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# THE ATTORNEY-CLIENT PRIVILEGE, CLIENT CONFESSIONS AND WRONGFUL CONVICTIONS: IMMUNITY AS A STATUTORY SOLUTION

Richard E. Myers II<sup>†</sup>

*Attorneys face a serious personal dilemma when a client confesses that he or she committed the crime for which someone else has been wrongfully convicted. If they do nothing, a wrongful conviction stands. If they come forward, their client faces the prospect of a new criminal conviction. Professional ethics require them to maintain all privileges and may lead them to counsel their client to remain silent, notwithstanding manifest injustice. This Essay proposes a statutory solution: states should create a procedure for in camera, ex parte review of the confession by the judge in the court of conviction or appropriate appellate body. In cases where the confession is sufficiently credible, the court would authorize immunity for the confessing client and forward the confession to the convicted individual's counsel to be used in motions for appropriate relief.*

## INTRODUCTION

Many people are familiar with Alton Logan's case, even if they don't know him by name. Logan is the Chicago man who was wrongfully convicted of having killed a McDonald's security guard in 1982, and then spent twenty-six years in prison while the real killer's lawyers kept an affidavit from their client confessing to the crime sealed in a box, at times under one lawyer's bed.<sup>1</sup> Those attorneys, Chicago public defenders Dale Coventry and Jamie Kunz, admitted to having their

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<sup>†</sup> Henry Brandis Distinguished Professor of Law, University of North Carolina School of Law. I would like to thank my Research Assistants, Rachel High Jennings and Henry Zaytoun, for their hard work on improving this Essay. Christine Mumma of the North Carolina Center on Actual Innocence contributed valuable insights, as did the participants in the Witt Professionalism Round Table and the members of the North Carolina Bar's subcommittee on Rule 3.8, who read and commented on a draft as part of that state's consideration of mandatory reporting rules for lawyers in innocence cases.

<sup>1</sup> 26-Year Secret Kept Innocent Man in Prison, CBSNEWS.COM (Mar. 6, 2008), [http://www.cbsnews.com/8301-18560\\_162-3914719.html](http://www.cbsnews.com/8301-18560_162-3914719.html) [<http://perma.cc/A9KR-TFFE>].

consciences torn constantly by the choice they had to make between a professional ethic that required them to protect their murderous client's secret and their personal concern for the wrongfully convicted Logan.<sup>2</sup> In an interview with CBS news program *60 Minutes*, Coventry was asked whether the attorneys should have come forward, despite the ethical rules. He said:

Well, the vast majority of the public apparently believes that, but if you check with attorneys or ethics committees[,] or you know[,] anybody who knows the rules of conduct for attorneys, it's very, very—it's not morally clear—but we're in a position to where we have to maintain client confidentiality, just as a priest would or a doctor would. It's just a requirement of the law. The system wouldn't work without it.<sup>3</sup>

Coventry and Kunz did come forward after their client's death, with his permission, and the affidavit they ultimately produced helped exonerate Logan.

Should an attorney whose client has credibly confessed to having committed a murder or other serious crime for which someone else has been wrongfully convicted be required to keep that secret?<sup>4</sup> Should the attorney be allowed to? Almost

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<sup>2</sup> *Id.*

<sup>3</sup> *Id.*

<sup>4</sup> For a thoughtful discussion of the answer to the question under current law, see James E. Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another?*, 38 HASTINGS CONST. L.Q. 811 (2011). See also Inbal Hasbani, Comment, *When the Law Preserves Injustice: Issues Raised by A Wrongful Incarceration Exception to Attorney-Client Confidentiality*, 100 J. CRIM. L. & CRIMINOLOGY 277, 297–98 (2010) (“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.”); Jean Fleming Powers, *Comparing Exceptions to Privilege and Confidentiality Relating to Crime, Fraud, and Harm—Can Hard Cases Make Good Law?*, 79 UMKC L. REV. 61, 80–82 (2010) (arguing that adding an exception to allow for an attorney to come forward with their client's information to free a person from wrongful incarceration is consistent with other exceptions to the rule of confidentiality and “the importance placed on liberty in this country”); Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477, 479 (2002) (arguing that the organized bar should “defer to the courts in establishing disclosure standards for client information on a case by case basis”); Ken Strutin, *Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence: A Systemic Approach*, 17 TEX. WESLEYAN L. REV. 499, 556–60 (2011) (proposing a “transactional immunity” approach to resolving the tension between incriminating evidence and the attorney-client privilege); Harry I. Subin, *The Lawyer As Superego: Disclosure of Client Confidences to Prevent Harm*, 70 IOWA L. REV. 1091, 1129 (1985) (“If the incrimination rationale were the law, the attorney-client privilege, which contains a host of qualifications—including, of course, the crime or fraud exception—would be converted into a constitutionally

