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When the State Demands Disclosure

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The obligation to provide certain types of information to government authorities—reporting child abuse, say, or insurance fraud—is proliferating. Are these laws enforceable against lawyers who obtain the sought-after information in the course of representing a client? This Article sets out to answer exactly that question. It begins by explaining why it is wrong to approach the question by balancing the policies that underlie attorney-client confidentiality against those underlying reporting statutes. Such an approach fails to grasp the essential nature of the question, which is one of legislative power and legislative intent. This Article is the first to offer an authoritative account of constitutional constraints on the power of legislatures to impose disclosure obligations on lawyers. Demonstrating that these are surprisingly few, the Article then asserts that in most cases the task remaining for courts will be one of statutory interpretation: Did the legislature intend for the disclosure statute to apply to lawyers and supersede the confidentiality obligation? And what should courts do when the answer is unclear?

I. INTRODUCTION

When a statute refers to “any person,” does it include those persons who are lawyers? To ask such a question is to invite the inevitable joke about the species to which lawyers belong, but a particular type of statute makes the question a bit more difficult than it at first appears. The statutes I am concerned with require individuals to provide certain types of information to government officials. Scattered throughout disparate regulatory schemes seeking to combat tax evasion, insurance fraud, child abuse, spousal abuse, elder abuse, and potentially more, these

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1. For example: Why won’t sharks attack lawyers? Professional courtesy. And: What is the difference between a lawyer and a vampire? The vampire only sucks blood at night.

2. The Internal Revenue Code requires particularized reporting from any person who receives in the course of trade or business a cash payment of more than $10,000. 26 U.S.C. § 6050I (2006).

3. See, e.g., Tex. Ins. Code § 701.051; Neb. Rev. Stat. § 44-393 (2010). South Carolina also has a mandatory reporting act that states “any person, insurer or authorized agency having reason to believe that another has made a false statement or misrepresentation or has knowledge of a suspected false statement or misrepresentation shall, for purpose of reporting and investigation, notify the Insurance Fraud Division of the Office of the Attorney General of the knowledge or belief and provide any additional information within his possession relative thereto.”

disclosure laws define, with varying degrees of precision, the scope of the information the government is seeking and then make punishable the failure to provide it.\(^5\) These required disclosures are interesting for any number of reasons;\(^9\) my concern here is the application of these statutes to lawyers who obtain the sought-after information in the course of representing a client. Such a scenario implicates the duty to protect client confidences and raises questions about the limits, if any, to legislative interference with one of the mainstays of the lawyer-client relationship.

The American Bar Association’s Model Rules of Professional Conduct sidestep these questions.\(^10\) As of 2002, Rule 1.6 (b)(6) expressly permits attorneys to reveal confidential client information to comply with

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5. K. and the ethical obligation of confidentiality).

6. The Attorney-Client Relationship In A Post 9/11 World number of reasons; failure to provide it.

7. The Financial Action Task Force, “a non-governmental organization charged with proposing and advocating internationally uniform policies for combating money laundering,” has recom-


10. The American Bar Association “is the world’s largest professional organization, with nearly 400,000 members.” STEPHEN GILLERS, ROY D. SIMON & ANDREW M. PERLMAN, REGULATION OF LAWYERS: STATUTES AND STANDARDS xv (2010). Although “a voluntary, private organization with no government affiliation,” id. at 3, the ABA has emerged as the profession’s single most influential source of model codes governing lawyer conduct, aptly described as “law-giver for the practice of law.” Ted Schneyer, The ALJ’S Restatement and the ABA’S Model Rules: Rivals or Complements?, 46 OKLA. L. REV. 25, 27 (1993). This is because the ABA’s Model Rules of Professional Conduct have been overwhelmingly adopted—sometimes with very little if any revision—by the highest court of each state, the entities responsible for adopting the legally binding rules of conduct that govern the jurisdiction’s lawyers. See GILLERS, SIMON & PERLMAN, supra at 3 (noting that “[f]orty-nine states and the District of Columbia have adopted the Model Rules numbering system and most of the language suggested by the Model Rules”); see also Benjamin H. Barton, An Institutional Analysis of Lawyer Regulation: Who Should Control Lawyer Regulation – Courts, Legislatures, or the Market? 37 GA. L. REV. 1167 (2003) ( noting that “state supreme courts govern the regulation of lawyers in all fifty states”); RONALD D. ROTUNDA AND JOHN S. DZIENKOWSKI, LEGAL ETHICS: THE LAWYER’S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 5–6 (2009) (describing similar success with previous versions of the ABA model codes). For discussion of “the de facto delegation of public lawmakers to private groups,” see Ted Schneyer, Professionalism as Bar Politics: The Making of the Model Rules of Professional Conduct, 14 LAW & SOC. INQUIRY 677, 679 (1989).
“other law” or court order. However, the Model Rules don’t make such disclosures mandatory, and attorneys seeking guidance on the scope and operation of this seemingly gaping exception to the duty of confidentiality won’t find it in the commentary. In addressing this provision the drafters have simply said that “[o]ther law may require that a lawyer disclose information about a client. Whether such a law supersedes 1.6 is a question of law beyond the scope of these rules.” This Article seeks to answer precisely that question: When and why do other sources of law trump an attorney’s obligation to maintain client confidences?

There have been virtually no attempts to answer this question in any sort of systematic way. There is ample scholarly commentary honing in on a single source of “other law” that imposes disclosure obligations on attorneys, decrying or defending particular mandated disclosures on various policy grounds. Some commentators haven’t seen the treatment of

11. MODEL RULES OF PROF’L CONDUCT R. 1.6 (b)(6). Fifteen jurisdictions have adopted this provision: Arkansas, Idaho, Indiana, Iowa, Louisiana, Minnesota, Mississippi, Montana, Nebraska, Nevada, South Carolina, South Dakota, Utah, Virginia, and Wyoming. Twenty jurisdictions have rules that are substantially similar, with minor modifications to wording: Arizona (requiring court order to be final and court to be of competent jurisdiction); Delaware (explaining in commentary that the “court order” exception includes those instances when attorney is called as a witness); District of Columbia; Florida; Georgia; Hawaii; Illinois; Kansas (unusual comment); Kentucky (court order only); Maine; Maryland; Massachusetts; Michigan; New Jersey (other law only); New York; North Carolina; Ohio; Oregon; Texas; Vermont (must reveal when required by ethical rules; may reveal when required by law or court order).

12. Oklahoma requires attorneys to disclose when required by law or court order, as does Tennessee.

13. MODEL RULES OF PROF’L CONDUCT R. 1.6 cmt.12.

14. The ethical duty of confidentiality is much broader than the attorney-client privilege, an evidentiary rule that applies only in formal legal proceedings. See, e.g., Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1145 (1985) (“the attorney-client privilege is a rule of evidence which applies only in judicial proceedings. Until that occurs the ethical rules can—and, as we shall see, do—expand the privilege’s protection, requiring lawyers to keep confidential a broad range of communications that a court could order disclosed if the issue arose before it. Thus, in many instances the law of confidentiality functions according to whether anyone asks a court to order a communication disclosed. Since, moreover, virtually all legal business is conducted outside of the courts, these “subservient” rules in fact influence attorney behavior far more than the “dominant” attorney-client privilege.”). See also Alison Beyea, *Competing Liabilities: Responding to Evidence of Child Abuse that Surfaces During the Attorney-Client Relationship*, 51 Me. L. REV. 269, 281–82 (1999) (discussing that because the evidentiary rules of privilege only address the in-court compulsion of testimony, the evidentiary rules have no bearing on disclosure of abuse to civil authorities); State v. Macumber, 544 P.2d 1084 (Ariz. 1976); cf. Jean Fleming Powers, *Going Too Far To Achieve Harmony*, 41 S. TEX. L. REV. 203, 207 (1999) (suggesting that the evidentiary rule of attorney-client privilege, or at least a court order concluding that the privilege does not protect material from disclosure, is itself the “other law” that might require disclosure).

“other law” in 1.6 as particularly problematic; illustrative is the approach of one professional responsibility textbook, which simply says that attorneys must look to this other law to determine when they must disclose. This endeavor, however, turns out to be considerably more complicated and fraught with difficulty than one might assume.

Consider New York Public Health Law § 4143, which requires any person who knows of a death that has occurred without medical attendance to report the death to the county coroner or medical examiner; violations are misdemeanor offenses punishable by fine or imprisonment. This provision was plucked out of statutory obscurity when it was used as the basis of a criminal prosecution of an attorney who had failed to disclose a confidential client communication coming within the four corners of the statute. The famous “buried bodies” case, as it is often described, begins with the appointment of Frank Armani and Francis Belge to represent Robert Garrow on charges arising from the stabbing of a young man named Phillip Domblewski. In the course of this representation, Garrow told his attorneys that he had kidnapped, raped, and murdered two young women who had gone missing shortly before Domblewski’s death. Armani and Belge elicited further information from Garrow about where he had hidden the bodies, and then went to confirm that the gruesome story was true. The attorneys found and photographed both bodies, revealing their discovery to no one, even as law enforcement authorities continued to search for the missing teenagers. About a month afterwards, during plea discussions with the district attorney in the Domblewski case, the attorneys suggested that they could help police find the bodies of the young women in exchange for favorable treatment for Garrow. The offer was rejected, and the plea negotiations terminated. The attorneys continued to maintain their silence, even as the father of one of the women approached Armani directly and pleaded for information about his daughter. When some college students accidentally discovered the bodies some months later, authorities were still unable to connect the crimes to Garrow. The information did not become public

16. Lisa Lerman and Phillip Schrag, Ethical Problems in the Practice of Law 208 (2008)
22. These additional details, bizarrely enough, were obtained through the attorneys’ use of hypnosis. See Lloyd Snyder, Is Attorney-Client Confidentiality Necessary?, 15 Geo. J. Leg. Ethics 477 (2002). Armani referred to this as a “parlor trick” in an interview with Lisa Lerman. Id.
until Garrow’s trial on the Domblewski charges: Armani and Belge put Garrow on the stand, apparently hoping that his testimony about the Domblewski murder would persuade the jury to accept his insanity defense. Garrow admitted not only to killing Domblewski, but also confessed to the murders of Hauk and Petz as well.

Armani and Belge, perhaps realizing that there were now sufficient data points from which one could conclude not only what they knew about the additional murders but how long they had known, held a press conference in which they announced that they had indeed known for six months that the two women were dead and where their remains were buried. The public outcry was swift, fierce, and perhaps predictable enough; much more interesting is that the district attorney responded by bringing an indictment against Belge, charging him with violating the public health statute described above. Belge moved to dismiss the indictment “on the grounds that a confidential, privileged communication existed between him and Mr. Garrow, which should excuse the attorney from making full disclosure to the authorities.”

The court dismissed the indictment “in the interests of justice,” liberally mixing concepts drawn from the ethical duty of confidentiality, the attorney-client privilege, and the Fifth Amendment privilege against


25. The New York confidentiality rule operative at that time allowed attorneys to disclose client confidences to comply with other law. See Bruce Green, The Criminal Regulation of Lawyers, 67 FORDHAM L. REV. 327 fn.249 (1998). Nonetheless, the New York State Bar not only absolved the attorneys of misconduct but concluded that the ethical rules required the attorneys to remain silent. N.Y. State Bar Ass’n, Comm. on Professional Ethics, Op. 479 (1978), reprinted in 50 N.Y. STR. B.J. 259, 259–62 (1978). The opinion made no mention of the public health statute or confidentiality’s exception for disclosures necessary to comply with other law. The opinion provides only the slightest hint that legal obligations might be relevant (“Legal issues, upon which we do not pass, may be inextricably interwoven with ethical considerations”), and does not discuss how the existence of a disclosure obligation in other law would change the confidentiality analysis. Instead, the opinion addressed the exceptions to confidentiality for “information involving the intention of the client to commit a crime in the future or the perpetration of a fraud during the course of the lawyer’s representation of the client, or where the client consents following full disclosure.” The opinion concluded that “none of the specified narrow exceptions appear to apply to the situation here presented.” In a companion piece, I explore the surprising invisibility of the “other law” exception to courts and commentators.

26. To the extent that the relevant communication between Garrow and his attorneys involved the concealment of evidence of crime, it is unlikely that the attorney-client privilege would protect such communication from disclosure. See People v. Fentress, 103 Misc. 2d 179 fn.4 (1980). (“The privilege may not be asserted when the communication relates to the commission of a future crime, or to advise the client to suppress or destroy evidence.”); United States v. Goldenstein, 456 F.2d 1006, 1011 (8th Cir. 1972) (communications made for the purpose of concealing fruits of crime would not be privileged); Tierney v Flower, 32 AD2d 392, 395–96 (1969) (exception to privilege where communications concerned the concealment of wrongdoing); see also Robert Allen Sedler & Joseph J. Simeone, The Realities of Attorney-Client Confidences, 24 OHIO STATE L. J. 1, 41(1963) (acknowledging that client consultation with attorney for purpose of concealing past crime and escaping punishment would fall outside privilege).
self-incrimination. Although this mélange of doctrines makes it a bit difficult to track with precision the contours of the court’s reasoning, what stands out quite clearly is the notion that the case against the lawyer was an easy one to dismiss because it was brought using “the trivia of a pseudo-criminal statute which has seldom been brought into play.”

The court announced explicitly that “[i]f the Grand Jury had returned an indictment charging Mr. Belge with obstruction of justice under a proper statute, the work of this court would have been much more difficult than it is.” Without any attempt to discern whether the legislature intended the public health provision to abrogate confidentiality, and with no further elaboration as to what makes one statute trivial and improper as compared to another when it comes to the application of general statutes to attorney conduct, the opinion leaves inchoate the suggestion that the public health statute was simply not important enough to warrant enforcement against an attorney for failing to disclose information falling within both the domain of the statute and the ethical duty of confidentiality.

The “Buried Bodies” case has served as a prism through which the profession’s ideas about confidentiality are refracted at many different angles. It can be read to illustrate that adhering to strong principles of client confidentiality can be unpopular, wrenching and personally risky for the attorney, but ultimately professionally correct, even heroic. It can also be read to expose the frailties of the claims that confidentiality makes: one scholar has described it as “a case in which the attorneys’ refusal to disclose the confidential information did not induce the client to be forthcoming, did not lead to a successful strategy either in plea bargaining or at trial, and did not prevent the attorneys from using the information when they, rather than the client, determined (wrongly as it turned out) that doing so would be in the client’s interest.” But throughout the commentary, the tension is assumed to be between the client’s interest in confidentiality and the emotional and moral claims of confidentiality.

27. As will be explained in detail in Section II (A), the Supreme Court has required compulsion against the accused before the Fifth Amendment privilege against self-incrimination is triggered. See, e.g., Couch v. United States, 409 U.S. 322 (1973).
29. Id. (emphasis added).
30. Application of Armani, 371 N.Y.S.2d 563 (1975). In approving compensation for Armani’s services in the Garrow case beyond the statutory limit, the court opined on the “extraordinary energy and talent” he devoted to the case as well as the disastrous consequences he suffered. “Who can imagine the anguish of these attorneys, fathers themselves, at having to carry inviolate this confidence knowing full well the agonies endured by the parents of the missing girls? Who can appreciate the torment, after the disclosure was made public, suffered by them as a result of the poisoned pens and poisoned tongues of the self-righteous? Who, indeed, in the legal profession can truly and objectively look back from the comfortable chair of the Monday morning quarterback and say, “I would have done thus and so in spite of the ethic of confidentiality which I am sworn to uphold?” Indeed, who can understand the anguish of having to defend oneself months later against charge of criminal wrongdoing where one has acted in the highest tradition of the legal profession? Who, indeed, but the one involved.”
31. Snyder, supra note 22.
the young women’s parents, who are begging to receive information that
will alleviate the suffering of their uncertainty.32 This, of course, is where
the story gets its dramatic force, not from the public health statute, and
thus the literature reflects scant interest in the lessons we might draw
from the case about the relationship between an attorney’s confidentiality
obligations and “other law.”33 At best we can discern glimmers of com-
mentary from which we might conclude that other law’s claim in this
context is minimal, not to be taken too seriously. One writer commenting
on the case, for example, describes the public health statute under which
Belge was charged as “rather remote.”34 Another calls the statute “ob-
scure” before calling the district attorney’s decision to indict Belge as
“indefensible.”35 An even more dismissive analysis: “the contempt with
which the criminal charge was ultimately treated by the courts was surely
predictable. It seems improbable that Belge even considered that he
might incur criminal liability. He was probably only slightly more sur-
prised by the allegation that he violated the decent burial law than was
the district attorney who discovered this obscure but handy means by
which to extricate himself from a political difficulty.”36 And most re-
markably, one author cites to the Belge case to support the very general
proposition that “while it is true that the political branches of government

32. See id. at 513. Snyder makes no mention of the public health statute, nor does he evaluate
whether the statute would have provided the sort of disclosure obligations found in “other law” that
might override confidentiality. See also Li Feldman, supra note 23 (noting that “[m]ost commenta-
tors discuss the case to debate the moral value of confidentiality, of the adversary system, or both”);
David Luban, Freedom and Constraint in Legal Ethics: Some Mid-Course Corrections to Lawyers
and Justice, 49 Md. L. REV. 424 (1990); W. Bradley Wendel, Value Pluralism in Legal Ethics, 78
WASH. U. L. Q. 113, 165 (2000) (“Revealing the location of the bodies would have assuaged the
parents’ despair, without materially worsening the position of the client, who was sure to be con-
victed of two other murders. The lawyer also realized, however, his obligation to pay due respect to
the potentially corrosive effects of lawyers divulging their clients’ secrets. Not revealing the location
of the bodies was mandated by the duty of loyalty to the client, while disclosure seemed required by
considerations of care for the anguished parents. The lawyer reported having felt this pull of oppos-
ing obligations, but he ultimately concluded that the parents’ suffering ‘was not worth jeopardizing
my sworn duty or my oath of office or the Constitution.’”) In Wendel’s discussion of the “pull of
opposing obligations,” no mention is given to the public health statute. Id.
33. See, e.g., Stephen Ellman, The Ethic of Care as an Ethic for Lawyers, 81 Geo. L. J. 2665,
2715–20 (1993). In imagining how a lawyer operating under care principles might handle the Gar-
row case, Ellman canvasses the arguments in favor of disclosure without even mentioning the public
health statute. This is particularly noteworthy because the public health statutes, especially the one
requiring “decent burial,” seem to further goals consistent with the ethics of care. See also Powers,
supra note 15, at 207. Powers mentions the case in a discussion of the differences between confiden-
tiality and privilege—she concludes that the existence and location of the buried bodies is both
confidential and privileged without ever mentioning the public health provision. Id.
(1988).
35. Stephen Gillers, Lawyering at the Edge: Unpopular Clients, Difficult Cases, Zealous
Advocates: The “Charles Stimson” Rule and Three Other Proposals to Protect Lawyers From
36. Subin, supra note 14, at 1102.
do pass laws that affect lawyer behavior, it is also true that laws that apply to everyone else in society often cannot be applied to lawyers.”

