



ST. MARY'S
UNIVERSITY

St. Mary's Journal on Legal Malpractice &
Ethics

Volume 12 | Number 2

Article 3

6-30-2022

Patients, Corporate Attorneys, and Moral Obligations

Ioan-Radu Motoarcă
ioan.motoarca@outlook.com

Follow this and additional works at: <https://commons.stmarytx.edu/lmej>



Part of the [Law and Society Commons](#), [Legal Ethics and Professional Responsibility Commons](#), [Legal Profession Commons](#), [Legal Remedies Commons](#), and the [Medicine and Health Sciences Commons](#)

Recommended Citation

Ioan-Radu Motoarcă, *Patients, Corporate Attorneys, and Moral Obligations*, 12 ST. MARY'S J. ON LEGAL MALPRACTICE & ETHICS 284 (2022).

Available at: <https://commons.stmarytx.edu/lmej/vol12/iss2/3>

This Article is brought to you for free and open access by the St. Mary's Law Journals at Digital Commons at St. Mary's University. It has been accepted for inclusion in St. Mary's Journal on Legal Malpractice & Ethics by an authorized editor of Digital Commons at St. Mary's University. For more information, please contact sfowler@stmarytx.edu.

ARTICLE

Ioan-Radu Motoarcă

Patients, Corporate Attorneys, and Moral Obligations

Abstract. There are two main questions that any account of corporate lawyers' moral obligations needs to answer: (1) Do corporate lawyers have moral obligations to third parties? and (2) In cases of conflict between obligations to the corporation and obligations to third parties, which should prevail? This Article offers answers to these questions in the context of lawyers working in medical corporations. I argue that lawyers do have moral obligations to third parties, and that in cases where patients' rights are being violated by a medical company, patients' rights should prevail. Consequently, attorney–client confidentiality rules should be relaxed to allow for attorney disclosures in egregious cases of potential harm to third parties.

Author. Ioan-Radu Motoarcă is an Associate at Ashman Law Offices, LLC. He has a JD from Chicago-Kent College of Law with a concentration in financial markets compliance and is licensed to practice in the State of Illinois. He holds a PhD in philosophy from the University of Illinois at Chicago, as well as a B.A. in French and English and an M.A. in American Linguistics and Literature, both from Babes-Bolyai University. Before law school, he held academic positions in philosophy at the University of Virginia and Rowan University. His publications cover issues in the philosophy of fiction, sports ethics, tort law on the Internet, and intellectual property. His current research focuses on issues in financial and corporate law, professional responsibility, and IP. He would like to thank Professor Felice Batlan for extremely helpful suggestions and insightful comments on a previous draft of this Article. Many thanks as well to Dean Lampley at St. Mary's University School of Law for precise and constructive comments on the Article.

ARTICLE CONTENTS

I. Duties to Disclose for Corporate Lawyers in Medical Companies to Serve the Public Good	286
A. Big Pharma and the Vioxx Case	287
B. Theranos and the Brave New World of Biotech Startups	289
C. The Lawyers' Role	291
II. The Moral Question	295
III. Do Lawyers Have Moral Obligations to Third Parties?	297
A. No Duty to Rescue	299
B. Actions, Omissions, and Causes	302
IV. Patients' Rights and Why They Are Hard to Override	305
V. Confidentiality	313
A. The Adversary System, Democracy, and Justice	314
B. Confidentiality Rules and the Lawyer-Client Relationship	316
VI. Steps Forward	321
VII. Conclusion	327

This Article addresses the moral and legal obligations of corporate attorneys working for medical companies¹ in cases of corporate wrongdoing. The paradigm case of misconduct that will be discussed is when a medical corporation places a third party (typically patients) at an increased risk of harm as a result of releasing inadequate medical products into the market and refuses to acknowledge publicly reasonable evidence concerning the inadequacy of the treatment. As United States law stands right now, attorneys working for corporations are bound by confidentiality rules and have limited options to disclose their client's wrongdoing to outside agencies, such as the Food and Drug Administration (FDA). I will argue that there are good reasons, at least in some cases, to relax the confidentiality rules and allow attorneys to report their suspicions outside the corporation in order to protect innocent people who might be victims of the corporation's actions.

Part I describes two cases in which a medical company released products on the market that put patients at risk of harm. It also considers the role of attorneys in a modern corporation. Part II focuses on the moral question raised by the kind of corporate conduct discussed in Part I. Part III argues that corporate attorneys have moral obligations to third parties (such as patients at risk of harm) and rejects two counter-arguments to that claim. Part IV considers why attorneys' moral obligations to third parties are difficult to outweigh by competing considerations. Part V addresses and rejects the duty of confidentiality to clients as a basis for not complying with a lawyer's moral obligations. Part VI briefly addresses further suggestions concerning the adoption of adequate confidentiality rules by the American Bar Association (ABA).

I. DUTIES TO DISCLOSE FOR CORPORATE LAWYERS IN MEDICAL COMPANIES TO SERVE THE PUBLIC GOOD

The moral and legal issues concerning corporate lawyers' obligations that are generated in the medical context are similar to those that arise in the case of other types of companies. Nevertheless, medical corporations are worth singling out because of two characteristics: (1) the potential of these companies to cause serious and widespread harm to third parties; and (2) the correlative stringency of corporate lawyers' disclosure obligations, stemming

1. I will be using the term "medical company" to mean any company whose main line of business involves providing medical goods or services. Pharmaceutical companies and biotechnology companies are examples of medical companies in this sense.

out of serious and widespread violations of third parties' rights. Non-medical companies may sometimes also be in a position to cause this kind of harm, in which case similar considerations will apply.²

There have been many instances of medical corporate wrongdoing over the years, most of them involving large public corporations.³ But private companies have not been without blame either, as we shall see shortly. In order to illustrate the kind of cases the discussion will be focusing on, this section will briefly describe two cases, one involving a public pharmaceutical corporation, and the other one a private biotechnology company. The corporate attorneys' conduct in these cases will also be addressed.

A. *Big Pharma and the Vioxx Case*

Pharmaceutical giant Merck managed to get a prescription drug called "Vioxx" approved by the FDA in May 1999.⁴ The medication was designed to relieve pain and inflammation caused by osteoarthritis, rheumatoid arthritis, menstrual pain, and migraines.⁵ In September 2004, as a consequence of clinical trial data showing that Vioxx increased the risk of adverse cardiovascular events like heart attack and stroke, Merck withdrew the drug from the market.⁶ Thousands of personal injury lawsuits followed, as well as 265 class action lawsuits based on claims of failure to warn about the negative effects of the drug.⁷ For the period between 1999 and 2004, while Vioxx was on the market, it is estimated that around 20 million people took the drug in the United States,⁸ and one study conducted by David G. Graham (at the time Associate Director for Science at the FDA Office of

2. Companies that sell tobacco, dietary supplements, or nicotine-based products are some examples among others. To what extent the proposal in this Article will apply in those cases will depend on a variety of factors, such as how much knowledge general consumers have about the products they are purchasing and how serious the harm of nondisclosure would be in a particular situation. Certainly, on the view advocated in this Article, non-medical companies should not be free to violate people's rights by not disclosing relevant information. Consequently, and as will be argued below, the strength of attorneys' duty of confidentiality will need to be re-assessed in some contexts.

3. See, e.g., *The Biggest Ever Pharmaceutical Lawsuits*, PHARM. TECH. (June 25, 2019), <https://www.pharmaceutical-technology.com/features/biggest-pharmaceutical-lawsuits/> [<https://perma.cc/YFG7-476K>] (listing ten of the biggest drug manufacturer lawsuit settlements).

4. *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 758 (E.D. La. 2011).

5. *Id.*

6. *Id.* at 758–59.

7. Jennifer Wolsing, *The Vioxx Litigation: Disincentivizing Patient Safety Through Misdirected Tort Rules*, 75 DEF. COUNS. J. 209, 210 (2008). The number of personal injury lawsuits was in excess of 28,000. *Id.*

8. *In re Vioxx*, 802 F. Supp. 2d at 759.

Drug Safety) concluded that 27,000 heart attacks and cardiac deaths may have been avoided if people had taken other medication.⁹

All these facts are consistent with Merck's ignorance of the negative effects of Vioxx and with its marketing the drug in good faith. However, there is evidence that Merck had been apprised of the potential cardiovascular effects of Vioxx well before the decision to withdraw it. For instance, in an internal email, Merck scientists observed that "the possibility of CV events is of great concern."¹⁰ The email also suggested that "high-risk patients should be excluded [presumably from study results] so that the difference between Vioxx patients and others 'would not be evident.'"¹¹ Furthermore, the *New England Journal of Medicine*, where Merck had published the results of a Vioxx Gastrointestinal Outcomes Research (VIGOR) clinical trial in 2000, later revealed that "Merck had deleted data about three heart attacks" before submitting the VIGOR results to the journal and accused Merck of manipulating the trial results.¹² The VIGOR trial results themselves, partial as they were, indicated that Vioxx could lead to as many as four times the number of heart attacks as the competitor drug naproxen,¹³ but Merck continued to deny the correlation between Vioxx and cardiovascular problems, and continued to market the drug without notifying physicians of the increased cardiovascular risks.¹⁴ Merck also preferred to ignore or hide certain inconvenient results that could affect the marketability of Vioxx. For example, it conducted an internal clinical trial in 1998 ("Study 090") which showed that the incidence of cardiovascular events for patients taking Vioxx was almost six times higher than for patients taking other arthritis drugs or placebos.¹⁵ The company did not publish the results.¹⁶ Similarly, after doing an internal meta-analysis which showed that Vioxx patients had twice as high a risk of having a heart attack

9. Walter T. Champion, *The Vioxx Litigation Paradigm: The Search for Smoking Guns*, 31 T. MARSHALL L. REV. 157, 164 (2006).

10. *Id.* (footnote omitted) (internal quotation marks omitted).

11. *Id.*

12. *Id.* at 166–67.

13. *Id.* at 166.

14. *Id.* at 170–72; David R. Culp & Isobel Berry, *Merck and the Vioxx Debacle: Deadly Loyalty*, 22 ST. JOHN'S J. LEGAL COMMENT. 1, 20–21 (2007). Merck relied on the theory that naproxen benefited the heart and Vioxx had no effect, hence the difference in cardiovascular events among the two groups of patients. However, Merck did nothing to test this hypothesis, mainly because it was concerned about losing profits in case it had to put warnings on its label. *Id.* at 22–23.

15. Culp & Berry, *supra* note 14, at 19.

16. *Id.*

as patients who took other painkillers, Merck gave the FDA only part of the results and did not include the rates at which Vioxx patients would incur heart attacks.¹⁷

After massive litigation, some fueled by Merck's pattern of denial and obfuscation, a global settlement was reached in 2007 between the company and a Negotiating Plaintiffs' Counsel, according to which Merck established a \$4.85 billion fund for resolving pending or tolled claims of heart attack, ischemic stroke, and sudden cardiac arrest against the company.¹⁸ It was one of the largest settlements in civil litigation history.¹⁹

B. *Theranos and the Brave New World of Biotech Startups*

Public companies are not the only ones plagued by legal problems stemming from disreputable ways of conducting business. While Merck was forced into a steep settlement by allegations of personal injury and failure to warn, Theranos was brought down as a result of egregious violations of federal securities laws. The most publicized scandal in the world of biotechnology companies in recent years, the case of Theranos serves as a reminder of the social and human costs of fraudulent corporate management and bad corporate culture.²⁰ From its position as "one of the most valuable private companies in Silicon Valley, one of the fabled unicorns[.]"²¹ whose founder Elizabeth Holmes's fortune was estimated at \$4.5 billion in 2014,²² Theranos declined by 2020 to the point where it was "dissolved with an assignment for the benefit of creditors,"²³ while Holmes is facing civil suits as well as criminal liability.²⁴ In 2018, the United States

17. *Id.* at 23.

18. *In re Vioxx Prods. Liab. Litig.*, 802 F. Supp. 2d 740, 760 (E.D. La. 2011).

19. Alex Berenson, *Merck Agrees to Settle Vioxx Suits for \$4.85 Billion*, N.Y. TIMES (Nov. 9, 2007), <https://www.nytimes.com/2007/11/09/business/09merck.html?searchResultPosition=1> [https://perma.cc/MEA6-PZPN].

20. For a detailed account of the Theranos affair from the journalist who uncovered it, see generally JOHN CARREYROU, *BAD BLOOD: SECRETS AND LIES IN A SILICON VALLEY STARTUP* (2018).

21. CARREYROU, *supra* note 20, at 218.

22. *Id.* at 213.

