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A RECENT SURVEY conducted among some hundred English and Welsh physicians revealed a marked difference of opinion regarding the practical obligations of medical secrecy.[1] The questionnaire submitted to these doctors took the form of a series of imaginary cases in which either the common good or the rights of individuals seemed to argue in favor of a doctor's divulging certain information acquired in the course of his professional practice. The doctors were asked to express their personal opinions as to proper procedure in each instance, whether to disclose or to withhold the information in question.

Some of the problems posed are quite provocative — and perhaps the divergence of opinions expressed would be considered even more so. If a physician, for example, as a private practitioner, should discover that a railroad engineer, whom he has diagnosed as epileptic, intends neither to inform his employers of his condition nor to give up his work, should the doctor himself report the case to railway authorities? Answers were almost seven to one in favor of divulging the information. Should the doctor report to the police the identity of a criminal abortionist, whose name he has learned from a woman patient who forbids him to make use of the knowledge? A slight majority favored reporting the culprit, while a strong minority declared for the contrary. A workman is receiving industrial insurance compensation for an injury alleged to have been received in the course of his work. Would his personal physician be justified in revealing to authorities that the disability was actually incurred prior to his employment and that the claim is therefore fraudulent? By approximately two to one, the doctors decided against the propriety of revealing this medical information.

The results of such a poll might easily provoke doctors to any one of several adverse reactions — either consternation at the number who would countenance an apparent breach of professional ethics in certain situations; or impatience with the insistence of some on the absolute sacredness of the medical secret regardless of all circumstances; or chagrin at the failure of doctors to agree on so basic a question; or perhaps resentment towards medical societies whose stringent ethical codes seem to create the dilemmas which occasion such uncertainties. Which, if any, is the proper reaction in the light of sound moral principles?

[1] Reported by E. C. Dawson, M.R.C.S., "Duties of A Doctor as A Citizen," *British Medical Journal*, 4902: 1474-1478 (Dec. 18) 1954.

In its ultimate refinements, the moral question of professional secrecy is complex to the extreme, and does not lend itself easily to exhaustive treatment within the limits of a single article.[2] But there is a certain minimum of basic principles which can be stated more or less briefly and which may serve to remove at least the major doubts which are likely to occur in this regard. So, in the interests of practicality, these are the principal points upon which solution will depend when problems of medical secrecy present themselves:

1) The doctor's obligation of medical secrecy is a serious duty arising from the nautral-law right of both patient and society;

2) The obligation as derived from natural law is not entirely absolute, but admits of some exceptions in accordance with the rights of both patient and society;

3) These exceptions are relatively rare, and usually at least the common good will require that a doctor maintain silence with regard to secret knowledge acquired of his patients in the course of professional practice.

NATURE OF SECRECY IN GENERAL

Apart from all technicalities, it is clear that much of what we know — especially knowledge of our own deficiencies in the physical or moral order—is of a highly personal and private nature and not the sort of information which we would care to share with others. Fortunately not all of those facts are externally apparent to others; the evidence is mercifully concealed to everyone but ourselves. For if others were to discover our secret, it could cause us notable displeasure, discomfort, embarrassment, or perhaps even misfortune of a more calamitous nature. Hence we take pains to conceal from others information which we consider to be no one's business but our own; and we resent those who pry into our private affairs for the satisfaction of their own curiosity. Whether it be the size of his bank account or the nature of his secret sins, the contents of his diary or his medical case history, the ordinary individual is extremely jealous of his monopoly on certain knowledge which he regards as being exclusively his. In other words, one's right to his own secrets is universally recognized and defended as part of our natural heritage.

It is that commonly accepted concept which the theologians attempt to delineate even more precisely when they define secrets in general as *any hidden knowledge, pertaining to a person by strict right, which others may not lawfully seek to possess, use, or dispose of (i.e., reveal) contrary to the reasonable will of the owner.* They, too, consider a secret to be the property of its owner in the very same sense in which material possessions belong exclusively to

[2] For an excellent and fully detailed treatment of professional secrecy, including specific applications to the obligation of doctors, see Robert E. Regan, O.S.A., *The Moral Principles Governing Professional Secrecy with an Inquiry into Some of the More Important Professional Secrets* (Washington: Catholic University of America, 1941).

this or that individual. Consequently only the owner of a secret has the right to possess, to use, or to share it with whom he may. For others to usurp that exclusive right is a form of injustice equivalent to theft, the seriousness of which must be estimated in proportion to the harm which is foreseen as consequent upon that injustice.