That lawyers are exempt from “laws that apply to everyone else in society” should be an astonishing assertion. But it is just the strongest, most candid version of the generally uniform but insufficiently articulated assumption that the public health statute did not create a legal disclosure obligation applicable to Belge. My review of the literature reveals virtually no attempts to seriously engage with the possibility, let alone argue or conclude, that Belge should have disclosed the information required by the public health law because it was applicable on its face to Belge’s circumstances and thus he was required to comply with it just like anyone else. The literature reflects either disinterest in the obligation set forth in the public health statute, as compared to the emotional and moral claims of the victims’ parents, or the refusal to conclude that confidentiality yields to a statute like this. But what is it that makes this statute trivial, obscure, or “remote” as applied to the conduct of lawyers? What would the legislature have to do to write a proper statute that would be effective as applied to the conduct of attorneys along with everyone else? Is it that the statute, while literally applicable, seems intended to serve purposes other than the use to which the prosecutor put

37. Randy Lee, Modern Ethical Dilemmas for ALJs and Government Lawyers: Conflicts of Interest, Appearances of Impropriety, and Other Ethical Considerations: The State of Self-Regulation of the Legal Profession: Have we Locked the Fox in the Chicken Coop? 11 WIDENER J. PUB. L. 69 (2002).

38. I note the distinct and more persuasive objection that there was the whiff of a selective prosecution about the whole affair. But to complain about the unfair, unseemly, politicized use of prosecutorial discretion is quite different than to assert or suggest that the object of such prosecution had no obligation to comply with the law under which he was charged. Similarly, I understand that the insights of legal realism explain that if the judge dismisses a prosecution against a lawyer for failing to make a disclosure seemingly required by law, then in a literal and direct sense it is true that the law “cannot be applied to lawyers,” because there is no enforcement mechanism with which to apply to lawyers the law “that applies to everyone else in society.” See, e.g., Stephen L. Pepper, The Lawyer’s Amoral Role: A Defense, A Problem, and Some Possibilities, 4 AM. B. FOUND. RES. J. 613 (1986) (noting that legal realism includes the “notion of law as a prediction of what human officials will do”). But again, that is a different claim than saying that Belge correctly and appropriately disregarded the disclosure requirement set forth in the statute.

39. For a noteworthy exception, see Roy M. Sobelson, Lawyers, Clients and Assurances of Confidentiality: Lawyers Talking Without Speaking, Clients Hearing without Listening, 1 GEO. J. LEGAL ETHICS 703, 728 (1988). Sobelson, canvassing the many exceptions to the seemingly broad duty of confidentiality, includes in his study those disclosures made mandatory by other law. He posits that especially in light of DR 7-102(A)(3), which prohibits a lawyer from keeping silent about that which he is required by law to reveal, “it would seem that whatever laws require disclosure apply to lawyers even if disclosure would violate confidentiality obligations.” Id. He goes on to note that this principle was not adhered to in the Belge case, as both the trial court and the state ethics committee held that Belge correctly withheld the information at issue “[d]espite the statute’s clear language.” Id. Sobelson offers neither defense nor critique of this conclusion; his purpose is to argue that disclosure obligations set forth in other law—however they might ultimately be interpreted and enforced—are among those limitations on confidentiality that should be explained to clients at the outset of a representation. See also Nancy A. Jacobson, Is Silence Really Golden?, 3 GEO. J. LEGAL ETHICS 377, 389–90 (1989) (discussing Belge and noting the reporting obligation imposed by the public health statute.)
it? How might we translate our inchoate unease with Belge’s prosecution into a workable principle that illuminates the relationship between confidentiality and other law? These are the questions that animate this paper.

Whether implied or stated explicitly, the proposition that a lawyer like Belge is excused from compliance with a generally applicable statute requires considerably more theorizing than has thus far been afforded to it: what is the source of such exemption? How would we justify it? The distinction between a trivial statute and one that properly, effectively, reaches the conduct of lawyers along with everyone else is not a sufficiently self-evident one to support a proposition with such profound structural implications. Nor has the scholarly literature provided an alternative method for interpreting the disclosure obligations set forth in “other law” and assessing when and to what extent such obligations are applicable to attorneys. This paper attempts to fill that gap.

The analysis proceeds in two parts. In Part II, I first reject the suggestion that lawyers are excused from compliance with generally applicable law on account of their confidentiality obligations. Specifically, I explain that the “confidentiality-as-trump” approach fails because it rests on the insupportable premise that legislatures lack the power to impose disclosure obligations on lawyers. By examining separation of powers principles, the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment right to counsel, I conclude that legislatures have considerably more authority to demand disclosure from attorneys than has been previously understood. In Part III, therefore, I argue that in most cases the task remaining for courts will be one of statutory interpretation: Did the legislature intend for its disclosure statute to preserve or abrogate the duty of confidentiality? And what should courts do where that cannot be ascertained? I assert that the Court’s clear statement jurisprudence provides a model to assist in answering these questions.

II. LEGISLATIVE SUPREMACY AND THE POWER TO DECIDE

The first step is to see that managing the tension between statutory disclosure requirements and the ethical obligation of confidentiality raises questions first asked by the Legal Process scholars some sixty years ago: Who has the power to decide—including the power to decide

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40. That, of course, would hardly distinguish the Belge prosecution from other enforcement efforts that seem to pose a “potential conflict between the text of a rule and its purpose.” Frederick Schauer, *A Critical Guide to No Vehicles In the Park*, 83 N.Y.U. L. Rev. 1109, 1115 (2010) (addressing the issue in the context of “the most famous hypothetical in the common law world”).

41. This is especially untenable given that the ethical duty of confidentiality is qualified by the “other law” exception. Nonetheless, this confidentiality-as-trump approach is not the straw man one might imagine: as I demonstrate in the companion piece to this paper, the organized bar has quite a history of asserting just this notion even though the confidentiality obligation has, for much of its history, been qualified by the “other law” exception.
If the legislature has the power to impose upon the general public a reporting obligation with regards to medically unattended deaths, does it not have the power to include lawyers in that obligation, even to the point of insisting that lawyers reveal confidential client information where covered by the statute? Does it not have the power to prioritize the policies advanced by the reporting requirement over the policies advanced by lawyer-client confidentiality, no matter how regrettable some might find that choice? The answer to these questions must be yes. This is the essence of the police power—bounded only by constitutional norms—matters of this type.

Even if it were true that statutory disclosure obligations conflict in a direct sense with the duty of confidentiality, a difficult proposition in

42. Richard H. Fallon, Reflections on the Hart and Wechsler Paradigm, 47 VAND. L. REV. 953 (1994) (attributing to Hart and Wechsler the “controlling insight” that “authority to decide must at least sometimes include authority to decide wrongly”) Fallon notes that “[t]his Legal Process notion is so familiar now that we no longer may be able to conceive of it as an insight without imaginative effort. But familiarity renders the idea no less generative. Once the point is recognized, it becomes evident that constitutional federalism and the separation of powers can be illuminated by painstaking attention to the question of where ultimate responsibility for certain kinds of questions, including the power to make uncorrectable mistakes, should lie.” Id; see also Akhil Reed Amar, Law Story, 102 HARV. L. REV. 688 (1989); Ernest Young, Institutional Settlement in a Globalizing Judicial System, 54 DUKE L.J. 1143 (2005) (“A central task of governance is to assign particular decisions to particular institutions, like the President, or Congress, or federal administrative agencies, or state courts. Once a decision is assigned to an institution, that institution’s decisions are taken as settled absent some particularly powerful reason for changing them. ‘Settled’ need not mean conclusive; there may be varying degrees of weight or deference. But at least some of the time, we must accept an institution’s resolution of an issue even though we, as observers or participants in some other institution, might have resolved the matter differently . . . the argument for overriding the initial institution’s decision must include something more than the mere contention that the initial decisionmaker got that decision wrong on the merits.”); Donald Dripps, Justice Harlan on Criminal Procedure: Two Cheers for the Legal Process School, 3 OHIO ST. J. OF CRIM. L. 125 (2005); William N. Eskridge & Phillip Frickey, The Making of the Legal Process, 107 HARV. L. REV. 2031 (1994); Anthony J. Seebok, Reading the Legal Process, 94 MICH. L. REV. 1571 (1994). For application of Legal Process Theory to questions about the comparative competence of various institutions to regulate lawyers, see David Wilkins, Who Should Regulate Lawyers?, 105 HARV. L. REV. 799 (1992); see also Ted Schneyer, Foreward: Legal Process Scholarship and the Regulation of Lawyers, 65 FORDHAM L. REV. 33 (1996).


44. Vermont Woolen Corp. v. Wackerman, 122 Vt. 219 (1961); see also Doyle v. Board of Barber Examiners, 219 Cal. App. 2d 504 (1963) (describing state police power as “simply the power to subject individuals to reasonable regulation for the purpose of achieving governmental objectives such as the public safety, health, morals and public welfare”).

45. By this I mean the sort of conflict that would make it impossible to comply with both obligations.
light of the fact that the rule allows lawyers to make disclosures that are necessary to comply with other law, the idea that lawyers are excused from compliance with generally applicable law rests on the mistaken premise that an ethical rule drafted by lawyers and adopted and enforced by the judiciary would trump a contrary statute. The ethical rules do not enjoy this sort of supremacy.

It is irrelevant whether the statute in question is wise or foolish, effective or futile; the operative principles are concerned not with statutory substance but with the structural relationship between courts and legislatures. This is why it is untenable to suggest, as the Belge court did, that confidentiality might be deemed to yield to a sufficiently important statute. This approach purports to assign to courts the power to weigh the costs of required disclosure against the benefits of confidentiality and make a uniquely legislative choice about which to pursue. In our system we presume that the legislature has already done this weighing: indeed, “the reconciliation of conflicting values or commitments—sometimes even widely held ones—is the very essence of legislation.” In a system generally characterized by legislative supremacy, any effort to challenge the legislature’s authority to choose between the benefits of disclosure and confidentiality must explain with some specificity where such a constraint is located.

A. Separation of Powers and Inherent Authority

Such efforts usually appeal to the doctrine of inherent authority, which sounds in the language of separation of powers and ascribes to the judiciary “the exclusive authority to regulate the practice of law.” The derivation of this authority, and the claim that it is commanded by the separation of powers framework that characterizes both federal and state

46. See supra note 10; see also Fred C. Zacharias, The Myth of Self-Regulation, 93 MINN. L. REV. 1147 (2007).
50. See, e.g., Id.; Thomas W. Merrill, The Disposing Power of the Legislature, 110 COLUM. L. REV. 452, 454 (2010) (asserting that in the American constitutional structure the legislature is the “exclusive repository” of “the power to decide who decides”).
51. Doyle v. Board of Barber Examiners, 219 Cal. App. 2d 504 (1963) (“The boundary of legislative power is situated wherever the judiciary locates a constitutional fence.”). Star Square Auto Supply Co. v. Gerk, 325 Mo. 968, 997 (1930) (“The propriety, wisdom, and expediency of legislation enacted in pursuance of the police power is exclusively a matter for the Legislature. The single question which lies within the province of the judiciary for its determination is whether the Legislature, in the exercise of its police power, had exceeded the limits imposed by the Constitution, Federal or State.”)
constitutions, proceeds by a series of inferences. As nicely summarized by one commentator:

The constitutional creation of a “court” implies that it must have the incidental powers necessary to the dignity, functioning, and survival. Under this theory the courts have claimed the power to punish for contempt, to promulgate rules of practice and procedure, to control certain nonadjudicatory administrative matters, to admit, supervise, and disbar attorneys, and generally regulate the practice of law. The theory with regard to regulation of attorneys is that, because they are officers of the court whose activities are crucial to the court’s operation, their qualifications and conduct must be subject to the control of the court.


54. Some state constitutions require no such inferences. A provision added to the Arkansas state constitution in 1939 explicitly assigns to the judiciary the power to “make rules regulating the practice of law and the professional conduct of lawyers.” Charles W. Wolfram, Lawyer Turf and Lawyer Regulation – The Role of the Inherent-Powers Doctrine, 12 U. ARK. LITTLE ROCK L. REV. 1, 6 (1989). In 1968, a similar amendment to the Pennsylvania constitution served to specify that the state’s supreme court has the power to prescribe general rules for admission to the bar and to practice law. Recent Decisions: Constitutional Law – Pennsylvania Uses Separation of Powers to Invalidate Legislation that Affects the Legal Profession, 66 TEMPLE L. REV. 499 (1993). Article Five, Section 15 of the Florida state constitution specifies that “[t]he supreme court shall have exclusive jurisdiction to regulate the admission of persons to the practice of law and the discipline of persons admitted.” Fla. CONST. ART. V, § 15 (2010). See also Mont. CONST. ART. VII, § 2(3).

55. Note, The Power of the Judiciary to Regulate the Practice of Law – A Proposed Delineation, 60 MINN. L. REV. 783, 784-85 (1976) [hereinafter A Proposed Delineation; see also Recent Decisions: Constitutional Law – Pennsylvania Uses Separation of Powers to Invalidate Legislation that Affects the Legal Profession, 66 TEMPLE L. REV. 499, 502 (1993) (“The existence of an independent judicial branch carries the implication that the judiciary shall possess the inherent powers necessary to carry out its essential function of resolving disputes and construing statutes and constitutions in the context of those disputes. The court’s power to regulate attorneys is considered necessary to ensure the proper functioning of this process.”)]; Robert J. Pushaw, Jr., The Inherent Powers of Federal Courts and the Structural Constitution, 86 IOWA L. REV. 735, 764 (2001) (“The inherent authority to administer judicial proceedings carries with it a corollary power to control those involved in court business—parties, witnesses, jurors, spectators, and lawyers—to maintain order, decorum, and respect.”); Attorney Gen. of Maryland v. Waldron, 289 Md. 683 (1981) (“[I]n addition to the specific powers and functions expressly granted to the three organs of government by the Constitution, each branch possesses additional powers perforce implied from the right and obligation to perform its constitutional duties…Cognizant of the constitutionally imposed responsibility with respect to the administration of justice in this State, this Court has heretofore recognized and held that the regulation of the practice of law, the admittance of new members to the bar, and the discipline of attorneys who fail to conform to the established standards governing their professional conduct are essentially judicial in nature and, accordingly, are encompassed in the constitutional grant of judicial authority to the courts of this State’’); Clark v. Austin, 340 Mo. 467, 476 (1937) (“The primary duty of courts is the administration of justice. Attorneys are officers of the court. They are, in effect, a part of the judicial system of the state. Their duties when honestly and ably performed, aid the courts in the administration of justice. Their educational and moral qualifications should be such as to insure the conscientious and efficient performance of such duties. The practice of law is so intimately connected with the exercise of judicial power in the administration of justice, that the right to define and regulate such practice logically and naturally belongs to the judicial department.”)
At this level of generality the notion that courts have the authority to regulate lawyers seems reasonable enough, although to accept even this mild notion at face value is to gloss over the criticisms of scholars who have traced the judiciary’s “inherent power” to regulate the practice of law to the exclusionary, guild-like bar politics of the late nineteenth and early twentieth century. Moreover, even at this stage it should be apparent that on the strength of this justification the doctrine cannot extend beyond the regulation of attorneys as attorneys—as officers of the court whose functioning is essential to the existence and operation of the court. But to see why it is that the inherent authority doctrine does not deprive the legislature of the power to include attorneys—as citizens—in generally applicable disclosure obligations, more detail is needed about the development of this doctrine.