23. *In re Arizona Theranos, Inc., Litig.*, No. 2:16-cv-2138-HRH, 2020 WL 5435299, at *1 (D. Ariz. Mar. 6, 2020).

24. For a civil case, see generally *In re Arizona Theranos, Inc., Litig.*, No. 2:16-cv-2138-HRH, 2020 WL 5435299, at *1 (D. Ariz. Mar. 6, 2020), certifying several classes of plaintiffs pursuing RICO claims, Arizona Consumer Fraud Act claims, California Unfair Competition Law and False Advertising Law claims, and battery and medical battery claims against Theranos and Walgreens. For the criminal litigation, see the main text.

Securities and Exchange Commission (SEC) filed a complaint alleging fraudulent conduct by Theranos in violation of Section 10(b) of the 1934 Securities Exchange Act and the attendant Rule 10b-5, as well as Section 17(a) of the 1933 Securities Act.²⁵ Holmes eventually reached a settlement with the SEC and agreed to pay a \$500,000 penalty, to not serve as a director or officer of a public company for ten years, and to return Theranos shares that she had obtained during the fraud.²⁶ But her troubles were not over: in October 2020, a federal court in California denied Holmes and her associate Ramesh Balwani's motions to dismiss a federal indictment alleging nine counts of wire fraud and two counts of conspiracy to commit wire fraud against both investors and patients.²⁷ Holmes's case eventually went to trial in 2021, and a jury found her guilty of conspiracy to commit wire fraud against Theranos investors and of three counts of wire fraud connected to the investor defrauding scheme.²⁸

The history of this disaster is instructive. Elizabeth Holmes formed Theranos in 2003 as a "health care and life sciences company."²⁹ Holmes's goal was to develop a technology that could perform blood testing for a wide variety of conditions³⁰ using only a few drops of blood from a patient's finger. The blood was supposed to be collected in a "nanotainer" and then immediately analyzed on Theranos' devices back at Theranos' labs.³¹ However, none of this materialized. The technology Theranos advertised to investors and others was plagued by significant technical problems and was impracticable at that stage of medical and engineering development.³² Instead of owning up to the failure of their technology, Holmes and Balwani made numerous misstatements and misrepresentations to investors, as well

25. SEC v. Holmes, No. 5:18-cv-01602, Document 1, at 1, 3 (N.D. Cal. Mar. 14, 2018).

26. Press Release, *Theranos, CEO Holmes, and Former President Balwani Charged with Massive Fraud*, SEC (Mar. 14, 2018), <https://www.sec.gov/news/press-release/2018-41> [<https://perma.cc/FBE2-FEWF>].

27. United States v. Holmes, No. 5:18-cr-00258-EJD, 2020 WL 666563, at *1 (N.D. Cal. Feb. 11, 2020).

28. *U.S. v. Elizabeth Holmes, et al.*, DOJ (Jan. 5, 2022), <https://www.justice.gov/usao-ndca/us-v-elizabeth-holmes-et-al> [<https://perma.cc/G8QV-8L45>].

29. *Holmes*, 2020 WL 666563, at *1.

30. For instance, the technology was supposed to be able to test for vitamin D and B₁₂ levels, syphilis, hormones affecting testosterone levels, prostate cancer, and much more. CARREYROU, *supra* note 20, at 95, 193–95. When preparing the partnership with Walgreens to have Theranos devices installed in various Walgreens stores, the startup claimed that its devices could handle 192 different blood tests. *Id.* at 129.

31. *Holmes*, 2020 WL 666563, at *1.

32. CARREYROU, *supra* note 20, at 189–190, 195–200.

as to doctors and patients, trying to market what they knew was nowhere near as valuable as what they were claiming.³³

For purposes of the following discussion, the significant aspect of Theranos' activities is that it endangered the health of patients and put them at significant risk of bodily harm, although to a lesser extent than Merck. For example, a Theranos blood test result sent to one patient showed an abnormally high level of thyroid stimulating hormone (TSH).³⁴ Since TSH levels are inversely correlated with thyroxine (a thyroid hormone),³⁵ these results suggested that the patient needed to increase the dose of thyroid medication she was taking.³⁶ However, the patient's doctor ordered a second independent test from another company, the results of which came back normal.³⁷ In the doctor's view, reliance on the Theranos results could have proved disastrous, and increasing her thyroid medication could have imperiled her pregnancy.³⁸ In a similar case, Theranos reported wrong potassium results for a patient who was on blood pressure-reducing medication.³⁹ Across a number of documented patients, the company's testing equipment routinely churned out either abnormally low or abnormally high results for a variety of blood tests like calcium, potassium, proteins, glucose, liver enzymes, cholesterol, and cortisol.⁴⁰

The difference between how Merck and Theranos handled the safety of the patients to whom their products were directed is mostly one of degree. From an ethical perspective, it is clear that both companies did not take into account the patients' health to the extent they should have. But what were the corporate lawyers doing all this time? It is to this issue that we now turn.

C. *The Lawyers' Role*

In the Vioxx case, it is not clear how much Merck's attorneys knew about the cardiovascular risks of the drug before the 2004 withdrawal from the

33. *Holmes*, 2020 WL 666563, at *2–*3.

34. *CARREYROU*, *supra* note 20, at 234.

35. Salman Razvi, Sindeep Bhana, Sanaa Mrabeti, *Challenges in Interpreting Thyroid Stimulating Hormone Results in the Diagnosis of Thyroid Dysfunction*, J. THYROID RSCH., Volume 2019, at 1, 2.

36. *CARREYROU*, *supra* note 20, at 234–35.

37. *Id.*

38. *Id.*

39. *Id.* at 235.

40. *Id.* at 231–37.

market.⁴¹ Nevertheless, they were obviously aware of violations of the FDA regulations that were mentioned in warning letters from the FDA, since they had to respond to those letters.⁴² It is also clear that the legal department had a lot of authority and control over the company's documents and communications.⁴³ During the class action lawsuit filed by patients against Merck, Judge Fallon in the Eastern District of Louisiana remarked upon the wide range of activities that attorneys at Merck were performing, many of which were not primarily for purposes of legal advice: "[T]oo often we discovered lawyers inserting new paragraphs, introducing references to different drugs, or eliminating entire sections of proposed articles, reports, and presentations."⁴⁴ It appears, therefore, that Merck's in-house counsel might have been privy to potentially incriminating documents, even though it is hardly possible after the fact to disentangle the precise extent to which this was the case. The question remains as to what the legal and moral responsibilities of in-house counsel would and should have been in the event they had information concerning the dangerous effects of Vioxx.

The conduct of lawyers employed by Theranos was also far from being a model of ethical behavior. Boies, Schiller & Flexner, the firm hired by Theranos to represent it, was well-known for its aggressive tactics.⁴⁵ Among other things, Boies had private investigators conduct surveillance of people that Holmes was planning to sue,⁴⁶ intimidated people who had leaked information about Theranos' practices by threatening to bankrupt their entire family or simply threatening to sue,⁴⁷ and suggested that compromising information about one of Holmes' opponents would be revealed if he did not agree to settle his patent claim with Theranos instead of insisting on going to trial.⁴⁸ As for the question of whether Theranos' attorneys were aware that not all was well at the company, there is evidence that some of them were at least willfully ignorant of the scientific practices

41. One of the crucial persons in Merck's legal department was Joanne Lahner, Assistant General Counsel at the time, in charge of Vioxx compliance. *In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 789, 801, n.20 (E.D. La. 2007).

42. *Id.* at 802.

43. Thus, one court noted that Merck gave "the legal department the power of the corporate executive." *Id.* at 805.

44. *Id.* at 807.

45. CARREYROU, *supra* note 20, at 133–34.

46. *Id.* at 133–35.

47. *Id.* at 247, 254–58.

48. *Id.* at 201–04.

of Theranos. Thus, in a discussion with journalists from *The Wall Street Journal*, David Boies and his lawyers were unwilling to answer basic questions concerning whether the firm was using a Siemens commercial blood analyzer and how many blood tests Theranos had performed on their proprietary device, with one lawyer even lying about Theranos releasing faulty potassium test results to patients.⁴⁹ The overall attitude of the lawyers during the meeting appears to have been one of aggressively defending what they claimed to be Theranos' trade secrets.⁵⁰

As it became clearer that there was not much scientific support behind Theranos' technology, Boies and other attorneys did nothing to verify whether their client's blood testing methods could actually be harming people, focusing instead on harassing former employees and pressuring journalists not to publish the articles.⁵¹

The behavior exhibited by attorneys working for Merck and Theranos seems to be typical of corporate counsel, especially in-house counsel.⁵² Corporations are intricate bureaucracies that do not incentivize lawyers to question the dubious decisions of management.⁵³ Lawyers' attitudes towards their own role within the corporation and their potential responsibility to third parties outside the corporation appears to stem both from a certain ideal of what is involved in being a lawyer, and from the way large organizations themselves are structured. These two factors are ordinarily intertwined and mutually reinforcing.⁵⁴

49. *Id.* at 250–54.

50. Carreyrou, an eyewitness at the meeting, remarks: “We continued going around in circles, never getting a straight answer about how many tests Theranos performed on the Edison [Theranos' proprietary device] versus commercial analyzers. It was frustrating but also a sign that I was on the right track. They wouldn't be stonewalling if they had nothing to hide.” *Id.* at 250–54.

51. *Id.* at 254–55; see also Carliss N. Chatman, *Myth of the Attorney Whistleblower*, 72 SMU L. REV. 669, 712 (2019) (“Instead of working to ensure that Theranos complied with regulations and followed corporate governance norms, its attorneys were deployed as a weapon against naysayers.”).

52. In the case of Theranos, Boies Schiller was the outside firm, but the relations between the firm and Theranos were so close that the distinction between inside and outside counsel started to lose its significance. For instance, Heather King, a partner at Boies Schiller, later became general counsel at Theranos. CARREYROU, *supra* note 20, at 257. Likewise, David Boies was remunerated with Theranos stock and later was appointed to the Theranos board of directors. *Id.* at 139, 279.

53. See Steven Vaughan & Emma Oakley, *Gorilla Exceptions' and the Ethically Apathetic Corporate Lawyer*, 19 LEGAL ETHICS 50, 60–61 (2016) (discussing the notion of how corporate lawyers practice “commerciali[z]ed professionalism” and are described as “cogs in a machine”).

54. See, e.g., *id.* at 62–64 (noting corporate lawyers' responses to various hypotheticals, evidencing that a number of lawyers were content with the fact that their client's actions complied with the law even though third parties were harmed). See also *supra* references in footnotes 51, 60, and 61.

Thus, in a recent study, Steven Vaughan and Emma Oakley interviewed fifty-seven corporate finance lawyers working for global law firms in London.⁵⁵ They found that most lawyers do not have a sense of responsibility for the public good, except for idiosyncratic exceptions (e.g., some lawyers declared that they would not work for companies that endangered the habitat of gorillas, while others singled out tobacco or gambling companies).⁵⁶ In general, lawyers preferred to distance themselves from ethical responsibility, in large part based on the notion that it is the client who is the ultimate decision maker, and the lawyer is only there to execute the client's wishes, even if wrong.⁵⁷ This type of framing of the lawyer's responsibilities is what Gerald Postema called the "standard conception" of the lawyer's role.⁵⁸ This standard conception is characterized by the ideals of partisanship (whereby the lawyer's responsibility is solely to the client) and neutrality (meaning that the nature of the client's objectives or moral character are not the concern of the lawyer, whose only job is to further the client's aims).⁵⁹

Commentators have noted that corporate culture itself contributes to bolstering the values underlying the standard conception. In-house counsel, for instance, depends on the corporation as its sole client for its livelihood and financial incentives.⁶⁰ Moreover, inside lawyers interact mostly with non-lawyer members of the corporation and often have to make business decisions and give advice on points of business, which leads them to identify very closely with the corporation.⁶¹ Working for a company which is the source of one's revenue and with which one identifies creates an incentive

55. *Id.* at 50.

56. *Id.* at 66–67.

57. *Id.* at 63. Similar findings were reported after interviews with lawyers from England and Wales by Moorhead and Hinchly. Richard Moorhead & Victoria Hinchly, *Professional Minimalism? The Ethical Consciousness of Commercial Lawyers*, 42 J. L. & SOC'Y 387, 396–97 (2015). When asked to rank the public interest, the client's interest and their own or their firm's interest, the answers of the respondents in Moorhead and Hinchly's study were consistent with the standard conception of lawyering (as explained in the text): "Generally . . . client interests came unequivocally first." *Id.* at 399. Interestingly, however, in-house lawyers were a little more likely than lawyers in private practice to put public interest first. *Id.* at 400.

58. Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63, 73 (1980).