every criminal defense attorney I have asked has said yes to both questions—the secret should be kept because of the value of the attorney-client privilege and because it is enshrined in state versions of American Bar Association Model Rule of Professional Conduct 1.6.<sup>5</sup> Every non-lawyer<sup>6</sup> to whom I have asked the same questions has said no to being required to keep the secret, because of the horrors of wrongfully convicting an innocent person. Given the client-confidentiality considerations, there has been a split to the answer on when they should be allowed to keep it. This divergence between legal ethics and lay intuitions of right and wrong is troubling. This Essay offers a way out of the dilemma.

I propose that states make it possible for attorneys to come

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mandated absolute rule.”).

<sup>5</sup> Most states have adopted some version of the American Bar Association’s Model Rule on the attorney-client confidentiality as part of their ethical rules governing lawyers’ conduct. See MODEL RULES OF PROF’L CONDUCT r. 1.6 (AM. BAR ASS’N 2018).

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

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;  
 (2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client;

(6) to comply with other law or a court order; or

(7) to detect and resolve conflicts of interest arising from the lawyer’s change of employment or from changes in the composition or ownership of a firm, but only if the revealed information would not compromise the attorney-client privilege or otherwise prejudice the client.

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.

<sup>6</sup> Asking friends and acquaintances is an admittedly unscientific method of testing social attitudes. I would expect notice and comment procedures before the appropriate state bodies made any changes to the ethical rules or new legislation.

forward by legislation. Once their client has credibly confessed to them that the client, not the convicted person, committed a crime, they could follow a set of procedures designed to create a path to immunity for the client in exchange for passing the information on to the criminal justice system to remedy the wrongful conviction. The same statute that created the immunity path would create an exception to the attorney-client privilege to make it possible for the attorney to come forward, with or without the client's permission. In addition, the bar association would create exemptions to the client confidentiality rules to permit the lawyer to come forward within the ethical rules. Finally, the statute would have to create a procedure for the information to be judicially tested in private and for a judge to decide whether to grant immunity.

Under my proposal, the convicted person would have to be factually innocent—a term of art I explain in greater detail below. There are at least five important choices that need to be made before any proposal is enacted. 1) Who reports, and under what conditions? 2) How is the information provided to the criminal justice system? 3) On what basis will immunity be provided? By whom, and with whose input? 4) Will the confessing client receive use immunity or transactional immunity? How will this grant of immunity impact the separation of powers inherent in the independent exercise of the prosecutorial function? 5) Will the new rule apply to all wrongfully convicted individuals or a subset? If a subset, how is the subset defined?

This is a complex set of changes that requires some careful drafting. As a first pass on the issue, I offer the following proposal, which makes some of the necessary choices. A state could adopt a version of these statutory additions and amendments to their attorney-client privilege and lawyer-client confidentiality rules:

First, attorneys who have a client who has credibly confessed to a felony for which they are aware a factually innocent person<sup>7</sup> has been wrongfully convicted and sentenced to incarceration for a term of more than one year shall within

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<sup>7</sup> The factually innocent would presumably follow the provisions of the applicable law for a pardon of innocence in the controlling jurisdiction, although a definition could be added within any implementing legislation. *See, e.g.*, N.C. GEN. STAT. § 15A-1460(1) (2016) (“‘Claim of factual innocence’ means a claim on behalf of a living person convicted of a felony in the General Court of Justice of the State of North Carolina, asserting the complete innocence of any criminal responsibility for the felony for which the person was convicted and for any other reduced level of criminal responsibility relating to the crime . . .”).

30 days file an affidavit, under seal and ex parte, with the trial court in which the conviction occurred, detailing the confession and any supporting evidence.

Second, the court, upon an in camera review and a finding that the evidence is sufficiently credible to call the conviction into doubt, shall grant use and derivative use immunity to the confessing client, provide the information to the convicted person's defense counsel of record and the prosecution, and request that the parties initiate appropriate proceedings.

Third, in the event that the trial court does not find that the evidence calls the conviction into doubt, the filing shall be retained under seal and the information may be not be disclosed for any other purpose without a grant of transactional immunity.

