus. In response to his probably evasive answer, she might ask if he has thought about disclosure. This approach therefore broaches the topic of disclosure while maintaining Matthew's power over decision-making. In this way, Matthew is less likely to feel threatened and will more likely continue the conversation.

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151. Cahn, *supra* note 101, at 1067.

152. *Id.*

153. *See* Huber, *supra* note 1, at 22-23 (noting how several religious leaders characterized AIDS as God's disapproval of the sinful gay lifestyle).

154. Here, she must be careful not to bore him with a lengthy public health lesson. He likely does know the risks; she must simply remind him as a seque to the crux of the discussion.

Hopefully Matthew eventually will decide to disclose. If at the end of the dialogue he has not indicated such, Sarah must offer a more affirmative suggestion. She should point out that disclosure is his best option. In doing so, she could suggest that disclosure might not destroy his relationship with Ben; instead, she could share her hopes that Matthew and Ben could fight the disease together, thereby strengthening the relationship in their battle. She finally should offer her support and explain how her organization can refer him to a social worker who specializes in such issues.

If Sarah successfully engages Matthew, the conversation can move in a number of directions. Although the content of the conversation is important, the sharing itself—the connection—is the crucial factor. Here, if Sarah creates the proper tone, Matthew will not be threatened by the conversation; eventually, he might even trust Sarah and value her opinion. Sarah then must focus her energies on developing a mutually respectful exchange. In sum, the more they share their experiences and explore the range of emotions, the more likely it is that they will come to the best resolution—that is, the more likely it is that Matthew will disclose his seropositivity to Ben.

## CONCLUSION

Care counseling does not guarantee that Matthew will disclose; indeed, using the neutral partisan or the moral activist approach, Sarah successfully might have counseled Matthew to disclose. Nevertheless, Sarah should adopt care counseling for two distinct yet related reasons. First, the ethic of care demands more than an outcome; it demands a process that encourages connection with others and the exploration of moral and emotional complexities of—what the other approaches deem—a clear case. The result is, at the very least, a more constructive attorney-client relationship. Second, the ethic of care challenges the existing models of lawyering. By integrating connection as an alternative form of moral reasoning, the ethic of care encourages Sarah to question her role as a lawyer and her relationships with her clients. In doing so, Sarah can learn to better identify and prioritize her moral, personal, and professional values. Such self-reflection will enable her to become a better lawyer and a better person.