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## WHEN THE LAW PRESERVES INJUSTICE: ISSUES RAISED BY A WRONGFUL INCARCERATION EXCEPTION TO ATTORNEY-CLIENT CONFIDENTIALITY

Inbal Hasbani\*

*What should an attorney do if he obtains information from a client that would help free an innocent man or woman from prison? In all but one state, ethical rules require attorneys to keep such information confidential even as innocents remain locked away in prison. This Comment proposes the introduction of a new exception to attorney-client confidentiality rules for wrongful incarcerations. It begins by providing background information on attorney-client confidentiality, including lawyers' duties to their clients and their ethical obligations under the Model Rules of Professional Conduct. It then considers whether a new exception to attorney-client confidentiality would chill attorney-client discussions, and whether the reasonably certain death and substantial bodily harm exception under Model Rule of Professional Conduct 1.6(b)(1) should be interpreted to include an exception for wrongful incarcerations. Practical issues associated with a new wrongful-incarceration exception are then analyzed, including the length of conviction after which an attorney would be required to disclose exonerating information; the proper timing procedurally for an attorney to come forward; the possibility that a wrongful incarceration exception violates a client's constitutional rights against self-incrimination; and finally, the difference in attorney behavior that could be expected as a result of a wrongful incarceration exception. The Comment concludes by suggesting that a discretionary disclosure rule would best solve the issues presented by a wrongful incarceration exception to attorney-client confidentiality.*

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\* J.D. Candidate, Northwestern University School of Law, May 2010; B.A., Brown University, 2003. Many thanks to all who assisted me in completing this Comment. Tremendous thanks to my family and friends for all of their love and support, and my mom in particular, for suggesting this topic.

## I. INTRODUCTION

The United States is built upon a foundation of liberty,<sup>1</sup> a value that is reflected in nearly every facet of American law and culture. Perhaps in part because of this fundamental value, the idea of wrongful incarcerations is particularly repugnant. In the past several years, two wrongful incarceration cases have garnered especially heightened media attention. Both cases involved lawyers who were privy to information that would help free wrongfully incarcerated men, but were barred from coming forward because of confidentiality restraints associated with their relationships with their clients. In other words, these lawyers were bound by the judicial system—a system Americans would like to believe secures liberty, justice, and freedom—from freeing innocent men from jail.

In one case, two attorneys, Dale Coventry and Jamie Kunz, knew that their client, Andrew Wilson, had committed the murder for which another man, Alton Logan, was serving a life sentence.<sup>2</sup> Wilson, who had confessed to the crime while Logan was being tried, was serving a lifetime sentence himself for two other murder convictions.<sup>3</sup> Unsurprisingly, Wilson did not authorize his attorneys to disclose his incriminating confession, and so the attorneys were required under Illinois ethical rules to remain silent.<sup>4</sup> In the face of this ethical quandary, the attorneys, along with Mark Miller, the attorney representing the alleged co-defendant in Logan's case, signed an affidavit stating that they had information from privileged sources that Logan was not responsible for the murder.<sup>5</sup> Wilson gave his attorneys permission to reveal the exonerating information in the event of his death.<sup>6</sup> Twenty-six years later, after Logan had spent nearly half his life in jail, Andrew Wilson died, and the attorneys revealed Logan's innocence.<sup>7</sup> Soon after, Logan was released from prison.<sup>8</sup>

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<sup>1</sup> See U.S. CONST. pmbl.

<sup>2</sup> Michael Miner, *The Greater of Two Evils*, CHI. READER, Jan. 31, 2008, at 6.

<sup>3</sup> Maurice Possley, *Inmate's Freedom May Hinge on Secret Kept for 26 Years*, CHI. TRIB., Jan. 19, 2008, at 1.

<sup>4</sup> Helen Gunnarsson, *The Conscience of a Lawyer: Your Client Admits He Committed Murder. What Should You Do? What Can You Do? For Two Illinois Lawyers, These Aren't Hypothetical Questions*, ILL. B.J., Mar. 2008, at 118, 118.

<sup>5</sup> *Id.*

<sup>6</sup> Miner, *supra* note 2. Wilson's lawyers have claimed as much, although there is no written proof that Wilson gave permission. See *id.*

<sup>7</sup> *Innocent Man Free After 26 Years in Prison*, CBS NEWS, Apr. 18, 2008, <http://www.cbsnews.com/stories/2008/04/18/national/main4028780.shtml>.

<sup>8</sup> Wendell Hutson, *After 26 Years in Prison, Alton Logan's Murder Charges Dismissed*, CHI. DEFENDER ONLINE, Sept. 5, 2008, <http://www.chicagodefender.com/article-1800-after-26-years-in-prison-alton-loganrss-murder-charges-dismissed.html>.

Similarly, Staple Hughes, a North Carolina lawyer, revealed his client's confession in 2004, hoping to free Lee Wayne Hunt from his life sentence in prison.<sup>9</sup> Hughes claimed that twenty-two years earlier, his now-dead client confessed that he acted alone in committing a double murder for which another man, Lee Wayne Hunt, was serving a life sentence.<sup>10</sup> Hughes claimed that after his own imprisoned client died, he felt it was "ethically permissible and morally imperative" that he come forward with the exonerating information.<sup>11</sup> The law, however, binds attorneys to remain silent even after their clients' deaths,<sup>12</sup> and Hughes did not receive his client's consent to reveal the confidential information.<sup>13</sup> Judge Jack Thompson of the Cumberland County Superior Court in Fayetteville refused to consider Hughes' testimony during a hearing in 2007 in response to Hunt's request for a new trial, claiming, "Mr. Hughes has committed professional misconduct."<sup>14</sup> Although Hughes was referred to the North Carolina Bar for violating attorney-client privilege, the complaint was dismissed in January 2008 in a confidential decision.<sup>15</sup> Meanwhile, Lee Wayne Hunt remains in jail despite the apparently exonerating information.<sup>16</sup>

The lawyers' silence in the Alton Logan and Lee Wayne Hunt cases produces a sense of outrage towards the ethical constructs that are meant to guide lawyers in the judicial system. The decades-long prison terms of innocent men force us to question whether the ethical guidelines are ethical at all. What kind of system allows a man to serve day after day in prison when lawyers know he is innocent? When the moral premise of the judicial system is to establish justice, how can the same judicial system require a lawyer to remain silent as innocent men and women remain in jail unjustly?

The answers, unfortunately, are more complicated than they seem. Although the end goal of the judicial system is certainly to produce justice, lawyers' first obligations are almost always to their clients, in the hopes that the adversarial system will weed out the truth from fiction and ensure that justice is served.<sup>17</sup> Thus, lawyers arguably represent a means to an end, and

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<sup>9</sup> Adam Liptak, *When Law Prevents Righting A Wrong*, N.Y. TIMES, May 4, 2008, Week in Review, at 4.

<sup>10</sup> *Id.*

<sup>11</sup> *Id.*

<sup>12</sup> *Swindler v. United States*, 524 U.S. 399, 405 (1998).

<sup>13</sup> Liptak, *supra* note 9.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209, 210 (citing CANONS OF PROF'L ETHICS Canon 15

the means require zealous advocacy on behalf of their clients,<sup>18</sup> even in the extreme case of a wrongful conviction.

However, every rule has exceptions, and attorney-client confidentiality is no different. In certain situations, the law allows confidentiality to be broken in order to preserve an overriding value, such as the prevention of substantial bodily harm or reasonably certain death.<sup>19</sup> Similarly, an exception for wrongful incarcerations could be promulgated as a declaration of society's overriding interest in preventing innocent men and women from serving sentences. However, in introducing such an exception, several issues are raised that are not immediately intuitive. This Comment is an attempt to frame some of these concerns and shed light on the issues presented by a wrongful incarceration exception. Although a wrongful incarceration exception risks chilling attorney-client discussions and raises a number of practical issues, such as when an attorney should disclose exonerating information and whether or not such a disclosure violates a client's constitutional rights against self-incrimination, this Comment argues that a rule allowing attorneys the discretion to come forward with confidences to help save the wrongfully convicted is worth the costs.

Part II of this Comment begins by providing background information on the judicial system's requirements of lawyers, including attorneys' ultimate duty to their clients and their obligations under attorney-client confidentiality. Part III proceeds with an analysis of the wrongful incarceration exception, with seven subparts. Subpart A discusses the possible chilling effect of a new exception on attorney-client discussions. Subpart B considers the proposition that the substantial bodily harm and reasonably certain death exception should be interpreted to include an exception for wrongful incarcerations. Subparts C, D, E, and F raise practical issues with a wrongful incarceration exception, including, respectively: the length of conviction after which an attorney would be required to disclose exonerating information; the proper timing procedurally for an attorney to come forward; the possibility that a wrongful incarceration exception violates a client's constitutional rights against self-incrimination; and finally, the difference in attorney behavior that could be expected to result from a wrongful incarceration exception. Subpart G concludes by suggesting that a discretionary disclosure rule would best solve the issues presented by a wrongful incarceration exception to attorney-client confidentiality.

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(1908) ("The Lawyer owes 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability.'").

<sup>18</sup> *Id.*

<sup>19</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2008).