Fourth, the information revealed may not be used in civil proceedings for money damages against the client whose confidentiality is at issue. In the event of a perjurious confession, any grant of immunity will be rescinded, and the person or persons rendering the false confession will be prosecuted for obstruction of justice and perjury as appropriate.<sup>8</sup> The state's version of Rule 1.6(b)(1), or other ethical analogue to the attorney's duty of confidentiality, would be amended to a modified version of the statement in the Massachusetts version of Rule 1.6 to permit disclosure, inter alia, "to prevent [or correct] the wrongful execution or incarceration of another."<sup>9</sup>

## I

### A REAL-WORLD PROBLEM

It is impossible to say as an empirical matter how often the

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<sup>8</sup> Other authors have considered some general notion of immunity for witnesses in wrongful conviction cases but propose solutions different from the one in this Essay. See, e.g., Hasbani, *supra* note 4, at 297–98 (proposing a permissive structure where attorneys may come forward in cases of wrongful conviction); Powers, *supra* note 4, at 82 (arguing that adding an exception to allow for an attorney to come forward with their client's information to free a person from wrongful incarceration is consistent with other exceptions to the rule of confidentiality and "the importance placed on liberty in this country"); Strutin, *supra* note 4 (surveying the pathways and analyses in assessing the propriety, necessity, and method of disclosure); Fred C. Zacharias, *Rethinking Confidentiality II: Is Confidentiality Constitutional?*, 75 IOWA L. REV. 601, 650 (1990) (listing the hypothetical situation in the appendix).

<sup>9</sup> See MASS. RULES OF PROFESSIONAL CONDUCT r. 1.6(b)(1) (2016) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm; or to prevent the wrongful execution or incarceration of another.").

problem will come up, but the Logan example, while famous, is not unique. Similar cases from Arizona and North Carolina appear in the case reporters, and attorneys in both cases risked discipline to come forward to testify.

A. Bill Macumber<sup>10</sup>

In Arizona, a man named Bill Macumber spent thirty-six years in prison for a pair of murders he steadfastly denied committing. The murders were committed in 1962. Macumber was convicted in 1976, after the twelve-year-old case was reopened when his estranged ex-wife came forward to say he had confessed to the crimes. At Macumber's trial, a federal public defender named Thomas O'Toole offered to testify that his deceased client, Ernest Valenzuela, had confessed to the 1962 murders in the course of preparing for a separate murder trial. (Valenzuela had also confessed to the killings during an earlier arrest but was dismissed by police as a crank.) Valenzuela was killed in prison after his own murder conviction. The trial court refused to let O'Toole testify in Macumber's trial, citing concerns about the attorney-client privilege. On appeal, the Arizona Supreme Court found no error in excluding O'Toole's testimony, but reversed on other grounds. However, one Justice concurring in the result would have allowed O'Toole to testify. Noting that Valenzuela was dead and could not face criminal jeopardy, he stated: "When the interests are weighed, I believe that the constitutional right of the accused to present a defense should prevail over the property interest of a deceased client in keeping his disclosures private. I would allow the defendant to offer the testimony of the attorneys concerning the confession of their deceased client."<sup>11</sup>

B. Lee Wayne Hunt

Similar circumstances occurred in the Lee Wayne Hunt case in North Carolina. There, a man named Jerry Cashwell confessed to his attorney that he acted alone when killing Roland and Lisa Matthews. Lee Wayne Hunt was convicted of having acted with Cashwell in a separate murder trial. Cashwell's attorney, Staples Hughes, testified at a hearing on Lee Wayne Hunt's motion for a new trial that Cashwell had

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<sup>10</sup> For an account of Macumber's conviction and release, see BARRY SIEGEL, *MANIFEST INJUSTICE: THE TRUE STORY OF A CONVICTED MURDERER AND THE LAWYERS WHO FOUGHT FOR HIS FREEDOM* (2013).

<sup>11</sup> *State v. Macumber*, 544 P.2d 1084, 1088 (1976) (en banc) (Holohan, J., specially concurring).

confessed that he committed the murders for which Hunt had been convicted.<sup>12</sup> The judge presiding over the hearing refused to consider Hughes's testimony and referred Hughes to the state bar for discipline.<sup>13</sup> The North Carolina State Bar ultimately dismissed the disciplinary proceeding.

According to Professor James Moliterno, who has proposed that the ABA modify Model Rule 1.6 to permit these types of disclosures, "[c]onfidence in the justice system cannot long survive in the face of long-past revelations of wrongful convictions when silence was mandated by lawyer ethics law."<sup>14</sup> The public outrage following the *60 Minutes* piece on the Logan case led to renewed interest in finding a way out of the ethical box.