59. *Id.*

60. Pam Jenoff, *Going Native: Incentive, Identity, and the Inherent Ethical Problem of In-House Counsel*, 114 W. VA. L. REV. 725, 739–40 (2012).

61. *Id.* at 741–42. On the various identities that lawyers may adopt within a corporation, see generally Sally Gunz & Hugh Gunz, *Ethical Decision Making and the Employed Lawyer*, 81 J. BUS. ETHICS 927 (2008).

for lawyers to comply with the demands of management and co-workers in order to thrive (or at the very least maintain their position) within the company.⁶²

Large corporations also tend to silo and embargo information, so that lawyers often do not have the whole picture of what the company is doing.⁶³ Elizabeth Holmes, for instance, approached the attorney issue “by not consulting attorneys with the expertise to tell her no, siloing information within her company, keeping in-house attorneys in the dark, and hiring attorneys to advance defenses that were colorable[] only if the attorneys lacked the information she kept siloed and embargoed.”⁶⁴ That way she could avail herself of lawyers throughout her fraudulent activities, while terminating those who did not comply.⁶⁵ This kind of corporate culture encourages lawyers to shirk responsibility for their actions by simply ignoring the unsavory aspects of the company’s business.⁶⁶

II. THE MORAL QUESTION

Any account of the moral responsibility of attorneys in cases like Merck and Theranos needs to answer two major questions: (1) Do attorneys representing a company have a moral obligation towards third parties; and (2) In case of an attorney’s conflict between a moral obligation to the company and a moral obligation to a third party, which obligation should prevail? In particular, the question is whether lawyers who are aware of moral wrongdoing on the part of a company have an obligation to disclose that wrongdoing to the authorities, and whether that obligation is stronger than their obligations to their client. Note that the concern here is with the *moral* obligations of lawyers, not with their legal obligations. The distinction is intuitive and familiar. However, despite the amount of literature that has been devoted to the ethical duties of lawyers, this crucial distinction sometimes tends to be lost in the shuffle.

Consider, for example, Painter’s proposal of a voluntary whistleblowing regime, according to which lawyers would be free to advertise their disclosure policies to clients, and clients would be free to pick and choose

62. Jenoff, *supra* note 60, at 744–46.

63. Chatman, *supra* note 51, at 674–75.

64. *Id.* at 712 (citation omitted).

65. *Id.* at 711.

66. For similar concerns about the position of inside counsel, see Sung Hui Kim, *The Banality of Fraud: Re-Situating the Inside Counsel as Gatekeeper*, 74 FORDHAM L. REV. 983, 1001–34 (2005).

the lawyers whose disclosure policy best suited the firm.⁶⁷ In this scheme, there would be no mandatory rule to disclose a client's wrongdoing. If a lawyer were to put a high price on morality and felt obligated to disclose such wrongdoing in certain cases, he would make this clear to her client at the start of the representation, and the client would be free to accept or reject that lawyer. Painter acknowledges that there may be conflicts between what he calls "common morality" and a lawyer's "role morality," but he believes it is hopeless to impose one-size-fits-all ethical rules on the profession.⁶⁸ Lawyers should instead be allowed to choose whichever disclosure policy they prefer.

But it is at least paradoxical to dismiss common morality in favor of a voluntary whistleblowing regime, since common morality, presumably, tells us the right thing to do. How can one claim that, although *X* is the right thing to do, one should do *Y* instead where *Y* entails not doing *X*? Claims that "enforcing a uniform rule is not always efficient in that benefits may not always exceed costs"⁶⁹ are not too helpful, since, assuming the uniform rule implements the dictates of common morality, it is hard to see why a cost-benefit analysis is relevant at all. Once common morality has spoken, it is strange to appeal to any further considerations that might overturn its verdict.

Of course, Painter could argue that lawyers' moral obligations to third parties (in case they exist) are only *prima facie* obligations and may be potentially overridden by considerations of efficiency. Thus, all things considered, lawyers would not have an obligation to disclose their client's wrongdoing, although *prima facie* they would. I will come back to this type of reply, but let us note for now that on this way of rephrasing the view, it is incorrect to speak as if morality requires one thing while efficiency requires something else. The more precise way of stating the view would be to say that morality ultimately does not require disclosure of the lawyer, since morality includes considerations of efficiency (Painter's common morality might be, in that case, some sort of consequentialism).

The next two sections focus on the two main questions about the moral responsibility of attorneys in medical companies.

67. Richard W. Painter, *Toward a Market for Lawyer Disclosure Services: In Search of Optimal Whistleblowing Rules*, 63 GEO. WASH. L. REV. 221, 284 (1995).

68. *Id.* at 289–90.

69. *Id.* at 290.

III. DO LAWYERS HAVE MORAL OBLIGATIONS TO THIRD PARTIES?

The cases we are considering involve companies (such as Merck and Theranos) releasing products into the market that put patients at a significant risk of death or bodily harm. As we will see, there is an obvious and straightforward argument that attorneys who are knowledgeable of the dangers posed to patients by their companies' products have a moral obligation to prevent harm to the patients.

Most commentators agree that lawyers have a duty to the public. In the field of securities regulation, where the role of corporate attorneys has often been scrutinized and criticized, scholars have recognized that public interest needs to be taken into account when considering what lawyers' obligations are. As Harvey Golschmid pointed out, "[t]here is . . . a broad consensus that lawyers should play a critical gatekeeping role in large public corporations."⁷⁰ Congress itself took this position when it enacted the Sarbanes-Oxley Act,⁷¹ pursuant to which the SEC adopted regulations mandating up-the-ladder reporting of material violations of securities laws and permitting external reporting to the SEC in certain circumstances.⁷² This view of the lawyer's obligations extends, of course, to corporate lawyers in general, and one often finds claims to that effect.⁷³ Codes of professional ethics also ordinarily include considerations of public interest.⁷⁴

70. Harvey J. Golschmid, *A Lawyer's Role in Corporate Governance: The Myth of Absolute Confidentiality and the Complexity of the Counseling Task*, 58 REC. ASS'N B. CITY N.Y. 306, 309 (2003).

71. *Id.* at 309–10.

72. 17 C.F.R. § 205.3.

73. See Roger C. Cramton, *Enron and the Corporate Lawyer: A Primer on Legal and Ethical Issues*, 58 BUS. LAW 143, 176 (2002) (refuting some of the bar's explanations for not creating stricter rules for corporate lawyers); see also William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1454 (2006) ("The confusion around these issues undermines the most fundamental claim of modern professionalism—that professionals can simultaneously serve their client's interests and the public's interest.").

74. In Breakey & Sampford, who discuss such codes, we find the following surprising claim: "In all cases, the duty to the public good comes first, the client second, and the profession third." Hugh Breakey & Charles Sampford, *Employed Professionals' Ethical Responsibilities in Public Service and Private Enterprise: Dilemma, Priority and Synthesis*, 40 U.N.S.W. L.J. 262, 268 (2017). Judging by the ABA Model Rules of Professional Conduct, this seems incorrect, as the client appears to be paramount therein. In 1985, Harry Subin offered the following assessment: "The Model Rules represent the most radical position yet assumed by the bar on the confidentiality issue, virtually eliminating an attorney's right to disclose client wrongdoing." Harry I. Subin, *Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1100 (1985). The Rules have changed to some extent since 1985, but Subin's comment is still not far from the truth. The 1908 Canons of Professional Ethics were likely closer to Breakey & Sampford's description, as they specified that a lawyer "must obey his own conscience and not that of his client." CANONS OF PROF'L ETHICS, Canon 15 (AM. BAR ASS'N 1908).

Interestingly, most of the time all these authorities simply *assume* that corporate lawyers have some kind of obligation to the public, and that therefore the lawyers' duties to their client can be in conflict with the mandates of morality.⁷⁵ Perhaps it is simply obvious that these conflicts can and do occur, and that is why the literature can afford to dispense with argument. Be that as it may, at some point skeptics might wish to know whether it is actually true that corporate lawyers need to concern themselves with the effects of their clients' actions on other parties. If their sole obligation is to their clients, there would be no conflict to resolve.

Monroe Freedman, for instance, appears to take the view that lawyers do not have any obligations whatsoever to parties other than their clients. According to Freedman, the public interest itself is served by an adversary system in which lawyers zealously serve and are answerable only to their clients.⁷⁶ Zealousness and confidentiality, for Freedman, are essential to the adversary system, which in turn is at the foundation of a democracy that values the dignity of the individual above all.⁷⁷ As a general argument for why lawyers should be limited to the role of serving their client, this will not do. Insofar as Freedman does not stop to consider the dignity of persons who are put in peril by corporate wrongdoing, it is far from clear that Freedman's picture of democracy is preferable to one where democracies acknowledge people's rights to be free from harm, even by weakening the adversarial system.⁷⁸ But even though Freedman's argument is misguided, it would still be worthwhile to offer a positive argument for why corporate lawyers do have moral obligations to third parties, not just to their clients.

75. See Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1, 11 (1975) (duty to public of lawyers involved in Watergate); David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1014 (1990) (suggesting American legal system has always had two opposing views of ethics—(1) moral activist and (2) partisan/nonaccountability); John T. Noonan Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485, 1486–87 (1966) (treating lawyers as extensions of the judicial truth-finding function).

76. Monroe H. Freedman, *Are There Public Interest Limits on Lawyers' Advocacy?*, 2 J. LEGAL PROF. 47, 47 (1977).

77. *Id.* at 48.

78. Freedman does seem to make an exception for the kind of case with which we are concerned here, as he would require a lawyer to reveal company information if the company were about to market a lethal drug. *Id.* at 51. But he focuses on the criminal character of the company's conduct, while I do not insist on this characterization. Irrespective of whether a company's conduct is criminal, a lawyer has a moral obligation to prevent harm to other people. For further criticism of the adversary system justification of lawyers' moral neutrality, see generally David Luban, *The Adversary System Excuse*, in LEGAL ETHICS AND HUMAN DIGNITY (2007).

As it turns out, in the case of providers of medical products or services there is an obvious and powerful argument that lawyers have moral obligations to people other than their clients. The argument relies on the familiar idea that whoever can prevent harm to someone at little cost to themselves has a moral obligation to prevent that harm.⁷⁹ Emergency situations are typical examples: if a person is dying of thirst in the middle of a desert and one happens to be driving by with sufficient water supplies, a moral obligation arises to help the person in need. On most ethical theories, and irrespective of the ultimate moral justification, this is the correct result.⁸⁰ Since corporate lawyers are sometimes in such emergency situations, they have an obligation in those cases to prevent harm to third parties (by reporting the danger, for example, to company management or outside the company to regulatory agencies).

One may attempt to reply to this argument in several ways. Two such replies are considered below and argued to be untenable.

A. *No Duty to Rescue*

One potential way to reject lawyers' obligations to third parties in the cases we are envisaging would be by relying on the idea that these cases involve rescuing persons from the harm the companies' products are causing. Since there is no duty to rescue, the argument would be that lawyers are under no obligation to rescue patients from harm. Let us assume, for the sake of argument, that the cases we are concerned with are analogous to rescue cases. There are two ways to understand this argument, as it could be focusing either on a legal or a moral conception of a duty to rescue. If we interpret it as being about a legal duty to rescue, the argument is beside the point: the fact that there is no duty to rescue in tort or criminal law in the United States does not show anything about lawyers' *moral* obligations. Thus, even supporters of the no-duty-to-rescue tradition acknowledge that not rescuing someone from harm is the morally wrong thing to do.⁸¹

79. For a classic application of this idea, see generally Peter Singer, *Famine, Affluence, and Morality*, 1 PHIL. & PUB. AFFAIRS 229 (1972).

80. There many persons willing to reject the idea that there is any moral obligation in this case. Presumably, the arguments in this essay will not be convincing to those who hold that view. For example, one could conceivably hold that moral obligations can arise only from express contracts. However, the onus is on these views to justify such a significant departure from widespread principles of ordinary morality.

81. See Marin Roger Scordato, *Understanding the Absence of a Duty to Reasonably Rescue in American Tort Law*, 82 TUL. L. REV. 1447, 1447 (2008) ("The absence in American tort law of a duty to reasonably

Therefore, to make this kind of argument would be to confuse legal obligations with moral obligations.