Granted therefore the occult nature of certain information, an exclusive title to it on the part of a particular individual, and the individual's reasonable unwillingness to share it with others, there arises from natural law an obligation on the part of all others to respect that right just as conscientiously as they should respect the right of private property. If, contrary to another's reasonable will, we pry into his secret knowledge or impart it to others or make unauthorized use of it in any way to his disadvantage, we do him an injustice just as surely as though we had appropriated his material possessions.

PROFESSIONAL SECRECY

The professional secret is all this and considerably more, entailing as it does additional obligations even more serious than those already predicated of secrets in general. Respect for the "simple" secret (the term is used in contradistinction to the more complex professional secret) is required primarily by *commutative* justice, i.e., by the rights of the *individual* whose exclusive possession the information is and to whose personal detriment violation of that right would tend. Professional secrecy is demanded also by *legal* justice, i.e., by the *common* good which is at very least endangered, if not actually damaged, by every violation of professional trust. It is that inevitable relationship to the common good of society which marks the essential feature of the professional secret and reveals its especially sacred character.

This relationship arises from the fact that certain professions, altogether indispensable to society, are of their very nature fiduciary, i.e., they necessarily deal with the secrets of clients. The medical profession, for example, which is unquestionably essential to the good health of any community, depends to a large extent for its effectiveness on the willingness of patients to make available to their doctors a good deal of information of a secret nature. Because of the necessity of procuring proper medical care, patients have no choice but to entrust their physicians with knowledge about themselves which otherwise they would not dream of divulging. They do so on the implicit understanding that their secrets are entirely safe with doctors and that their confidence as patients will in no way be used to their disadvantage. They do not relinquish their right to secrecy, but perforce allow the doctor to share in the possession of knowledge over which they alone retain the right of any further disclosure.

Now let us suppose an outright breach of medical secrecy on the part of a physician. What harm would thereby be done? There would be, of course, a personal injustice to the individual patient, as would be true in any violation of secrecy. But over and above this personal injustice, a blow would also be struck against the integrity of the profession as a whole and consequently against its future effectiveness for the common good. To function at ideal maximum efficiency, the medical profession simply must command the respect and esteem of the public and maintain that tradition of unquestioned trustworthiness which invites the confidences of individual patients. Conduct which belies that reputation cannot fail to have deleterious effects on the profession's potential worth as a service to humanity. It is for this *social* purpose that medical codes of ethics are primarily devised. Their principal aim is to protect the integrity of the profession as such, that the public good may be adequately served. Professional misconduct, therefore, becomes reprehensible not only as an offense against the individual patient but also as a form of perfidy against both the profession and the community.

Such are the several implications intended by theologians when they describe medical secrecy as a *special obligation, binding doctors in both commutative and legal justice, of maintaining a discreet silence with reference to the confidential communications made to them in the course of their practice.* The basic obligation of the medical secret differs in no way from the obligation of secrecy in general, and forbids the physician to use or to reveal his patients' secrets contrary to their reasonable wishes. The source of the obligation, however, is twofold: commutative justice which determines the doctor's duty to his individual patients; and legal justice, which fixes his responsibility to the medical profession and to the public at large.

No member of the medical profession, when he functions as such, can possibly escape this responsibility to the individual and to the common good. It is simply inseparable from his office as physician, and made so by natural law. It is implicit in the tacit contract upon which he enters with his patient when he undertakes to act in the latter's behalf, and would be so even independently of any humanly contrived code of ethics. While it is true that every medical code from the time of Hippocrates has recognized and sanctioned his rule of professional secrecy, the fundamental obligation in no way depends upon human legislation. We do well to reaffirm and specify it by positive precept, just as the Church has often declared other duties of natural law. But in the last analysis we must face the fact that the medical secret is sacred not by mere convention or arbitrary agreement among honorable men, but by virtue of that universal and immutable law of which none less than God is the author.[3]

[3] For further clarification of the distinction to be made between medical ethics in the strict and in the broad sense, see Fr. Kelly's comments on the *International Code of Medical Ethics*, p. 55 of this issue of LINACRE QUARTERLY.