## II

### THE PRIVILEGE NOW

The classic formulation of the attorney-client privilege is embodied in section 502(b) of the Uniform Rules of Evidence:

General rule of privilege. A client has a privilege to refuse to disclose and to prevent any other person from disclosing a confidential communication made for the purpose of facilitating the rendition of professional legal services to the client:

- (1) between the client or a representative of the client and the client's lawyer or a representative of the lawyer;
- (2) between the lawyer and a representative of the lawyer;
- (3) by the client or a representative of the client or the client's lawyer or a representative of the lawyer to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein;
- (4) between representatives of the client or between the client and a representative of the client; or
- (5) among lawyers and their representatives

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<sup>12</sup> Adam Liptak, *When Law Prevents Righting a Wrong*, N.Y. TIMES (May 4, 2008), [http://www.nytimes.com/2008/05/04/weekinreview/04liptak.html?pagewanted=all&\\_r=0](http://www.nytimes.com/2008/05/04/weekinreview/04liptak.html?pagewanted=all&_r=0) [<http://perma.cc/R2T3-UJXN>].

<sup>13</sup> *Id.*

<sup>14</sup> Moliterno, *supra* note 4, at 833.



representing the same client.<sup>15</sup>

Reasonable minds can and do differ on the appropriate scope of the privilege and the utilitarian and rights-based theories that have been advanced to support it. Some critics of the privilege have gone so far as to argue for its abolition. According to Jeremy Bentham, the result of abolishing the attorney-client privilege will not be wrong verdicts but rather “[t]hat a guilty person will not in general be able to derive quite so much assistance from his law adviser, in the way of concerting a false defense, as he may do at present.”<sup>16</sup> Squared off on the other side are John Henry Wigmore and a host of others. Wigmore argued that the entire system benefits when attorneys can discuss cases with their clients with complete candor, even if the privilege does interfere in some measure with the courts’ truth-seeking function. Even Wigmore conceded that the privilege’s “benefits are all indirect and speculative; its obstruction is plain and concrete.”<sup>17</sup>

Some judges consider the privilege so important that they refuse to hear from lawyers who are willing to testify regarding wrongful convictions, even after their client is dead.<sup>18</sup> To a large portion of the defense bar, any proposal to limit the privilege is the equivalent of heresy.<sup>19</sup>

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<sup>15</sup> UNIF. R. EVID. 502(b).

<sup>16</sup> 5 JEREMY BENTHAM, *RATIONALE OF JUDICIAL EVIDENCE, SPECIALLY APPLIED TO ENGLISH PRACTICE* 304 (1827).

<sup>17</sup> 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2292 (McNaughton rev. 1961) (cited in 1 CHARLES T. MCCORMICK, *MCCORMICK ON EVIDENCE* 388 (6th ed. 2006)).

<sup>18</sup> See, e.g., *State v. Macumber*, 544 P.2d 1084, 1086 (Ariz. 1976) (holding that the privilege could not be abrogated after the client’s death, even where the deceased had confessed to his attorney and to law enforcement that he had committed the murder for which the defendant had been charged, and his federal public defender wanted to come forward to describe his confession). For an extended discussion of the case and the efforts to free Macumber by the Arizona Justice Project, see SIEGEL, *supra* note 10.

<sup>19</sup> See Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991) (quoting nineteenth-century lawyer Henry Lord Brougham in 2 TRIAL OF QUEEN CAROLINE 8 (J. Nightingale ed. 1821), *quoted in* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1036 (1975)) (“[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, among 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 consequences, though it should be his unhappy fate to involve his country in confusion.”); Monroe H. Freedman, *Lawyer-Client Confidences under the A.B.A. Model Rules: Ethical Rules Without Ethical Reason*, CRIM. JUST. ETHICS, Summer/Fall 1984, at 3; see also Joe Concha, *Dershowitz on FBI Raid of Trump Attorney: ‘Dangerous Day Today for Lawyer-Client Relations’*, THE HILL (Apr. 10, 2018, 11:11 AM),

The compromise solution offered in this Essay would arguably weaken the privilege in a small handful of cases. But the privilege is far from absolute now. Most states have adopted some version of Model Rule 1.6, which permits exceptions for reasonably certain death or substantial bodily harm, which some lawyers argue includes instances of wrongful incarceration.<sup>20</sup> Two states, Alaska and Massachusetts, have explicitly recognized an exception for preventing wrongful incarceration within their versions of Rule 1.6. Massachusetts Rule 1.6(b)(1) states that a lawyer may reveal privileged information “to prevent reasonably certain death or substantial bodily harm, or to prevent the wrongful execution or incarceration of another.”<sup>21</sup> Comment 6[A] provides: “Rule 1.6(b)(1) also 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. This language has been included to permit disclosure of confidential information in these circumstances where the failure to disclose may not involve the commission of a crime.”<sup>22</sup>

In Alaska, Rule of Professional Conduct 1.6(b) provides:

A lawyer may reveal a client’s confidence or secret to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain:

(A) death;

(B) substantial bodily harm; or

(C) wrongful execution or incarceration of another[.]<sup>23</sup>

Most other states have a version of Rule 1.6 that contains some form of the Model Rules’ permissive disclosure provision, which allows an attorney to come forward based on a

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<http://thehill.com/homenews/382453-dershowitz-on-fbi-raid-of-trump-attorney-dangerous-day-today-for-lawyer-client> [<https://perma.cc/UH8X-8N3Q>] (warning that the FBI investigation may erode attorney-client privilege).