But, even focusing on the legal question, the argument fails for other reasons as well. For example, the no-duty-to-rescue rule has an exception for cases in which someone takes charge of another who is in danger or unable to protect themselves. In such a case, as the Restatement (Third) of Torts points out, “[t]he actor has singled himself or herself out,”⁸² so that their voluntary intervention justifies imposing a duty of reasonable care on the voluntary rescuer.⁸³

Now, owing to their particular line of business, medical companies and their agents have arguably made themselves vulnerable to this exception. Medical companies that sell products to patients are clearly holding themselves out as being in the business of curing people, not harming them. Contrast this with a company that sells securities to investors. The company is not guaranteeing a profit to investors, and the best it can promise is loyalty to the investors and honesty in its dealings.⁸⁴ Investors will, therefore, know that there is a risk associated with their investment. But there is nothing comparable in the medical industry. A medical company, on the face of it, sells products directed at curing various medical conditions. Every medical product that is marketed to patients is supposed to make their life better in some way. Patients have every reason to believe that the risks associated with medications approved by federal agencies are not such as to seriously endanger their health, and that known risks will be revealed and considered by their medical providers. Because of these features of medical companies, an argument could be constructed that under common law principles, at the very least, agents of these companies (such as attorneys) who (i) have knowledge of defective and dangerous products and (ii) have contributed in some way to the marketing of these products cannot simply stand by while patients are being harmed, as the agents share in the responsibility of the company: they have incurred a duty of care towards those patients by the very nature of the business they are representing.

aid a stranger in peril . . . utterly fails to accurately articulate our conventional sense of morality and appropriate social behavior.”)

82. RESTATEMENT (THIRD) OF TORTS § 44, cmt. d (AM. L. INST. 2012).

83. *Id.*; see also Liam Murphy, *Beneficence, Law, and Liberty: The Case of Required Rescue*, 89 GEO. L.J. 605, 613 (2001) (further discussing commission by omission).

84. In the case of companies that deal in highly risky financial products, the contrast is even starker, given the obviousness of the market risks.

Consequently, lawyers arguably have a legal duty to rescue patients at risk of harm from defective medical products.⁸⁵

What about the argument that lawyers have no *moral* duty to rescue patients? Joel Feinberg has argued that one can be in a position to have duties of rescue to total strangers if the situation requires one to help another person in need. Feinberg's goal is to reject certain views according to which rescue situations should be conceptualized merely as conferrals of gratuitous favors on persons in need of rescue and not as involving any rights of those persons. To do so, Feinberg contrasts the case of a good swimmer standing on a bridge who fails to save someone drowning in the water below with the case of a governor who denies the last-minute appeal to clemency of a murderer on death row.⁸⁶ The distinction between these two cases can be explained by the fact that one involves the assertion of rights, whereas the other only involves a gratuitous favor. In the swimmer case, the person drowning can be said to have a right to be saved, and the swimmer a correlative duty to save him.⁸⁷ But the governor is under no duty to pardon the murderer, because the murderer has no right to demand clemency.⁸⁸ If the governor pardoned the murderer, that would be an act of gratuitous favor, while the same cannot be said about the swimmer situation.⁸⁹

Feinberg's argument is incomplete as it stands, because, although it illustrates the distinction between rights and favors, it does not explain it. The argument should be qualified by a doctrine of waiver of rights (or a similar mechanism) in order to explain the intuition that the governor's pardon is indeed a gratuitous favor, and not a moral duty. Feinberg suggests that the drowning person being a human being is enough to ground a duty to rescue in the swimmer case.⁹⁰ But that cannot be the whole story, since the murderer is also a human being, and he does not have a right to be

85. Robert Schwartz has also suggested that the association between a lawyer and a particular type of business represented may impose certain obligations on the lawyer: "[D]oesn't the ethical health lawyer have some obligation to advance the interests of those who need health care? Why else would attorneys choose to practice health law?" Robert Schwartz, *The Ethical Lawyer: When Doing the Right Thing Means Breaking the Law—What is the Role of the Health Lawyer?*, 34 J. L., MED. & ETHICS 624, 626 (2006).

86. Joel Feinberg, *The Moral and Legal Responsibility of the Bad Samaritan*, 3 CRIM. JUST. ETHICS 56, 60 (1984).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

pardoned. Neither is it sufficient to say that the murderer has waived his right to be saved by committing the murder. For, in a case where this same murderer was to escape and then inadvertently fall into a pond, a swimmer passing by would arguably have a duty to rescue him. I believe the right thing to say is that waiver of rights is relative to a context: one can waive one's right to be saved relative to one context, but not to another. The murderer has waived his right to be saved in the judicial context, but not in the drowning context. And the drowning victim in the swimmer case has not waived her right to be saved at all (she would not have waived it even if she had ended up in the water out of her own recklessness).

Thus, qualified with a doctrine of waiver, this argument can be deployed to argue that lawyers working for medical companies have a moral obligation to rescue patients at risk of harm. Since we have stipulated that we are interested in cases where lawyers have knowledge of the dangers posed by the companies' products, these lawyers are in an analogous position to the swimmer on the bridge in Feinberg's example. Just like the drowning person in Feinberg's example, the patients who utilize the various products released by companies, such as Merck and Theranos, have the right to be saved by potential rescuers who are in a position to do so. Moreover, just like the drowning victim and unlike the murderer in the judicial context, these consumers have not waived their right to be saved. As the next section will argue, since the harm to patients is too great compared to the inconveniences that lawyers could suffer in these cases, there is no excuse for not intervening.⁹¹

B. *Actions, Omissions, and Causes*

Another way to argue that lawyers have no duty to prevent harm to patients focuses on the idea of omission. Since lawyers' silence is not an action, but only an omission to act, it might be claimed that lawyers therefore do not incur any moral responsibility for that omission.

As a general claim about moral responsibility not being capable of arising out of omissions, this argument is incorrect. Omissions liability is

91. I will not be discussing here the objection that the victims of corporate wrongdoing are unknown or not sufficiently individualized. Let me just note that it is enough that *some* victims will suffer harm as a result of corporate activity for the attorneys' moral obligations to arise. It is irrelevant who the victims are. A lot of the current regulatory regime in various areas of the law proceeds on the same assumption, that harm to potential victims is a sufficiently serious concern for the government to ban certain types of economic behavior. Securities laws and laws prohibiting various kinds of activities resulting in environmental pollution are but two examples among many.

recognized both by common morality and in the law. Suppose I promise A that I will do X, and then I fail to do X, when in fact I would have been able to do X. In that situation, I am clearly morally responsible for failing to keep my promise. A legal example is Rule 10b-5 of the SEC, which explicitly mentions omissions as a basis for securities fraud liability.⁹² If it is argued that in these cases omissions give rise to moral or legal responsibility only because there a prior duty to perform the action in question (a duty rooted in the promise, or in the fraud regulations), then we are back to claiming that in the corporate lawyer case there is no duty to act in order to prevent harm to patients. If so, then the issue is no longer about omissions, but about whether lawyers have a duty to act. This type of argument was considered and rejected in the previous section.

But it might be argued that omissions cannot really give rise to moral responsibility, perhaps on the theory that omissions do not cause anything, and that one can be morally responsible only for what one causes.⁹³ If so, then the lawyers' omission to act cannot be the cause of harm to patients, and consequently the lawyers are not morally blameworthy.

To reject this kind of argument, it is sufficient to reject its second assumption. Thus, even accepting that omissions are not causes, we can point to the fact that our attributions of moral responsibility do not function according to the principle that we are morally responsible only for what we cause. The burden is on the proponent of that principle to adduce arguments as to why the principle is true. The reason is that our judgments of moral responsibility (e.g., we are, all else being equal, morally responsible for promises we do not keep) are more robust than our confidence in an abstract principle concerning the relation between morality and causation. In the absence of any argument as to why the principle is true, it is more rational to continue trusting our intuitions about what our moral obligations are.

The first assumption of this argument, i.e., the idea that omissions cannot be causes, fares no better. An omission by a corporate lawyer to prevent

92. "It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange . . . [t]o make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading . . ." 17 C.F.R. § 240.10b-5(b).

93. Fiona Woollard & Frances Howard-Snyder, *Doing vs. Allowing Harm*, STANFORD ENCYC. PHIL. (July 7, 2021), <https://plato.stanford.edu/entries/doing-allowing/#CausNotCausNotOccu> [<https://perma.cc/GM4G-H25B>].

harm to third parties is clearly a cause in the 'but for' sense of causation: if the omission had not occurred, the harm would not have occurred. Some theorists, however, are dissatisfied with this account because it multiplies causes beyond measure. Eric Mack, for instance, has argued that non-occurrences are never causal factors, because we do not cite non-occurrences in our causal explanations of various events, and because including non-occurrences in our causal explanations would render what were supposed to be sufficient conditions for an event to occur insufficient.⁹⁴ Mack uses the example of Jones, who fails to save Smith from drowning.⁹⁵ When we talk about the causes of Smith's drowning, we do not cite Jones not rescuing Smith among those causes.⁹⁶ The reason, according to Mack, is that there are a number of sufficient conditions for Smith's drowning that are identifiable as the causes, which would have led to the drowning even in the absence of Jones' non-rescuing.⁹⁷ The view is that, since these conditions are stipulated to be sufficient for Smith to drown *before* Jones either acts or omits to act, Jones' non-action cannot be a necessary cause of Smith's drowning, and therefore cannot be a cause of Smith's drowning.

However, Mack's argument is open to question. The argument assumes that isolating sufficient conditions for Smith's drowning is unproblematic, while that is not the case. Let us assume, for simplicity, that we have isolated the fact that Smith does not know how to swim and the fact that he fell in the water as sufficient to cause Smith's death. On reflection, these conditions are not really sufficient for Smith to drown. For example, if the water were one-foot deep, Smith would not be drowning. So, we need to add the fact that the water is deep among the sufficient conditions for Smith's drowning. But the augmented set of three conditions is still not sufficient for Smith's drowning. A host of other things need to obtain in order for Smith to drown: the laws of physics need to hold, Smith's movements in the water have to cause him to submerge instead of keeping him afloat (the latter could accidentally happen even if he does not know how to swim), and so on. It does not look like there is a non-arbitrary way of picking out sufficient conditions for Smith's drowning.

94. Eric Mack, *Bad Samaritanism and the Causation of Harm*, 9 PHIL. & PUB. AFFAIRS 230, 257–58 (1980).

95. *Id.*

96. *Id.* at 259.

97. *Id.*

This thought-experiment is, of course, an aspect of the well-known distinction between causes and background conditions;⁹⁸ when we pick out causes among various events, we ordinarily keep some background conditions fixed and do not call them “causes,” although in other contexts they could be relevant.⁹⁹ So, given the context-relativity of causal attributions, and contrary to Mack’s argument, it is far from clear that we will never cite non-occurrences as causes. In a context where Jones happens to be passing by while Smith is drowning, we might very well consider that Jones’ non-prevention of Smith’s drowning is a cause of the drowning, while in a context where Jones is 1000 miles away at the moment that Smith is drowning,¹⁰⁰ we will be inclined to not include Jones’ nonfeasance among the causes of the drowning. Arguably, the situation of corporate lawyers who are aware of wrongdoing by the companies they work for is more analogous to the former case than to the latter, so that attributing the status of cause to lawyers’ non-actions is not out of the question.

To conclude this discussion, the omission argument against lawyers’ moral obligations to third parties fails, just as the no-duty-to-rescue argument failed. Of the two arguments against lawyers’ duties to third parties that we have considered, neither is workable.

It is important to note that, if the argument in this section is correct, corporate lawyers sometimes have a moral obligation, and not merely the permission, to prevent harm to third parties, such as patients who stand to be harmed by a company’s medical products. The next question is whether there are any countervailing considerations that may defeat this obligation, in particular considerations related to lawyers’ professional obligations to their corporate clients.

IV. PATIENTS’ RIGHTS AND WHY THEY ARE HARD TO OVERRIDE

There is something strange and *prima facie* inappropriate in asking whether lawyers need to comply with their moral obligations. How is it possible that

98. See David Lewis, *Causation*, in 2 PHILOSOPHICAL PAPERS 162 (1986) (explaining the distinction between conditions and causes); cf. H.L.A. HART & A.M. HONORÉ, *CAUSATION IN THE LAW* 11 (1959) (1959) (sing conceptions of causes in the justice system).

99. This problem is echoed in the legal distinction between “but for” causes and proximate causes. See Mack, *supra* note 95, at 244–45 (detailing the difference between “but for” causation and proximate causation).

100. See *id.* at 243 (explaining “[a]dvocates of the causation thesis insist that either omissions of rescue activity or such omissions plus failures to engage in rescue activity are causally related to the subsequent injuries which the rescue activities would have prevented—at least as causally necessary conditions of those injuries”).

lawyers would manage to avoid doing the right thing to do? Other members of society do not seem to be able to take such vacations from morality, so why are lawyers different?¹⁰¹

In the previous section, I have argued that there are situations in which lawyers have moral obligations to third parties. But the argument, as it stands, does not entail any *general* moral obligations of lawyers to not harm other people. Lawyers, as a matter of course, whether in litigation or in transactional work, often cause harm to other actors. For instance, by providing legal advice to one company, a lawyer may cause the company's competitors to do worse and lose business. If, following Feinberg, we conceive of harms as setbacks to interests,¹⁰² this kind of lawyer behavior will constitute harm to the affected party. The question then becomes whether we can square this routine and apparently morally unproblematic causing of harm with the medical cases in which lawyers do have a duty to not cause harm.