A LIMITED OBLIGATION

On the basis of this concept of medical secrecy, the obligation it entails is to some extent limited and not absolute, and may be expressed in such terms as these: *the physician is obliged to protect his patient's secret as long as the patient retains the right to secrecy and remains reasonably unwilling that its content be divulged,* or *as long as the common good, even independently of the patient's right, requires that secrecy be observed.*

This principle affirms the right of both patient and society to require secrecy of doctors. And, with the consistency of logic itself, it also implies that *if* neither the patient's right nor the common good should demand secrecy in a given instance, the obligation in that particular case is simply nonexistent. Perhaps the easiest way to explain the exceptions implicit in the general rule would be to consider some of the situations in which revelation of a medical secret could be regarded as compatible with both the patient's rights and the good of society.

1) Consent of the Patient

a) *Explicit Consent*

To begin with the most obvious, it is clear that the patient himself, as proprietor of his own secret, may authorize its disclosure to whomsoever he pleases. Though still in possession of his right to secrecy, he may simply prefer not to exercise it absolutely but to admit certain others to a share in his knowledge. In the event of explicit authorization of this sort, it is hardly necessary to state that no injustice *to the patient* is done by revealing the information in question, provided that only as much is divulged as has been authorized and only to the parties designated. The patient's request, for example, that the doctor release to an insurance company whatever part of his medical record be necessary for adjustment of claims, limits both the recipient of the information and the amount to be divulged.

Does the common good make any demands of the doctor in cases of this kind? It does, at least to the extent of requiring caution lest a wrong impression be given when divulging information even with the consent of the patient. Especially when dealing with laymen, a doctor would be wise to let the fact of authorization be known to those to whom he must disclose his patient's secrets. Otherwise there can be danger of creating suspicion that medical confidences are being violated, even when actually they are not, with resultant discredit to the individual doctor and to the profession itself.

(For much the same reason, incidentally, doctors should avoid if possible discussing even the nonsecret affairs of their patients, i.e., facts about them which may be common knowledge, but which a physician might also know in a professional capacity. Everyone in the neighborhood may know, for instance, about the birth of an illegitimate child. But to have that knowledge confirmed by the attending obstetrician would not be the sort of conduct which does credit to the medical profession.)

b) *Presumed Consent*

It cannot be denied that circumstances can arise in which the patient's willingness to admit certain others to his secrets may be legitimately presumed. If for any reason it is impossible to contact the patient in circumstances which seem to demand some disclosure of professional knowledge, and if it can be prudently judged that authorization would be readily granted if the request could be made, then presumption of consent could be in order. Certainly, for example, no doctor would hesitate to call medical consultants into a case in which an unknown patient is unconscious and consultation advisable. And because it is only reasonable to suppose that patients are concerned for their spiritual welfare, it is also a safe presumption that they are not unwilling that the chaplain be supplied with whatever information may be necessary to his proper function in their regard.

Perhaps a practical test for the validity of such a presumption would be some such question as this: is disclosure of this information so obviously to the patient's benefit that he would readily authorize it if he were able? But unless that question can be answered with prudent assurance in the affirmative, presumption of consent in this matter can be risky business and should be restricted to that absolute minimum which only real necessity requires.

2) Cessation of the Patient's Right

When we speak in terms of the right to complete secrecy, we imply that one is justified in excluding all others from any share in the knowledge he claims as secret. Now it can happen that others besides the patient can acquire legitimate title to the knowledge which comprises the medical secret, and can justly demand that they be allowed their rightful share in that knowledge. Or it can happen that some higher moral duty of the patient towards himself may require at least partial revelation of his secret. If either possibility should eventuate (and how it might eventuate will be illustrated shortly), it is clear that no injustice is done *the patient* if a secret, which in conscience he should share with others, is actually communicated to those legitimate claimants. That is why the doctor's obligation was conditioned previously with the proviso, "as long as the patient retains his right to secrecy."