<sup>20</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, 392–93, 395–96 (2008) (arguing that states that currently have a discretionary disclosure exception for reasonably certain death or substantial bodily harm can read an exception for wrongful incarceration because of all the potential for bodily harm or death that accompanies imprisonment).

<sup>21</sup> MASS. RULES OF PROF’L CONDUCT r. 1.6, *supra* note 9.

<sup>22</sup> *Id.* at cmt. 6[A].

<sup>23</sup> ALASKA RULES OF PROF’L CONDUCT r. 1.6 (2018).

“reasonably certain death or serious bodily harm.”<sup>24</sup>

Permissive grants are not the best option. Professor Moliterno notes that the permissive grant requires significant case-by-case balancing regarding the degree of harm caused by incarceration and requires judgment calls about whether the imprisonment is for a “substantial period.”<sup>25</sup> “As currently drafted, Model Rule 1.6(b)(1) is a somewhat unwieldy vehicle to support a doctrinal path that would allow a defense lawyer to remedy a wrongful conviction of another.”<sup>26</sup> He contrasts the Model Rule with the categorical approach in the Alaska and Massachusetts rules, which allow permissive reporting of wrongful conviction. “The Alaska and Massachusetts approach is cleaner but still requires what may be unpalatable to some: Inflicting harm on one’s own client to aid an innocent other.”<sup>27</sup> That concern for the lawyer’s current client is real and for many lawyers would be an absolute barrier to coming forward to help the wrongfully convicted. As Coventry said when asked about the Logan case, “I could not figure out a way, and still cannot figure out a way, how we could have done anything to help Alton Logan that would not have put Andrew Wilson in jeopardy of another capital case.”<sup>28</sup> Forcing lawyers to choose between harming their client and helping an innocent creates a moral quandary, and permissive statutes and rules do not resolve it.

Though the foregoing discussion was focused on utilitarian arguments for the proposal, other claims about the privilege are rights-based. These argue that the Sixth Amendment provides for an unqualified privilege that may not be abridged by statute. My answer to those critiques is that that ship has sailed. Once one looks at all of the attorney-protecting exceptions in Rule 1.6, it is clear that we do not have a true rights-based model. Those wedded to a view that the attorney-client privilege is an essential individual human right, maintaining an essential separation between the individual and the state, will be unlikely to support any version, with or without the immunity grant.<sup>29</sup>

### III

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<sup>24</sup> MODEL RULES OF PROF’L CONDUCT r. 1.6, *supra* note 5.

<sup>25</sup> Moliterno, *supra* note 4, at 828.

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 832–33.

<sup>28</sup> See *26-Year Secret Kept Innocent Man in Prison*, *supra* note 1.

<sup>29</sup> See MCCORMICK, *supra* note 17, at 388–90 (discussing the bases for the privilege).

## HOW THE PROPOSAL DIFFERS FROM CURRENT LAW

The proposal as drafted would make significant changes to current law. Like the Alaska and Massachusetts rules, which permit attorneys to reveal client confidences to remedy cases of wrongful conviction, my proposed statute similarly removes the balancing of harms required under the Model Rule. But it also differs from the more permissive versions of Rule 1.6 adopted in Alaska and Massachusetts in two important ways. First, it does away with the unpalatable—and quite frankly for many defense attorneys absolutely foregone—choice between harming one’s client and seeking justice for the wrongfully convicted person. Second, it is mandatory as proposed, although it may be more acceptable to some if it were optional. I will address these drafting choices in turn. Additionally, it applies to a subset of the wrongfully convicted, to minimize the impact. As a threshold matter, it is important to note that the proposed rule only applies post-conviction where someone is sentenced to incarceration for more than a year, so the concerns about group criminal activity with designated immunized “no-fall” guys is somewhat alleviated, and the perjury temptations that now exist in instances of organized crime will not be significantly rebalanced.