The starting point is to recognize that in many jurisdictions, concurrent legislative involvement in the regulation of legal practice extended to at least the start of the twentieth century, and sometimes later. State statutes might, for example, set forth circumstances under which an attorney could be disbarred, and without passing upon the validity of the legislature’s involvement, courts would cite the statute in support of a disbarment decision. Against this backdrop, it eventually became necessary to determine whether a court could disbar an attorney in the absence of such legislative authorization; the answer, of course, turned out to be that courts did have this power, grounded upon the judiciary’s inherent authority to regulate the practice of law. In its early stages, then,

56. See, e.g., Thomas Alpert, The Inherent Power of the Courts to Regulate the Practice of Law: An Historical Analysis, 32 BUFF. L. REV. 525, 532 (1983). Alpert suggests that “[t]he English and American experiences before the Revolution provide little basis for the contention that control of the legal profession was or would have been regarded by the framers of the first state constitutions as an inherently judicial task and thus protected from legislative encroachment.”


58. See A Proposed Delineation, supra note 55 (citing In re Arctander, 26 Minn. 25 (1879)).

59. In re Greathouse, 189 Minn. 51 (1933), for example, concerned a disbarment proceeding against an attorney who “employed four or five different attorneys who devoted a considerable portion of their time to the solicitation of business for him.” Such conduct was not prohibited by any express statutory provision which the court could invoke as authority for the lawyer’s sanction; nonetheless, the court had little difficulty concluding that it possessed an inherent power to disbar that was “not confined or limited to the particular statutory grounds for disbarment.” In Rhode Island Bar Assn. v. Automobile Service Assn., 55 R.I. 122 (1935), members of the bar brought an unauthorized practice petition against laymen who were providing legal advice and consultation in cases arising out of the use of a motor vehicle. The respondents admitted the conduct but asserted that these acts did not come within the confines of the Rhode Island statute making it a criminal offense to engage in certain activities without being licensed as lawyers. The court ruled that it had the inherent authority to hold the respondents in contempt for the unauthorized practice of law regardless of the parameters of the statute. See also In re McBride, 164 Ohio 419 (1956) (“Since, in our view, the statutory grounds for the suspension or disbarment of an attorney are not exclusive and are not strictly binding on the courts, other serious unprofessional and unethical conduct may be the basis for court proceedings to reprimand, suspend or disbar.”) (citing cases from multiple jurisdictions for the proposition that courts have independent authority to sanction or disbar, regardless of statutory grounds).
the doctrine served to justify the exercise of judicial authority rather than to preclude or override legislative activity.

Even as the doctrine expanded, however, to result in the invalidation of legislative enactments thought to interfere with the judicial prerogative, the statutes struck down sought directly to regulate the practice of law. In more than one case the legislature was held to have transgressed its boundaries by passing a bill that purported to restore the law license of an attorney who had been suspended from practice by the state supreme court.60 Several cases involved attempts by the legislature to secure automatic admission to the bar for graduates of particular law schools.61 Other invalidated legislative enactments included attempts to impose statutes of limitation on disbarment proceedings,62 to limit the amount of attorney fees recoverable in a medical malpractice action,63 to reorganize the process by which the legal profession was licensed,64 and to authorize lay persons to provide delineated services of a legal nature.65

Whatever one might have to say about the merits of these cases and the breadth of exclusive judicial authority protected therein, they are cases in which the legislature sought to participate in decisions about who should be admitted (or re-admitted) to the bar and upon what procedures; upon what terms one could practice as a member in good standing; and who should be sanctioned or disbarred. In characterizing these cases as ones that involve the direct regulation of the legal profession, I do not mean to suggest that the boundaries of this category are easily discernable—quite the contrary. Consider Attorney Gen. of

60. In re Cannon, 206 Wis. 374 (1932). Although the court deemed the enactment unconstitutional, it nonetheless acknowledged a role for the Legislature: “While the Legislature may legislate with respect to the qualifications of attorneys, its power in that respect does not rest upon any power possessed by it to deal exclusively with the subject of the qualifications of attorneys, but is incidental merely to its general and unquestioned power to protect the public interest.” Id. For a similar case from a different jurisdiction, see In re Thatcher, 22 Ohio Dec. 116 (Lucas Co. Common Pleas Ct. 1912). After Charles Thatcher had been disbarred by the state supreme court for unethical conduct, the state assembly passed a bill “authorizing and empowering Charles A. Thatcher to appear as an attorney and counsellor at law in all the courts of this state.” On this authority Thatcher sought to be permitted to appear before the Lucas County Common Pleas Court, which rebuffed him, holding the legislative enactment an unconstitutional invasion of judicial authority. Thatcher’s efforts to obtain a writ of mandamus from the appellate court ordering the lower court to permit him to practice fared no better. State ex rel, Thatcher v. Brough, 15 Ohio C.C. 97 (cir. Ct. 1912).

61. Ex parte Steckler, 179 La. 410 (1934) (focusing on graduates of Tulane); cf. In re Day, 181 Ill. 73 (1899) (focusing on graduates of two year law schools who had enrolled before the state supreme court promulgated new rules requiring applicants to study for three years and sit for a bar examination).

62. In re Tracy, 197 Minn. 35 (1936) (noting many citations to cases from other jurisdictions).

63. Heller v. Frankston, 76 Pa. Commw. 294

64. Sharood v. Hatfield, 296 Minn. 416 (1973).

Maryland v. Waldron, 66 a protracted struggle over the constitutionality of legislative restraints on retired judges. 67 At issue was a statutory provision that prohibited retired judges from both accepting their pension and engaging in the practice of law for compensation. 68 The state’s highest court endorsed the trial judge’s characterization of the statute as one that “regulates the practice of law” by “depriving a person who has been admitted to practice of his right to do so unless he meets further conditions.” 69 The court found it “clear that the enactment now before us manifests an undertaking on the part of the General Assembly to regulate the legal profession by prescribing for certain otherwise qualified practitioners additional prerequisites to the continued pursuit of their chosen vocation.” 70 Having chosen this characterization of the statute, the court predictably concluded that the statute was invalid, holding that a properly admitted “attorney may be deprived of his license only through judicial action for proper cause, and any attempt by the legislature to effect the same result by enactment must fail as an unconstitutional usurpation of a power vested exclusively in the judiciary.” 71 What is illuminating about Waldron is that the statute at issue was just as susceptible to being framed as one setting conditions upon the receipt of a pension drawn out of the public fisc. 71

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66. 289 Md. 683 (1981)
67. The opinion described the retired judge as having “initiated a frontal assault on the apparent legislative impediment.” Id. at 686.
68. The challenged statute provided: “A judge who retires and accepts the pension provided by this subtitle may not, thereafter, engage in the practice of law for compensation; but this prohibition does not apply to a former judge who has attained the age of 70 years and received less than $3500 per annum in pension as provided by this subtitle, and who has not voluntarily retired.” Id. at 687–88.
69. The Court of Appeals found this to be consistent with its own view of the statute, expressed at an earlier stage in the case, as “a direct command to a retired judge who accepts a pension that he may not, thereafter, engage in the practice of law for compensation.” Id. at 688.
70. Id.
71. The court entertained this construction only in the portion of the opinion dealing with Waldron’s equal protection contentions, and rejected it on grounds that are not entirely persuasive, asserting that “[t]he statute does not establish a precondition for receipt of the pension; rather, it flatly prohibits this group of state pensioners from engaging in their profession for pay.” The court referred to its earlier decision, Chairman of Board of Trustees v. Waldron, 285 Md. 175 (1979), in which it had interpreted the statute as “a direct command to a retired judge who accepts a pension that he ‘may not, thereafter, engage in the practice of law for compensation.’” In the service of this construction, the court opined that “obviously” the statute simply precludes a judge who has accepted pension benefits from practicing law for remuneration rather than attempting “to precondition his retention of his pension upon compliance with any stricture concerning his receiving remuneration for providing legal services.” Id. But it isn’t at all obvious that these are mutually exclusive, or that the statute can’t plausibly be read as a precondition on receiving the pension benefits. The Court attempted to bolster its conclusion by comparing the statute to its predecessor, which in the court’s view, did operate as such a precondition. Id. The predecessor statute read: “A judge who has been receiving the [pension] benefits provided by this section and who decides to engage in the practice of law may notify the Governor and Comptroller of such fact, and on the indicated date of his engaging in the practice of law his benefits under this section shall cease and no longer be paid; and such a judge shall never again be paid such benefits.” Id. I suppose that the opt-out provision makes this version of the regulation operate more explicitly as a “precondition” to receiving benefits. Id. But that in itself certainly can’t mean that the new version cannot be read similarly. Both versions of the statute clearly forced a choice between continuing to practice law and receiving the pension benefits.
In cases like *Waldron*, courts have labored to characterize the statute at issue as one that regulates the practice of law, when alternate framings were readily available and would potentially have saved the statute. Troubling as this might be from the perspective of inter-branch comity, it underscores the doctrinal importance of this element. A statute headed for invalidation must be framed as one that directly regulates the practice of law because the incidental inclusion of attorneys is not enough to doom an enactment for interfering with inherent judicial authority.

Courts have taken the inherent authority doctrine to ridiculous lengths, invalidating legislative prohibitions on lawyers that were perfectly coextensive with what the judicially-promulgated rules of professional conduct would impose under the circumstances. But for the most part, courts have stopped short of invoking their inherent authority to invalidate legislation simply because some of those within the scope of the statute may happen to be attorneys; the cases, in other words, reflect a distinction between statutes that seek to regulate the practice of law directly and statutes of general applicability that may simply include lawyers within their reach. The latter pass muster as long as they do not inhibit or interfere with the functioning of the judiciary.
In *Maunus v. State Ethics Commission*, for example, the Pennsylvania Supreme Court considered a challenge to a provision of the state’s Ethics Act that required public employees to file annual financial disclosures.\(^76\) Two attorneys employed by the state liquor control board, concededly within the class of individuals defined as public employees, refused to provide the required disclosures on the grounds that it would entail “an unconstitutional legislative intrusion” into the judiciary’s exclusive authority to regulate the practice of law.\(^77\) Rejecting the premise with little difficulty, the court explained that its exclusive authority over the practice of law meant that it “is the only governmental body entitled to regulate and discipline the professional class of attorneys. No other component of our state government may impose duties applicable to every attorney admitted to practice in the Commonwealth, nor may another Commonwealth entity admit to practice or discipline an attorney.”\(^78\) The court then proceeded to conclude that it was nonetheless “ludicrous to suggest that employers are constitutionally precluded from imposing ethical and professional requirements on their employees, some or all of whom may be attorneys.”\(^79\)

In a case involving a similar challenge to New York’s Ethics in Government Act, the court “readily disposed” of the contention that the statute violated the separation of powers, characterizing this argument as resting on “the erroneous assumption that only the judiciary may regulate the practice of law, so that any legislative attempt to impose restrictions on attorneys’ practices would be a usurpation of judicial power.” The court emphasized that the statute “is not directed specifically at admitted attorneys but rather is aimed at all former executive branch employees. Its effect on the practice of law is, thus, merely incidental.”\(^80\)

In Connecticut, a law firm being investigated for violations of the state’s Unfair Trade Practices Act\(^81\) sought to block the investigation on grounds that the statute’s application to attorneys was an unconstitutional incursion into judicial power. The Supreme Court of Connecticut refused, noting that the statute—one of “general applicability”—was not rendered unconstitutional simply because it “may overlap with disciplinary rules specific to attorney conduct.”\(^82\) Other jurisdictions have simi-

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77. Id. at 594.
78. Id. at 597.
79. Id.
81. The alleged violations included “unfair or deceptive use of the terms ‘clinic’ and ‘law clinic’ in the defendant’s advertising, misrepresentations by the defendant as to its fees and as to the fees of other attorneys performing the same services, and referrals by the defendant . . . which caused those referred to pay higher legal fees than the fees advertised by the defendant.” Heslin v. Conn. Law Clinic of Trantolo & Trantolo, 190 Conn. 510, 513 (1983).
82. Id. at 524.
larly concluded that the judiciary’s inherent authority to regulate the practice of law does not preclude legislatures from including lawyers in obligations imposed on a broader group of people:

A person possessing a law license is not exempt from the duties of citizenship or ordinary state laws. For example, a lawyer’s business is affected and limited by local zoning ordinances, yet these regulations do not impede or frustrate this Court’s authority over the practice of law. A lawyer who converts and commingles his clients’ money may have violated this Court’s disciplinary rules but is also subject to the state criminal theft laws. Similarly, an attorney who is a public official or employee is subject to the Rules of Professional Conduct, as well as the ethics code rules which apply to all public servants, as long as the ethics code provisions do not impede or frustrate this Court’s authority to regulate the practice of law.\(^{83}\)

The distinction prevalent in the case law between legislation that seeks to regulate the practice of law and statutes of general applicability that simply include lawyers in their scope—and the insistence that the latter passes muster under a separation of powers analysis—is essential for our purposes. Like the public health statute at issue in the Buried Bodies case, many of the statutes that impose disclosure obligations do so upon “any person” who receives knowledge of the sort specified in the statute; they thus operate on lawyers only as members of the general public. The Internal Revenue Code, for example, requires particularized tax reporting from “any person who receives in the course of trade or business a cash payment of more than $10,000.”\(^{84}\) There are fifteen states that require “any person” who has reason to suspect that a child is the victim of abuse or neglect to make a report to the relevant authorities; in these statutes attorneys are neither specified nor exempted.\(^{85}\) To say that


\(^{84}\) 26 U.S.C. § 6050I (2006). As I recount in some detail in the companion piece to this Article, lawyers unsuccessfully resisted disclosure under this tax reporting provision on grounds of attorney-client privilege and the ethical duty of confidentiality.

\(^{85}\) DEL. CODE ANN. tit. 16 § 903; FLA. STAT. ANN. § 39.20; IDAHO CODE § 16-1605; IND. CODE ANN. § 31-33-5-1; KY. REV. STAT. ANN. § 620.030; NEB. REV. ST. §§ 28-711; NH REV. STAT. ANN. § 160-C:29; N.J. STAT. ANN. § 9:6-8.10; N.M. STAT. ANN. § 32A-4-3; NC. GEN. STAT. § 7B-301; OKLA. STAT. ANN. tit. 10, § 7103; R.I. GEN. LAWS § 40-11-3; TENN. CODE ANN. § 37-1-403; UTAH CODE ANN. § 62A-4A-403; WYO. STAT. ANN. § 14-3-205. (Both Idaho and Utah exempt religious personnel but do not similarly exclude attorneys). There are also states, like Texas, that impose the reporting requirement on “any person” and then proceed to specify in some way that attorneys are included in that obligation. TEX. FAMILY CODE ANN. § 261.101. See also OR. REV. STAT. 419B.010
these are legislative efforts to regulate the practice of law because “any person” may at times include an attorney stretches the concept beyond what it can bear; these are clearly statutes of general applicability, fitting within what the Louisiana court above describes as “duties of citizenship or ordinary state laws.”

There are some statutes that impose disclosure obligations on lawyers by virtue of their inclusion within a subset of the general population, a class we might describe as “those uniquely likely to come into contact with the type of information the government is seeking.” Nevada, for example, rather than requiring reporting from “any person” who encounters evidence of child abuse or neglect, provides an enumerated list of mandated reporters and specifically includes attorneys in that list. But the specification of attorneys does not make this statute any more of an attempt to regulate the practice of law than the examples described above. The list of mandated reporters includes an array of professions and occupations, including athletic trainer, clergy member, dental hygienist, librarian, and coroner, that have little in common other than the potential perceived by the legislature for these individuals to come into contact with, or receive knowledge about, abused children.

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87. See, e.g., Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKEL.J. 491, 520 (1986) (suggesting that mandatory reporting statutes impose obligations “on individuals particularly well-suited to provide necessary information that would be difficult to obtain from other sources”).
(a) A physician, dentist, dental hygienist, chiropractor, optometrist, podiatric physician, medical examiner, resident, intern, professional or practical nurse, physician assistant licensed pursuant to chapter 630 or 633 of NRS, psychiatrist, psychologist, marriage and family therapist, clinical professional counselor, clinical alcohol and drug abuse counselor, alcohol and drug abuse counselor, clinical social worker, athletic trainer, advanced emergency medical technician or other person providing medical services licensed or certified in this State.
(b) Any personnel of a hospital or similar institution engaged in the admission, examination, care or treatment of persons or an administrator, manager or other person in charge of a hospital or similar institution upon notification of suspected abuse or neglect of a child by a member of the staff of the hospital.
(c) A coroner.
mandated reporters is simply too extensive, and too heterogeneous, to allow the conclusion that the legislature intended to regulate attorneys as attorneys, and as the foregoing cases illustrate, simply including attorneys in obligations that apply more broadly does not render a statute un-constitutional.