This issue can be resolved by observing that not all harms are wrongs. When harming others in the ordinary course of business, lawyers do not at the same time wrong those parties. To wrong someone, according to Feinberg, is to indefensibly (unjustifiably and inexcusably) violate their rights.¹⁰³ When the competitors' business does less well because of the lawyer's legal advice to a corporation's management, the lawyer has not violated any right of the competitor not to be harmed. In contrast, if the argument in the previous section is correct, by not preventing harm to patients in situations like the ones under discussion, lawyers do violate patients' rights, and thereby wrong them, in addition to harming them. Consequently, although there is no general moral prohibition on lawyers' causing harm to third parties, there is a moral prohibition on their wronging third parties. The situations triggering this prohibition are the ones that

101. One may object that corporate officers are also in a position where they need to focus most on profit, not on morality. That is correct, but morality cannot be entirely ignored even in that context, as a corporation arguably has social responsibility obligations as well. What would be particularly strange is if one social category, like lawyers, could completely ignore moral rules by forwarding them to others.

102. Joel Feinberg, *Harm to Others*, in 1 THE MORAL LIMITS OF THE CRIMINAL LAW 33 (1984). Harms in this sense are of course ubiquitous, and they are not restricted to lawyers or any specific professions.

103. *Id.* at 34. One might adopt some other definition of wronging someone, but terminology is not the issue. What matters is that the distinction between harms and wrongs is essential to understanding why some harms are morally permissible while others are not.

require a justification as to how and why lawyers are exempt from the demands of morality.

The duties of loyalty and confidentiality to their client arise for lawyers as a result of a contract with the client. But if lawyers sometimes have a moral obligation to not harm third parties, their fiduciary duties arising out of a contract with the client are too slender a basis to defeat that obligation. Generally, one cannot contract around strict moral obligations, as is evidenced by the fact that one cannot contract to intentionally kill innocent people or perform other immoral acts.¹⁰⁴ So, one problem for those who want to defend the permissibility of lawyers withholding information from patients in these cases is that there is no perspective outside of morality from which one could argue for such a claim.¹⁰⁵

Therefore, arguing that lawyers are exempt from the burdens of morality requires some special sort of moral justification, perhaps in the form of an argument that it is better for everyone if lawyers, sometimes, do not comply with their *prima facie* moral obligations. To defeat the demands of *prima facie* morality, this kind of argument would have to rest on two theses: (i) that consequentialism is the right ethical theory; and (ii) that consequentialism would mandate violating lawyers' duties to third parties in the cases under discussion. To be confident that (ii) is correct, one would have to adduce empirical evidence that the amount of the consequentialist's favored basic good (happiness, pleasure, preference satisfaction, or whatever) is greater society-wide if lawyers do not meet their obligations to third parties than if they do.

So far, no empirical evidence to this effect has been uncovered.¹⁰⁶ The argument proceeds rather by pointing to the intuitive benefits of lawyers'

104. See Alistair Macleod, *Moral Permissibility Constraints on Voluntary Obligations*, 43 J. SOC. PHIL. 125 (2012) (arguing there are moral constraints on the generation of voluntary obligations). When those moral constraints are violated, the voluntary actions undertaken (whether by contract, promise, etc.) do not give rise to obligations. Richard Arneson rightly points out that "[o]ne is not morally obligated to help one's friend if doing so would violate a moral requirement such as the requirement to report illegal activity to the police or the requirement to refrain from aiding and abetting persons who are initiating a course of action that would wrongfully violate the significant rights of other persons." Richard Arneson, *Consequentialism vs. Special-Ties Partiality*, 86 MONIST 382, 397 (2003).

105. It would be possible to argue that legal permissibility is sufficient for the lawyers' activities and concede that what lawyers do is immoral. I know no theorist willing to go that far.

106. Counting and comparing the amount of happiness or any other kind of state over multiple subjects is notoriously difficult, which is a serious obstacle to any consequentialist defense along the lines presented in the main text. As a first approximation, one could compare the rough number of lives saved in states or countries that impose and enforce legal obligations on lawyers to prevent harm to third parties to the number of lives lost in jurisdictions that do not. But a full statistical analysis of

loyalty to their clients, which are supposed to outweigh their moral obligations to third parties. But, for the cases with which we are concerned here, namely cases in which people's lives and health are at stake, it is likely that the argument for lawyers' non-intervention will fail even on consequentialist terms.

One of the reasons to be skeptical of generalized consequentialist claims about the all-things-considered right thing to do is that any plausible consequentialist theory will need to take into account the rights of the parties involved. The more serious the rights involved, the less convincing will be the claim that those rights will be outweighed by other considerations. Rights are very robust moral considerations, so that ordinarily the justification for violating or infringing people's rights must meet an extremely high bar. Ronald Dworkin, for instance, has argued that rights function as trumps over considerations having to do with overall social utility.¹⁰⁷ But even were rights not to function in all instances as trumps over utility, it is hardly plausible that in the medical cases that are the focus of this particular discussion patients' rights could be outweighed by other considerations. Especially when harms to patients are known (as opposed to speculative) and serious (as opposed to *de minimis*), overriding patients' rights is going to be hard to justify.

What rights are at stake in cases of medical companies releasing potentially dangerous products on the market? Patients' rights can be formulated in a variety of ways, for instance as rights to be free from bodily harm, rights not to be harmed, rights not to be killed, or as rights to life. Martha Nussbaum, for example, has included bodily health and bodily integrity among the central human capabilities essential for a life with dignity.¹⁰⁸ The right to life is widely acknowledged as one of the

these types of laws in terms of their impact on happiness, preference satisfaction, etc. would obviously have to take into consideration a lot more parameters than just the number of lives saved or lost, and to make several non-obvious assumptions about what happiness or preference satisfaction are and how to measure them. The final analysis is bound to be extremely complex, and the results very likely controversial. See Marc Fleurbaey's *Economic Theories of Justice*, 11 ANN. REV. ECON. 665 (2019) (discussing some related open questions in economic theory). For one mathematically sophisticated account of the feasibility of interpersonal comparisons of well-being, see generally MATTHEW D. ADLER, WELL-BEING AND FAIR DISTRIBUTION 57–153 (2012).

107. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 191 (1978); Ronald Dworkin, *Is There a Right to Pornography?*, 1 OXFORD J. LEGAL STUD. 177, 199–212 (1981); cf. JOHN RAWLS, POLITICAL LIBERALISM 187 (1996) (“[I]t is neither possible nor just to allow all conceptions of the good to be pursued (some involve the violation of basic rights and liberties).”).

108. MARTHA C. NUSSBAUM, FRONTIERS OF JUSTICE: DISABILITY, NATIONALITY, SPECIES MEMBERSHIP 75–76 (2007). Nussbaum is interested in these capabilities as a foundation for an

fundamental human rights, for instance in the Universal Declaration of Human Rights.¹⁰⁹ Some hold that the right not to be killed is such that it cannot be infringed no matter what we put in the consequentialist balance.¹¹⁰ For our purposes, it is immaterial on which formulation of patients' rights we settle. The significant fact is that these are all very important rights. Companies like Merck and Theranos, through their actions, have violated one or several of them. For the purposes of this discussion, I will be proceeding on the commonly accepted assumption that patients, and people in general, do have such fundamental rights to be free from harm, or at least from unjustifiable harm.¹¹¹

Given the serious character of these rights, what can the consequentialist place in the balance? It is instructive to consider what types of cases are usually discussed in connection with the potential permissibility of infringing the right to be free from bodily harm or the right not to be killed, as these will provide us with a useful comparison class to be contrasted with the case of corporate lawyers and patients at risk of injury.

One important class of cases that both common morality and the law recognize is constituted by cases of self-defense.¹¹² Apart from self-defense, putative examples of the permissibility of infringing people's fundamental rights that are sometimes put forth are so-called 'trolley problem' cases. These hypothetical scenarios are meant to test our moral intuitions about the permissibility of killing or letting someone die. For instance, is it morally permissible for someone who is driving an unstoppable trolley to steer the trolley away from a track that contains five people and onto a track that only has one person on it, given that those are the only two options and either one or five people are stipulated to die,

account of social justice. *Id.* This essay is focused on the narrower question of whether there is any plausible justification for lawyers infringing these rights.

109. G.A. Res. 217 (III) A, Universal Declaration of Human Rights, Art. 3 (Dec. 10, 1948).

110. See JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 168 (1990) (calling such rights "maximally stringent claims"). Following Thomson, I will be using the term "infringe" (in connection with rights) to denote an encroachment on a right that need not be at the same time morally wrong (as opposed to violations of rights, which are moral wrongs). *Id.* at 122.

111. Re'em Segev, *Fairness, Responsibility and Self-Defense*, 45 SANTA CLARA L. REV. 383, 436–37 (2005); see also THOMSON, *supra* note 111, at 228–48 (providing a defense of the strong view that people have a right not to be caused harm *simpliciter*).

112. These cases can be conceptualized as situations where the attacker waives their rights to be free from harm, so they may not be genuine cases where it is permissible to infringe people's rights after all.

depending on the driver's choice?¹¹³ Many consequentialists (but not exclusively) will say it is permissible to kill one person in this context in order to save five. Sundry examples have been produced in the literature to test the boundaries of moral permissibility in similar instances. For instance, why does it seem permissible for someone to kick another person in the shin in order to save five lives, but it does not seem permissible for a surgeon to cut up a person and distribute their organs to five people, thereby saving five lives?¹¹⁴

We do not need to wade through all the intricacies of these questions here. For our purposes, we need only note the *kinds* of reasons that might justify infringing someone's right to life or right not to be harmed. These countervailing reasons have to do in each instance not only with competing interests of other people, but with similarly stringent interests. One is seldom worried about the question whether a person's right not to be harmed can be infringed just so a million other persons can enjoy their morning coffee. For fundamental rights to be permissibly infringed (if at all), sufficiently weighty reasons are required. That is what makes trolley problems hard cases; however one proposes to ultimately solve them. *Bona fide* hard cases are frequent in the legal domain as well. As one commentator observed, a securities lawyer may be faced with the question of what action to take in a case where there is a 50% chance that a certain public disclosure is legally required.¹¹⁵ Given the complexity of federal securities regulations, it may just not be clear what the answer is in such a case.

In contrast, it does not look like lawyers' professional relationship to their clients is sufficiently weighty to overcome the demands of morality in the medical cases at issue here. The nature of the cases is actually such that they could not be hard cases at all. The clients (Merck, Theranos and others) are corporations, and corporations do not have a right to bodily integrity or a right to life. Even on a consequentialist view, there is nothing as significant as the patients' rights to put in the balance. That is why Merck and Theranos are easy cases.

Of course, what makes these cases easy is the egregious character of the facts in each. However, not all cases will be so clear. Since typically any drug and many medical products that legally enter the stream of commerce have

113. See Philippa Foot, *The Problem of Abortion and the Doctrine of the Double Effect*, 5 OXFORD REV. 1, 2-3 (1967) (applying a hypothetical to explain the doctrine of the double effect).

114. THOMSON, *supra* note 111, at 149-50.

115. Simon M. Lorne, *The Corporate and Securities Adviser, the Public Interest, and Professional Ethics*, 76 MICH. L. REV. 423, 467 (1978).

side effects, some of them lethal, there arises the question at what point the corporate lawyers' moral obligations to third parties are triggered. There is no precise answer to this question. Some cases will be obvious, others will require lawyers to balance various considerations. I suggest that the materiality standard adopted by the SEC and by the courts in the context of security fraud would be helpful here as well. In *Basic Incorporated v. Levinson*,¹¹⁶ the Supreme Court held that “[a]n omitted fact is material if there is a substantial likelihood that a reasonable shareholder would consider it important in deciding how to vote[.]”¹¹⁷ and further clarified that for a fact to be material, “there must be a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the ‘total mix’ of information made available.”¹¹⁸ This test of materiality is suitable to the medical context precisely because it focuses on the impact of the information on patients and thereby respects their autonomous choice whether to use a product or not.