However, even though there may be others to whom a medical secret should be divulged, it does not immediately follow that the physician should be the one to make the disclosure. Society and his profession also have further claims on his silence. For unless we restrict to the barest possible minimum even those disclosures which do no violence to the rights of individual patients, inevitably there will result a damaging loss of public confidence in and respect for the essential inviolability of professional trust. Primarily for that reason, the common good will usually require that the doctor maintain secrecy even after the patient's strict right may have lapsed. And that is the reason,

too, for including within our general principle the phrase, "as long as the common good, even independently of the patient's right, requires that secrecy be observed." Translated into medical terminology, it means that disclosure of professional knowledge should be for the doctor a procedure of last resort.

But to return to cases, what circumstances could deprive the patient of his personal right to complete secrecy? The generic answer is "conflict"; more specifically, conflict either with a higher obligation on his own part or with a predominant right on the part of others. The following break-down of possibilities perhaps will serve to illustrate the type of limitation which must be put on the patient's right to complete secrecy.

a) *Conflicting Obligation of the Patient*

There are times when a patient's refusal to allow medical secrets to be divulged to certain others will do him more harm than good, and when insistence on secrecy may appear to conflict with more important rights and obligations of his own. It may happen, for example, that if a needy patient would only inform a wealthy relative of his need of some expensive treatment, death might be averted. Still the patient refuses to reveal his plight, and the doctor may wonder whether for the stubborn one's own good he himself should contact the relative in question.

"As long as the patient retains his right to secrecy, the doctor must respect that right." And from the sole fact that his secret will do him more physical harm than good, it does not necessarily follow that the right of secrecy lapses. *Only if the harm which would result is one which he is obliged to avert even at some sacrifice of secrecy,* will his right to that degree of privacy be nullified What appears to be, according to human standards, "the sensible thing to do" is not always of obligation.

But take for example the fallen-away Catholic who is in serious danger of death from some ailment not apparent to the unprofessional eye and who has falsified his religion upon admission to the hospital. He forbids the doctor to inform the Catholic chaplain either of his physical condition or of his religious status. Clearly this insistence on the right to secrecy is unfounded, since it is in direct conflict with the patient's higher right and obligation to save his soul. Actually he does not possess the right to that degree of secrecy, if the revelation of those two facts represents his only practical chance for salvation. Certainly in this extreme case no right of the patient is violated if this professional knowledge is made available to the chaplain; and, if it is not likely that the latter will acquire the information elsewhere, the doctor would be justified in supplying it.

Perhaps the example is so strained as to appear worthless. The choice was deliberate because of a personal conviction that in a conflict of this kind it is seldom easy to decide with certainty that the right to secrecy must yield.

Even more seldom would it be the prerogative of the doctor to solve such doubts contrary to the patient's own decision. The case cited above is, I think, clearly one on which right to secrecy must yield; but it is one of comparatively few.

b) *Conflicting Rights of the Doctor*

Even in the face of his obligation to respect the medical secret as being the property of another, the physician himself possesses certain inviolable rights to reputation and to the pursuit of his material and spiritual welfare. To what extent must he sacrifice any of these rights in order to protect a medical secret? Or is he justified in protecting his own legitimate interests even at the cost, if necessary, of revealing certain professional knowledge?

In at least one such contingency, it is clear that it is the patient's right which yields and the doctor's which prevails. The case is one in which the medical secret is abused by being deliberately employed as a weapon of unjust aggression against the doctor himself. Instead of employing his doctor's silence as a means of protecting his own legitimate interests (the only purpose for which the right to secrecy is granted him), the patient now threatens to make use of that silence in an unjust invasion of the physician's rights.

Suppose, for example, that a patient were maliciously to bring unwarranted suit for malpractice against an innocent physician. The latter's only defense, we can further suppose, against financial loss and defamation of character is the testimony of his medical records of the case. According to the principle of legitimate self-defense against unjust aggression, the plaintiff has sacrificed his right to secrecy by making it an instrument of injustice, and the doctor may, in proportion to the gravity of the danger which threatens him, make whatever use of professional knowledge may be truly necessary to defend himself.

Legally the case is more simply solved. Unless I am mistaken, no plaintiff would be allowed to instigate such a suit unless he waived the right to secrecy in what constitutes pertinent evidence. Thus the solution is again based on consent of the patient. But the moral justification of such a legal ruling can be found in this principle of the right to defend oneself against unjust attack.