## II. BACKGROUND

## A. THE LAWYER'S DUTY

A trial, the Supreme Court has asserted, is a “search for truth.”<sup>20</sup> This assertion resonates easily with intuitive conceptions of what a judiciary is meant to establish. Since justice is the prevailing goal of a judicial system, then truth, one would think, must be its unerring companion. But, herein lies the paradox. Although truth may be the end goal of every trial, the lawyers playing their parts serve a different end—advocacy on behalf of their clients—that may very well be at odds with the search for truth. Although such a conception of a lawyer’s duty may at first glance seem to conflict with the overlying goal of the judicial system—and in fact, in some situations it does—the American judicial system is built upon this fundamental premise in its pursuit of justice.

The legal profession is guided by rules that recognize a lawyer’s duty as a “zealous advocate for the client, putting that person’s interest ahead of all others.”<sup>21</sup> As far back as 1820, Lord Brougham famously described the role of the lawyer:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is the client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.<sup>22</sup>

Aside from a few exceptions, the legal profession is built on a standard of strict attorney loyalty to the client. In fact, despite the conundrum that lawyers face as being both advocates on behalf of their clients—clients who may have little to gain from the ascertainment of truth—and officers of the court “presumably working to advance the truth,”<sup>23</sup> the ethical guidelines often require the lawyer’s duty to the client to be the lawyer’s ultimate obligation.

The Model Rules of Professional Conduct (Model Rules), which is the ethical code upon which most states base their ethics guidelines for lawyerly conduct, do not once “directly reference truth in the provisions

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<sup>20</sup> *Nix v. Whiteside*, 475 U.S. 157, 171 (1986).

<sup>21</sup> Henning, *supra* note 17, at 210 (citing CANONS OF PROF’L ETHICS Canon 15 (1908)).

<sup>22</sup> MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS’ ETHICS 71-72 (3d ed. 2004) (citing LORD HENRY BROUGHAM, TRIAL OF QUEEN CAROLINE 8 (1821)).

<sup>23</sup> Henning, *supra* note 17, at 211.

that establish the precepts for the proper practice of law.”<sup>24</sup> Devotion to the client, not truth, is the lawyer’s ultimate duty. Although

certain rules discuss the requirement that lawyers not introduce false evidence, mislead a third person, or act deceptively or fraudulently . . . nowhere do they instruct a lawyer—even on representing a client in an adjudicatory proceeding—to ensure that the result of the legal representation reflects what actually happened in the transaction that is the substance of the dispute.<sup>25</sup>

In fact, the Model Rules go so far as to require the lawyer to cross-examine a witness, in an effort to undermine her credibility, even if the lawyer knows the witness is truthful.<sup>26</sup> Similarly, a criminal defense attorney’s mission is to defend a guilty client, even when that defense results in the client’s acquittal.<sup>27</sup> Such advocacy can hardly be framed as a “search for truth” and may, at times, conflict with the ascertainment of justice. But our judicial system is built on the notion that a lawyer is a client’s representative, and together the lawyer and client should create the most powerful and rigorous defense possible on behalf of the client.<sup>28</sup>

#### B. ATTORNEY-CLIENT CONFIDENTIALITY

Attorney-client confidentiality has a long history in the American legal system and was recognized at least by the middle of the nineteenth century as an ethical mandate.<sup>29</sup> A lawyer’s relationship with his client, both as a zealous advocate and as a gatekeeper of his client’s secrets, has been and continues to be one of the most sacred and protected relationships in the law.

Client confidentiality has both evidentiary and ethical components. The attorney-client privilege, which is the evidentiary doctrine, is the oldest common law privilege of the various confidential communications.<sup>30</sup> The privilege is premised on the theory that the “public benefit in encouraging clients to fully communicate with their attorneys in order to enable the attorney to act most effectively, justly and expeditiously in providing sound legal advice, outweighs the harm caused by the loss of relevant

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<sup>24</sup> *Id.* at 213.

<sup>25</sup> *Id.* (citing MODEL RULES OF PROF’L CONDUCT R. 3.3, 4.1, 8.4(c) (2008)).

<sup>26</sup> *See id.* at 217.

<sup>27</sup> *Id.* at 213.

<sup>28</sup> See MODEL RULES OF PROF’L CONDUCT R. 1.1-1.3, for more information about the lawyer’s role under the Model Rules.

<sup>29</sup> FREEDMAN & SMITH, *supra* note 22, at 130 (citing L. Ray Patterson, *Legal Ethics and the Lawyer’s Duty of Loyalty*, 29 EMORY L.J. 909, 938 (1980)).

<sup>30</sup> JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN’S EVIDENCE MANUAL §18.03[1] (8th ed. 2007).

information.”<sup>31</sup> Proposed Rule of Evidence 503 (also known as Supreme Court Standard 503), which is commonly used as a guide to attorney-client privilege in federal courts,<sup>32</sup> states that “a client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications made for the purpose of facilitating the rendition of professional legal services to the client.”<sup>33</sup>

The ethical component of attorney-client confidentiality, for the most part, expands on this concept. The Model Rules require a lawyer not to reveal “information relating to the representation of a client.”<sup>34</sup> Thus, the ethical guidelines require the attorney to keep a wider arena of information confidential—any information “relating” to the attorney’s representation—while the attorney-client privilege prevents the attorney from disclosing any information “made for the purpose of facilitating the rendition of professional legal services to the client.”<sup>35</sup>

One of the main guiding principles behind the confidentiality doctrine is the notion that each member of our society is entitled to the free exercise of his or her autonomy.<sup>36</sup> To that end, each person is “entitled to know his rights with respect to society and other individuals, and to decide whether to seek fulfillment of those rights through the due processes of law.”<sup>37</sup> Because lawyers have a “legal and practical monopoly over access to the legal system and knowledge about the law,” their “advice and assistance are often indispensable” to the effective exercise of individual autonomy.<sup>38</sup> Competent representation requires that a lawyer be “fully informed of all the facts of the matter he is handling.”<sup>39</sup> Since clients are not likely to give full, candid, and possibly incriminating or embarrassing facts to their lawyers unless they are confident that the lawyer will keep the information confidential, attorney-client confidentiality is essential for the effective

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<sup>31</sup> *Id.*; *see, e.g.*, *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981) (“Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.”).

<sup>32</sup> WEINSTEIN & BERGER, *supra* note 30, at §18.03[1].

<sup>33</sup> PROP. FED. R. EVID. 503(b), *reprinted in* 56 F.R.D. 183, 236 (1972).

<sup>34</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6 (2008).

<sup>35</sup> *Id.*; PROP. FED. R. EVID. 503(b).

<sup>36</sup> FREEDMAN & SMITH, *supra* note 22, at 62.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 129. (citing *Upjohn Co. v. United States*, 449 U.S. 383, 391 (1981)).

assistance of counsel.<sup>40</sup> In fact, the Supreme Court has asserted that the attorney-client privilege survives even after the death of a client.<sup>41</sup>

Despite the benefits of confidentiality, it can produce some friction with the search for truth. As one court put it, “Because ‘the attorney-client privilege may serve as a mechanism to frustrate the investigative or fact-finding process, it creates an inherent tension with society’s need for full and complete disclosure of all relevant evidence during implementation of the judicial process.’”<sup>42</sup> But courts have acknowledged that this “is the price that society must pay for the availability of justice to every citizen, which is the value that the privilege is designed to secure.”<sup>43</sup> The “social good derived from the proper performance of the functions of lawyers acting for their clients . . . outweighs the harm that may come from the suppression of the evidence.”<sup>44</sup>

Although confidentiality is generally upheld, the ethical guidelines have recognized a few exceptions to the attorney-client confidentiality doctrine. Model Rule 1.6 outlines six such exceptions, including exceptions to “prevent reasonably certain death or substantial bodily harm”<sup>45</sup> and to “prevent, mitigate or rectify substantial injury to the financial interests or property of another.”<sup>46</sup> The Model Rules, however, do not currently have an exception for situations like Alton Logan’s and Lee Wayne Hunt’s, when a lawyer knows and would like to disclose that his or her client committed a crime for which an innocent person is serving a sentence.

### III. ANALYSIS

#### A. THE IMPACT OF A NEW EXCEPTION ON ATTORNEY-CLIENT DISCUSSIONS

In light of the long history and tradition supporting attorney-client confidentiality, one of the gravest problems with introducing a new exception to attorney-client confidentiality is that it would prevent the frank and candid discussions that are the very purpose of the confidentiality doctrine. Confidentiality proponents “contend that confidentiality exceptions will interfere with the development of client trust and will

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<sup>40</sup> *Id.* (citing *Linton v. Perrini*, 656 F.2d 207, 212 (6th Cir. 1981)).

<sup>41</sup> *See Swindler v. United States*, 524 U.S. 399, 405 (1998).

<sup>42</sup> *In re A John Doe Grand Jury Investigation*, 408 Mass. 480, 482 (1990) (quoting *In re Grand Jury Investigation*, 723 F.2d 447, 451 (6th Cir. 1983)).

<sup>43</sup> *Id.*

<sup>44</sup> *Id.* (citing *Commonwealth v. Goldman*, 395 Mass. 495, 502 (1985)).

<sup>45</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2008).