According to this standard, a lawyer would incur moral obligations to patients at risk of harm when the information about the drug or product is material in the sense of *Levinson*. In medical cases, we would be asking whether there is a substantial likelihood that a reasonable person would be affected in their medical choices by the information that is being withheld from the public. Information that is already publicly available about drugs' side effects and other potential problems that are publicly known will not be subject to this test of materiality. But with other kinds of information that lawyers may come across, they will have to make a decision as to whether the harm to patients is serious enough to warrant further action.

I have claimed that, in easy cases like Merck and Theranos, once moral obligations to third parties are triggered, it is unlikely that a consequentialist calculus could yield the conclusion that lawyers' professional obligations could override patients' rights. In response, one might try to argue that we need to consider the rights of everyone involved with the corporation, such as shareholders, employees, directors, and maybe even outside entities like creditors or contractors. Perhaps accounting for the interests of all these people would justify the lawyers' silence about the companies' dangerous products. There are several replies to this objection. First, given the

116. *Basic Inc. v. Levinson*, 485 U.S. 224 (1988).

117. *Id.* at 231 (quoting *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)).

118. *Id.* at 231–32.

stringency of the patients' right to life and/or right not to be harmed, it is implausible to say that adding up a multitude of lesser rights could result in the permissibility of infringement. It is also implausible to claim that the companies' employees or contractors have a right that information about the companies' products cannot be revealed. How would they have acquired such a right in the first place?

Second, on consequentialist grounds there is no need to limit the relevant parties to persons who stand to benefit monetarily from the corporation. The result of the consequentialist calculus is, therefore, not certain to yield a verdict of non-disclosure. In this connection, the Business Roundtable recently issued corporate guidelines according to which a company should take into account a variety of stakeholders when making decisions: "customers, employees, suppliers, communities and shareholders."¹¹⁹ Accordingly, lawyers would also have to take all these constituencies into account when deciding what to do.¹²⁰ But nothing guarantees that, when adding customers and communities to the consequentialist mix, the verdict would be non-disclosure. Rather the opposite.

Third, and irrespective of the new Business Roundtable guidelines, it is far from clear that corporate lawyers actually do need to think about all the parties involved in some way with the corporation when deciding what to do. And in fact, scholars who would likely advise non-disclosure in these circumstances have relied not on any consequentialist number crunching, but on a principled argument from lawyers' responsibilities to their clients, foremost among them being the duty of confidentiality.¹²¹ This justification will be examined in the next section.

119. John Levin, *The Lawyer's Role Under the New Corporate Guidelines*, 34 CBA REC. 42, 42 (2020).

120. *Id.* It is true that lawyers owe fiduciary duties to the company, and not to other constituencies. To that extent, the claims of the company may receive a greater weight in the rights calculation envisioned in the main text. But lawyers' fiduciary duties cannot be decisive at this point in the dialectic. If the argument is that lawyers need not disclose because of consequentialist calculations, fiduciary duties will enter the calculations merely as one further consideration, perhaps with an extra weight. An argument that fiduciary duties will defeat any third-party claim from the get-go in virtue of their nature as fiduciary duties is a different kind of argument than the one under consideration here. Arguments for why the duty of confidentiality is special in this way are addressed in the next section. *See* discussion *infra* Part V.

121. Abe Krash, *Professional Responsibility to Clients and the Public Interest: Is There a Conflict?*, 55 CHI. B. REC. 31, 31 (1974); Stephen J. Friedman, *Limitations on the Corporate Lawyer's and Law Firm's Freedom to Serve the Public Interest*, 33 BUS. LAW. 1475, 1484 (1978); Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RSCH. J. 613, 629 (1986); Stephen Pepper, *Why Confidentiality?*, 23 LAW & SOC. INQUIRY 331, 334 (1998) [hereinafter Pepper, *Why Confidentiality?*]; Freedman, *supra* note 76, at 50.

V. CONFIDENTIALITY

The relevant confidentiality provisions and disclosure regime for the corporate lawyer are contained in Rules 1.6 and 1.13 of the ABA Model Rules of Professional Conduct.¹²² Rule 1.6 is the general confidentiality provision, and paragraph (a) states:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).¹²³

Relevant for our purposes, paragraph (b) permits, but does not require, the lawyer to reveal confidential information in order “to prevent reasonably certain death or substantial bodily harm.”¹²⁴

Rule 1.13 concerns lawyers that represent organizations. After making it clear that corporate lawyers represent the organization (as opposed to its constituents), the Rule mandates that a lawyer who knows that a person associated with the organization is violating his or her legal obligation to the organization or violating some other law where that violation could be imputed to the organization is to “proceed as is reasonably necessary in the best interest of the organization.”¹²⁵ The Rule further specifies that, unless the lawyer reasonably believes it is not necessary to report this misconduct, the lawyer is in fact obligated to refer the matter higher up the organizational ladder, including potentially to the highest authority in the organization.¹²⁶ If the highest authority does not rectify the situation, and continues on a course of conduct that is “clearly a violation of law,” then the corporate lawyer, to the extent he or she “reasonably believes that the violations reasonably certain to result in substantial injury to the organization,” may, but need not, disclose confidential information.¹²⁷

122. Almost all states have adopted some version of these rules. See *Alphabetical List of Jurisdictions Adopting Model Rules*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules/ [<https://perma.cc/HU3X-8XGS>] (last updated Mar. 28, 2018) (listing the date when each state adopted the Model Rules); MODEL RULES OF PROF'L CONDUCT R. 1.6 (Am. Bar Ass'n 2021); MODEL RULES OF PROF'L CONDUCT R. 1.13.

123. MODEL RULES OF PROF'L CONDUCT R. 1.6(a).

124. *Id.* at R. 1.6(b)(1).

125. *Id.* at R. 1.13(b).

126. *Id.*

127. *Id.* at R. 1.13(c).

A lawyer who does not observe these rules may be subject to discipline by the bar in the state where they practice. But why do codes of ethics include confidentiality rules, and why do lawyers and clients need them? Confidentiality rules have been justified in the abstract by reference to the essential role they play in the adversary system of justice and ultimately in democratic societies,¹²⁸ or by relying on the idea that confidentiality is necessary for an effective representation of the client.¹²⁹ Both of these justifications of confidentiality have serious problems. The following subsections will take a brief look at each.

A. *The Adversary System, Democracy, and Justice*

Insofar as we rely on the value of confidentiality to the overall adversary system, we need an explanation for why anyone should care about the adversary system in the first place. Any plausible answer to that question will involve some kind of argument that the adversary system is an essential part of a legitimate democratic system¹³⁰ that, as a matter of fairness and the democratic process, any person is entitled to know what the law says about his or her conduct without placing him or herself at risk of harm for so doing¹³¹ or some similar argument to the same or similar effect. The problem with this answer, as mentioned already in Section III, is that from the point of view of the political system in its entirety, third parties' rights, and especially important rights such as the right to life or the right not to be harmed, count just as much (if not more) than the rights of lawyers and their clients.¹³² So, it is hardly coherent to justify a privilege for the adversary system on grounds of fairness or the value of the democratic system when that involves leaving out other constituencies that are also an essential part of a democratic society.

A further and fundamental mistake of this approach to justifying confidentiality is to assume that, once a social practice (such as

128. See Pepper, *Why Confidentiality?*, *supra* note 122, at 334 (detailing the need for lawyers and their duty of confidentiality in a complex society); see also Freedman, *supra* note 76, at 50 (explaining how lawyers are servants to their clients, rather than the clients' masters in a democratic society).

129. See MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 2 ("A fundamental principle in the client-lawyer relationship is that, in the absence of the client's informed consent, the lawyer must not reveal information relating to the representation).

130. See Freedman, *supra* note 76, at 47 (noting the adversary system in society is the highest point of public interest).

131. See Pepper, *Why Confidentiality?*, *supra* note 122, at 336 (suggesting one ought to have the opportunity to "know the law which governs [his or her] conduct").

132. See *supra* Section III (discussing a lawyer's obligations to third parties).

confidentiality) is justified as a matter of general principle, it is inviolable. But that is incorrect, since any policy or principle is subject to exceptions. It is well-known that laws have an open texture, in that they cannot countenance all the particulars of each case they will be applied to.¹³³ Therefore, sometimes exceptions to the rule of law arise that have to be dealt with.¹³⁴ The same is true of all social practices, not just legal practice. As H.L.A. Hart pointed out, the rule prohibiting breaking a promise may be broken in certain circumstances.¹³⁵ Hence, for the corporate lawyer faced with potential violations of moral obligations by their client and with duties to third parties, it is small comfort to be told that the rule of client confidentiality can be justified in the abstract as good for democracy (or some similar justification). The lawyer wants to know what to do in his or her particular situation, and relying blindly on an immutable confidentiality rule is not always going to yield the morally right result because the particular case may just be one of the exceptional circumstances.¹³⁶ In cases like Merck and Theranos, not only are the situations exceptional because of the stringency of third parties' rights involved, but it is *easy* to see that they are exceptional because of the egregiousness of corporate conduct.

Frederick Schauer has observed that, if we justify legal rules based on considerations of justice or equity, it is actually misleading to speak of exceptions to those rules in particular cases:

For if a rule will be applied only when it is consistent with justice, then it turns out once again that talk of exceptions, or of the power to create them, is largely distracting. The power to create an exception to a rule when required by justice is equivalent to the power to do justice *simpliciter*.¹³⁷

If Schauer is right, and if we insist on justifying confidentiality by something like its role in the democratic system (or similar ideas), then cases in which patients' rights are violated by medical companies are not even exceptions to the confidentiality rules, but cases that straightforwardly mandate the lawyer to apply fundamental principles of democracy or justice

133. See H.L.A. HART, *THE CONCEPT OF LAW* 128 (2d ed. 1994).

134. See, e.g., Frederick Schauer, *Exceptions*, 58 U. CHI. L. REV. 871, 871 (1991) ("Exceptions to statutes, regulations, common law rules, and constitutional tests are of course everywhere in the law . . .").

135. Hart, *supra* note 134, at 139.

136. Cf. J.J.C. Smart, *Extreme and Restricted Utilitarianism*, 6 PHIL. Q. 344, 348–49 (1956) (critiquing rule utilitarianism).

137. Schauer, *supra* note 135, at 895.

directly to his particular case, which entails taking patients' rights into account from the get-go. On this view, all the work is done ultimately by the principles that are said to underlie confidentiality, and not by confidentiality as such. We are therefore brought back, by a different route, to the idea that a theory that seeks to justify confidentiality on the basis of higher political or ethical principles is ultimately self-undermining, since by its own lights it will have to consider stakeholders other than solely the lawyer's client. The ultimate principles that are held to justify confidentiality will turn out to not support a view of confidentiality that consists only in loyalty to the client to the exclusion of everyone else. It is actually hard to see how principles of democracy or justice could possibly yield any other kind of result.

B. *Confidentiality Rules and the Lawyer-Client Relationship*

Confidentiality rules are often justified based on the utility of confidentiality to clients and lawyers, without essential reliance on any higher-order social or political justification. One can spell out this traditional view in various ways. Following Deborah Rhode, we can say that this type of justification boils down to two main ideas: "first, that any risk of disclosure would deter clients from freely confiding in counsel; and second, that the costs of such a chill on clients' access to legal assistance would outweigh any societal benefits."¹³⁸

Before taking up the question whether this view of confidentiality is correct, it is worth pointing out that although the concept of confidentiality is nowadays taken for granted in the practice of law (to the extent that the practice would look unimaginable without it to most lawyers), this concept is far from being an a-historical given, let alone anything analytic in the idea of law practice itself. As recent scholarship has shown, confidentiality as we know it today is a relatively recent development. Ray Patterson has adduced convincing evidence that a shift toward loyalty to the client as the lawyer's primary duty (to the detriment of the duty of candor to the court and of a duty of fairness to third parties) occurred in the second half of the 19th century.¹³⁹ In the earlier half of the 19th century, lawyers' duties to their clients were just as important as their duties to others.¹⁴⁰ Early

138. Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 613 (1985).