I do not mean to oversell the rigor of this distinction.\textsuperscript{90} When the legislature enacts (and the executive enforces) a requirement that lawyers make particular disclosures, it constricts the boundaries of the territory covered by an attorney’s confidentiality obligation and therefore operates to modify the practice of law. But this limitation is contemplated by—and incorporated into—the confidentiality obligation itself, which expressly provides an exception where disclosure is necessary to comply with other law.\textsuperscript{91} The professional duty of confidentiality does not require lawyers to keep quiet about what the law requires them to reveal; the force of “other law” is already accounted for in the definition of the lawyer’s ethical obligation.\textsuperscript{92}

For a disclosure statute to be unconstitutional under the inherent authority doctrine, its application to lawyers would have to frustrate or interfere with the functioning of the courts in some demonstrable way.\textsuperscript{93} It is conceivable that this could be the case in particular situations,\textsuperscript{94} but it

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  \item (d) A member of the clergy, practitioner of Christian Science or religious healer, unless the person has acquired the knowledge of the abuse or neglect from the offender during a confession.
  \item (e) A social worker and an administrator, teacher, librarian or counselor of a school.
  \item (f) Any person who maintains or is employed by a facility or establishment that provides care for children, children’s camp or other public or private facility, institution or agency furnishing care to a child.
  \item (g) Any person licensed to conduct a foster home.
  \item (h) Any officer or employee of a law enforcement agency or an adult or juvenile probation officer.
  \item (i) An attorney, unless the attorney has acquired the knowledge of the abuse or neglect from a client who is or may be accused of the abuse or neglect.
  \item (j) Any person who maintains, is employed by or serves as a volunteer for an agency or service which advises persons regarding abuse or neglect of a child and refers them to persons and agencies where their requests and needs can be met.
  \item (k) Any person who is employed by or serves as a volunteer for an approved youth shelter. As used in this paragraph, "approved youth shelter" has the meaning ascribed to it in NRS 244.422.
  \item (l) Any adult person who is employed by an entity that provides organized activities for children.
  \item Id.
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  \item 90. I do think that while the distinction is perhaps tenuous, it is essential to the legitimacy of the inherent authority doctrine, for without it, the doctrine devolves into a wholesale invalidation of any legislation that has an effect, even indirectly, on the practice of law.
  \item 91. \textsc{Model Rules of Prof’l. Conduct} R. 1.6 (b)(6).
  \item 92. For the assertion that this is the case regardless of whether the confidentiality rule contains an explicit exception for “other law,” see 1 \textsc{Hazard and Hodes, The Law of Lawyering}, §§ 9.24 and 9.25 (3d. ed. 2007).
  \item 93. See, e.g., In re Clerk of Lyon Cnty Courts’ Compensation, 308 Minn. 172, 180 (1976) (“Inherent judicial power grows out of express and implied constitutional provisions mandating a separation of powers and a viable judicial branch of government. It comprehends all authority necessary to preserve and improve the fundamental judicial function of deciding cases.”).
  \item 94. Charles Wolfram, a vocal critic of the more aggressive iterations of the inherent authority doctrine, has noted that a $3,500 statutory cap on compensation for capital defense would indeed prevent the court from performing the “essential judicial function of ensuring adequate representation by competent counsel.” Wolfram, \textit{supra} note 54, at 9.
cannot be assumed, and the assessment has to be made in the context of the disclosure obligations the judiciary imposes upon lawyers on its own behalf. The judiciary’s own demand for disclosure in certain situations complicates the assumption that the judiciary’s functioning is necessarily undermined when attorneys reveal client confidences.

Consider, for example, Rule 3.3 of the Model Rules of Professional Conduct, entitled “Candor to the Tribunal,” which requires an attorney to take “reasonable remedial measures, including, if necessary, disclosure to the tribunal,” when the attorney knows that her client (or another of her witnesses) has offered false material evidence. The operation of this rule might have the same deleterious consequences for the attorney-client relationship as the statutory disclosure obligations we’ve been discussing, yet it would be absurd to suggest that this rule—clearly designed to promote the judiciary’s performance of its functions—hinders or impedes it in some way. Against this backdrop, it is difficult to justify the premise that requiring lawyers to comply with statutory disclosure obligations frustrates the judicial function because of the mistrust and bitterness between client and attorney engendered by the disclosure. While the lawyer may have to withdraw after the disclosure, the possibility—or necessity—of withdrawal looms in the background of many of the potential tensions that can arise between lawyer and client.

To make this point clearer, imagine a meeting between lawyer and client in a custody case, taking place in a state that requires reporting from any person who has knowledge that a child has been abused or neglected. The client acknowledges to his lawyer that he has, in moments of frustration and stress, beaten his eleven year old son with enough force to leave bruises. Lawyer and client proceed to the custody hearing at which client asserts on the stand that he has never laid a hand on any of his children. The lawyer is under two distinct disclosure obligations: the mandatory reporting statute, and the ethical duty to correct the false

95. MODEL RULES OF PROF’L CONDUCT R. 3.3 (a)(2).
96. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.16 (a)(1) (requiring the lawyer to withdraw if the representation will result in violation of the rules of professional conduct or other law); R. 1.16 (b)(2) (allowing the lawyer to withdraw if the client persists in a course of action involving the lawyer’s services that the lawyer reasonably believes is criminal or fraudulent); R. 1.16 (b)(3) (allowing the lawyer to withdraw if the client has used the lawyer’s services to perpetrate a crime or fraud); R. 1.16 (b)(4) (allowing the lawyer to withdraw “if the client insists upon taking action that the lawyer considers repugnant or with which the lawyer has a fundamental disagreement”); R. 1.16 (b)(5) (the client fails substantially to fulfill an obligation to the lawyer regarding the lawyer’s services). Withdrawal is contemplated, recommended, or required throughout the Rules as a response to several specialized situations; R. 1.2 cmt.10 (discussing that a lawyer’s withdrawal required to avoid assisting client in criminal or fraudulent course of action); R. 4.1 (b) cmt. 3 (discussing the same); R. 1.7 cmt. 4 & cmt. 5 (lawyer must withdraw if nonconsentable conflict of interest arises during the representation).
97. I put aside for the moment whether the attorney was under an obligation to tell the client at the outset of the representation that any such confidences would have to be disclosed. See generally Sobelson, supra note 39, at 728; Lee A. Pizzimenti, The Lawyer’s Duty to Warn Clients About Limits of Confidentiality, 39 CATH. U. L. REV. 441 (1990).
testimony. How could one convincingly argue that compliance with the statute—in furtherance of the state’s goals in protecting children from abuse—interferes with the functioning of the court, when the court similarly requires the attorney to reveal what she knows?

Whatever the precise contours of the inherent authority doctrine, it does not confer upon courts the power to declare that a lawyer’s professional responsibilities supersede conflicting obligations set forth in general public welfare statutes duly enacted by the legislature. Unless the application of the statute to an attorney in a particular situation would frustrate or impede the judicial function in some specific way, the judiciary simply does not have the inherent authority to excuse lawyers from compliance with law, whatever its view of the transcendent importance of the duty of confidentiality.

B. Fifth and Sixth Amendment

Are there other constitutional commands that undergird the lawyer’s ethical duty, insulating it against legislative incursion? Might confidentiality in criminal cases be mandated by the Fifth Amendment privilege against self-incrimination or the Sixth Amendment guarantee of effective assistance of counsel? Commentators often suggest that such might be the case, but a detailed and precise analysis reveals that the situations in which an attorney’s compliance with a statutory disclosure obligation might violate the Fifth or Sixth Amendment are few.

First, it is necessary to begin by noting the obvious: the Fifth and Sixth Amendments apply only to criminal cases. Statutory disclosure duties may arise in situations where the attorney is not representing the client in a criminal proceeding, so that the nature of the case itself does not immediately call forth the protections of the Fifth and Sixth Amendment. What is less obvious is that statutory disclosure obligations may be

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98. In some jurisdictions disclosure obligations may come in yet other forms. See, e.g., Colorado Court Rule 16.2.

99. The institutional dynamics are different in California, where a lawyer’s confidentiality obligation is set forth in the statutory scheme enacted by the legislature, rather than a code of professional responsibility drafted by private organizations and adopted by the judiciary. See Fred C. Zacharias, Privilege and Confidentiality in California, 28 U.C. Davis L. Rev. 367 (1995). See also Ore. Rev. Stat. § 9.460 (2010), “Duties of Attorneys,” stating that an attorney shall “Maintain the confidences and secrets of the attorney’s clients consistent with the rules of professional conduct.”

100. The right is triggered when a suspect can “show ‘compulsion’ exerted upon him to engage in ‘testimonial’ behavior that is ‘self-incriminating.’” Kevin R. Reitz, Clients, Lawyers, and the Fifth Amendment: The Need for a Projected Privilege, 41 Duke L.J. 572, 577 (1991).

101. Monroe Freedman, Are the Model Rules Unconstitutional?, 35 U. Miami L. Rev. 685, 690 (1981); Fred Zacharias, Rethinking Confidentiality, 74 Iowa L. Rev. 351 (1989) (explaining why his analysis is limited to confidentiality rules as applicable in civil litigation, Zacharias notes that “[t]he relationship between criminal lawyers and their clients is unique. To the extent secrecy helps maintain criminal defendants’ trust and contributes to quality representation, the Constitution seems to give confidentiality its blessing.”)

102. U.S. Const. amend. V (“No person…shall be compelled in any criminal case to be a witness against himself . . . .”); U.S. Const. amend. VI (“In all criminal prosecutions, the accused shall enjoy the right…to have the Assistance of Counsel for his defence.”).
triggered by information that does not incriminate the attorney’s own client in any way, such that the disclosure—while resisted by the client for any number of reasons—may not even raise the specter of a criminal prosecution of the client at issue.

To illustrate, imagine a dependency proceeding initiated by a social services agency because an eleven-year-old girl has not been attending school. An attorney is appointed to represent the child, and learns from her client that the child’s mother disappears from home for days at a time, leaving the girl to care for her younger siblings. The child reveals that the mother, when home, sometimes becomes violently enraged if the children are noisy or disobedient, lashing out with severe physical punishment. The child insists that the attorney not reveal this information. She does not want to get her mother in trouble, nor does she want to end up in foster care, likely separated from her siblings.

This scenario, regardless of where it takes place, presents a profound dilemma for the attorney, who is caught between the young client’s assessment of her own interests and the sense that children generally should be in stable environments that present no threat to their physical safety. 103 If this scenario takes place in a jurisdiction where the mandatory reporting statute includes lawyers, the dilemma takes on a different tenor, as the attorney could face criminal liability for acceding to her client’s wishes. As fraught with difficulty as this situation is, however, the attorney’s compliance with the reporting statute has no Fifth or Sixth Amendment ramifications.

But what of the cases where the information that forms the basis of the attorney’s disclosure obligation does incriminate the attorney’s own client? Would it not violate the client’s constitutional rights to be ratted out by her own attorney? It depends. First, the Supreme Court has made clear its unwillingness to have the Fifth Amendment “serve as a general protector of privacy,” concluding that “the Fifth Amendment protects against compelled self-incrimination, not the disclosure of private information.” 104 The privilege is personal to the accused: “it is the extortion of information from the accused himself that offends our sense of justice.” The Court has thus required “the ingredient of personal compulsion against an accused” before finding that the Fifth Amendment was violated. A straightforward application of this principle meant rejecting the contention that the enforcement of a documentary summons directed to a

103. Model Rule of Professional Conduct 1.14 sets forth special guidelines for the representation of clients with diminished capacity, but notes that ‘children as young as five or six, and certainly those of ten or twelve, are regarded as having opinions that are entitled to weight in legal proceedings concerning their custody.” MODEL RULES OF PROF’L CONDUCT R. 1.14 cmt. 1. See also ABA STANDARDS OF PRACTICE FOR LAWYERS REPRESENTING A CHILD IN ABUSE AND NEGLECT CASES (1996).

taxpayer’s accountant violated the Fifth Amendment rights of the taxpayer.105

But where the sought-after records are in the hands of an attorney, other principles come into play that may change the result. Because in this situation as well the “ingredient of personal compulsion against an accused” is lacking, there is still no Fifth Amendment violation, according to the Court.106 However, the records may be protected against disclosure by the operation of the attorney-client privilege.107 Noting that the purpose of the attorney-client privilege “is to encourage clients to make full disclosure to their attorneys,” the Court reasoned that clients would be reluctant to confide in their lawyers if they knew that damaging information could be more readily obtained from the attorney than it could have been obtained from themselves had they not confided in their attorney.108 The Court thus concluded that when the client himself would be exempt from production of documents by virtue of the self-incrimination privilege, “the attorney having possession of the document is not bound to produce.”109 If information is protected in the hands of the client by virtue of the Fifth Amendment, then it is protected in the hands of the attorney by the attorney-client privilege.110

In some circumstances this will be a meaningful barrier to the application of statutory disclosure obligations to an attorney.111 Imagine a scenario like the one sketched out in the preceding section, where the client reveals to his divorce attorney that he has abused his children. The client himself could not be forced to reveal this information, because it would strike at the heart of the Fifth Amendment prohibition: compelled self-incrimination. This information also falls squarely within the attor-

106. Fisher, 425 U.S. at 396. Noting agreement with the proposition that “if the Fifth Amendment would have excused a taxpayer from turning over the accountant’s papers had he possessed them, the attorney to whom they are delivered for the purpose of obtaining legal advice should also be immune from subpoena.” However, the Court announced that although it agreed with this proposition, “it is not the taxpayer’s Fifth Amendment privilege that would excuse the attorney from producing.” Id. (emphasis added). Rather, it is the attorney-client privilege that excuses the attorney from turning over evidence that would have been exempt from compelled disclosure in the client’s hands.
107. Our above holding is that compelled production of documents from an attorney does not implicate whatever Fifth Amendment privilege the taxpayer might have enjoyed from being compelled to produce them himself . . . In the posture of this case, we feel obliged to inquire whether the attorney-client privilege applies to documents in the hands of an attorney which would have been privileged in the hands of the client by reason of the Fifth Amendment.” Fisher, 425 U.S. at 402.
108. Id. at 403.
109. Id.
110. The policies underlying the attorney-client privilege suggest that the shield surrounding the attorney has to be co-extensive with the shield surrounding the client, or else the client runs too great a risk in confiding in the attorney.
111. For purposes of this discussion I assume that compliance with a mandatory reporting statute would constitute sufficient compulsion to implicate the Fifth Amendment, even though there is no subpoena or in-court testimony.
ney-client privilege as it is generally formulated: it is a communication made between attorney and client in confidence for the purpose of obtaining legal advice, and not for the purpose of furthering crime or fraud.\textsuperscript{112} Thus, under Fisher, if the client conveys this information to the attorney, the attorney may not be forced to disclose either.\textsuperscript{113}

The result is different, however, if the revelation of the client’s abusive conduct comes from a source other than the client. Imagine that the client’s sister tells the attorney that her brother has behaved violently towards his children. This would be “information relating to the representation of a client,” and thus covered by the attorney’s ethical obligation to maintain confidentiality unless an enumerated exception—such as disclosure to comply with other law—is applicable.\textsuperscript{114} But while it certainly is contrary to the client’s interests for such information to come to light, there is no Fifth Amendment bar to the enforcement of a statute that requires the attorney to disclose what he learned from his client’s sister. The sister cannot invoke the privilege on her own behalf, because the information does not incriminate her,\textsuperscript{115} according to the Court, the privilege “was never intended to permit a person to plead the fact that some third person might be incriminated by his testimony.”\textsuperscript{116} Nor is the attorney-client privilege applicable, because the statement from the client’s sister is not a communication between client and attorney made in order to obtain legal advice. This scenario presents neither of Fisher’s two predicates for protection from compelled disclosure, and the attorney’s compliance with the reporting statute would raise no Fifth Amendment concerns.

The Supreme Court’s decision to “simulate”\textsuperscript{117} the protections of the Fifth Amendment by relying on the attorney-client privilege has even more surprising ramifications that emerge as we push on the boundaries of the attorney-client privilege. As one scholar has pointed out, “Fisher’s simulated privilege can be claimed only if evidence or information

\textsuperscript{112} Wigmore, Restatement

\textsuperscript{113} It is essential to note, however, the role that use immunity plays in neutralizing any violation of the privilege against self-incrimination: the Court has held that a state may compel a person to provide incriminating evidence as long as neither the evidence nor anything derivative is used in a criminal prosecution against that person. See Kastigar v. United States, 406 U.S. 441, 453 (1972). As other commentators have noted, the state may thus obtain client statements from an attorney; what is forbidden is direct or indirect use of those statements in a criminal prosecution. See Subin, supra note 14, at 1126.