<sup>46</sup> *Id.* R. 1.6(b)(3).

discourage clients from using or freely communicating with their counsel.”<sup>47</sup> Moreover, creating a new exception, which would allow attorneys to reveal client confidences, “puts the profession on a slippery slope of having to be the judge of which confidences are to be revealed and which are not.”<sup>48</sup> As lawyers increasingly assume the role of deciding when to make disclosures without judicial oversight or clear guidelines, lawyers may become more comfortable with disclosure.<sup>49</sup> Such a fundamental shift in the direction of the profession could lead to ineffective representation, which would arguably violate a client’s rights to effective assistance of counsel under the Sixth and Fourteenth Amendments.<sup>50</sup>

Although longstanding conventional wisdom considers confidentiality essential to ensure full and candid disclosure of embarrassing and potentially incriminating truths from clients, this consensus is difficult to prove empirically.<sup>51</sup> As Professors Monroe Freedman and Abbe Smith posit, “How would one determine scientifically how many clients in fact gave sensitive information to their lawyers which they would not have given but for assurance of confidentiality?”<sup>52</sup>

Without scientific proof of confidentiality’s effects, many have doubted whether confidentiality is necessary to enhance client discussions. For example, Professor Harry Subin contends that if an attorney explains to his client that the best way to advocate on his behalf requires him to know all of the facts involved in the case, regardless of confidentiality, she is “likely to induce the client to disclose them, for nondisclosure jeopardizes the client’s goals.”<sup>53</sup> Professor Lloyd Snyder adds that “clients will distort facts and withhold information from their lawyers no matter how strict or loose the rules of confidentiality may be.”<sup>54</sup> Then again, clients may speak candidly for a number of reasons, including, for example, an “urge to cleanse oneself through confession,” or because of “some subconscious desire to seek help,” or “the conclusion that one cannot obtain help otherwise”—forces that operate regardless of a confidentiality rule.<sup>55</sup>

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<sup>47</sup> Leslie Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 97 (1994).

<sup>48</sup> Kathryn W. Tate, *The Hypothetical as a Tool for Teaching the Lawyer’s Duty of Confidentiality*, 29 LOY. L.A. L. REV. 1659, 1683 (1996).

<sup>49</sup> *Id.*

<sup>50</sup> Harry I. Subin, *The Lawyer as Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1127 (1985).

<sup>51</sup> FREEDMAN & SMITH, *supra* note 22, at 139.

<sup>52</sup> *Id.*

<sup>53</sup> Subin, *supra* note 50, at 1163.

<sup>54</sup> Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477, 485 (2002).

<sup>55</sup> Subin, *supra* note 50, at 1164.

According to Professor Snyder, “[c]onfidentiality rules can be an inducement to clients to be forthcoming with their lawyers only if they are aware of and understand the rules.”<sup>56</sup> Since most clients do not know or comprehend the rules, or the complexity of the exceptions, any exceptions to the confidentiality rule are unlikely to affect legal assistance.<sup>57</sup> Thus, the promise of absolute secrecy is not necessary in order to promote open discussion between clients and attorneys.<sup>58</sup>

In response to such criticism, many studies have tested the effect of confidentiality on frank and candid discussion of respondents. For example, one behavioral study found that respondents were five times more likely to admit to corporal punishment of their children when confidentiality was clear.<sup>59</sup> Similarly, another study conducted by behavioral scientists revealed that respondents were twice as likely to admit to undesirable behavior, like illicit drug use, racist attitudes, and racist behavior, when the methodology assured confidentiality.<sup>60</sup> A study by the *Yale Law Journal* suggested that more than 50% of lay people surveyed believed that they would be less likely to make free and complete disclosure to a lawyer if their lawyer was legally obligated to disclose client information to another lawyer in court.<sup>61</sup> A survey of New Jersey lawyers conducted by Professor Leslie Levin found that over 65% of lawyers surveyed informed none of their clients about an attorney’s obligation under New Jersey ethical rules to disclose client confidences to prevent a client from committing a wrongful act.<sup>62</sup> The reason most lawyers did not discuss the subject of mandatory disclosure, was “because they [felt] that discussions about confidentiality exceptions would interfere with client trust.”<sup>63</sup> The violation of such trust led lawyers to believe they would obtain less than full disclosure from their clients if they promised anything less than complete confidentiality.<sup>64</sup> Although the studies did not test the impact of a discretionary disclosure rule on client discussions, they suggest that clients are less likely to make full and complete disclosure when something less than complete confidentiality is promised.

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<sup>56</sup> Snyder, *supra* note 54, at 505.

<sup>57</sup> *Id.* at 505.

<sup>58</sup> *Id.* at 484.

<sup>59</sup> FREEDMAN & SMITH, *supra* note 22, at 140 (citing ROBERT F. BORUCH & JOE S. CECIL, ASSURING THE CONFIDENTIALITY OF SOCIAL RESEARCH DATA 70 (1979)).

<sup>60</sup> *Id.* (citing BORUCH & CECIL, *supra* note 59, at 71).

<sup>61</sup> Notes & Comments, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1262 (1962).

<sup>62</sup> Levin, *supra* note 47, at 120-22.

<sup>63</sup> *Id.* at 122.

<sup>64</sup> *Id.* at 122-23.

Professor Leslie Levin's study nonetheless confirmed some of Professor Snyder's reservations that clients are unaware of the complexity of the confidentiality rules. Levin's study found that most New Jersey lawyers did not believe that their clients understood that attorneys may be required to disclose client confidences in certain circumstances.<sup>65</sup> A study conducted in Tompkins County, New York, revealed that 42% of all clients surveyed believed that confidentiality requirements are absolute.<sup>66</sup> Despite clients' incomplete understanding of the ethical rules, Professor Levin's study suggested that lawyers believe confidentiality works to promote the free flow of client information.<sup>67</sup> In other words, even though clients may not comprehend the nuances of the confidentiality rules, they still rely on their attorneys' assurances that their communications are confidential to reveal embarrassing or incriminating information.

Professor Levin's study also found that discussing disclosure requirements with a client at the first substantive meeting or when the lawyer thinks the client might be about to discuss future wrongdoing may reduce "the likelihood that clients will say any more about the subject."<sup>68</sup> Although warning clients about disclosure requirements "unquestionably promotes client autonomy" (since clients are entitled to know what is not protected before they speak), it leads to inhibited discussion, and a reluctance to speak any further.<sup>69</sup> This is particularly disconcerting when considering the Fifth Amendment rights involved, which require the attorney to fully explain any adverse consequences of disclosure and the client to voluntarily waive the privilege prior to any self-incriminating confession if such confession is ever used in court.<sup>70</sup> Warned as such, a client may decide to keep any incriminating information to himself, even if he is responsible for a crime for which an innocent person is being punished.<sup>71</sup>

If one assumes that clients would withhold information from their attorneys because of a wrongful incarceration exception to the confidentiality rules, the introduction of such an exception could in fact be

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<sup>65</sup> *Id.* at 122.

<sup>66</sup> *Id.* at 103-04 (citing Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351, 379 (1989)).

<sup>67</sup> *Id.* at 122.

<sup>68</sup> *Id.* at 125.

<sup>69</sup> *Id.*

<sup>70</sup> See discussion *infra* Part III.E.

<sup>71</sup> If, however, the client was never forewarned, or did not waive the attorney-client privilege, then any incriminating information could be protected under use immunity. See *id.* This could very well provide a perverse incentive for the attorney not to explain the consequences of any incriminating discussions, in the hopes that doing so would save his client from punishment under use immunity.

self-defeating. As Professors Freedman and Smith note, “Certainly it is correct to say that lawyers know a good deal of truth. They do so, however, because clients feel secure in entrusting their lawyers with damaging truths.”<sup>72</sup> The problem is that it is hard to determine just how such an exception would actually affect discussions. If the wrongful incarceration exception would affect many cases, or a few prominent ones, then word of mouth could travel widely, and attorney-client trust could erode over time. On the other hand, if an exception would affect a small number of cases, and clients remained unaware of the exception, then perhaps it would not make much difference at all. Still, relying on the ignorance of clients and attorneys’ lack of disclosure of confidentiality exceptions to argue that a new exception would not impact candid attorney-client discussions seems perverse.

Given the uncertainty and controversy over confidentiality’s precise impact on client discussions, the ultimate impact of a wrongful incarceration exception on client discussions may simply be unquantifiable. Ultimately, the promulgation of a new rule would require lawmakers to decide that the benefits of freeing wrongfully incarcerated men and women are worth the possible chilling effects caused by creating such a rule. Although a new rule could prevent attorneys from receiving the crucial information that would put them in a position to disclose wrongful incarcerations, it would afford them the opportunity to do something if they are in receipt of such information.

B. MODEL RULE 1.6(B)(1)’S “REASONABLY CERTAIN DEATH OR  
SUBSTANTIAL BODILY HARM” EXCEPTION  
AND WRONGFUL INCARCERATION

Perhaps one of the most powerful arguments in favor of an attorney’s right to reveal confidential information about a wrongful incarceration is that Model Rule 1.6(b)(1)’s exception to prevent “reasonably certain death or substantial bodily harm” already encapsulates such a right.<sup>73</sup> In a recent essay, Professor Colin Miller argues that the twenty-six states that have adopted some form of Model Rule 1.6(b)(1) “can and should read an implied wrongful incarceration/execution exception into their existing rules.”<sup>74</sup> The twenty-three states without such a rule should adopt some form of Model Rule

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<sup>72</sup> FREEDMAN & SMITH, *supra* note 22, at 138.