## A. Immunity as a Legislative Choice

As noted, the proposal is significant because it statutorily creates a mandatory grant of use and derivative use immunity for the client who has confessed to their lawyer.<sup>30</sup> Use immunity would mean that the attorney’s report of his client’s statements could *never* be used in connection with the crime to which they had credibly confessed. The proposal could work with no such grant, or with a broader transactional immunity grant. I arrived at use and derivative use immunity for two reasons. I believe that the state-bar politics surrounding the proposed change are far more likely to receive support on both sides when the defense receives a benefit of equal or greater value than the privilege it is being asked to yield. I also believe that without it, many defense attorneys would be noncompliant. Immunity is necessary to get defense attorneys to come forward, because criminal defense lawyers are unlikely to reveal their clients’ confidences when they know it will expose the client to criminal prosecution and other potential harms, notwithstanding personal moral qualms regarding the

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<sup>30</sup> In discussions with prosecutors, this feature is usually vehemently resisted.

wrongful conviction of others.<sup>31</sup> Moreover, I concede that knowing that such confidences might be revealed will in fact have *some* marginal detrimental effect on a client's willingness to be completely candid with his or her lawyers; but confidences can already be revealed for a multitude of reasons, and I do not believe the marginal effects outweigh the potential benefits.<sup>32</sup>

## B. Mandatory Reporting

The benefit that we as a society gain in exchange for the immunity grant is a mandatory reporting regime. Lawyers will be *required* to come forward with the confession information once they become aware that someone factually innocent has been convicted and their client has credibly confessed<sup>33</sup> to being the actual perpetrator. As drafted, they *shall file* the affidavit detailing the information. Other writers, such as Hasbani for example, suggest a permissive reporting scheme and would trigger the right to report a client confession at wrongful incarceration.<sup>34</sup> A permissive approach would leave it up to individual defense attorneys to decide for themselves whether to come forward. I believe that the permissive approach would not solve the public trust problems that the withholding of information creates and would leave the range of attorney-client disclosures that would go with such a rule so unpredictable as to offer cold comfort to those committed to the truth. Moreover, the permissive approach could conceivably encourage attorneys to gain a competitive advantage by claiming to offer the more impenetrable version of the privilege to their clients.

My proposal places significant weight on remedying wrongful convictions. It is premised on the belief that it is more

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<sup>31</sup> The client could face civil liability, reputational damage, or lose the right to vote, lose a job (felon-restricted positions), or lose the right to many classes of government benefits, among other things.

<sup>32</sup> See, e.g., Rebecca Aviel, *When the State Demands Disclosure*, 33 CARDOZO L. REV. 675, 720–21 (2011) (“[E]nforcing disclosure statutes against attorneys gives clients a reason to restrict communication with their own counsel, undermining the effectiveness of their assistance.”); Robert P. Mosteller, *Child Abuse Reporting Laws and Attorney-Client Confidences: The Reality and the Specter of Lawyer as Informant*, 42 DUKE L. J. 203, 277 (1992) (“[T]he net loss of [confession] information occasioned by the [attorney-client] privilege is relatively minimal as it is the privilege’s very promise of confidentiality that encourages the initial candid and damaging revelation.”).

<sup>33</sup> Attorneys who are opposed to this kind of reporting may very well find that the confession is not “credible.” I leave the fine-tuning of such determinations to case-by-case decisions.

<sup>34</sup> See Hasbani, *supra* note 4, at 297–98.

important to overturn a wrongful conviction than to convict the guilty party. This intuition has a long history, embodied in the maxim that it is better that ten guilty people go free than that one innocent person be convicted.<sup>35</sup> It also recognizes that it is significantly unlikely that an accurate conviction will ultimately be achieved when someone has already been wrongfully convicted for the crime. So, on one side of the equation we have the opportunity to free a wrongfully convicted innocent person, and on the other we have the cost to the state and to the victims of further reducing the already massively discounted opportunity to convict the factually guilty.

#### IV

##### CONSTITUTIONAL CONSIDERATIONS

The proposed statute is constitutional. The attorney-client privilege itself is a product of state law, not a constitutional mandate. Both immunity grants and mandatory reporting of client confidences by attorneys have been upheld in other contexts.

*Kastigar* immunity—a form of use and derivative use immunity—has been an accepted part of federal trial practice for decades.<sup>36</sup> In a different context, challenges to mandatory child-abuse reporting statutes in Texas and Oklahoma, which explicitly narrowed the attorney-client privilege to require lawyers to come forward, have also established that shall-report statutes pass constitutional muster. As Professor Frank Bowman has noted, “the privilege itself is not guaranteed by the U.S. Constitution, either under the Sixth Amendment right to counsel or under the Fifth Amendment privilege against compelled self-incrimination. The fact that courts have created a zone of privilege to protect the attorney-client relationship gives the privilege itself no independent constitutional status.”<sup>37</sup> Likewise, the Fifth and Sixth Amendments apply only when testimony is being compelled and after the initiation of formal adversarial criminal proceedings, respectively.<sup>38</sup>

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<sup>35</sup> See 4 WILLIAM BLACKSTONE, COMMENTARIES \*352.