\textsuperscript{114} Model Rule of Professional Conduct 1.6, entitled “Confidentiality of Information,” states that “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).” Paragraph (b) permits, but does not require, an attorney to reveal information relating to the representation of a client in six delineated situations. Model Rules of Professional Conduct R. 1.6.

\textsuperscript{115} Let’s assume the sister is in full compliance with the state’s mandatory reporting law.

\textsuperscript{116} Fisher, 425 U.S. at 398.

\textsuperscript{117} Reitz, supra note 100, at 615. Reitz describes Fisher as announcing a “simulated” Fifth Amendment privilege “because it is an indirect assertion of the client’s self-incrimination rights.” Id.
sought from a defense lawyer was obtained in connection with a communication protected by the attorney-client privilege. An assertion of the attorney-client privilege can fail either because the person claiming it has not shown the preconditions for the privilege, or because an exception to the privilege is found to be in effect.\textsuperscript{118}

One such exception to the privilege goes into effect where the client’s intent in consulting an attorney is to further future or ongoing crime or fraud.\textsuperscript{119} Thus, if the client reveals to his attorney that he has fraudulently diverted millions of dollars of corporate funds for his own purposes, and asks for the attorney’s assistance in covering up the improper transactions, the conversation falls outside the scope of the privilege.\textsuperscript{120} This information is obviously incriminating, and compelled disclosure from the client himself would violate the Fifth Amendment privilege against self-incrimination.\textsuperscript{121} But the information is not covered by the attorney-client privilege, because it was communicated to the attorney with the intent to further the client’s crime or fraud. Thus, although \textit{Fisher} does not squarely address this scenario,\textsuperscript{122} it is at least plausible to read the opinion as one that would—as a constitutional matter—permit an attorney’s disclosure of information outside the scope of the attorney-client privilege, even if it were incriminating for the client.\textsuperscript{123} Bringing this back to the world of statutory disclosure obligations, if the client’s malfeasance constituted a “fraudulent insurance act,”\textsuperscript{124} attorneys in some jurisdictions would be required to report to the relevant authori-

\textsuperscript{118} Id. at 639.
\textsuperscript{119} Clark v. United States, 289 U.S. 1, 15 (1933) (“The privilege takes flight if the relation is abused. A client who consults an attorney for advice that will serve him in the commission of a fraud will have no help from the law”). See also \textsc{McCormick on Evidence} 429. (“Since the policy of the privilege is that of promoting the administration of justice, it would be a perversion of the privilege to extend it to the client who seeks advice to aid him in carrying out an illegal or fraudulent scheme. Advice given for those purposes would not be a professional service but participation in a conspiracy. Accordingly, it is settled under modern authority that the privilege does not extend to communications between attorney and client where the client’s purpose is the furtherance of a future intended crime or fraud.”) Note, \textit{The Future Crime or Tort Exception to Communication Privileges}, 77 Harv. L. Rev. 730, 731 (1964).
\textsuperscript{120} See, e.g., United States v. Reeder, 170 F.3d 93, 106 (1999).
\textsuperscript{121} See, e.g., \textit{Fisher}, 425 U.S. at 403.
\textsuperscript{122} In \textit{Fisher} the Court decided that the production of the documents at issue would involve no incriminating testimony within the protection of the Fifth Amendment; having arrived at this conclusion, the Court had no occasion to contemplate the appropriate analysis for incriminating information that would be protected from compelled disclosure from the client’s lips by virtue of the Fifth Amendment, but outside the scope of the attorney-client privilege. Id.
\textsuperscript{123} Reitz, supra note 100, at 639; cf. State v. Charlesworth, 151 Ore. App. 100, 120–21 (1997) (holding that there was no 6th Amendment violation where state obtained documents from lawyer’s office coming within crime-fraud exception).
\textsuperscript{124} See, e.g., Fidelity-Phenix Fire Insurance Co. of New York v. Hamilton, 340 S.W.2d 218 (Ky. 1960) (detailing a fraudulent claim under an insurance policy); Standard Fire Insurance Co. v. Smithhart, 211 S.W. 441 (Ky. 1919).
ties, and it seems unlikely that a Fifth Amendment challenge could be successfully raised against the reporting statute.

Moreover, while the attorney-client privilege may be a powerful bar against disclosure where it does apply, it is just an evidentiary rule. As it isn’t constitutionally mandated, legislatures can abrogate it – and in the context of some of the disclosure statutes we are exploring, they have explicitly done so. Texas specifies that its child abuse reporting obligation “applies without exception to an individual whose personal communications may otherwise be privileged, including an attorney.” Oklahoma, a state that similarly requires reporting from “[e]very person having reason to believe that a child under the age of eighteen (18) years is a victim of abuse or neglect,” likewise specifies that “[n]o privilege or contract shall relieve any person from the requirement of reporting pursuant to this section.” After Fisher, the territory that is kept off-limits to legislatures by virtue of the Fifth Amendment is surprisingly meager.

125. TEX. INS. CODE 701.051; NEB. REV. STAT. § 44-393 (2010).
126. I recognize that this is a startling conclusion: the Fifth Amendment protects the client from being compelled to reveal this, but has no relevance at all once the client chooses to reveal the information to the lawyer. Instead, the information in the hands of the lawyer is protected by the attorney-client privilege and thus subject to the significant exceptions of that privilege. This might seem to harm the client for choosing to reveal the information to the lawyer, and to the extent that is true I take that to be one of Fisher’s ramifications. On the facts of this scenario, however, it is more precise to conclude that the client is being harmed for seeking the lawyer’s assistance in covering up the fraudulent transaction—it is this intent that triggers the exception that makes the information discoverable in the hands of the lawyer. See, e.g., United States v. Lentz, 419 F.Supp. 2d 820, 830 (2005) (“[I]t cannot be said that advice in furtherance of a fraudulent or unlawful goal is sound, nor is it to be encouraged. Rather, advice in furtherance of such goals is anathema to our system of justice; hence, a client’s communications seeking such advice are not worthy of protection.”).
127. Reitz, supra note 100, at 639. “Fisher’s simulated Fifth Amendment privilege, which enables the lawyer to assert the act of production rights of the client, was not conceived in Fisher as emanating from the self-incrimination clause. In fact, the Court took pains to locate the simulated privilege wholly outside the Constitution. The lawyer’s power to object is based instead upon the attorney-client privilege and thus subject to the significant exceptions of that privilege. This might seem to harm the client for choosing to reveal the information to the lawyer, and to the extent that is true I take that to be one of Fisher’s ramifications. On the facts of this scenario, however, it is more precise to conclude that the client is being harmed for seeking the lawyer’s assistance in covering up the fraudulent transaction—it is this intent that triggers the exception that makes the information discoverable in the hands of the lawyer. See, e.g., United States v. Lentz, 419 F.Supp. 2d 820, 830 (2005) (“[I]t cannot be said that advice in furtherance of a fraudulent or unlawful goal is sound, nor is it to be encouraged. Rather, advice in furtherance of such goals is anathema to our system of justice; hence, a client’s communications seeking such advice are not worthy of protection.”).
129. The obligation to report is imposed upon “a person having cause to believe that a child’s physical or mental health or welfare has been adversely affected.” TEX. FAM. CODE § 261.101 (2010).
132. The privilege does not even apply to compelled production of physical evidence. See Schmerber v. California, 384 U.S. 757 (1966) (distinguishing between real or physical evidence such
The right to counsel guaranteed by the Sixth Amendment presents a more challenging inquiry. It ensures some level of adequacy in the representation afforded to criminal defendants, and the idea that such adequacy would be threatened by enforcing mandatory disclosure obligations against a criminal defendant’s attorney certainly has strong intuitive appeal. But there is an uneasy tension between the force of this intuition—passionately and persuasively defended by scholars—and a Sixth Amendment jurisprudence that is growing increasingly technical, with the Supreme Court developing complex rules about when it does and doesn’t apply, and increasingly insistent on demonstrations of some concrete prejudicial impact on the reliability of the trial.

An immediate limitation on the reach of the guarantee of effective assistance of counsel is that it applies only to criminal cases that result in imprisonment and does not attach until “the initiation of adversary judicial criminal proceedings—whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.” The divorce client discussed above has no Sixth Amendment right to counsel, even if he has engaged in criminal conduct, unless and until the state initiates criminal proceedings against him. The Sixth Amendment doesn’t govern the relationship he has with his attorney, and so the attorney’s compliance with the child abuse reporting statute doesn’t violate

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134. See, e.g., Wayne D. Brazil, Unanticipated Client Perjury and the Collision of Rules of Ethics, Evidence, and Constitutional Law, 44 MO. L. REV. 601, 623 (1979) (“The sixth amendment right to effective assistance of counsel is in some measure jeopardized by any rule of law that discourages a defendant from sharing openly and fully with his lawyer all information that may be relevant to his defense.”); see also United States v. Henry, 447 U.S. 264, 295 (1980) (Rehnquist, J., dissenting) (“the Sixth Amendment, of course, protects the confidentiality of communications between the accused and his attorney.”). STEPHEN A. SALTZBURG & DANIEL J. CAPRA, AMERICAN CRIMINAL PROCEDURE: CASES AND COMMENTARY 1360 (9th ed. 2010) (“Can you think of anything more destructive to the attorney-client relationship than the lawyer ratting out her client?”); Marjorie Cohn, Looking Backward: The Evisceration of the Attorney-Client Privilege in the Wake of September 11, 2001, 71 FORDHAM L. REV. 1233, 1240 (2003) (“Effective assistance of counsel requires confidential and unfettered communication between the accused and his attorney at every critical stage of a criminal proceeding . . . When his attorney-client privilege is wrongfully violated, a defendant has been denied his Sixth Amendment right to the effective assistance of counsel.”).

135. The intuition builds on the “dominant view” of the lawyer’s role as partisan advocate who knows only his client’s interests; the Supreme Court views defense attorneys as making the process fair; defense attorney’s role is to legitimate the outcome and justify the institution of criminal trials.


137. Kirby v. Illinois, 406 U.S. 682, 689 (1972); Brewer v. Williams, 430 U.S. 387 (1977); Rothgery v. Gillespie Cnty, 554 U.S. 191 (2008) (reiterating that “the right to counsel guaranteed by the Sixth Amendment applies at the first appearance before a judicial officer at which a defendant is told of the formal accusation against him and restrictions are imposed on his liberty”). For criticism of this line of cases, see Pamela R. Metzger, Beyond the Bright Line: A Contemporary Right-to-Counsel Doctrine, 97 NW. U. L. REV. 1635, 1636 (2003) (asserting that “a mechanical and rote invocation of a rigid right-to-counsel doctrine deprives modern criminal defendants of counsel at proceedings that are truly critical stages of contemporary criminal procedure”).
the Sixth Amendment even though criminal proceedings may follow as a result of the disclosure.\footnote{138}

Moreover, the Sixth Amendment right is offense-specific.\footnote{139} The Buried Bodies case provides a perfect illustration: Garrow had already been indicted on the Domblewski murder at the time he revealed to his attorneys the existence and location of the buried bodies, and he was thus fully possessed of the right to effective assistance of counsel for that charge. But he had no Sixth Amendment rights with regards to other murders he may have committed until the state initiated formal criminal proceedings against him for those crimes.\footnote{140} A statute that requires an attorney to disclose information about unindicted offenses does not violate a client’s Sixth Amendment right to counsel unless it deprives him of effective assistance for the charges already filed against him.\footnote{141}

To be sure, we can readily see how such a dynamic might emerge. Imagine that Armani and Belge, upon confirming the existence and location of the buried bodies, had complied with the public health statute, making the required report to the relevant authorities about the medically unattended deaths. They then satisfy their ethical obligation to tell Garrow that they have done so,\footnote{142} and he becomes infuriated by their betrayal, refusing to communicate with them or to cooperate in any way. If Garrow is forced to proceed to trial on the Domblewski charges represented by attorneys he does not trust and will not speak with, surely his right to be represented by effective counsel has been implicated.\footnote{143} How-

\footnote{138. See, e.g., Nickel v. Hannigan, 97 F.3d 403 (10th Cir. 1996).}

\footnote{139. Texas v. Cobb, 532 U.S. 162 (2001); Construction and Application of Sixth Amendment Right to Counsel—Supreme Court Cases, 33 A.L.R. FED. 2d 1 (2009).}


\footnote{141. See, e.g., United States v. Fortna, 796 F.2d 724, 731 (5th Cir. 1986) ("[E]vidence obtained by governmental actions which violate an individual’s Sixth Amendment rights with respect to an offense as to which adversary judicial criminal proceedings had been initiated when the actions occurred, is not inadmissible under the Sixth Amendment in a trial (or presumably in a grand jury proceeding leading to indictment) of the same individual for a different offense as to which adversary proceedings had not been initiated when those same actions took place.").}

\footnote{142. See MODEL RULES OF PROF'L CONDUCT R. 1.4, which requires a lawyer to “keep the client reasonably informed about the status of the matter...consult with the client about any relevant limitation on the lawyer’s conduct when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law . . . [and] explain a matter to the extend reasonably necessary to permit the client to make informed decisions regarding the representation.” Id. For a critique of 1.4’s limited scope, see Eli Wald, Taking Attorney-Client Communications (and Therefore Clients) Seriously, 42 U.S.F. L. REV. 747 (2008). Wald proposes that the attorney’s obligation to communicate with the client be construed so that “if developments in the representation lead the lawyer to entertain disclosure of confidential client information, then whether and how the lawyer plans to exercise her discretion to reveal confidential client information becomes material and must be communicated to the client promptly.” Id. at 791.}

\footnote{143. While this seems intuitively correct, it is an unsettled area of Sixth Amendment law. The Sixth Amendment generally requires the petitioner to demonstrate in some specific way how he was prejudiced by the attorney’s alleged deficiencies. Strickland v. Washington, 466 U.S. 668 (1984); Wiggins v. Smith, 539 U.S. 510 (2003) (“A petitioner must show that counsel's performance was deficient, and that the deficiency prejudiced the defense.”). However, criminal defendants are, in a broader sense, entitled to counsel who functions in the active role of an advocate, see Entsinger v. Iowa, 386 U.S. 748 (1967), and the Supreme Court has on occasion been willing to forego the preju-}
ever, any constitutional violation can be avoided by allowing withdrawal from the attorney whose relationship with the client has been compromised by the disclosure and appointing substitute counsel who does not labor under the same shroud of hostility and mistrust.\textsuperscript{144} If Garrow proceeds to trial on the charged offenses with a new attorney who performs competently, his former attorney’s disclosure regarding the unindicted offenses raises no cognizable Sixth Amendment violation. This is because the Sixth Amendment is offense-specific and attaches only after the initiation of formal proceedings, as mentioned above, and also because the Supreme Court generally requires Sixth Amendment claimants to demonstrate “some effect of challenged conduct on the reliability of the trial process.\textsuperscript{145} Garrow would have to show how his former attorney’s disclosure regarding one set of crimes undermined the fairness of a trial on unrelated offenses during which he was represented by a different lawyer.

\textsuperscript{144} Whether the Sixth Amendment requires such substitution is another matter altogether; but it certainly is satisfied by it. Good cause for the substitution of counsel has been defined as a “conflict of interest, a complete breakdown of communication, or an irreconcilable conflict with the attorney . . . If the district court denies the request to substitute counsel and the defendant proceeds with unwanted counsel, we will not find a Sixth Amendment violation unless the district court’s ‘good cause’ determination was clearly erroneous or the district court made no inquiry into the reasons for the defendant’s request to substitute counsel.” United States v. Goldberg, 67 F.3d 1092, 1098 (3d Cir.1995); cf. Plumlee v. Masto, 512 F.3d 1204 (9th Cir. 2008). \textit{But see} Seidelson, \textit{supra} note 127, at 708 (1977) (asserting that to tell clients “that their sixth amendment right to counsel has not been violated because they are able to acquire new counsel before trial hardly undoes the harm imposed by compelling original counsel to comply with the subpoena . . . Surely the Sixth Amendment does not require or even permit, as a condition precedent to the right to counsel, that clients make potentially damaging revelations to the prosecution through their first selected counsel. The imposition of that price would appear to be basically inconsistent with the sixth amendment”).

But let us examine a situation uncomplicated by the need to distinguish between indicted and unindicted offenses, in which the impact of an attorney’s disclosure on pending criminal proceedings is much less attenuated. Consider an attorney representing a defendant charged with insurance fraud. The attorney contemplates a defense centering on the assertion that the defendant did not have the requisite knowledge of the falsity of the statements in question, and raises this with her client. In response, the client acknowledges having been aware that his statements were false, and ruefully suggests that another strategy might be preferable. In a handful of states the attorney would now be under an obligation to report—maybe even within thirty days—what she knows or at least reasonably suspects to be a fraudulent insurance act committed within the state. (Let’s put aside for the moment the seemingly limited utility of requiring someone to report to the government an incident that is the subject of a pending prosecution. Although some reporting statutes contain exceptions of this sort, many do not.) If the attorney complies with the statute, reporting to the state department of insurance incriminating information that would undoubtedly help the prosecution prove its case against her client, haven’t some core Sixth Amendment principles surely been offended?