139. L. Ray Patterson, *Legal Ethics and the Lawyer's Duty of Loyalty*, 29 EMORY L. J. 909, 912 (1980).

140. *Id.*

authorities on legal ethics, such as David Hoffman and George Sharswood, did not even consider confidentiality to be an ethical duty of the lawyer and did not dwell much on the topic (Hoffman did not address it at all).¹⁴¹ The Pennsylvania Supreme Court, in a 1845 case,¹⁴² deemed it “a popular, but gross mistake” to suppose that a lawyer owes fidelity solely to her client.¹⁴³ Confidentiality made its first appearance in a code of ethics in Alabama in 1887.¹⁴⁴ Since then, it has been a staple throughout the Canons of Professional Ethics, the Model Code of Professional Responsibility, and all the way up to the contemporary Model Rules. According to Patterson, once the lawyer’s duty of loyalty to the client became prominent in the 19th century, it was inevitable that confidentiality, as one aspect of the duty of loyalty, would follow quickly along.¹⁴⁵ On Patterson’s analysis, confidentiality underwent a transformation from initially being just a right of the client as part of the attorney–client privilege to being “a moral obligation of the lawyer.”¹⁴⁶ Consequently, one of the main reasons why this new idea of confidentiality as the lawyer’s duty became successful over time is that lawyers found it convenient to evade responsibility to third parties by using their duty of confidentiality as a protective shield.¹⁴⁷

Lloyd Snyder has also noted that “[c]onfidentiality, as a rule of professional ethics, is of recent origin.”¹⁴⁸ Snyder places the first unequivocal formulation of a duty to preserve a client’s confidences in 1937, when the ABA clarified the 1927 version of Canon 37 of the 1908 Canons.¹⁴⁹ As Snyder notes, for 400 years the desideratum that the client is to be forthcoming with their lawyer had only justified the evidentiary attorney–client privilege, but by “the middle of the 20th century, for some unstated reason, the same rationale required that attorneys withhold disclosure of an expanded inventory of information.”¹⁵⁰

The fact that confidentiality as currently understood has a history should not be insignificant to those who try to place it on a pedestal, as the

141. *Id.* at 914, 941.

142. *Rush v. Cavanaugh*, 2 Pa. 187 (1845).

143. Patterson, *supra* note 140, at 928 (quoting *Rush v. Cavanaugh*, 2 Pa. 187, 189 (1845)).

144. *Id.* at 914.

145. *Id.* at 914–15.

146. *Id.* at 915.

147. *Id.* at 915–16, 958.

148. Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary*, 15 *GEO. J. LEGAL ETHICS* 477, 479 (2002).

149. *Id.* at 487–88.

150. *Id.* at 491.

lackluster pedigree of the concept shows that the practice of law seemingly survived for most of history without it.

But apart from this historical *caveat*, the idea that confidentiality is essential to the lawyer-client relationship because it encourages clients to utilize legal services and to be straightforward with their lawyers is questionable. An initial difficulty is that clients may not have a precise knowledge or understanding of confidentiality rules. In the late 1980s, Fred Zacharias conducted an empirical survey of sixty-three attorneys and 105 lay persons in Tompkins County (New York) which suggested, among other things, that what drives client behavior is general trust in lawyers, not the strict confidentiality regime mandated by the rules.¹⁵¹ While Zacharias' study is inapplicable to sophisticated corporate clients, it does tend to show that the contribution of confidentiality rules to client candor is not as strong as proponents of the traditional justification of confidentiality have supposed.¹⁵²

Of more relevance to the corporate context is the observation that clients need lawyers in many instances because of the complexity of the legal issues that they face.¹⁵³ In such circumstances, it may be sufficient for the lawyers to ask for all the relevant information (without any promise of confidentiality) for the client to be sincere.¹⁵⁴ In many cases, and in particular in commercial transactions, confidentiality may be superfluous, because if the client is not sincere with their attorney, the client would not be able to achieve their goals.¹⁵⁵

Moreover, and as Daniel Fischel has argued, confidentiality rules come with their own costs to the entire judicial system.¹⁵⁶ Since decision makers (e.g., judges or juries) do not receive an independent assessment of a case, but instead two opposed partisan views filtered through the lens of the parties' attorneys, the decision process incurs costs associated with arriving at the truth.¹⁵⁷ In this system, confidentiality makes it harder for parties with nothing to hide to distinguish themselves from parties who rely on

151. Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 379, 386 (1989).

152. *Id.* at 396.

153. See Subin, *supra* note 74, at 1163 (contemplating the intuition that "most clients feel the need for professional legal services to help them with the complexities of [the American] legal system").

154. *Id.*

155. *Id.* at 1163-64; see also Samuel D. Thurman, *Limits to the Adversary System: Interests that Outweigh Confidentiality*, 5 J. LEGAL PROF. 5, 9 (1980) (noting it may be in the best interest of most clients to converse freely with their attorneys).

156. Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 18 (1998).

157. *Id.* at 18-19.

confidentiality to dissimulate.¹⁵⁸ Parties who have nothing to hide will therefore spend more resources in order to distinguish themselves, and decision makers will have to expend more effort in finding out who is right.¹⁵⁹ On the whole, the benefits of confidentiality to the class of clients in its totality tend to balance out, so that there is no net gain.¹⁶⁰ In fact, according to Fischel, it is mostly the legal profession, and not society as a whole, who stands to benefit from strict confidentiality rules, because such rules increase the cost of legal services.¹⁶¹

We have so far looked at some of the criticism that has been leveled at the idea that confidentiality rules are essential to the lawyer-client relationship. But, even supposing that this justification of confidentiality was actually empirically sound, a strict confidentiality regime such as the one currently on the books is bound to succumb to the problem of exceptions, which affected the broader political justification of confidentiality as well. Hard and fast confidentiality rules have been criticized precisely from the perspective that in certain cases, they reach morally incorrect results and prevent people at risk of harm from obtaining necessary help.¹⁶²

It is to be emphasized again that some cases in the medical company context will be easy, so that it will be very clear what the moral obligations of attorneys are. In those cases, the fact that confidentiality can perhaps be justified as a policy cannot outweigh the urgency of the attorneys' ethical obligations to third parties at risk. The morally obvious character of situations where people's lives are at stake has been noted by commentators more than once. Consider the infamous case of *Spaulding v. Zimmerman*.¹⁶³ In *Spaulding*, the plaintiff, a passenger in the defendant's car, suffered injuries as a result of a collision between the defendant's car and another vehicle.¹⁶⁴ The defendant's lawyer later came to have knowledge that the plaintiff had an aorta aneurism (which might have been caused by the car accident), while

158. *Id.*

159. *Id.*

160. *Id.* at 18.

161. *Id.* at 3; cf. Subin, *supra* note 74, at 1154 (remarking ironically: "it is ethically inappropriate for the Model Rules to protect attorneys from wrongful actions of the client while protecting no one else—except, of course, the prospective victims of that commonly encountered client, the homicidal maniac").

162. Subin, *supra* note 74, at 1164; Roger C. Cramton & Lori P. Knowles, *Professional Secrecy and Its Exceptions: Spaulding v. Zimmerman Revisited*, 83 MINN. L. REV. 63, 78 (1998).

163. *Spaulding v. Zimmerman*, 116 N.W.2d 704 (Minn. 1962).

164. *Id.* at 348.

the plaintiff himself was not aware of this condition.¹⁶⁵ The defendant's attorney did not disclose to the plaintiff that he had a life-threatening condition, and the case settled.¹⁶⁶ In a discussion of *Spaulding*, Roger Cramton and Lori Knowles note that "[g]iven agreement about the primacy of human life as a value, the moral issue in *Spaulding* should be an easy one for lay people and moral philosophers alike."¹⁶⁷

In *Spaulding*, the plaintiff to whom the lawyer owed a moral duty of disclosure was a readily identifiable person, which perhaps makes the case even more egregious than that of corporate attorneys working for medical companies, where the patients who are at risk of harm are ordinarily not known in advance to the lawyer (or anyone else). But even in the latter case, the moral obligation to prevent harm at low cost to oneself is the same, because it is grounded in patients' right to life or the right not to be harmed, just like the defendant's lawyer in *Spaulding* had an obligation to tell the plaintiff that he was in danger because the plaintiff had a right to life. The fact that corporate lawyers cannot specifically name the people who will be affected by a company's medical products is morally irrelevant.¹⁶⁸

As a matter of principle, it would be disingenuous to argue that potential victims of corporate harm cannot be protected by disclosure rules because these victims are a non-identifiable amorphous mass. This objection makes little sense in the corporate context precisely because the corporate client is just as amorphous as the potential victims. If the non-identifiable character of the victims is sufficient to avoid lawyers' legal or moral obligations to them, how is it that the abstract notion of the corporation is a sufficiently identifiable subject of the lawyers' confidentiality obligations?

This interpretation is borne out by the scant, but very pertinent, case law on the topic. Thus, in *Balla v. Gambro*,¹⁶⁹ the Supreme Court of Illinois held that the death or serious bodily injury exception applies in a case where a lawyer disclosed information about his employer company's purchase (with intent to sell) non-FDA-compliant dialyzers.¹⁷⁰ The court recognized that Rule 1.6 protected "the lives and property of citizens," and, deeming that

165. *Id.* at 349-50.

166. *Id.* at 350.

167. Cramton & Knowles, *supra* note 163, at 87.

168. *Cf.* Matthew K. Wynia, *Breaching Confidentiality to Protect the Public: Evolving Standards of Medical Confidentiality for Military Detainees*, 7 AM. J. BIOETHICS, 1, 2 (2007) ("[I]s being 'identifiable' a morally legitimate basis for getting extra attention?").

169. *Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991).

170. *Id.* at 109, 112-13.

the seizure by the FDA of the dialyzers showed that their use would cause death or serious bodily injury, held that the lawyer was required by Rule 1.6 to disclose information about the purchase.¹⁷¹ The court was not concerned that the potential victims of the defective dialyzers were unknown at the time of the purchase. It correctly deemed this to be irrelevant to its decision.

A comparison between attorneys and other professions in which confidentiality is highly valued tends to confirm the conclusion that lawyers should be subject to mandatory disclosure obligations in some circumstances. Other professions have mandatory reporting obligations in certain situations. Medical personnel have duties to reveal confidential information to protect third parties from harm, and sometimes legal obligations to report in order to protect the public (for instance, duties to report child abuse, gunshot wounds, or certain kinds of diseases).¹⁷² Likewise, courts have sometimes recognized a duty for psychiatrists to reveal confidential information about their client when the client is a threat to another person.¹⁷³ Public accountants, under the Private Securities Litigation Reform Act of 1995, have to implement procedures to detect illegality when performing company audits. If they discover anything illegal, they have to report up the ladder to management and to the board of directors; and in case the board does not disclose to the SEC, the accountants are required to report to the SEC themselves.¹⁷⁴ Given these precedents, it is not clear why lawyers should be excepted from mandatory disclosure rules. As we shall see shortly, some states actually do require disclosure in their confidentiality provisions.

VI. STEPS FORWARD

Model Rule 1.6(b)(1) permits an attorney to disclose confidential information to prevent reasonably certain death or substantial bodily harm. If the arguments in the previous sections are correct, the Rule does not go far enough. I have argued that lawyers are under a moral obligation to prevent harm to third parties when doing so comes at little cost to themselves. Since this obligation is not outweighed by lawyers'

171. *Id.* at 108–09.

172. Nancy J. Moore, *Limits to Attorney-Client Confidentiality: A Philosophically Informed and Comparative Approach to Legal and Medical Ethics*, 36 CASE W. RESV. L. REV. 177, 192 (1985).

173. *Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334, 347 (Cal. 1976).

174. Richard W. Painter & Jennifer E. Duggan, *Lawyer Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. REV. 225, 255 (1996).

confidentiality obligations to clients, the Model Rules should reflect that fact and require (not merely permit) lawyer disclosure in cases of potentially serious bodily harm. This conclusion is not novel among advocates of the rights of the public as against misconduct of lawyers' clients.¹⁷⁵ The preceding arguments are restricted to cases of serious physical harm caused by medical companies, and it remains to be seen whether the same kinds of argument would justify lawyer disclosures in other contexts, such as various kinds of commercial activities that pose risks of harm to third parties.¹⁷⁶

Certain states have already adopted confidentiality exceptions that conform to an adequate moral standard. For instance, Rule 1.6(c) of the Illinois Rules of Professional Conduct states: "A lawyer *shall* reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."¹⁷⁷ Similar provisions appear, for example, in the Rules of Professional Conduct of Washington State and of Iowa.¹⁷⁸ The language of "substantial bodily harm" is sufficiently broad to capture cases like Vioxx and Theranos. The 1998 internal study conducted by Merck showed a much higher risk of heart problems for patients taking Vioxx than patients using other sorts of arthritis medication. On any reasonable account of what constitutes "substantial bodily harm," an increased risk of cardiovascular events will qualify. Similarly, reporting incorrect blood test results to patients, as Theranos did, can have serious consequences for their health, because patients rely on blood tests to make decisions about other medications they are taking, the diet they are on, medical procedures they decide to undergo, and so on.

Some states condition lawyer disclosure on the criminality of the client's conduct. Thus, the corresponding Arizona rule states: "A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary to prevent the client from committing a criminal act that the lawyer believes is

175. See e.g., Subin, *supra* note 74, at 1172–73 ("[A]n attorney should have a legal duty to disclose information obtained during the course of representation in order to prevent serious harm.").