<sup>36</sup> For a much broader discussion of the issue, see generally Mosteller, *supra* note 32; see also *Kastigar v. United States*, 406 U.S. 441, 459–62 (1972) (holding that the government may grant use and derivative use immunity and compel a witness to testify before the grand jury, consonant with the Fifth Amendment guarantee against self-incrimination).

<sup>37</sup> Frank O. Bowman III, *A Bludgeon by Any Other Name: The Misuse of Ethical Rules against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 688 (1996) (footnotes omitted).

<sup>38</sup> See U.S. CONST. amend. V (“[No person] shall be compelled in any criminal

Much of the discussion in the law review literature has been driven by the Supreme Court cases of *Swidler & Berlin v. United States*, which confirmed that the attorney-client privilege extends beyond death,<sup>39</sup> and *Fisher v. United States*, which examined the relationship between client and attorney in a Fifth Amendment context and held that documents were not covered by attorney-client privilege simply because they had been transferred to an attorney.<sup>40</sup> These cases, as well as numerous other lower-court cases, have examined questions related to the matter of the Fifth and Sixth Amendment implications of revealing client wrongdoing.<sup>41</sup> Most of the scholarship in the area suggests that client confidences could be revealed, at least under certain circumstances, without violating either the Fifth or Sixth Amendment.

On one side of the debate are scholars such as my colleague, Robert Mosteller, who stated:

[I]f the privilege were changed by legislative action prior to the client's consultation to eliminate the guarantee of confidentiality upon which the defendant may have relied, it is difficult to find much in the theory of the Fifth Amendment, or due process for that matter, that would render the legislative action unconstitutional.<sup>42</sup>

However, Mosteller notes, if the attorney used some form of a promise that the information would not be used by the attorney to obtain the incriminating information, this could be viewed as coercion and, as such, a violation of the client's due process

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case to be a witness against himself . . . ."); U.S. CONST. amend. VI ("In all criminal prosecutions . . . .").

<sup>39</sup> See 524 U.S. 399, 405 (1998).

<sup>40</sup> See 425 U.S. 391, 397 (1976).

<sup>41</sup> See, e.g., *United States v. Amlani*, 169 F.3d 1189, 1195-96 (9th Cir. 1999) (holding that defendant waived attorney-client privilege where defendant brought Sixth Amendment attorney disparagement claim); *Foster v. Hill* (*In re Foster*), 188 F.3d 1259, 1271 (10th Cir. 1999) ("Under *Fisher*, however, [the attorney-client] privilege effectively incorporates a client's Fifth Amendment right; it prevents the court from forcing [an attorney] to produce documents given it by [a client] in seeking legal advice if the Amendment would bar the court from forcing [the client] himself to produce those documents."); *United States v. Schmidt*, 105 F.3d 82, 89 (2d Cir. 1997) ("Schmidt's new attorney Cohen twice stated in her presence that he believed [her former attorney's] testimony might be necessary to decide her Sixth Amendment claim. She therefore either impliedly waived the attorney-client privilege or consented, by her silence, to disclosure."); *United States v. Davis*, 636 F.2d 1028, 1044 (5th Cir. 1981) (holding that attorneys could not assert a client's Fifth Amendment privilege where the Internal Revenue Service sought testimony and production relating to the tax liability of the attorney's client).

<sup>42</sup> Mosteller, *supra* note 32, at 270.

rights.<sup>43</sup>

[A] legislature could constitutionally eliminate the protections of the attorney-client privilege except when criminal litigation has been formally initiated. This statement may seem shocking, suggesting an unrealistic, apocalyptic result, but to the contrary is based on uncontroversial constitutional interpretation. The attorney-client privilege as it applies to . . . testimony by an attorney against the (former) client depends largely upon the good judgment of legislatures and their determination of sound social policy.<sup>44</sup>

On the other side of the debate is Monroe Freedman, who believes the privilege is constitutionally required. In his view, even the current permissive reporting requirements under the Model Rules are unconstitutional. According to Freedman, “the sixth amendment right to counsel and the fifth amendment privilege against self-incrimination have been inextricably linked with the lawyer-client privilege as constitutional expressions of the adversary system. The Model Rules, with their assault on confidentiality, attack the adversary system and therefore the Constitution.”<sup>45</sup>