Perhaps surprisingly, the answer is not at all clear, in part because the closest analogues in existing Sixth Amendment case law are still at some distance. When we evaluate those cases, we see two principles emerge that limit the potential force of the Sixth Amendment in this area: first, the notion that attorney conduct that is compliant with ethical rules meets the standard of reasonableness required by the Sixth Amendment; and second, the relentless demand for “demonstrable prejudice” that characterizes the Sixth Amendment inquiry.

146. See, e.g.,TEX. PENAL CODE §35.92
147. TEX. INS. CODE 701.051
148. The utility is certainly limited, if not non-existent, if the purpose of the reporting statute is to bring wrongful conduct to the government’s attention, enabling it to investigate, remediate, and perhaps prevent additional harm. If, on the other hand, the purpose is to provide informational advantages to the government for criminal prosecution and punishment, the utility is clearer, although the state may face additional Sixth Amendment scrutiny where it is deliberately seeking to obtain confidential communications. See, e.g., Robert Mosteller, Discovery Against the Defense: Tilting the Adversarial Balance, 74 CAL. L. REV. 1567, 1666 (1986); Martin Gardner, The Sixth Amendment Right to Counsel and its Underlying Values: Defining the Scope of Privacy Protection, 90 J. CRIM. L. & CRIMINOLOGY 398, 413–16 (2000); Robert P. Mosteller, Admissibility of Fruits of Breached Evidentiary Privileges: The Importance of Adversarial Fairness, Party Culpability, and Fear of Immunity, 81 WASH. U.L.Q. 962, 997–98 (2003).
149. Oregon’s child abuse reporting statute, for example, does not require a report where an individual “acquires information relating to abuse by reason of a report made under this section, or by reason of a proceeding arising out of a report made under this section, and the public or private official reasonably believes that the information is already known by a law enforcement agency or the Department of Human Services.” OR. REV. STAT. § 419B.010(2) (2010).
150. Scholars have decried the heavy burden imposed by this requirement. See, e.g., Sanjay Chhablani, Disentangling the Sixth Amendment, 11 U. PA. J. CONST. 487, 541–43 (2009) (criticizing Strickland’s requirement that “defendants demonstrate—not for purposes of determining whether
Both principles can be traced to *Strickland v. Washington*, in which the Supreme Court announced the test it would use to evaluate whether an attorney’s performance was so inadequate as to violate the Sixth Amendment. To prevail on such a claim, one must show both that the attorney in question performed beneath an objective standard of reasonableness, and that the defendant was prejudiced by the deficient performance. As to the first prong, the Court explained that counsel’s conduct would be assessed in light of “prevailing professional norms.” As to the second, the Court emphasized that the defendant must show “a reasonable probability that but for counsel’s unprofessional errors, the outcome of the proceeding would have been different.”

Applying the *Strickland* standard in subsequent cases, the Court has paid particular attention to what prevailing professional norms have to say about the challenged aspect of an attorney’s performance. In *Nix v. Whiteside*, the conduct in question was the trial attorney’s refusal to allow his client to present potentially perjurious testimony. Whiteside, who was charged with murder and intending to assert at trial that he stabbed the victim in self-defense, suggested for the first time on the eve of trial that he had seen the victim reach for “something metallic” immediately before the stabbing. The late addition of this detail, combined with Whiteside’s associated commentary (“in Howard Cook’s case there was a gun. If I don’t say I saw a gun I’m dead”), led the attorney to conclude that any such testimony would be perjurious and impermissible, and he said as much to Whiteside. Upon Whiteside’s continued insistence that his testimony would include a mention of “something metallic,” the attorney announced that he would then be obliged to inform the court that Whiteside had perjured himself and would seek to withdraw from the case. Whiteside apparently took this to heart, as his testimony at trial was free of the forbidden reference; it was also unsuccessful, inasmuch as the jury rejected his self-defense claim and he was convicted of second degree murder. The Supreme Court rejected Whiteside’s contention that his attorney’s admonitions deprived him of the effective assistance of counsel, emphasizing that the attorney’s conduct was “wholly consistent with the Iowa standards of professional conduct and law, with the overwhelming majority of courts, and with codes of professional ethics. Since there has been no breach of any recognized profes-

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152. *Id.* at 691.
153. *Id.* at 694.
155. *Id.* at 161.
156. *Id.*
157. *Id.*
158. *Id.* at 162.
sional duty, it follows that there can be no deprivation of the right to assistance of counsel under the Strickland standard.”

Even in contexts that do not involve client perjury, this language has been read to foreclose Sixth Amendment claims where the challenged conduct was consistent with the applicable rules of professional responsibility. In McClure v. Thompson, for example, the Ninth Circuit refused to find constitutionally ineffective assistance of counsel where an attorney voluntarily disclosed to law enforcement authorities the location of two children who had been kidnapped and murdered by the attorney’s client. The attorney withdrew from representation after the disclosure, but at trial the prosecution introduced a great deal of evidence stemming from the discovery of the children’s bodies, as well as testimony regarding the anonymous phone call placed by the attorney’s secretary to the sheriff’s department. After his conviction and triple life sentence were affirmed on appeal by the state court, the client brought a federal habeas petition asserting that his Sixth Amendment right to effective assistance of counsel had been violated by the disclosure. The panel evaluated this claim by assessing whether the attorney complied with the rules of professional responsibility in revealing the information. On the factual record before it, the majority concluded that it was reasonable for the attorney to believe that the two children were still alive at the time he had their whereabouts reported to the sheriff, and that the disclosure was necessary to prevent the escalation of kidnapping to murder. Because the ethical rule permits disclosure in such circumstances, the attorney’s conduct did not violate the Sixth Amendment.

The implications for our inquiry seem to be quite striking. Rule 1.6(b)(6) explicitly permits an attorney to disclose client confidences where necessary to comply with other law. If the Sixth Amendment is satisfied by attorney conduct that stays within the bounds of the ethical rules, then any contention that an attorney was constitutionally inadequate for complying with reporting laws would seem to be a non-starter. It is important

159. Id. at 175.
160. McClure v. Thompson, 323 F.3d 1233 (9th Cir. 2003); cf. In re Seelig, 180 N.J. 234, 254–56 (2004) (noting that in an attorney disciplinary proceeding, the court rejected the assertion that the Sixth Amendment rights of the attorney’s client excused the attorney’s failure to comply with ethical rules, noting that the Sixth Amendment does not require that which is unethical.”)
161. 323 F.3d at 1235.
162. Id. at 1236.
163. It was uncontested that this was the right approach; the dispute between the parties, and between the majority and the dissent, was whether the attorney’s conduct did or did not violate the ethical rules. Id. “The parties, apparently agreeing that these consistently recognized ethical standards provide important guidance as to whether Mecca’s counsel was deficient under the first prong of Strickland, focus much of their dispute on the reasonableness of Mecca’s actions in light of these exceptions to the general principle of confidentiality. We agree that this approach is proper.” Id. at 1242.
164. Id. at 1245–46.
165. Id. at 1247.
to recognize, however, that cases like Nix and McClure are analytically distinct: they involve challenges to an individual attorney’s discretionary decision-making. In those circumstances, compliance with the rules of professional responsibility serves as a proxy for the reasonableness of the attorney’s conduct; reference to the applicable ethical rules illuminates the soundness of the professional judgment that is at the heart of the Strickland inquiry. Our question, however, is very different. In searching for the constitutional implications of laws that take away an attorney’s discretion, an inquiry into the reasonableness of counsel’s conduct is rather off-point. It is structurally inapt to look to the ethical rules, which govern individual attorney conduct, to ascertain whether the legislature is demanding something of a criminal defense attorney that the Sixth Amendment does not permit it to demand.

What we want to know is what sort of scrutiny the Sixth Amendment brings to bear on state action that undermines the confidentiality of attorney-client communications. The Supreme Court cases pertinent to this question break down into two distinct types: in one set the government intrudes into the defense camp—perhaps through an undercover informant, or some sort of electronic surveillance. In the other strand, the “interference” cases, the government interposes some sort of obstacle between attorney and client—such as a ban on communication during a trial – without itself becoming privy to their discussions.

The leading intrusion case is Weatherford v. Bursey, in which an undercover agent, acting in the guise of a co-defendant, participated in meetings between an accused and his attorney. Weatherford, the undercover agent, participated along with Bursey in the vandalizing of a selective service office. Weatherford immediately reported the incident, and was arrested and charged along with Bursey to maintain his undercover status. After being released on bond, Bursey retained counsel; in preparing for trial Bursey and his attorney invited Weatherford to two of their meetings, “in an effort to obtain information, ideas or suggestions” for Bursey’s defense. Weatherford attended the meetings, purportedly to avoid blowing his cover, but did not discuss with or con-

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166. For an incisive analysis of attorney discretion under the ethical rules see Bruce A. Green & Fred C. Zacharias, Permissive Rules of Professional Conduct, 91 MINN. L. REV. 265 (2006). One commentator has colorfully described discretionary disclosure provisions as “a luxury made available to the morally scrupulous at their own risk.” David Fried, Too High a Price for the Truth: The Exception to the Attorney-Client Privilege for Contemplated Crimes and Frauds, 64 N.C. L. REV. 443, 495 (1986).


169. Id. at 547.

170. Id.

171. Id. at 548.
vey to his superiors, the prosecuting attorney, or anyone on the prosecutor’s staff any information about Bursey’s trial plans or defense strategy. Weatherford did, however, testify at trial; his effectiveness as an undercover agent having been brought into question in the weeks preceding the trial, the prosecutor decided to call him as a witness, and he gave an eyewitness account of Bursey’s vandalism. Bursey was convicted, and subsequently brought suit under 42 U.S.C. § 1983, seeking money damages for what he asserted was the violation of his Sixth Amendment right to counsel.172

The Supreme Court reversed the appellate court’s decision in Bursey’s favor, rejecting the view of the Fourth Circuit that “whenever the prosecution knowingly arranges and permits intrusion into the attorney-client relationship the right to counsel is sufficiently endangered to require reversal and a new trial.”173 Calling this a “per se rule” that “cuts too broadly,” the Court refused to recognize a Sixth Amendment violation where there had been no evidence introduced at trial obtained through Weatherford’s attendance at the meetings, “no communication of defense strategy to the prosecution, and no purposeful intrusion by Weatherford.”174

What does this mean for the constitutionality of enforcing disclosure statutes against attorneys? To draw some insight from Weatherford we must begin from the premise that requiring an attorney to disclose confidential client information coming within the realm of a disclosure statute is conceptually similar to having the state listen in on attorney-client communications via an undercover informant. Weatherford strongly suggests that the Sixth Amendment is not necessarily violated by the government’s access to confidential information, but by the government’s use of that information against the accused; under this rubric, attorney compliance with reporting statutes would only violate the Sixth Amendment if the attorney’s report, or evidence derived from the report175 was introduced into evidence against the defendant or otherwise affected his criminal trial in some identifiable manner.176 One commentator, evaluating lower court cases after Weatherford, concludes that “in situations where the Sixth Amendment right to counsel has attached, a constitutional violation occurs if the government purposefully intrudes into that relationship or knowingly acquires confidential information and

172. Id. at 549.
173. Id.
174. Id. at 557.
175. For a careful discussion of how to evaluate the admission of fruits of the attorney’s disclosure, see Mosteller, supra note 149.
176. I assume here that reporting statutes would not constitute the sort of “purposeful intrusion” into the attorney-client relationship that the Weatherford opinion suggested might warrant a different outcome. See Weatherford, 429 U.S. at 557.
uses it to the prejudice of the accused.” 177 In his influential treatise Wayne LaFave is even more direct, asserting that after Weatherford, an invasion of the attorney-client relationship “will not be deemed to violate the Sixth Amendment in the absence of a realistic likelihood of having adversely impacted the defense at trial.” 178 The implications for our inquiry are quite profound, suggesting that states could demand disclosure even from criminal defense attorneys so long as the attorney’s disclosure had no effect on the client’s trial.

Where the government interferes with the attorney-client relationship, however, blocking communication between the accused and his lawyer rather than simply listening in on it, the Supreme Court has on occasion been willing to forego the prejudice inquiry, excusing the Sixth Amendment challenger from the obligation to demonstrate particularized prejudice stemming from the interference. 179 In one such case, Geders v. United States, the accused testified in his own defense. 180 Shortly before 5:00 pm, when his direct examination had just been completed, the trial judge adjourned for the day and instructed the defendant and his attorney not to communicate during the overnight recess. 181 Counsel objected, explaining that he and his client needed to discuss a variety of problems that had emerged over the trial and that they would refrain from discussing the impending cross-examination. The trial court insisted that there be no communication during the overnight recess and counsel obeyed. 182 The appellate court affirmed Geders’ conviction on the grounds that he had been unable to demonstrate any prejudice arising from his inability to consult with counsel during the overnight recess. 183 The Supreme Court reversed; without any assessment of potential prejudice, the Court held that the “sustained barrier to communication between a defendant and his lawyer” violated the right to the assistance of counsel guaranteed by the Sixth Amendment. 184

How might this shed light on the Sixth Amendment implications of attorney compliance with disclosure statutes? The premise is that the defense team’s knowledge that the government may obtain some of their confidences operates in a powerful ex ante fashion, chilling the frank exchange of information between attorney and client and interfering with the candor that is the hallmark of effective representation. Is this the sort of “sustained barrier to communication” that would violate the Sixth Amendment?

177. Mosteller, supra note 149, at 1002; see also United States v. Morrison, 449 U.S. 364 (defendant must show that government’s intrusion into the attorney-client relationship resulted in demonstrable prejudice causing an adverse impact upon criminal proceedings).
178. 3 WAYNE LAFAVE ET AL. CRIMINAL PROCEDURE §11.8(b).
180. 425 U.S. 80 (1976)
181. Id. at 82.
182. Id. at 82-83.
183. Id. at 85-86.
184. Id. at 91.
Amendment without a demonstration of particularized prejudice? Possibly, but the Court’s explanation for its holding is so tied to the fairness of the proceeding as to suggest some grounds for skepticism that the principle would be extended to scenarios that affected the trial less directly. Emphasizing that the recess in question was an overnight recess, 17 hours long, the Court then observed:

It is common practice during such recesses for an accused and counsel to discuss the events of the day’s trial. Such recesses are often times of intensive work, with tactical decisions to be made and strategies to be reviewed. The lawyer may need to obtain from his client information made relevant by the day's testimony, or he may need to pursue inquiry along lines not fully explored earlier. At the very least, the overnight recess during trial gives the defendant a chance to discuss with counsel the significance of the day’s events. Our cases recognize that the role of counsel is important precisely because ordinarily a defendant is ill-equipped to understand and deal with the trial process without a lawyer's guidance.\(^{185}\)

On this account, the value of attorney-client communication is an instrumental one, furthering the defendant’s right to a fair trial. Even in this rare instance in which the Court doesn’t place the burden of demonstrating prejudice on the petitioner, it is evident that the Court’s central preoccupation is with the Sixth Amendment’s guarantee that one will not be tried without having an attorney by one’s side to provide guidance, explanation, and counsel throughout the trial process. It is simply not clear that the Court would be similarly willing to forego a prejudice inquiry where the “sustained barrier to communication” is partial, circumscribed, and comes in the form of a defendant’s own hesitation about what to share with his attorney.\(^{186}\)

The synthesis of these disparate strands of right-to-counsel jurisprudence is this: to reach the boundary on legislative power imposed by the Sixth Amendment first requires that the accused’s Sixth Amendment’s rights have attached, and have attached with regards to the offenses that form the basis of the attorney’s disclosure obligation. We then have to posit that attorney compliance with the relevant ethical rules would not be deemed controlling as it has been in other scenarios. Assuming we’ve gotten that far, it is unlikely that a Sixth Amendment challenge to these disclosure statutes would be evaluated without an inquiry into prejudice. Where prejudice is an element of the inquiry, any conclusions about whether the right was violated will necessarily involve a case-by-case

\(^{185}\) Id. at 88.
\(^{186}\) Some of the post-\textit{Geders} cases are illuminating in this regard. 581 F.3d 614; 487 F.3d 124; 412 F.3d 292.
assessment, one that will have a great deal to do with what happened at trial.