176. I believe that similar arguments would actually apply to those cases as well. In order to avoid certain kinds of complexities and focus on the basic moral arguments; however, the view advocated in this paper is restricted to what I have called "easy" cases.

177. ILL. RULES OF PROF'L CONDUCT R. 1.6(c) (emphasis added).

178. WASH. RULES OF PROF'L CONDUCT R. 1.6(b)(1); IOWA RULES OF PROF'L CONDUCT R. 32:1.6(c). The ABA provides a state-by-state comparison chart as to how Model Rule 1.6 has been modified by each state. *Jurisdictional Rules Comparison Charts*, ABA, https://www.americanbar.org/groups/professional_responsibility/policy/rule_charts/ [https://perma.cc/7NWJ-5FL5].

likely to result in death or substantial bodily harm.”¹⁷⁹ The Arizona rule resembles a suggestion of Harry Subin, who, while advocating for lawyers’ legal obligation to reveal confidential information in order to prevent serious harm, defines “harm” as “any conduct that would constitute a felony and the continuing consequence of any conduct that would constitute a felony.”¹⁸⁰

The problem with the Arizona rule, as well as with Subin’s proposal, is that, by interposing an intermediate inquiry into the criminal character of the client’s behavior, they incorrectly shift the focus of the lawyer’s duty back onto the client, thereby concealing the true source of the lawyer’s moral obligation to disclose. If the arguments in this paper are correct, the origin of the lawyer’s duty to disclose is in the rights of third parties to not be harmed, rather than in the illegality of the client’s conduct. It is true that when clients harm third parties, they will often be engaged in some form of fraud or illegal conduct. Theranos is one such example. But that is not always the case. In Merck’s marketing of Vioxx, there is no clear case of fraud perpetrated by Merck. But even in the cases where the companies are not committing fraud or any other illegality, lawyers will still have a moral obligation to disclose information if the company does not do it of its own accord. None of the arguments presented in this paper relied on the illegality of the client’s conduct, as that is not where lawyers’ duties spring from.

The latter point is most obvious in basic cases such as saving someone from drowning and the like: ordinarily, how the drowning person came to be placed in that position is irrelevant to whether one has a duty to rescue. But the fact that we are dealing here with corporations does not essentially change this aspect of the situation. Whether the company acted negligently, recklessly, or intentionally in endangering others is irrelevant to the question whether lawyers have a duty to disclose once they are apprised of the relevant information. The only question at that point is whether or not the company is willing to do something about it.

A further problem with the criminal conduct approach is that lawyers will sometimes be put in the position to assess the criminality of their client’s conduct where that issue is not clear. In some cases, it is far from certain whether something constitutes a felony or some other kind of criminal

179. ARIZ RULES OF PROF’L CONDUCT R 1.6(b); *see also* N.J. RULES OF PROF’L CONDUCT R. 1.6(b)(1) (using a very similar rule to Arizona).

180. Subin, *supra* note 74, at 1173.

act.¹⁸¹ Especially in corporate cases, it will often be easier to assess the likelihood of harm to other people than the criminal character of corporate behavior.

It might be objected, however, that it will be often very difficult for a lawyer to form an opinion as to the likelihood of harm to third parties, especially when forming such an opinion involves assessing specialized scientific information. The objection is pertinent as far as it goes. The lawyer certainly cannot be asked to have the same degree of scientific knowledge as an expert. However, in some cases the evidence will be clear enough for the lawyer to form a reasonable opinion as to the potential harm their client might be causing. Note that the ABA Model Rule 1.6 and its state counterparts require only reasonable belief, not certainty, before a lawyer is permitted or required to disclose.¹⁸² The lawyer may form such a reasonable belief not only from reading a scientific report, but from other sources of evidence as well. The lawyer's conversations and interactions with the company's executives and personnel will also contribute to the process of belief formation. Likewise, if the corporate client deviates significantly from industry practice in certain areas, that may be further evidence that something is amiss. Corroborating evidence from similar reports or other sources may also play a role. Given all the evidentiary sources that will ordinarily be taken into account by a lawyer in forming a reasonable opinion as to corporate conduct, it would be an oversimplification to picture a lawyer having to make a decision whether to disclose confidential client information based solely on perusing one report filled with scientific jargon (although that may also happen sometimes). The rules of professional responsibility place no restrictions on *how* lawyers may arrive at a reasonable belief about the client's harmful conduct, so lawyers will go about that process in the same way one forms reasonable beliefs about anything else, namely by examining the strength of the evidence, the trustworthiness of the evidentiary sources, and so on.¹⁸³

181. Incidentally, it is not obvious why Subin's proposed definition of "harm" restricts it to felonies. Antecedently, there is nothing preventing misdemeanors from having serious harmful effects on third parties. The same goes for tortious behavior.

182. MODEL RULES OF PROF'L CONDUCT R. 1.6.

183. None of this is to deny that there will be cases in which the lawyer may defer to the judgment of corporate executives. Sometimes the initial evidence of potential harm may be explained away, or it might not warrant the conclusions lawyers have drawn from it. Such cases are best described as lawyers ultimately *not* forming a reasonable belief about substantial harm to third parties.

For the reasons stated above, it would be advisable to adopt something like the Illinois, Washington, and Iowa exception to confidentiality, which does not depend on the legal character (whether criminal, tortious or in any other way illegal) of the client's conduct. This is also one of the reasons why Model Rule 1.13 is not adequate in this context, since it conditions the corporate attorney's up the ladder reporting on a person associated with the company acting, intending to act, or refusing to act in a manner that is "a violation of a legal obligation to the organization, or a violation of law that reasonably might be imputed to the organization."¹⁸⁴ There are at least two other reasons why Rule 1.13 is inadequate. First, it does not mandate that the attorney go outside the organization and report to the authorities. The Rule is only permissive, so that it does not reflect the attorney's moral obligations. Second, the up the ladder reporting envisaged in Rule 1.13 does not do justice to the urgent character of medical cases, where people's lives are at stake. In a situation where a corporate attorney has knowledge that the organization is doing something that is putting people's health at significant risk of harm, going through all the steps in Rule 1.13 would be too cumbersome, and third parties could be impacted significantly while the organization decides on what to do. To be effective, Rule 1.13 should provide that in such cases an attorney should be obligated to talk to the highest authority in the organization; and if that authority does not act within a reasonable period given the urgency of the situation, the lawyer should be required to disclose to the proper outside authority. In the case of medical companies, the regulator to report to would be the FDA.

So far, I have assumed that Rule 1.6, at least in its Illinois, Washington, and Iowa incarnation (and other states that follow this model) does capture the correct moral standard to be applied to lawyer disclosures in emergency situations. But given the general character of the rule, this may not be so clear. Unlike the court in *Balla v. Gambro*,¹⁸⁵ other courts might not be willing to interpret the language of the rule in such a way as to mandate disclosures when public safety is at risk, but only when a specific individual could be harmed. The possibility of such an interpretation represents yet another reason for attorneys to not comply with their moral responsibilities. Therefore, the rule should be modified to provide explicitly that it does apply in cases of harm to public safety. It should be made clear that there need not be an identifiable subject that would suffer reasonably certain

184. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (AM. BAR ASS'N 2021).

185. *See Balla v. Gambro, Inc.*, 584 N.E.2d 104 (Ill. 1991);

death or substantial bodily harm, and that it is sufficient for there to be *someone* who would be so affected. After all, for disclosure purposes, there does not seem to be any legal or moral ground for distinguishing between “there is an 80% probability that Johnny [a specific person] will be harmed” and “there is a 80% probability that either patient₁, or patient₂, or . . . patient_n will be harmed.”¹⁸⁶

One important issue that will have to be addressed in future research concerns the appropriate incentives for attorneys to comply with the disclosure regime advocated in this Article. Currently, attorneys do not seem to have a lot of protection against retaliation by the corporation after they disclose confidential information to the public. The court in *Balla* refused to extend the tort of retaliatory discharge to in-house counsel.¹⁸⁷ According to the court, the lawyer in that case was not faced with a choice between, on the one hand, reporting his client’s conduct and potentially losing his job, and on the other hand not reporting in order to salvage his position. The lawyer was simply required to report under Illinois’ Rule 1.6—end of story.¹⁸⁸ The court also voiced worries that permitting a lawyer to sue their employer for retaliatory discharge would have a “chilling effect” on the client–lawyer relationship, making the client less likely to ask the lawyer for advice in certain sensitive matters.¹⁸⁹

Similar kinds of problems arise for corporate attorneys under Section 806 (the Whistleblower Provision) of the Sarbanes-Oxley Act, which on the face of it offers whistleblower protection to public company employees, including lawyers.¹⁹⁰ Given the breadth of the at-will employment doctrine adopted in many states, lawyers face serious obstacles in bringing retaliatory discharge actions against their employers.¹⁹¹ It seems that this is a generalized problem that affects in-house counsel in various areas of the law.

186. I am using “80%” merely for illustrative purposes. In order to disclose, the lawyer needs to have a reasonable belief that substantial harm will be caused. The reasonable belief standard is inherently untranslatable into precise percentages.

187. *Balla*, 584 N.E.2d at 109.

188. *Id.*

189. *Id.* at 110.

190. Jisoo Kim, *Confessions of a Whistleblower: The Need to Reform the Whistleblower Provision of the Sarbanes-Oxley Act*, 43 J. MARSHALL L. REV. 241, 252 (2009); see also *Wadler v. Bio-Rad Lab’s, Inc.*, 916 F.3d 1176, 1191 (9th Cir. 2019) (illustrating a successful case of an attorney bringing a whistleblower protection claim under the Sarbanes-Oxley Act).

191. Kim, *supra* note 192, at 252–53.

It is beyond the scope of this paper to provide a general solution to this issue. It can only be suggested that states should adopt robust statutes protecting lawyers against retaliatory discharge in cases involving safeguarding public health and safety. These statutes should include both reinstatement provisions and monetary compensation for lawyers who suffer adverse effects after disclosing confidential information. Other alternatives are also possible but are better left for another occasion.

VII. CONCLUSION

The question whether lawyers have duties to third parties that may be placed at risk of harm by the actions of the lawyers' clients has received a lot of attention in the professional responsibility literature. In this paper, I have focused on the case of medical companies, and have distinguished two main questions that need to be addressed in this context. The first is whether lawyers do, as a matter of fact, have duties to third parties. Many authors simply assume this to be the case, without arguing for this assumption. The second question is whether duties to third parties, in case they exist, may be overridden by other considerations. As to the first question, I have argued that corporate lawyers do have moral obligations to third parties who are at risk of substantial harm from products marketed by the medical companies those lawyers provide legal advice for. The argument relies on common sense morality, more specifically on the idea that one has a duty to prevent harm to others when doing so comes at little cost to oneself. The moral obligations of corporate lawyers in the medical context takes the form of required disclosures to the regulatory authorities in case the company itself decides to ignore potential harm to patients. The two examples that I have taken to illustrate the kind of case where this duty might arise were the release and subsequent withdrawal of the anti-inflammatory drug Vioxx by the pharmaceutical company Merck, and the marketing of a deficient blood testing device by the biotech startup Theranos. I have defended the existence of corporate lawyers' moral obligations to third parties against arguments to the contrary based on the notion that there is no duty to rescue, and that failing to act cannot be a cause of harm.

Importantly, the existence of lawyers' obligations to disclose does not depend on the corporation's degree of culpability. Whether the corporation acted with negligence, recklessly or intentionally in endangering patients is irrelevant. What matters is whether the company is disposed to inform the

public once it is in possession of material information that could affect patients' choices and behavior. If there is no will to disclose at the higher corporate echelons, lawyers with knowledge of such material information who have a reasonable belief that patients will be harmed have a moral obligation to alert the industry regulators, in particular the FDA.

Having established that lawyers do have moral obligations to third parties, I have then argued that it is not plausible that these obligations are overridden by other considerations. The reason is that the lawyers' obligations in the medical context are grounded in patients' rights, such as the right not to be harmed or the right to life. Since these are very stringent rights, it is unlikely that they can be infringed in this instance. Therefore, lawyers will have to comply with their moral obligations to patients, should it be necessary.

One important defense of the permissibility of lawyers' noncompliance with their duties to third parties relies on the lawyers' duty of confidentiality to their clients. I have shown, however, that confidentiality is not a sufficiently robust concept to shield lawyers from what they are morally required to do. Some states, such as Illinois or Washington, have already implemented a version of Model Rule 1.6 that requires lawyers to disclose confidential client information in order to prevent death or substantial bodily harm, which is the correct result according to the view advocated in this paper.