<sup>73</sup> MODEL RULES OF PROF’L CONDUCT R. 1.6(b)(1) (2008).

<sup>74</sup> Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391, 393 (2008).

1.6(b)(1), and read a wrongful incarceration/execution exception into the rule.<sup>75</sup> One state, Massachusetts, already has a provision under Massachusetts Rule of Professional Conduct 1.6(b)(1) that explicitly permits attorneys to disclose client information to “prevent the wrongful execution or incarceration of another.”<sup>76</sup>

Professor Miller argues that incarceration can be analogized to substantial bodily harm for three reasons. First, compared to the non-incarcerated, “inmates face an increased risk of physical violence based upon factors such as the concentration of violent individuals, overcrowding, prison culture, the inability of prisoners to physically separate themselves, the prevalence of drug use, and prison guard brutality.”<sup>77</sup> One national study cited by Miller indicated that 27% of inmates will suffer from a physically violent attack, excluding rape, at some point in their imprisonment.<sup>78</sup> Miller also notes that studies which estimate the amount of violence in prisons are likely to underestimate the problem since inmates are reluctant to snitch and generally fear retaliation.<sup>79</sup>

Second, Miller argues that inmates experience heightened risks of communicable diseases compared to the general population, perhaps because of “prison overcrowding . . . poor medical screening[,] and treatment in prisons.”<sup>80</sup> The statistics, Miller argues, prove it: “According to a 2002 study by the National Commission on Correctional Health Care, the rates of HIV and Hepatitis C infections in prisons are more than five times and between nine and ten times the corresponding rates in the general population, respectively.”<sup>81</sup> Third, inmates are subjected to an increased risk of rape.<sup>82</sup> Miller points to a study reporting that 98% of inmates surveyed were aware of at least one sexual assault occurring in the previous year.<sup>83</sup> Additionally, Miller asserts that the states whose rules allow attorneys to disclose client information to prevent substantial injury to the financial interest of another can include the significant financial effects of imprisonment as part of the harm to be prevented by a wrongful

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<sup>75</sup> *Id.*

<sup>76</sup> *Id.* (citing MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2008)).

<sup>77</sup> *Id.* at 397.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* (citing Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 462, n.126 (1993)).

<sup>80</sup> *Id.* at 397 (citing Potts, *supra* note 79, at 465-70).

<sup>81</sup> *Id.* (citing 1 NAT'L COMM'N ON CORR. HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS 18 (2002), available at [http://www.ncchc.org/stbr/Volume1/Health%20Status%20\(vol%201\).pdf](http://www.ncchc.org/stbr/Volume1/Health%20Status%20(vol%201).pdf)).

<sup>82</sup> *Id.* at 398 (citing Potts, *supra* note 79, at 471 n.185).

<sup>83</sup> *Id.*

incarceration/  
execution exception.<sup>84</sup>

Miller argues that because the risk of suffering from substantial bodily harm in prison is commensurate with the risks faced by intended victims in situations where we already permit Rule 1.6(b)(1) disclosures, lawyers should be just as able to come forward under the current exception to prevent an intended victim from suffering as they would for an innocent person's wrongful incarceration.<sup>85</sup> Miller's argument is compelling particularly when considering the real dangers presented by incarceration. However, he overlooks some holes in the substantial bodily harm exception that would likely present problems for attorneys hoping to disclose information about wrongful incarcerations. Moreover, the rule, as constructed, does not reflect the full spectrum of values and rights that a specific wrongful incarceration exception should aim to uphold.

To begin, Miller's argument depends on prison statistics indicating that incarceration presents heightened exposure to bodily harm. Although prisons today certainly include high risks of violence and disease, and this Comment does not intend to minimize the real-world danger of such risks, assume for a moment that prison did not involve a greater risk of harm than a non-incarcerated life. Still, inmates would be confined to prison cells, day after day, drudging through the monotony of an imprisoned life. As inmates, they would not have regular access to their families, and, as often happens, hundreds of miles would separate them from loved ones. Moreover, they would lead a depersonalized existence with little privacy, as passersby could gaze into their cells to watch them eat, sleep, or use the toilet.<sup>86</sup> Although they would be subjected to no more or less of a risk of substantial bodily harm than the average American citizen, the constricted lifestyle, the monotony, and the lack of opportunity to establish careers, relationships, and hobbies would detract from their quality of life.

Under such conditions, an attorney would not be able to come forward with information that would help exonerate an innocent inmate under Model Rule 1.6(b)(1). Since the inmate was not exposed to substantial bodily harm, there would be no current rule that could save him. Thus, an inmate like Alton Logan could spend twenty-six years in prison while an

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<sup>84</sup> *Id.* at 398-99 (citing Burden of Innocence Frequently Asked Questions, FRONTLINE, May 1, 2003, <http://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/faqsreal.html> ("Studies by the Life After Exoneration Project found that over 90 percent of exonerees lost all their assets—savings, vehicles, houses—while imprisoned.")).

<sup>85</sup> *Id.* at 398.

<sup>86</sup> SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 68 (8th ed. 2007) (citing Richard A. Wright, *Prisons: Prisoners*, in ENCYCLOPEDIA OF CRIME AND JUSTICE 1182 (Joshua Dressler ed., 2d ed. 2002)).

attorney would be obligated to remain quiet. This hypothetical, though extreme, illustrates a shortcoming in focusing only on the bodily harm involved in imprisonment. It is not only that prisoners are exposed to substantial bodily harm, but also that they are limited from experiencing the freedom and autonomy that a wrongful incarceration exception should seek to protect.

Second, in arguing that a wrongful incarceration exception should be read into the substantial bodily harm exception, Professor Miller incorrectly assumes that the risk of an inmate facing substantial bodily harm is commensurate with the risk a lawyer must analyze when determining whether his client will likely harm an intended victim.<sup>87</sup> The difference between these two risks, however, is that in one scenario, the attorney has a direct relationship with the person aiming to do the harm—his client—and, therefore, has some direct understanding of the intended victim's risk of harm. In the other scenario, where an attorney seeks to free an innocent inmate, her only gauge of the inmate's risk of harm is a set of prison statistics. The attorney who believes her client intends to do harm can converse with her client, attempt to dissuade him from the planned wrongdoing, and measure the likelihood that harm will ensue without further intervention. Under a wrongful incarceration situation, an attorney has none of these tools to assess the likelihood of harm.

Despite these differences, Professor Miller argues that because lawyers frequently gauge their clients' behavior incorrectly, the risks are commensurate.<sup>88</sup> To support this conclusion, he cites a survey conducted by Leslie Levin in 1994 of a set of New Jersey lawyers where fifty-two out of the sixty-seven attorneys who believed that their clients were going to commit specific wrongful acts likely to result in death or substantial bodily harm had at least one client who did not ultimately commit the contemplated acts.<sup>89</sup> However, Professor Miller failed to note that of those fifty-two lawyers, 61.5% believed that they were responsible for dissuading their clients from committing the wrongful act.<sup>90</sup> These attorneys failed to come forward not because they incorrectly gauged their clients' intentions, but because they understood their clients enough to dissuade them from doing harm, thereby preventing the wrongdoing altogether. In fact, of the sixty-seven lawyers who believed that their clients were going to commit

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<sup>87</sup> Miller, *supra* note 74, at 398.

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* (citing Levin, *supra* note 47, at 111-12, 114 n.145).

<sup>90</sup> Levin, *supra* note 47, at 119 nn.172-73 ("Twenty-eight out of 52 lawyers (53.3%) believed that they dissuaded their clients by using reasoning other than the threat to disclose. Another 7.7% thought that their clients did not commit the acts at least in part because the attorneys had threatened to disclose.").

wrongful acts likely to result in future death or bodily injury, thirty-six had valid reasons to conclude that disclosure was not necessary to prevent the wrongful act.<sup>91</sup> Only six lawyers reported that the wrongful acts did not occur because they were wrong about their client's intentions or their client calmed down.<sup>92</sup> Thus, Levin's survey suggests that only 10% of lawyers miscalculate their clients' intentions to do harm.

The Comment to Model Rule 1.6 suggests that lawyers "may consider such factors as the nature of the lawyer's relationship with the client and with those who might be injured by the client, [and] the lawyer's own involvement in the transaction"<sup>93</sup> when exercising their discretion to come forward with confidential information under Model Rule 1.6(b). Professor Miller, however, would require attorneys to come forward with evidence about a wrongful incarceration without any relationship with the actors (fellow prisoners or security guards) who would likely impose substantial bodily harm on the innocent inmate. Professor Miller assumes that attorneys should come forward based strictly on nationwide statistics describing conditions of incarceration. But, without performing any specific research on the conditions of an inmate's imprisonment, an attorney could arguably never know with the "reasonabl[e] certain[ty]"<sup>94</sup> required under Model Rule 1.6(b) that disclosing the confidential information would prevent substantial bodily harm. A wrongful incarceration exception to attorney-client confidentiality should not require an attorney to disclose only when they are reasonably certain that substantial bodily harm might ensue. The exception should be provided for situations in which an innocent is in prison or facing prison time for a crime they did not commit, regardless of the bodily harm they may or may not suffer, or the attorney's knowledge of such harm.