Theoretically it may also happen that through no fault of the patient the medical secret becomes a serious threat to the doctor. The classic example is that of a doctor who is himself accused of a crime which from professional knowledge he knows was committed by his patient. The latter, according to the further supposition, is in no way responsible for suspicion having fallen on the innocent doctor, and hence cannot be classified as an unjust aggressor in his regard.

Such a contingency, though possible, does not seem to be a highly practical probability. Perhaps, however, a case in point is created by the failure of our common law to recognize in court the privileged nature of the medical secret. Suppose, for example, that a civil court

should subpoena a physician to testify from his records against a criminal abortionist. Say what we may about the defectiveness of a civil law which creates such dilemmas, the fact remains that, justly or unjustly, the doctor could be prosecuted in many of our states and severely penalized for refusal so to testify. Must he in conscience submit to such a penalty rather than reveal professional knowledge?

On condition that the danger threatening him can be appraised as truly serious, and that the doctor can avoid it in no other practical way, his testimony from the medical record would be morally permissible. He should have the court record show that he considers his knowledge privileged; and he should conceal, if possible, the identity of the patient. Beyond that point he is not obliged to go. The reasons in order are these: 1) the doctor-patient contract cannot be said to be undertaken with intent to bind even with serious harm to the physician, and hence does not certainly oblige from justice at that cost to him; 2) charity does not require that one protect another at the serious risk of equivalently the same harm to self; 3) since in the circumstances it should be clear to all that the doctor testifies only under protest and because of the alleged requirements of the common good, neither his own reputation nor that of the profession should reasonably suffer in public estimation.

The solution is not an ideal one, chiefly because the anomaly of our civil law makes ideal solution impossible. But perhaps it may provide some measure of assurance for doctors who must face the dilemma.

c) *Conflicting Rights of Others*

We have said that a doctor is sometimes justified (at the sacrifice of secrecy, if necessary) in protecting himself against a patient's misuse of the secret as a weapon of unjust aggression. So too, he may at times protect others individuals or society as such in the same way. What we may legitimately do for ourselves in this regard we may in charity do for others.

The traditional example cited in this connection is that of the patient with a contagious and not readily curable disease who is contemplating marriage and who refuses to inform his fiancée of his physical condition. Clearly the patient is not justified in concealing the fact from his wife-to-be, and his silence is a serious threat to her physical welfare. May the physician make the information available to her?

He should first make all reasonable effort to persuade the patient either to postpone the marriage until cured or to inform his fiancée of his condition. Failing that, he would be justified in communicating that professional knowledge to the one interested party, if there is no likelihood that she would acquire the information from some other source or otherwise be protected from the danger which threatens her.

d) *Conflicting Rights of Society*

What can be said about the conflicting rights of other individuals applies *a fortiori* to the rights of society. This conflict is well illustrated by one of the cases included in the survey referred to at the beginning of this discussion—that of the epileptic engineer. In refusing either to quit his work or to inform railway officials of his incapacity, this patient is using secrecy unjustly as a weapon against the public at large. The common good demands protection against his unjust aggression. If the only practical means of providing that protection is revelation of professional knowledge, the doctor is within his moral rights in disclosing the dangerous fact to the proper authority. On the very same principle we would justify without hesitation the reporting of contagious diseases to the extent necessary to insure proper quarantine.

It is when the common good is seriously imperilled in this way that release from the obligation is least difficult, though still far from easy, to vindicate. The reason is that if the common good would suffer notably more from secrecy than it would from disclosure, society is considered as preferring the lesser evil and as thereby waiving the claim which in legal justice it has to the preservation of secrecy. In all other cases, however, that perennial claim of the common good argues more strongly against any disclosure of professional knowledge.