What the foregoing does not resolve is the role that confidentiality plays in allowing a criminal defendant to enjoy the full scope of both his Fifth and Sixth Amendment rights without sacrificing one for the other.\(^{187}\) Scholars have advanced several variations on this argument, concluding that only by insulating the attorney from disclosure can we avoid forcing a constitutionally impermissible choice on a criminal defendant: share key facts with one’s attorney and risk subsequent incriminating disclosure that one could not have been forced to make oneself, or keep such facts to oneself and risk the consequences of proceeding with an ill-informed attorney.\(^{188}\) This is an alluring argument, but it is only as strong as each of the two rights that form the horns of the dilemma. As Professor Westen has explained, “Either a compelled election between two constitutional rights violates one or more of the two rights, or it does not . . . Contrary to a suggestion that is sometimes made, the mere ‘juxtaposition’ of two constitutional rights does not itself create a constitutional issue: the so-called ‘tension’ between two constitutional rights is not itself a constitutional problem apart from the effect of the compelled election on the two respective rights.”\(^ {189}\)

This is best illustrated by *McGautha v. California*, in which the Court considered an Ohio state procedure that relied on a single trial both to determine guilt and impose a sentence; the defendant asserted that the procedure required him to choose between his privilege against self-incrimination and his right to face his sentencer.\(^ {190}\) The Court explained that “[t]he threshold question is whether compelling the election impairs to an appreciable extent any of the policies behind the rights involved.”\(^ {191}\) This articulation is not, in itself, particularly useful; what is much more instructive is how the Court proceeded to answer the question. The Court first assessed whether the single trial system could be said to force a waiver of the privilege against self-incrimination where the defendant wishes to address the jury regarding the appropriate punishment.\(^ {192}\) The Court determined that the choice, while perhaps even

\(^{187}\) See, e.g., Seidelson, *supra* note 127, at 713. Discussing whether an attorney can be compelled to produce physical evidence given to him by a client, allegedly “fruits of a violent crime,” Seidelson posits: “If the retention of counsel and subsequent intercourse between client and counsel jeopardize client’s fifth amendment right against self-incrimination or his privilege of confidentiality, client may be dissuaded from retaining counsel. This dissuasive effect would be in basic opposition to the suspect’s right to counsel.” *Id.*


\(^{191}\) *Id* at 214.

\(^{192}\) *Id* at 215.
“cruel,” was analogous to other strategic choices bound up in the decision whether to testify, and presented no greater offense to the privilege against self-incrimination than, for example, the requirement that a defendant who has chosen to testify must also submit to cross-examination. The Court then turned to the converse: a situation in which the accused, to preserve his privilege against self-incrimination, foregoes the opportunity to provide “evidence peculiarly within his own knowledge” that might persuade the sentencer to exercise mercy. Here too the Court found that there was no constitutional violation, even assuming that the Constitution requires an opportunity for the defendant to provide evidence and argument relevant to sentencing: “we do not think the Constitution forbids a requirement that such evidence be available to the jury on all issues to which it is relevant or not at all . . . We do not think that Ohio was required to provide an opportunity for petitioner to speak to the jury free from any adverse consequences on the issue of guilt.” The Court thus concluded that the single trial procedure was thus “consistent with the rights to which petitioners were constitutionally entitled.”

So let’s apply a similar approach to our dilemma. It is often posited that an attorney’s effectiveness depends on discovering all relevant facts, some of which can only be obtained from the defendant; some of these facts might of course be incriminating. Where an accused shares damaging information with her attorney, who then must disclose it to comply with a reporting statute, has the privilege against self-incrimination been violated? We answered this question before: in deciding to share these facts with her attorney, the client releases the information into a realm in which it is not protected by the Fifth Amendment.

Conversely, if the client chooses not to reveal damaging information to his attorney so as to protect the information from forced disclo-
sure, the client risks impairing the attorney’s effectiveness. In other words, enforcing disclosure statutes against attorneys gives clients a reason to restrict communication with their own attorneys, undermining the effectiveness of their counsel. Is this impairment a cognizable violation of the Sixth Amendment? This just restates ever so slightly the problem we explored in depth above, and as we saw, the best answer we have is maybe.

In short, the Fifth and Sixth Amendments as currently interpreted will allow a great many applications of disclosure statutes to attorneys. The foregoing discussion illustrates what is straightforward in the abstract but what takes some elaboration to understand in its particulars: except where it would be unconstitutional, legislatures have the power to pass statutes requiring citizens to disclose to government authorities certain types of information; they can impose the obligation on lawyers just as they can on beauticians, mechanics, and poets. Unless the application of a disclosure statute to an attorney would fall into one of the narrow categories of decisions prohibited to legislatures by state and federal constitutions, a court has no basis to presume that a lawyer would be excused from compliance with generally applicable law simply because the statute requires the disclosure of confidential client information.

III. THE QUESTION OF STATUTORY INTERPRETATION

The right question to ask is whether the legislature actually exercised the power to require lawyers to disclose. In other words, did the legislature consider when it passed the public health statute that among those the statute might reach would be lawyers receiving knowledge of medically unattended deaths in the course of representing a client? And did it intend that such a lawyer treat the disclosure requirement as superior to the ethical duty of confidentiality? Or would the legislature have qualified the reporting obligation with an exception for client confidences had it anticipated the situation confronting Armani and Belge? Most fundamentally, what should a court assume about how the legislature would resolve the conflict between disclosure and confidentiality where the statute does not specify? The question is not whether lawyers can claim some exemption to generally applicable law by virtue of their professional responsibilities; the question is whether the legislature in-

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199. See supra note 200.

200. For a small sample of the academic criticism of Strickland, see, e.g., William S. Geimer, A Decade of Strickland’s Tin Horn: The Doctrinal and Practical Undermining of the Right to Counsel, 4 WM. & MARY BILL OF RTS. J. 91 (1995) and Stephen B. Bright, Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer, 103 YALE L.J. 1835 (1994).

201. For a discussion of the various institutional characteristics that might lead one, as a policy matter, to prefer legislatures over courts as regulators of lawyers, see Benjamin H. Barton, supra note 10.
tended its statute to abrogate or preserve confidentiality. Where that cannot be ascertained, the question becomes what default rules of interpretation should courts apply to best manage the uncertainty about legislative intent. In the section that follows, I argue that the Supreme Court’s clear statement jurisprudence provides a model to assist in the answering of these questions.

A. Of Plain Text and Clear Statements

Perhaps the best place to begin is with the most pertinent objection: where a statute like New York Public Health Law § 4143 applies by its plain text to “any person” and makes no mention of exceptions or exclusions for information gained in the course of an attorney-client relationship, on what basis is it legitimate even to query what the legislature may have had in mind with regards to the professional duty of confidentiality? What grounding is there for entertaining any interpretation other than that the statute applies without exception to attorneys just as it does to anyone else? Perhaps there is none that is ultimately satisfactory. But there are two reasons it is worth investigating. First, it is far more faithful to notions of democratic legitimacy and separation of powers to ask whether the legislature intended for the disclosure statute to abrogate or preserve lawyer-client confidentiality—even where it seems somewhat forced or manipulative to generate the ambiguity—than to assert that confidentiality shields lawyers from compliance with otherwise applicable law. Second, as I will demonstrate in this section, the Supreme Court has long interpreted Congressional enactments in light of background principles that appear nowhere on the face of the statute at issue. Time and time again, across multiple contexts, the Court has refused to give effect to the most natural reading of statutory language where that would upset some pre-existing relationship of rights and responsibilities deemed by the Court too fundamental to be re-ordered silently. Where a statute appears to give rise to these consequences the Court applies what has come to be known as the clear statement rule.

202. I acknowledge here the very trenchant critique that legislatures are collective, comprised of individuals who cannot meaningfully be said to share a single intent with regards to enacted legislation, much less an intent discernable from the text of the statute. See, e.g., Kenneth A Shepsle, Congress is a “They,” Not an “It”: Legislative Intent as Oxymoron, 12 INT’L REV. L. & ECON. 239 (1992).

203. Similar examples abound. The requirements of § 6050I, as implemented through Form 8300, state that “Any person who receives in the course of trade or business a cash payment of more than $10,000” must provide the name, address, and TIN of the person from whom the cash was received, the amount of cash received, and the date and nature of the transaction. There is no statement reflecting an intent to abrogate confidentiality, but neither is there any indication that Congress intended to exempt anyone at all.

204. All state constitutions vest the powers of government in separate and distinct departments. A Proposed Delineation, supra note 55, at fn.14 (citing R. DISHMAN, STATE CONSTITUTIONS: THE SHAPE OF THE DOCUMENT 6–7 (rev. ed. 1968)).

background principles that receive special judicial solicitude in statutory interpretation, the question then becomes whether confidentiality should be among those.

B. Clear Statement Rule as a Substantive Canon

The Supreme Court applies a clear statement requirement where the natural and probable reading of statutory text would threaten values identified by the Court as being particularly deserving of solicitude—values such as federalism and separation of powers. Where these are implicated, the Court will require Congress to state unambiguously that it intends with its enactment to adjust, diminish, or abrogate these values; the Court will not interpret the statute to such effect without this statement of Congressional intent. Thus, absent a clear instruction to do so, the Court will not interpret a statute to waive the federal government’s immunity from suit, to abrogate a state’s sovereign immunity from suit in federal court, to regulate core state functions, to abrogate Indian treaty rights, to abrogate the inherent power of a federal court, or to apply retroactively.

Where Congress did indeed intend to produce such results, it can amend the statute in question to provide the required clear statement. Thus, while the clear statement rule might indeed displace legislative choice, such displacement need only be temporary.

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207. Clear statement rules are similarly used to preserve balance of powers between the branches. St. Cyr v. INS, 229 F.3d 406 (2000), requires a clear statement of intent to abrogate habeas jurisdiction.


209. See Joseph D. Block, Suits Against Government Officers and the Sovereign Immunity Doctrine, 59 Harv. L. Rev. 1060, 1064–65 (1946) (distinguishing federal from state sovereign immunity and noting “[w]ith respect to suits against the Federal Government, it is wholly a judge-made doctrine, since there is nothing in the Constitution requiring it”).

210. Gregory v. Ashcroft, 501 U.S. 452 (1991) (noting that a clear statement is required when Congress attempts to regulate—such as through the Age Discrimination Employment Act—core state functions—such as setting qualifications for state office—requiring judicial retirement at age 70).


214. See, e.g., Lane v. Pena 518 U.S. 187, 198 (1996) (recognizing that Congress had amended the Rehabilitation Act to provide the sort of express waiver of state sovereign immunity found lacking in Atascadero State Hospital v. Scanlon).

215. A remarkable study by Professor Eskridge showed that in fact congressional staffers routinely monitor Supreme Court statutory decisions, that Congress holds legislative hearings on nearly 50% of these interpretations, and that at least 6-8% are legislatively overridden. William N. Eskridge, Jr., Overriding Supreme Court Statutory Interpretation Decisions, 101 Yale L.J. 331 (1991). This 6-8% statistic is alone significant and likely somewhat understates the general incidence
clear statement rules are what scholars of statutory interpretation have referred to as “substantive canons.” They reflect judicial value judgments about which background principles are weighty enough to warrant interposition. They challenge the idea that a judge interpreting a statute must strive to be the “honest agent” of the legislature’s intent, simply aiming to find the most natural and probable reading of the statute in question. They fit uncomfortably in a system purportedly characterized by legislative supremacy. Although clear statement rules do not result in the outright invalidation of legislation, they nonetheless raise “the counter-majoritarian difficulty.” They therefore require “substantial justification” to be legitimate.

Perhaps the most central justification, in that it is one the Court relies on repeatedly, is that clear statement rules are undergirded by considerations of federalism, separation of powers, and various rule of law principles, such as the reviewability of agency action, that are fundamental to our very constitutional structure. Eskridge and Frickey call this
“quasi-constitutional law…the reading into statutes of constitutional values subject only to clear legislative override.”

On this account, canons such as the clear statement rule:

- can protect important constitutional values against accidental or undeliberated infringement by requiring Congress to address those values specifically and directly. Protecting under-enforced constitutional norms through super-strong clear statement rules makes sense: it is not ultimately undemocratic, because Congress can override the norm through a statutory clear statement; such rules still provide significant protection for constitutional norms, because they raise the costs of statutory provisions invading such norms; and ultimately such rules may even be democracy-enhancing by focusing the political process on the values enshrined in the Constitution.

This insight is an essential and illuminating one for us: clear statement rules protect constitutional values from undeliberated infringement in situations where these values may be threatened, but where there is not a sufficiently direct or concrete constitutional violation for Marbury-style judicial invalidation. I think this nuanced description of terrain lying just on the outskirts of a constitutional provision, but not quite within its direct protection, is the right way to think about the application of disclosure statutes to attorneys representing criminal defendants. The Sixth Amendment discussion revealed several doctrinal reasons—offense-specific attachment, an emphasis on attorney compliance with prevailing professional norms, the requirement of demonstrable prejudice—that an attorney’s compliance with a reporting statute wouldn’t necessarily give rise to a cognizable violation of the Sixth Amendment as the Supreme Court currently sees it. But it is impossible to ignore the ways in which such disclosure gets uncomfortably close to some core values that shape our understanding of the Sixth Amendment even if we can’t quite point

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223. Eskridge & Frickey, supra note 208.
224. Id.
225. As Amy Coney Barrett has explained, “a court can overprotect a norm through statutory interpretation even if it underprotects that norm through judicial review. That is so because no canon purports to mirror the rule that would have been applied in an exercise of judicial review; a court applying a canon does not simply articulate what would have been a hard constitutional limit in the softer form of statutory interpretation.” Barrett, supra note 216, at 172.
226. I recognize that this touches upon questions of constitutional adjudication that go well beyond the clear statement rule, suggesting comparisons to the prophylactic rules in constitutional criminal procedure, the debate over whether the Court merely interprets the Constitution or implements it as well, and the legitimacy of these various extra-interpretive endeavors. Mitchell Berman, Aspirational Rights and the Two-Output Thesis, 119 Harv. L. Rev. F. 220 (2006); see also Henry P. Monaghan, The Supreme Court 1974 Term – Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 21 (1975) (describing that a prophylactic rule might be constitutionally compelled when it is necessary to overprotect a constitutional right because a narrow, theoretically more discriminating rule may not work in practice).
to their place in the doctrine. While the Supreme Court has not demarcated the point at which loss of trust between attorney and client constitutes a Sixth Amendment violation, asserting, in fact, that the Sixth Amendment does not ensure a “meaningful relationship” with one’s attorney, surely the element of trust has some functional role to play in effectuating the narrower, more technical and instrumentalist guarantee of effective assistance of counsel that the Supreme Court does recognize. Disclosure requirements that threaten this trust may not offend the Sixth Amendment so directly as to be unenforceable against attorneys, but they reach closer to the boundary of the “hard constitutional limit” than should happen without deliberation and explicit announcement by the legislature.

The legislature would have much to think about in such a regime. If it intends to impose disclosure obligations on criminal defense attorneys, it will have to say so in the text of the statute, putting lawyers on notice as described above; lawyers will in turn have an obligation to pass this information on to their clients, which at least some of them will fulfill. While there is much we don’t know about how clients decide what information to share with their lawyers, it is reasonable to assume that at least some clients will decide to keep to themselves precisely those facts that the attorney would be obliged to report. The legislature will have to wonder what exactly it is achieving with such a result: has anyone been made better off by discouraging the transmission of this information to attorneys? The point is not to make attorney disclosure so unpalatable to legislatures that they will give up the project; the point is to smoke out these deficiencies and force them into the deliberative process.

The argument that attorney-client confidentiality is constitutionally protected, however, can be made only for lawyers representing the criminally accused. Beyond the criminal context, the link between the Constitution and the confidentiality obligation is so attenuated as to render unconvincing the idea that confidentiality is a constitutional principle. Our concerns about unreflective threats to constitutional values can be resolved merely by insisting that legislatures provide clear statements of

227. For a careful and extensive discussion of three distinct values that underlie the Sixth Amendment, see Martin R. Gardner, supra note 149.
229. See Barrett, supra note 216, at 172.
230. The literature is replete with suggestions that lawyers who obtain sensitive information from their clients can protect third party interests—without disclosure—better than if they had never become privy to those facts in the first place.
231. Even in civil cases resulting in grievous deprivations of liberty, such as the permanent termination of parental rights, the Supreme Court has refused to hold that there is a per se right to counsel similar to that enjoyed by criminal defendants. See Lassiter v. Dept. of Soc. Serv., 452 U.S. 18, 25–26 (1981). See also Zacharias, supra note 101, at 357.
232. But see Monroe H. Freedman, Our Constitutionalized Adversary System, 1 CHAP. L. REV. 57, 66–68 (1998) and Subin, supra note 14, at 1127–28 who both assert that the due process clause protects one’s right to retain counsel in civil cases even though there is no right to appointed counsel nor a requirement that counsel perform effectively.
their intent to subject criminal defense attorneys to disclosure obligations. If it cannot be said that protection of constitutional values requires anything further, what should courts do when assessing the application of a disclosure statute to every other type of attorney?