Another shortcoming provided by reinterpreting the substantial bodily harm exception to include wrongful incarceration is that the wording of Model Rule 1.6(b)(1) makes no distinction between saving an innocent or a guilty person from suffering substantial bodily harm.<sup>95</sup> In fact, by freeing one inmate from suffering bodily harm in prison, an attorney places another person, his own client, in the same conditions. In some scenarios, an attorney's disclosure could actually lead to his client's receiving the death

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<sup>91</sup> *Id.* at 128-29 n.211. Thirty-two lawyers reported that they dissuaded their clients and four reported that the client had no opportunity to commit the act. *Id.*

<sup>92</sup> *Id.* at 129 n.211. It is unclear from the survey responses whether these lawyers reached this conclusion before the wrongful act was supposed to occur—in which case there was no duty to disclose—or afterwards. *Id.*

<sup>93</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 15 (2008).

<sup>94</sup> *Id.* R. 1.6(b)(1).

<sup>95</sup> *See id.*

penalty—a fate Dale Coventry, Andrew Wilson’s attorney in the Alton Logan case, feared for his client if he were to reveal his guilt.<sup>96</sup> Although such punishment may be deserved, Model Rule 1.6(b)(1) makes no such distinction. By remaining silent, therefore, attorneys prevent their own clients from being exposed to the substantial bodily harm or reasonably certain death presented by incarceration—and since Model Rule 1.6(b)(1) seeks to prevent such harm without any limitation for the identity of the victim, one could argue that the attorney who remains silent in fact adheres to the principles propounded by the ethical rules.

Finally, although Miller’s argument would present an easy solution to a complicated problem, it is simply impractical.<sup>97</sup> Model Rule 1.6(b)(1), and its state statute counterparts, has been interpreted for years not to include a wrongful incarceration exception. It is doubtful that Miller’s encouragement of a new interpretation would carry much weight, as judges would likely continue to read the rule consistently with its original meaning.<sup>98</sup> Moreover, even if judges interpreted the bodily harm exception to include wrongful incarcerations, there may be situations where incarceration did not produce reasonable certainty of bodily harm, in which case, the exception would not help the innocent. A new rule promulgated by the legislature would carry much more weight as a clear signal of a new intent to protect the wrongfully incarcerated specifically. To the extent that Miller’s analysis suggests that states with bodily harm exception rules should more comfortably adopt a wrongful incarceration exception, recognizing some of the overlap in values protected in each, his arguments are instructive. However, a better solution would be the enactment of a new and clear rule that would properly accommodate the host of issues presented by a wrongful incarceration exception to attorney-client confidentiality.

### C. MINIMUM SENTENCE REQUIREMENTS

In enacting a new rule, one of the practical issues presented by a possible wrongful incarceration exception is whether it should only apply when innocents have been sentenced to terms of a specified minimum number of years. Alton Logan’s life sentence—and his twenty-six year imprisonment—is an extreme case for which many argue there was a moral mandate to come forward. But what happens when an innocent inmate is sentenced to thirty days, or just one day? Is the moral prerogative still just

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<sup>96</sup> Miner, *supra* note 2.

<sup>97</sup> Julia Thomas-Fishburn, *Attorney-Client Confidences: Punishing the Innocent*, 61 U. COLO. L. REV. 185, 208 (1990).

<sup>98</sup> *Id.*

as strong when the prison term is reduced? If not, then at what point should lawyers come forward?

Physical violence and rape can and do occur as soon as the first day of incarceration.<sup>99</sup> As such, if the moral prerogative is to save an innocent person from substantial bodily harm—as the Model Rules currently suggest<sup>100</sup> and Professor Miller strongly advocates—then an attorney should arguably be given the right to come forward with exculpatory evidence even for a single day of undeserved confinement. Moreover, the social stigma, financial loss, and impingement on freedom associated with incarceration may be severe enough to warrant an attorney's right to come forward with exonerating information for any length of wrongful confinement.

Allowing an attorney the right to come forward to prevent an innocent person from serving any length of time in prison provides the attorney with the opportunity to properly weigh the issues presented by wrongful incarceration against a breach of confidentiality with his own client. Any rule that sets a predetermined sentence requirement before allowing disclosure risks exposing innocent people to the hazards presented by incarceration. Setting an arbitrary cut-off (for example, allowing disclosures only in the case of felony convictions) would impose unfair distinctions among innocent people serving time for offenses they did not commit. Those serving shorter sentences would have no avenue for recourse in the law, even though they were equally innocent of a crime they did not commit.

Certainly, allowing attorneys the right to come forward will not always translate into an attorney's decision to come forward in those jurisdictions that adopt discretionary disclosure rules. In extreme situations, where disclosing confidential information would save an innocent person from serving a year in prison but would land one's client in prison for life,<sup>101</sup> many attorneys may decide to remain silent. Even in less severe situations, attorneys may choose not to disclose confidential information, weighing

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<sup>99</sup> *United States v. Bailey*, 444 U.S. 394, 421 (1980) (Blackmun, J., dissenting) (“A youthful inmate can expect to be subjected to homosexual gang rape his first night in jail, or, it has been said, even in the van on the way to jail.”); Christopher D. Man & John P. Cronan, *Forecasting Sexual Abuse in Prison: The Prison Subculture of Masculinity as a Backdrop for “Deliberate Indifference,”* 92 J. CRIM. L. & CRIMINOLOGY 127, 153-54, 169-71 (2001) (citing Donna Brorby, Remarks at the “Not Part of the Penalty”: Ending Prisoner Rape Conference (Oct. 19, 2001)).

<sup>100</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6.

<sup>101</sup> Such a scenario may be likely in a three-strikes rule state, where one additional felony conviction could land a client in jail for life while saving an innocent inmate without any prior convictions from serving just a year. See, e.g., CAL. PENAL CODE ANN. § 667(b) (West 2009).

client confidentiality as the paramount value. A discretionary rule would allow attorneys this right, providing them the flexibility to weigh the issues on each side and determine the best course of action. Although a mandatory rule would ensure that the innocent were protected under any circumstances and would create consistency between cases, it would come at the expense of a client's trust and attorney confidence. The current exceptions to client confidentiality already indicate that such trust should not be easily discarded, affording attorneys the discretion to come forward even in cases where a victim may be the subject of substantial bodily harm.<sup>102</sup> Such discretion is afforded because of the difficulty of the issues at stake, and the importance of confidentiality and candid discussion against nearly any value. Similarly, a wrongful incarceration exception should afford attorneys the same opportunity, in recognition of the values involved in choosing either to disclose or to remain silent.

#### D. PROCEDURAL ISSUES: THE RIGHT TIME TO DISCLOSE

In considering whether to disclose confidences about a wrongful incarceration, an attorney must consider the proper time within the judicial process to disclose the information. Professor Miller asserts that attorneys should be able to disclose client information at some point during the pretrial period because of the large percentage of defendants detained even before trial begins.<sup>103</sup> Since such detention risks exposure to substantial bodily harm, attorneys should be able to come forward before the trial has even begun based on the policies propounded by Model Rule 1.6(b)(1). Additionally, Miller asserts, assuming the large costs of litigation, those states that permit or require attorneys to disclose client information to prevent substantial injury to the financial interest of another should allow attorneys to come forward as early as the pretrial phase of the proceedings.<sup>104</sup>

A mandatory disclosure rule that requires attorneys to immediately come forward with exonerating information could seriously hurt a client's case.<sup>105</sup> For example, in the midst of a trial in which an attorney's own client is being tried, the immediate disclosure rule would require the attorney to disclose potentially damning confidential information about his

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<sup>102</sup> See MODEL RULES OF PROF'L CONDUCT R. 1.6.

<sup>103</sup> Miller, *supra* note 74, at 398.

<sup>104</sup> *Id.* at 398-99.

<sup>105</sup> The mandatory death or substantial bodily harm disclosure rule is the minority rule, currently present in twelve states' ethical codes: Arizona, Connecticut, Florida, Illinois, Iowa, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, and Wisconsin. Brooks Holland, *Confidentiality and Candor Under the 2006 Washington Rules of Professional Conduct*, 43 GONZ. L. REV. 327, 344 (2008).

client in order to save an innocent co-defendant from serving any time in prison. A rule that would require such disclosure could violate a client's right against self incrimination under the Fifth Amendment, discussed in more detail in Part III.E.

Under a discretionary rule, most attorneys would likely rather wait until the trial is over before coming forward with evidence, even if the innocent defendant was being detained pretrial. By waiting, there is still some hope that justice will be served and the innocent defendant will only be temporarily detained. Similarly, in cases where the client is not detained, but stands to spend a significant amount of money on litigation expenses, most lawyers would probably refrain from coming forward until the completion of the trial. In fact, in situations where lawyers could prevent financial injury or property damage to another by disclosing client confidences, a study suggested that only 9% of lawyers chose to disclose.<sup>106</sup> Attorneys, it seems, are reluctant to break confidentiality with their clients in order to prevent financial injury, and there is no reason to believe that such reluctance would not also apply during pretrial proceedings, even when the large expense of litigation looms.