RIGHT VS. OBLIGATION

Besides the problem of the *right* to divulge medical secrets, moralists also consider the question of *obligation* at times to make such a disclosure. I have deliberately restricted this discussion to the question of *right* and have avoided all reference to any *obligation*. My reason for doing so is not a contention that obligation in these cases can never be verified. Rather it is a conviction that very rarely in medical practice will a doctor encounter a situation in which, beyond shadow of all legitimate doubt, he must under pain of sin reveal professional knowledge. And until all reasonable doubt to the contrary is dispelled, no one is justified in insisting that a medical secret *must* be revealed. Moral permissibility ("may do") is consistent with legitimate differences of theological opinion; but moral obligation ("must do") is not. In this particular matter there are too many imponderables to make it frequently possible in practice to exclude all legitimate doubt. Therefore, in what is meant to be a predominantly practical discussion, I prefer to transmit the question of obligation as it affects disclosures. If doctors ever should encounter a case in which they feel conscience-bound and yet reluctant to reveal a medical secret, they would do well to propose their problem to a competent theologian and be guided by his considered opinion.

The basic reason behind this caution is again the fact that the common good is ultra-sensitive to any revelation of professional secrets. Even legitimate disclosures have to be regretted to some extent, because together with the good which they accomplish there is always the danger that the integrity of the profession will suffer in public estimation. Unless the

good to be achieved is proportionate to concomitant harmful effects, and unless no other practical means is available to attain that necessary good, secrecy should be maintained. As difficult as it is to cite practical cases in which a doctor would be *permitted* to reveal a medical secret, it is immeasurably more difficult to prove instances in which he is certainly *obliged* to make such a revelation.

THE SURVEY CASES

On the basis of all that has preceded, my own opinion on the two other cases proposed to the English and Welsh doctors would favor the physician's maintaining secrecy in both. The most to be achieved if the doctor reports the abortionist is the possible apprehension and prosecution of one criminal, but unfortunately not the extirpation of the criminal practice. And if conviction should depend primarily on the doctor's evidence, the chances of effecting even that result are poor, since he can provide only hearsay evidence from a hostile witness. If the doctor identifies his patient in order that she be forced to testify, he is violating her right to reputation, which is still extant despite her moral guilt in procuring abortion. It seems to me that too little good and too much harm would actually result from revelation in this case, and that the doctor is still obliged to secrecy.

In the insurance case,[4] the patient is clearly making an unjust claim under the terms of his policy. But the company has or had at its disposal, and apparently failed to use, a very ordinary and acceptable means of protecting itself against such an eventuality, viz., medical examination by its own physician prior to issuing the policy. The patient's personal physician has no obligation to the insurance company in these circumstances. If by his silence an injustice is made possible, it is one which, as far as the doctor is concerned, he permits because of a higher necessity and does not directly intend. And that injustice which is allowed does not seem comparable in significance to the harm which would be inflicted on the whole profession and on the common good if this type of revelation were generally permitted.

SUMMARY AND CONCLUSION

Natural law obliges the doctor to silence with regard to the secrets in which he shares by virtue of his professional calling. This grave obligation derives from both commutative justice (which determines the rights of individual patients) and from legal justice (which specifies the right which society exercises over the silence of doctors). Because the rights of patients in this regard are not unlimited, and because the common good can at times be adequately served only by some disclosure of the medical secret, the natural law obligation of medical secrecy is not absolute and does admit of legitimate exception. By the very nature of things, these exceptions should in the practical order be most rare, and require most careful consideration in each individual case.

It was in reference to an even more sacred secrecy (one which admits of no conceivable exception) that St. Augustine had this to say: "I know less about the things which I hear in confession than I know of those things about which I know nothing." If not the same rule, then one quite similar should characterize the doctor's habitual attitude towards the medical secret.

[4] As proposed to the British physicians, the case presents the State as the insuring agent. In order to make the problem more practical for American doctors, I am assuming a situation more common in this country and supposing a case in which private industry makes its own provisions for employee accident insurance.

Creditable Record . . . . .

Catholic hospitals and allied agencies in the United States and Canada now total 1,501 representing an increase of some 200 per cent in forty years, with a total of 214,015 beds and 29,015 bassinets.

At the present time, there are 1,141 Catholic hospitals and allied agencies in the United States with 147,577 beds and 23,121 bassinets; while Canada boasts 360 such institutions with 66,018 beds and 5,894 bassinets.

The total number of patients cared for during 1954 in U. S. hospitals is reported as 8,093,669 and an estimated number in Canadian institutions of 2,250,000. The total of 10,343,608 includes in and out patients.

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