At this juncture it is important to note that the Court has not limited itself to the protection of constitutionally derived values in applying clear statement rules. The Court has held that the legislature must indicate its intention to tax in clear and unambiguous terms, creating a strong interpretive presumption in favor of the taxpayer, and has said that where there is any doubt about the meaning or intent of a veteran’s statute it must be construed in the beneficiaries’ favor.233 It has been suggested that these are antiquated decisions, or at least outlying examples that appear “not to have taken root on a generalized basis,”234 but other examples are available. In interpreting 42 U.S.C. § 1983, the Court read into the statutory text common law immunities that had no constitutional provenance.235 And it is difficult to see how the canon requiring clear statement of Congressional intent to abrogate Indian treaty rights has any constitutional foundation.236 Moreover, as Manning himself demonstrates so persuasively, even those clear statement rules that arguably do have constitutional pedigree, such as the presumption against retroactive application, cannot meaningfully be traced to the Constitution without abstracting them beyond what their origins can bear.237

Thus, as a merely descriptive matter, the Court’s use of clear statement rules cannot fully be explained by reference to constitutional principles. And indeed, the defense of clear statement rules offered by some scholars suggests a much broader justification.238 Sunstein, for example, introduces his discussion by noting that legislatures must provide “a ‘clear statement’ before courts will interpret a statute to disrupt time-honored or constitutionally grounded understandings about proper governmental arrangements.”239 He then argues that interpretive principles such as clear statement rules serve “to promote better lawmaking” and “to improve the deliberation and accountability that are supposed to ac-

234. Id. at 426.
235. See discussion infra Part IIIC.
236. Philip Frickey, Congressional Intent, Practical Reasoning, and the Dynamic Nature of Federal Indian Law, 78 CAL. L. REV. 1137, fn.8 (1990). As Frickey notes, “Indians are mentioned only three times in the Constitution. Two places direct that “Indians not taxed” are to be ignored in apportioning the House of Representatives. U.S. CONST. art. I, § 2, cl. 3; Id. at amend. XIV, § 2. The only source concerning congressional power authorizes Congress “[t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Id. at art. I, § 8, cl. 3; see also Elhague, supra note 220, at 2211 (characterizing the canon in favor of Indian tribes as “having no roots in constitutional law”).
239. Id.
company [the lawmaking processes].” Tribe simply posits that “By refusing to construe ambiguous legislation expansively, the Court can effectively prevent Congress from avoiding hard questions.”

This view of the rule’s utility—as forcing deliberation and explicit decision from the politically accountable body—obviously has appeal across a doctrinal breadth that goes beyond constitutional principles; if the rule promotes better lawmaking, if it is democracy-enhancing because it elicits legislative preference in a way that is superior to other interpretive methods, then there is no reason to limit use to those statutes that implicate constitutional principles. The difficulty lies in determining what exactly is the limiting principle circumscribing the set of values that will prompt the Court to return a statute to the legislature to demand additional clarity. The problem for our inquiry is that there doesn’t seem to be one readily available; the characteristic that binds together the Court’s clear statement cases is simply not sufficiently defined. And to err on the side of including additional values in the set that requires clear statement rules is to impose additional costs. While the prospect of a court excusing a lawyer from compliance unless and until the legislature makes plain its intent to trump confidentiality may in many cases be only a growing pain, a transitional cost that will eventually subside as legislatures take the instruction to heart, that doesn’t mean the cost is de minimus.

Consider again the group of states that require child abuse reporting by all persons, without mentioning or excluding attorneys. Imagine that an attorney in one such state receives information coming within the reporting obligation; perhaps she makes a shell report, acknowledging the statutory duty but refusing to disclose client confidences, sending the agency off to court to compel disclosure. Or perhaps the attorney goes directly to court herself and seeks a declaratory judgment as to the scope of her reporting obligation. A court following the clear statement rule would excuse the attorney from reporting what she knows about an abused child because the legislature, which we know was seeking to impose a capacious reporting scheme (in contrast, for example, to states that specify certain professionals, like teachers and medical personnel), did not make a clear statement about the effect of the statute on attorney-client confidentiality. The legislature then has to expend the transaction

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240. Id.; see also Cass R. Sunstein, Nondelegation Canons, 67 U. Chi. L. Rev. 315 (2000) (asserting that canons of construction such as the clear statement rule sometimes operate as nondelegation principles, “designed to ensure that Congress decides certain contested questions on its own” rather than sloughing them off on administrative agencies).


242. Manning, supra note 49, at 403 (noting that “clear statement rules do impose something of a clarity tax upon legislative proceedings, in particular areas, which would seem to demand a justification other than the raw expression of judicial value preferences”).

costs to respond with the clear statement, and meanwhile, there’s considerable delay in the implementation of the state’s public policy. If the legislature’s premise was correct—that capacious reporting schemes reduce harm to children—then children may suffer in the interim.

Incurring these costs to promote judicial policy preferences in favor of confidentiality is troubling; at the very least, it seems to require an examination of the values that underlie the confidentiality principle. As readers will no doubt be aware, this is an enormous task, but by no means a neglected one. 244 The careful attention lavished upon it by generations of legal ethics scholars has made it difficult even to summarize comprehensively the justifications underlying the confidentiality principle. Although there are many ways to organize the inventory, a recurring schematic classifies confidentiality’s justifications as falling into three distinct groups: the necessity of confidentiality for the effective functioning of an adversary system,245 the client counseling/law compliance rationale,246 and the promotion of trust, dignity and autonomy on the part of the client.247 One risks serious understatement to note that each of these justifications has been vigorously contested.248

If the use of a clear statement rule in this context required first that we ascertain some consensus about confidentiality’s justifications, and then found a cogent way to assert that these were similar to (or as compelling as) the justifications for the nonconstitutional clear statement rules already deployed by the Court, we would be an unmanageable distance away. There are, however, other ways of understanding the Court’s use of clear statement rules that require much less.

244. See Deborah Rhode, Ethical Perspectives on Legal Practice, 37 STAN. L. REV. 589 (1985) (noting, some 25 years ago, that the “profession’s conventional defense” of attorney-client confidentiality “is too familiar to warrant extended exegis here”). See Fred Zacharias, Harmonizing Privilege and Confidentiality, 41 S. TEX. L. REV. 69, 69–70 (1999) (“The subject of attorney-client confidentiality has assumed more significance in recent scholarship than it deserves. Since its promotion as the core of the adversary system and the attorney-client relationship, numerous authors – including myself – have focused on the importance of strict confidentiality, the appropriateness of broadening or narrowing exceptions, the validity of the assumptions underlying strict confidentiality rules, and even proposals for new formulations of the principle.”).

245. Zacharias, supra note 101.

246. William H. Simon, The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology, 23 LAW AND SOC. INQUIRY 243, 281 (1998) (noting that, in support of confidentiality, “a key part of the bar’s argument is that inducing people with a shaky commitment to law abidingness to seek legal advice is good because it gives their lawyers an opportunity to dissuade them from illegal conduct.”)


248. See, e.g., David Luban, The Adversary System Excuse, in LEGAL ETHICS AND HUMAN DIGNITY (2007); Daniel R. Fischel, Lawyers and Confidentiality, 65 U. CHI. L. REV. 1, 33 (1998); Zacharias, supra note 101, at 377–96 (noting that the key assumptions underlying the adversary system rationale have been vulnerable to empirical testing).
C. Clear Statement Rules in the Service of Faithful Agency

The Court sometimes applies canons of construction that deviate from statutory text simply because it does not believe that a rational legislature could have intended the result indicated by the plain text of the statute. One could challenge the validity of the Court’s conclusion that the plain text of the statute is an inferior measure of the legislature’s preference than the Court’s own intuitions, but nonetheless, the clear statement rule in these instances is couched in terms of “faithful agency,” the idea that the Court is laboring exclusively to ascertain and effectuate legislative intent.

To start with just one example, the plain text of 42 U.S.C. § 1983 appears to impose liability on:

\[
\text{[a]ny person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws . . . .}
\]

The statute certainly does not delineate categories of public officials who are to be immune from suit; it mentions no defenses to liability at all. The Court, however, has repeatedly interpreted this silence to preserve rather than abrogate those immunities, such as the legislator’s privilege to be free of arrest or civil process for what is said or done in legislative session, that were in existence at common law when the statute was enacted. Finding in the legislative record “no clear indication that Congress meant to abolish wholesale all common-law immunities,” the Court presumed that had Congress wished to abolish the doctrine of legislative or judicial immunity it “would have specifically so provided.” Rather than giving the statute’s unqualified language its natural effect—“any person” means “any person”—the Court disregarded the plain text, refusing to construe it as an improbable silent abrogation of common law principles. “We cannot believe that Congress—itself a staunch advocate of legislative freedom—would impinge on a tradition so well grounded in history and reason by covert inclusion in the general language before us.”

250. The notion would certainly be offensive to textualists, who assert that “statutory text is the only reliable indication of congressional intent.” Barrett, supra note 216, at 112.
251. See Church of the Holy Trinity, 143 U.S. at 459 (“a thing may be within the letter of the statute and yet not within the statute, because not within its spirit, nor within the intention of its makers . . . This is not the substitution of the will of the judge for that of the legislator . . . .”).
Is it similarly difficult to believe that a legislature would “impinge” on attorney-client confidentiality “by covert inclusion” in the general language of reporting statutes? Debates about the history and provenance of confidentiality persist, and, as noted above, to make a normative assertion about confidentiality’s solid grounding in reason is to weigh in on a controversy too long-standing and extensive to canvass adequately here. But one can assert as a descriptive matter that the protection of client confidences has been part of the attorney’s professional responsibility for at least a hundred years. The evidentiary rule preventing the in-court admission of privileged communications between lawyer and client is considerably older than that, arising in its “modern form” in sixteenth century England. Whatever one’s views about the importance or value of confidentiality, its existence as a key feature of the attorney-client relationship—and thus the legal system itself—predates the emergence of statutes requiring “any person” to report certain types of information to government authorities. In other words, it is fair to say that disclosure statutes were enacted against a background expectation that attorneys generally must protect client confidences. A court laboring faithfully to ascertain legislative intent would have warrant to be skeptical that the legislature had intended to nullify these expectations without being clear about those consequences.

C. Clear Statement Rules as a Notice Requirement

The clear statement rule might also be thought of as the judicial enforcement of minimal standards of notice for the consequences of congressional enactments. Consider Pennhurst State School and Hospital v. Halderman. The federal statute in question provided financial assistance to states for the care and treatment of the developmentally disabled. As the Court noted, “the Act is voluntary and states are given the choice of complying with the conditions set forth in the Act or forgoing the benefits of federal funding.” The Act also included a “bill of

257. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 297 (1986) (noting that the Canons of Ethics drafted by the ABA in 1908 “posited a lawyer’s obligation to protect the ‘confidences’ of a client, and that an oath required of lawyers as far back as 1850 included references to maintaining the secrecy of client information); see also State v. Gleason, 19 Or. 159, 162 (1890) (describing an Oregon statute concerning an attorney’s duty to preserve client secrets as “simply declaratory of the common law”).
258. Zacharias, supra note 101, at 1106.
259. Statutes requiring the disclosure of child abuse are the earliest of these; such statutes began to emerge in the 1960s. See Robert P. Mosteller, supra note 127, at 211–12.
260. It is instructive that some reporting statutes contain exactly the sort of announcement contemplated. See discussion supra Part IIB.
262. Id. at 12–13.
263. Id. at 11.
rights,” stating that people with mental disabilities have a “right to appropriate treatment, services, and habilitation,” and are entitled to have such services “provided in the setting that is least restrictive of the person’s personal liberty.”

The gravamen of the plaintiffs’ complaint was that Pennsylvania, a recipient of federal funds under the Act, had failed to provide appropriate treatment in the least restrictive environment as required by the “bill of rights.” The question, then, was whether the “bill of rights” provisions created enforceable rights against participating states—whether those provisions were among the terms to which the states bound themselves by accepting federal funding. The Court began by noting that while Congress may indeed “fix the terms on which it shall disburse federal money to the States,” it must do so unambiguously, with the clarity necessary to permit the conclusion that a state knowingly and voluntarily accepted these terms in return for federal funding. Observing that the bill of rights provisions contained no conditional language that would signal their inclusion as terms of the bargain, the Court concluded that states had not been provided clear notice that by accepting federal funds, they were exposing themselves to causes of action brought under the bill of rights provisions.

Although the statutes we are concerned with do not present this funding-for-compliance arrangement, or indeed any other sort of bargain that would make relevant the principle of knowing and voluntary acceptance, the idea of a clear statement rule as providing minimum standards of notice certainly has considerable appeal in our context. Notice is an unmistakable element of an interpretive rule that would instruct the legislature to specify in the text of a statute when and whether the disclosure obligation contained therein applied to confidential information conveyed to an attorney. The notice rationale rests on ideas closely related to our discussion above: that confidentiality is so entrenched and pervasive a professional obligation for lawyers that a statute mandating disclosure from “any person” in some sense cannot be said to provide adequate notice to lawyers that they too are obliged to disclose.

Not only would the attorney know when she was required to cross the boundary from ethically-mandated confidentiality to legislatively-mandated disclosure, but—in theory at least—such a rule would transitorily provide notice to the attorney’s clients as to the scope of protection afforded by confidentiality, allowing them to make knowing and informed decisions.

264. Id.
265. Id. at 17.
266. Id.
267. Lee A. Pizzimenti, The Lawyer’s Duty to Warn Clients About Limits of Confidentiality, 39 CATH. U. L. REV. 441 (1990). Pizzimenti proposes a model warning for lawyers to give clients about the limits of confidentiality: interestingly, the warning does not mention exceptions to confidentiality for disclosures required by other law. Id. See, in contrast, Sobelson, supra note 39.
formed decisions about what to tell their lawyers. This notice, and the attendant sphere of client decision-making it protects, in turn minimizes the potential for unanticipated lawyer disclosure to produce that sense of betrayal so destructive to the attorney-client relationship.

D. Confidentiality’s Claim to Clear Statements

To embrace a clear statement rule in this context we need only accept the descriptive proposition that confidentiality is salient enough as a background principle to raise questions about statutory meaning that fairly present themselves independently of the interpreter’s own views about confidentiality’s importance. This salience is quite demonstrable—the persistent debate in the scholarly literature over confidentiality’s justifications, and the scope of its exceptions, obscures the almost surprising degree of consensus that confidentiality should characterize the lawyer-client relationship to some degree. Every single jurisdiction in the United States has adopted rules of professional responsibility for lawyers that include the duty of confidentiality. These rules almost uniformly announce the very broad principle that a lawyer shall not reveal information relating to the representation of a client, and then set forth enumerated exceptions; this structure conveys the default expectation of confidentiality that admits of only narrow exclusions. The confidentiality obligation is so pronounced as “a core rule of professional conduct for lawyers” that its recognition extends beyond the profession’s own understandings: one prominent authority comments that the public has “a keen awareness” that confidentiality is at the heart of the attorney-client relationship.

This is not to say that confidentiality is justified because it is so entrenched, but rather to suggest that its pervasiveness complicates the seemingly unambiguous nature of a broad disclosure statute that on its face seems to apply to everyone, including attorneys. One can be agnostic about the underlying value of confidentiality and still accept that the best approach to statutory interpretation in this context requires a clear statement rule.

268. I acknowledge here once again the considerable empirical uncertainty regarding the extent to which clients understand the confidentiality rule, and its exceptions, and accordingly make decisions about what to tell their lawyers. See, e.g., Zacharias, supra note 101; Clark D. Cunningham, How to Explain Confidentiality?, 9 CLINICAL LAW REVIEW 579 (2003).

269. It would be difficult to justify the legislature’s prerogative to regulate in this area by stealth.

270. See discussion supra Part III(B).


272. HAZARD & HOODES, THE LAW OF LAWYERING 6–9. “It is probably only a slight exaggeration to say that in the public mind, lawyers are regarded as people who know how to keep secrets, as much as they are regarded as litigators or advisors or draftsmen of contracts and wills.” Id.
IV. CONCLUSION

So does a statutory disclosure obligation imposed on “any person” include lawyers? If that’s what the legislature intended, it most certainly could. To assume that lawyers are exempt unless the statute seems to serve some particularly compelling purpose is almost exactly wrong; on the contrary, our constitutional structure requires one to locate with specificity the boundaries on legislative power that would put lawyers beyond reach.

This article has demonstrated that these boundaries leave much more within legislative authority than has previously been understood. Disclosure statutes would have to target the practice of law directly, or interfere with the functioning of the judiciary in some specific way, to violate separation of powers principles. Client confidences in the hands of an attorney are governed not by the Fifth Amendment but by the non-constitutional, and therefore abrogable, attorney-client privilege. And the Supreme Court’s current right-to-counsel jurisprudence provides any number of reasons—including offense-specific attachment, an emphasis on attorney compliance with prevailing professional norms, and the requirement of demonstrable prejudice—to be skeptical that the Sixth Amendment would impose an outright bar on attorney disclosure.

While legislatures have extensive authority to impose disclosure obligations on lawyers, however, we might still insist that legislatures announce unambiguously when they are exercising it. Doing so can protect penumbral Sixth Amendment values from unreflective infringement. Moreover, it is not always clear that legislatures have deliberately inverted the long-standing expectation that lawyers maintain client confidences. For courts to require a clear statement of such intent, rather than assuming a silent abrogation of attorney-client confidentiality, is sound. It provides attorneys, and clients, with reasonable notice that the rules of the game are changing.