Then again, despite attorneys' reluctance to disclose information during or before trial, once an innocent defendant has been sentenced it can be quite difficult to appeal his conviction. Most prosecutors "genuinely . . . believe in the guilt of persons that a jury has found guilty beyond a reasonable doubt."<sup>107</sup> Once a defendant is convicted, the presumption of innocence fades, and any protective posture the prosecutor might adopt towards a defendant pretrial disappears.<sup>108</sup> Moreover, "[a]s a policy matter, the reopening of a closed . . . case invites public distrust of the accuracy of the criminal justice system."<sup>109</sup> New evidence "often lack[s] the ring of truth" and may be considered a last ditch effort on the part of the convict himself to avoid (continued) incarceration.<sup>110</sup>

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<sup>106</sup> Levin, *supra* note 47, at 129-30. New Jersey's rule requires that an attorney reveal "such information to the proper authorities, as soon as, and to the extent the lawyer reasonably believes necessary, to prevent the client . . . from committing a criminal, illegal or fraudulent act that the lawyer reasonably believes is likely to result in . . . substantial injury to the financial interest or property of another." N.J. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2009), available at <http://www.judiciary.state.nj.us/rules/apprpc.htm>.

<sup>107</sup> W. William Hodes, *What Ought to Be Done—What Can Be Done—When the Wrong Person Is in Jail or About to Be Executed? An Invitation to a Multi-Disciplined Inquiry, and a Detour About Law School Pedagogy*, 29 LOY. L.A. L. REV. 1547, 1561-62 (1996).

<sup>108</sup> Fred C. Zacharias, *The Role of Prosecutors in Serving Justice After Convictions*, 58 VAND. L. REV. 171, 210 (2005).

<sup>109</sup> *Id.* at 174.

<sup>110</sup> Hodes, *supra* note 107, at 1562.

Presumably, defense attorneys understand the difficulty of introducing new information to exonerate a client. Their reluctance to come forward early in a proceeding should be balanced with the difficulty in helping an innocent defendant once he or she has been convicted. Ultimately, attorneys are in the best position to do such balancing since they have all the information in front of them. Requiring disclosure at a certain point could either seriously jeopardize a client's case or could greatly impede a postconviction actual innocence claim, depending on when the disclosure was made. Attorneys should be given the discretion to weigh properly the concerns presented on each side of the timing decision. Although this could present inconsistency amongst different cases, it is the only way of ensuring that proper consideration is given to the myriad values at stake.

#### E. SELF-INCRIMINATION AND USE IMMUNITY

By breaking confidentiality and disclosing incriminating information about her client, an attorney arguably violates her client's Fifth Amendment rights. The Fifth Amendment privilege against self-incrimination "prevents the use, in a criminal prosecution, of a defendant's testimony elicited by compulsion."<sup>111</sup> In a wrongful incarceration scenario, the Fifth Amendment right is triggered not by a client's compelled incriminating testimony, but by his attorney's disclosure of confidential incriminating statements in a criminal prosecution against his client. The reason the constitutional right is triggered is in part because a client who "makes an unwarned confession to . . . his lawyer is entitled to believe that he is speaking to someone who is acting 'solely in his interest' in a relationship of trust and confidence."<sup>112</sup> If an attorney then breaks that trust and reveals incriminating information about his client, the client's personal privilege against self-incrimination is violated. Moreover, a client is entitled to be free from being made "the deluded instrument[] of his own conviction."<sup>113</sup> An attorney who reveals incriminating, privileged information against his client's will is incriminating him in a way that violates his constitutional rights.

In *Fisher v. United States*, the Supreme Court recognized the relationship between the Fifth Amendment's privilege against self-incrimination and the attorney-client privilege.<sup>114</sup> The Supreme Court held that an attorney could not be compelled to break the attorney-client privilege and produce incriminating information about his client that would

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<sup>111</sup> Subin, *supra* note 50, at 1120.

<sup>112</sup> FREEDMAN & SMITH, *supra* note 22, at 190.

<sup>113</sup> *Id.* (quoting *Estelle v. Smith*, 451 U.S. 454, 467 (1981)).

<sup>114</sup> 425 U.S. 391 (1975).

violate his Fifth Amendment rights.<sup>115</sup> The Court highlighted the importance and purpose of the attorney-client privilege to “encourage clients to make full disclosure to their attorneys.”<sup>116</sup> *Fisher* established that if the information

would have been protected by the Fifth Amendment in the hands of the clients, [it] must continue to be protected (by the attorney-client privilege) in the hands of the lawyer. . . . [O]therwise[,] defendants would de facto lose whatever Fifth Amendment protection they originally had, as a “penalty” for communicating with their lawyers.<sup>117</sup>

In order to avoid the Fifth Amendment constitutional violations triggered by an attorney’s disclosure of a wrongful incarceration, use immunity should be offered as a corollary right under a wrongful incarceration exception. Use immunity, which protects clients from the use of compelled testimony (or any information derived from that testimony) in a future criminal prosecution,<sup>118</sup> is provided in situations in which the overriding values of the public interest in criminal investigation require that an attorney disclose incriminating and privileged information.<sup>119</sup> Use immunity would protect any incriminating information revealed by the attorney against his client’s wishes from being used against the client in a criminal prosecution. Therefore, an attorney’s disclosure of a wrongful incarceration would help the innocent by providing exonerating information, while offering no new evidence against a client in a criminal prosecution against him. Since the Fifth Amendment does not bar the revelation of incriminating testimony—it only prohibits using the information in a criminal prosecution—use immunity could effectively protect a client’s Fifth Amendment rights even if his attorney disclosed confidential, incriminating information.<sup>120</sup> Additionally, in those situations where a client knowingly and voluntarily waived the attorney-client privilege, and granted his attorney permission to reveal confidences, there would be no Fifth Amendment violation, and therefore no need for use immunity’s protection.

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<sup>115</sup> *Id.* at 403-05.

<sup>116</sup> *Id.* at 403.

<sup>117</sup> FREEDMAN & SMITH, *supra* note 22, at 186 n.140 (quoting 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 9.13 (Supp. II 2004)).

<sup>118</sup> Use immunity grants immunity from the “use of . . . compelled testimony (or any information derived from that testimony) in a future prosecution against [a] witness.” BLACK’S LAW DICTIONARY 767 (8th ed. 2004).

<sup>119</sup> Subin, *supra* note 50, at 1123 (citing *State ex rel. Sowers v. Olwell*, 394 P.2d 681, 684 (Wash. 1964)).

<sup>120</sup> *Id.* at 1120-21.

In order to preserve a prosecution's already existing case against a client, use immunity would only protect information that the attorney received from the client for legal assistance purposes and that the prosecution had not already acquired. Any information that the prosecution gathered independently would be unprotected. The prosecution could therefore bring a case against a guilty client if it could prove the case without using any immunized information.<sup>121</sup> Thus, a case that was already being developed against a client need not suddenly be dropped when an attorney comes forward with a confession. This tool would only be available in cases where the prosecution had already gathered sufficient evidence to prosecute, so that an attorney's decision to disclose would not necessarily save a client who already feared prosecution.

Use immunity would thus protect a client's constitutional rights and would provide attorneys some comfort in deciding to disclose client confidences. Such safety would not come without any expense. Use immunity would grant guilty people a get out-of-jail-free card by potentially allowing self-confessing criminals to go unpunished for a crime they committed. Such impunity would be a tough pill for victims and their family members to swallow, as they would have no way of seeking retribution in cases where only immunized information was available. Most disturbingly, use immunity risks that guilty people with a propensity for crime will be free to commit crimes again. Despite these serious drawbacks, use immunity may be the only option available under a wrongful incarceration exception that would avoid constitutional violations. Regardless of the form a wrongful-incarceration exception rule takes, use immunity is a necessary, if not perfect, safeguard to ensure a client's constitutional rights are protected.

#### F. THE IMPACT OF A NEW RULE ON ATTORNEYS' BEHAVIOR

Although there are several concerns that would require consideration before introducing a new exception to attorney-client confidentiality, one of the main practical issues is whether it would ultimately make any difference in lawyers' behavior. Massachusetts is currently the only state that has a wrongful incarceration exception. Comment 9A to the Massachusetts Rule explains that the exception "*permits* a lawyer to reveal confidential information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution."<sup>122</sup> As of the writing of this Comment, I could

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<sup>121</sup> *Id.* at 1176-77.

<sup>122</sup> MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) cmt. 9A (2008) (emphasis added), available at <http://www.mass.gov/obcbbo/rpcnet.htm>.

find no reported instances of a lawyer making a disclosure under this rule. Although it is possible that there have been no cases to report, it might very well be that lawyers are choosing to remain silent despite the exception. Dale Coventry, for example, who remained silent for so many years while Logan served time in jail, explained his actions by reasoning that his ultimate obligation was to his client.<sup>123</sup> Under a discretionary rule, it is questionable whether Coventry would have disclosed his client's confession any earlier, since his client's trust was his most important concern. Such trust should not be undermined nor discounted, but ultimately, the lack of impact caused by a discretionary rule should be considered.

There is some evidence that even a mandatory rule would not make much of a difference in lawyers' behavior.<sup>124</sup> According to Leslie Levin's study of New Jersey lawyers, only about half of the lawyers who were *required* to disclose under New Jersey's Rule of Professional Conduct 1.6(b) to prevent death or substantial bodily harm actually made disclosures.<sup>125</sup> Although lawyers offered a number of reasons for not disclosing client information to prevent harm to another, most of these reasons related to a basic disagreement with the disclosure rule.<sup>126</sup> Also, the lawyers who did not disclose client information to prevent harm often indicated that they did not do so because of the perceived importance of maintaining client trust.<sup>127</sup> For example, one public defender noted, "Once you lose your reputation for fighting for your client regardless of the information that you receive from him, it leaves you in a vulnerable position."<sup>128</sup> On the other hand, virtually all of the lawyers who came forward and disclosed client information to prevent substantial harm indicated they would have disclosed even if disclosure were optional under

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<sup>123</sup> Dale Coventry, Remarks at Loyola University of Chicago School of Law Panel Discussion: 26 Years of Justice Denied: The Ethics of Attorney-Client Privilege in the Wrongful Conviction of Alton Logan (Nov. 3, 2008) (on file with author).

<sup>124</sup> Whether an exception would in reality produce much benefit to the wrongfully accused or convicted, even if a lawyer did disclose confidential information, is another concern worth exploring. In fact, "[i]f a lawyer were to reveal a deceased client's confession to a crime for which another had been charged or convicted, there are a number of serious evidentiary barriers to the admission of such testimony in a court proceeding, including attorney-client privilege, the hearsay rule, and the alternate perpetrator doctrine." Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, CRIM. JUST., Summer 2008, at 46, 48. Although I do not explore the evidentiary hurdles produced by a wrongful incarceration exception in this Comment, they are certainly worth considering when drafting a possible new exception.

<sup>125</sup> Levin, *supra* note 47, at 129.

<sup>126</sup> *Id.* at 132.

<sup>127</sup> *Id.* at 132-33.

<sup>128</sup> *Id.* at 133.

the New Jersey rule.<sup>129</sup> Although the mandatory rule seemed to have some effect on attorneys, the primary reason lawyers came forward was concern for the intended victim.<sup>130</sup> Taken together, it is questionable whether even a mandatory rule would result in changes in attorneys' behavior: if lawyers disagree with the rules, then they may remain silent regardless.

Part of the reason lawyers can remain silent despite mandatory rules is because it is nearly impossible to police their behavior. If both a client and his attorney remain silent about a confession, then there is virtually no way to regulate the attorney's conduct. Under such conditions, attorneys may be more likely to behave according to what they believe is right or wrong, instead of what the ethical guidelines require. In fact, Jamie Kunz, one of Andrew Wilson's lawyers, claimed that if Alton Logan had faced the death chamber instead of life in prison, she would have come forward regardless of the statutory ethical rules.<sup>131</sup> There is some evidence that clients, even those who understand confidentiality rules to be absolute, believe that their lawyers will behave according to their personal sense of what should be kept confidential.<sup>132</sup> Finally, disciplinary committees presiding over such situations may not apply the ethical rules rigidly, understanding that certain situations deserve some leniency.<sup>133</sup> For example, Dale Coventry and Jamie Kunz were never disciplined for coming forward with their confidential information, even though there was some question as to whether Andrew Wilson really gave them permission to disclose his confession upon his death.<sup>134</sup> Similarly, although Staple Hughes was referred to the North

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<sup>129</sup> *Id.* at 131.

<sup>130</sup> *Id.*

<sup>131</sup> Gunnarsson, *supra* note 4, at 119. Illinois rules allow a lawyer to disclose information to prevent serious bodily harm only if it is the result of a client's *act*. ILL. RULES OF PROF'L CONDUCT R. 1.6(b) (2009), available at [http://www.state.il.us/court/supremecourt/rules/art\\_viii/](http://www.state.il.us/court/supremecourt/rules/art_viii/). Therefore, Kunz would not have been protected even if Logan were sentenced to death.

<sup>132</sup> Zacharias, *supra* note 66, at 383.

<sup>133</sup> Analyzing a hypothetical case where an attorney was forced to decide whether to disclose confidential information that would save a defendant from execution, Professor Mary Daly predicted that regulatory officials would not discipline the attorney for coming forward, sympathizing with her "extreme predicament." Mary C. Daly, *To Betray Once? To Betray Twice?: Reflections on Confidentiality, a Guilty Client, an Innocent Condemned Man, and an Ethics-Seeking Defense Counsel*, 29 LOY. L.A. L. REV. 1611, 1627 (1996); see also, Monroe H. Freedman, *The Life-Saving Exception to Confidentiality: Restating Law Without the Was, the Will Be, or the Ought to Be*, 29 LOY. L.A. L. REV. 1631, 1633 (1996); Robert P. Lawry, *Damned and Damnable: A Lawyer's Moral Duties with Life on the Line*, 29 LOY. L.A. L. REV. 1641, 1654 (1996).

<sup>134</sup> Whether or not Wilson actually gave permission is based on the attorneys' word. Miner, *supra* note 2. The lawyers actually received permission from a judge before revealing Wilson's confession in court. Sharon Cohen, *Murder Verdict Sealed by Silence*, L.A. TIMES, Apr. 13, 2008, at 12.

Carolina State Bar for violating the attorney-client privilege, the bar ultimately threw out the complaint.<sup>135</sup> Professor Abbe Smith notes,

[I]n the rare case where it is truly necessary to disclose information obtained through the lawyer-client relationship (to stop the wrong person from being executed, to prevent premeditated murder, to prevent mayhem), a lawyer will do so notwithstanding the principle, and . . . the lawyer will not be disciplined for it.<sup>136</sup>

This suggests that disciplinary committees are likely to avoid penalizing lawyers in the most egregious cases—which, under a discretionary rule (and perhaps, even a mandatory rule based on Levin’s study), may be the only time lawyers would come forward anyway.

Even so, it is hard to gauge how many lawyers do not come forward strictly because a rule does not exist. Although there is some evidence that a rule does not necessarily produce lawyer disclosure, it is unclear how many lawyers remain silent because of fear of discipline or sanction. This is particularly true for lawyers who would come forward in cases where an innocent person served time in jail for a short period, if a rule existed. In those cases, the threat of discipline, or of hurting one’s reputation, may be more severe. A rule that would allow or require attorneys to come forward in such a situation may reduce that threat. Then again, the history of Massachusetts’s experience certainly casts doubt on the reliability of a rule to change attorney conduct. Whether or not a rule necessarily results in change, however, there is value in creating a rule as an assertion of the principles we believe are important, and as a declaration of the rights lawyers should have (whether or not they choose to exercise those rights) if they have confidential information that would exonerate an innocent inmate.

#### G. THE BENEFITS OF A NEW DISCRETIONARY RULE

Public response to wrongful incarcerations and executions reflects deep resentment and disapproval of this very serious flaw in the judicial system.<sup>137</sup> In addition to DNA testing, which helps exonerate the innocent, a wrongful incarceration exception could add another safeguard for innocent men and women.<sup>138</sup> The media explosion and the subsequent public disgust with Alton Logan’s twenty-six-year incarceration<sup>139</sup> suggest that the public would favor an exception. Although there are various issues

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<sup>135</sup> Paul Woolverton, *Bar Lets Lawyer Keep License*, FAYETTEVILLE OBSERVER, Feb. 12, 2008, at B1.

<sup>136</sup> FREEDMAN & SMITH, *supra* note 22, at 154.

<sup>137</sup> See Joy & McMunigal, *supra* note 124, at 46-49.

<sup>138</sup> *Id.* at 49.

<sup>139</sup> See, e.g., Miner, *supra* note 2.

involved in introducing an exception, the public's outrage is certainly a factor to consider in the decision to promulgate a new rule, since after all, lawyers' ultimate purpose is to represent the public.<sup>140</sup>

Several proposals have already been presented. Professor Miller's contribution—the reinterpretation of the substantial bodily harm exception discussed above in Part III.B—certainly raises valuable and significant considerations.<sup>141</sup> His strongest argument comes through the Model Rules' assertion that the prevention of substantial bodily harm is a concern that overrides confidentiality.<sup>142</sup> However, his argument overlooks the fact that the substantial bodily harm exception is simply not designed to protect the wrongfully incarcerated. In those situations where wrongful incarceration does not include substantial bodily harm, or where lawyers simply cannot gauge with reasonable certainty whether a prisoner would be subjected to bodily harm, the substantial bodily harm exception would not help. Additionally, the wording of the substantial bodily harm exception does not accommodate the wrongful incarceration situation, as it places no limitation on the identity of the person harmed, such that placing one's client in jail in place of the innocent actually violates the rule. Finally, and perhaps most importantly, judges simply have not interpreted the substantial bodily harm exception to include a wrongful incarceration exception, and, in the absence of specific legislative action to protect the wrongfully incarcerated, it is unlikely that judges will add new meaning to the rule.

Another proposal was suggested by Criminal Justice Section Ethics, Gideon & Professionalism Committee co-chairs Bruce Green and Ellen Yaroshevsky.<sup>143</sup> Their proposal to amend Model Rule 1.6 allows disclosure of confidential information in cases of a wrongful conviction only if an attorney's client is already deceased: “[a] lawyer may reveal information relating to the representation of a deceased client to the extent the lawyer reasonably believes necessary to prevent or rectify the wrongful conviction of another.”<sup>144</sup> The drafters recognized the difficulty in allowing disclosure before a client's death; as noted in the comment to the proposed rule, “[t]he interests underlying the confidentiality obligation are usually paramount in the case of living clients because clients will not be as forthcoming if there is a risk that their confidences will be disclosed during their lifetimes.”<sup>145</sup> However, the drafters add, “the societal interest in disclosure may be paramount when the client is deceased, particularly when the client's

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<sup>140</sup> Thomas-Fishburn, *supra* note 97, at 211.

<sup>141</sup> Miller, *supra* note 74, at 393.

<sup>142</sup> MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (2008).

<sup>143</sup> Joy & McMunigal, *supra* note 124, at 46.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.* at 47.

reputation and estate will not be prejudiced by disclosure.”<sup>146</sup> Green and Yaroshevsky’s proposal reflects a movement forward in the wake of the Alton Logan and Lee Wayne Hunt cases, but their proposed exception would do nothing to prevent people in similar situations from serving years-long sentences before the true criminals died. While closing the door on some issues, their proposal leaves significant concerns unanswered.

Legislatures should adopt a wrongful incarceration exception to attorney-client confidentiality that is available to attorneys even before a client’s death. The values involved in freeing the innocent from undeserved prison sentences should be recognized as too weighty to overlook even in the face of the long revered benefits of confidentiality. Incarceration robs innocent people of their freedom, exposes them so often to disease and physical violence, and diminishes their ability to lead meaningful lives. Incarcerating the innocent goes against the very goals implicit in a judicial system—to punish wrongdoers, impose order, and establish justice. A wrongful incarceration exception should be promulgated as an assertion of society’s values in preserving the freedom of the innocent.

Though not a solution to all of the issues raised in this Comment, the best rule is one that would allow lawyers the discretion to disclose confidential information of a wrongful incarceration. A discretionary rule would allow an attorney to decide when to come forward during a proceeding—whether pretrial, mid-trial, or after conviction—balancing the possible financial and bodily harm imposed on the innocent throughout the course of a proceeding and the harm caused to his client by disclosure. Similarly, a discretionary rule would allow an attorney to decide whether to come forward with confidential information even when it would save an innocent from serving just a short sentence.

Ultimately, disclosing information early in a proceeding or saving an innocent defendant from serving a very short sentence, could result in grave consequences to the defense attorney’s reputation and client loyalty and trust. Recognizing that disclosing each and every time a wrongful incarceration was presented could chill discussions with their clients over time, attorneys may use their discretion in choosing to disclose only when the benefits of disclosure are significant. At the same time, coming forward too late could result in the media backlash that Coventry, Kunz, and Hughes faced (though, it is unclear whether their professional careers have been impacted by their decision to keep confidences for so long), and perhaps most importantly, could weigh heavily on lawyers’ consciences. Since there is some evidence that clients do not know or understand the exceptions to confidentiality, and assume anyway that attorneys will

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<sup>146</sup> *Id.*

disclose information if they feel morally compelled to do so, a new rule for wrongful incarcerations may not chill discussions at all. However, to the extent that it would chill discussions or destroy confidences, a discretionary rule would regulate such decisions by forcing attorneys to take into consideration the effect on their client before coming forward with confidences. Although a mandatory disclosure rule would make a decision to disclose easier, and could promote consistency in lawyers' response to wrongful incarcerations, it would ultimately detract from the values at stake while making a very complicated decision a black-and-white one. A discretionary rule gives attorneys the opportunity to fully respect the issues at stake and decide the best route.

Giving attorneys discretion to disclose is not a foreign concept in the ethical guidelines. The current exceptions to confidentiality in the Model Rules afford an attorney great leeway in the decision to disclose confidential information. The exceptions allowing attorneys to reveal information concerning future crimes "have been given very broad discretion with virtually no definition of the provisions' terms and scope."<sup>147</sup> The Massachusetts rule allowing disclosure to prevent "the wrongful execution or incarceration of another" provides no guidance as to when an attorney should come forward.<sup>148</sup> Such discretion suggests that attorneys, in the end, are in the best position to regulate such decisions. Although the Massachusetts rule has produced no disclosures so far, the lack of disclosure could simply signify that lawyers are weighing the issues at stake against disclosure. Such a decision should not necessarily be discounted as wrong. In fact, even Alton Logan, who served so many years in prison for a crime Andrew Wilson committed, claimed upon his release that "Andrew Wilson's attorney did nothing wrong. They did their job."<sup>149</sup> Attorney-client confidentiality may in fact be that important to the legal profession, and even the wrongfully incarcerated understand that.

The American judicial system does not generally impose a duty on attorneys to come forward with evidence in cases where they are not representing any parties.<sup>150</sup> In fact, more broadly speaking, there is no general obligation for persons to report crimes.<sup>151</sup> Although lawyers have

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<sup>147</sup> Tate, *supra* note 48, at 1681.

<sup>148</sup> MASS. RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2009), available at <http://www.mass.gov/obcbbbo/rpcnet.htm>.

<sup>149</sup> Susan Poll-Klaessy, *The Role of Attorney Ethics and Witness Misidentification in the 26 Year Incarceration of an Innocent Man*, 14 PUB. INT. L. REP. 25, 27 (2008).

<sup>150</sup> See Subin, *supra* note 50, at 1175. Also, the Model Rules do not reference any ethical obligation of lawyers to disclose evidence in cases where they do not represent any parties. See MODEL RULES OF PROF'L CONDUCT (2008).

<sup>151</sup> Subin, *supra* note 50, at 1175.

assumed certain responsibilities as advocates before the law, “they have hardly agreed to become law enforcement officers.”<sup>152</sup> Requiring lawyers to come forward regardless of the effects on their client would cause a fundamental shift in the legal profession. Legal representation should always allow an attorney to consider, at the very least, the possible negative effects of his actions on his client before disclosing confidences. Without allowing such space for client consideration, lawyers would become yet another actor in the law enforcement system, and client representation would ultimately suffer.

Regardless of the form a wrongful incarceration exception takes—whether discretionary or mandatory—if an attorney does come forward, use immunity should be employed to safeguard a client’s constitutional rights against self-incrimination. Thus, any information that was revealed against the client’s wishes could not be used against him in a court of law. Of course, an attorney’s disclosure could not prevent a client from being prosecuted when existing information about him would be enough to prosecute him, but an attorney could still more comfortably reveal confidences knowing some safeguards were available. More importantly, a client’s constitutional rights would be protected.

A discretionary rule certainly has drawbacks, but it is the best option to handle the numerous competing interests involved. Any black letter law that sets in stone when, if, and under what circumstances an attorney should come forward would not take into account all of the values at stake. A discretionary rule with few exacting constraints is the only option that would reflect the gravity of issues presented. Inherent in a discretionary rule is the possibility that lawyers will choose not to come forward, but it is a price that many jurisdictions with similar discretionary rules to prevent substantial bodily harm and imminent death already choose to pay in order to ensure that clients are given effective representation. Similarly, it is a price worth paying in the case of wrongful incarcerations.

#### IV. CONCLUSION

Wrongful incarcerations are one of the most tragic products of a judicial system. Often, they are impossible to avoid as judges and juries imposing punishment are exposed to only so much information and are, after all, only human. But when exonerating information is available and wrongful incarcerations continue to occur, there is a sharp sense of failure in the system. Although lawyers are trained to serve clients, bound by confidentiality restraints to preserve their innermost secrets, it seems that some secrets are simply too costly to bear. Saving the innocent from

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<sup>152</sup> *Id.*

serving time in prison is a value that deserves recognition in the law in spite of the recognized benefits of attorney-client confidentiality.

Still, the issues involved in breaking confidentiality to save the wrongfully incarcerated are complex. Clients arguably should not be penalized for revealing incriminating information to their attorneys—information that they would have kept hidden if it were not for a promise of confidentiality. A wrongful incarceration exception could thus chill the very discussions that contribute to an attorney's knowledge of exonerating information. Adding yet another exception to confidentiality could silence clients when their honesty and openness are most important. In fact, without knowing a client's full story, an attorney may be prevented from providing the effective assistance clients so need.

In addition to the dangers presented by an exception to attorney-client confidentiality, a wrongful incarceration exception raises issues involved in the timing of disclosure. When is the right time to disclose and should disclosure happen regardless of the sentence imposed? Is freeing the innocent an overriding value in every circumstance, regardless of the effect on a client—and on legal assistance as a whole? This Comment suggests that such value judgments are best left to attorneys representing their clients. A discretionary rule for wrongful incarceration disclosures is the best option that allows for the most recognition of the values at stake. By allowing attorneys to weigh the issues presented before disclosing, clients' rights are recognized, while the innocent are still provided some hope of recourse in the law. In recognition of the lives of innocent men and women serving in prisons, states should adopt a discretionary wrongful incarceration exception to attorney-client confidentiality ethical rules.