I agree with Mosteller that there are no Fifth Amendment barriers to the use of a “shall-report” formulation. There is no constitutionally significant difference from schemes that provide that those attorneys with more robust consciences *may* disclose. Is there state coercion inherent in requiring reporting that runs afoul of the Fifth Amendment? The statutory grant of immunity from prosecution undercuts those Fifth Amendment objections. Because immunity obviates criminal prosecution, a state requirement to come forward will not require statements to be made “in any criminal case.”<sup>46</sup>

Moreover, other cases demonstrate that use immunity, which would prevent the government from using the evidence of the guilty client’s confession in any subsequent trial, but would not preclude the government from initiating an investigation from that testimony, appears to be all that is constitutionally required.<sup>47</sup>

In addition to the Fifth Amendment concerns, there are

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

<sup>44</sup> *Id.* at 271–72 (footnotes omitted).

<sup>45</sup> Monroe H. Freedman, *Are the Model Rules Unconstitutional?*, 35 U. MIAMI L. REV. 685, 690 (1981)

<sup>46</sup> U.S. CONST. amend. V.

<sup>47</sup> Derivative-use has been upheld in cases such as *Kastigar v. United States*, 406 U.S. 441 (1972).



potential Sixth Amendment concerns if the proposal unduly interferes with the defendant's right to counsel. As noted by Professor Tremblay in his examination of mandatory reporting regimes implicating attorneys in a different context,

[t]he three Sixth Amendment concerns are ineffective assistance of counsel, government intrusion into the attorney-client relationship, and conflict of interest. These arguments only come into play, however, where the government has interfered with the lawyer who is defending the accused on the charge which is the subject of the Sixth Amendment claim.<sup>48</sup>

Professor Aviel notes that: "A statute that requires an attorney to disclose information about unindicted offenses does not violate a client's Sixth Amendment right to counsel unless it deprives him of effective assistance for the charges already filed against him."<sup>49</sup> Moreover, conduct that follows the ethical rules is considered effective, even in those instances where the privilege is implicated.

In *Swidler*, which upheld a posthumous attorney-client privilege, Justice O'Connor considered the situation at issue in this article when she wrote in dissent:

[T]he costs of recognizing an absolute posthumous privilege can be inordinately high. Extreme injustice may occur, for example, where a criminal defendant seeks disclosure of a deceased client's confession to the offense. In my view, the paramount value that our criminal justice system places on protecting an innocent defendant should outweigh a deceased client's interest in preserving confidences. . . . I do not believe that the attorney-client privilege should act as an absolute bar to the disclosure of a deceased client's communications. When the privilege is asserted in the criminal context, and a showing is made that the communications at issue contain necessary factual information not otherwise available, courts should be permitted to assess whether interests in fairness and accuracy outweigh the justifications for the privilege.<sup>50</sup>

O'Connor's considerations were practical, not constitutional, but she, too, saw no constitutional bar to limiting the privilege.

As the foregoing shows, the components of this proposal, both immunity grants and mandatory reporting of client

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<sup>48</sup> Paul R. Tremblay, "Ratting," 17 AM. J. TRIAL ADVOC., 49, 66-67 (1993) (footnotes omitted).

<sup>49</sup> Aviel, *supra* note 32, at 708 (emphasis omitted).

<sup>50</sup> *Swidler & Berlin v. United States*, 524 U.S. 399, 413-14 (1998) (O'Connor, J., dissenting) (citations omitted).

confidences by attorneys, have been upheld in other contexts.<sup>51</sup>

## V

### PRACTICAL CONSIDERATIONS

In this section, I briefly consider some of the practical considerations below to give the reader some sense of the problems to be considered. The proposal will only succeed if the practical concerns that lawyers may have, as prosecutors, defense counsel, or external critics of the system, are met in a manner in which the predictable costs, both administratively and in potential new inaccuracies, are considered.

#### A. Prosecution-Side Objections

The most significant objection to the proposal is perhaps the risk of false confessions by collusive cohorts of the convicted person.<sup>52</sup> Individuals may be tempted to falsely confess to having committed a crime for which a friend, relative, or criminal associate was convicted, seeking to receive a grant of immunity and get the friend or relative out of prison via their false confession. While it is entirely conceivable that someone might be tempted to tell such a lie, the proposal retains a couple of safeguards. First, a lawyer is required to act as an intermediary for the grant of immunity to be available. Attorneys will be subject to ethical limitations that place their professional livelihood in jeopardy if they engage in a fraud on the court. The falsely confessing cohort can be prosecuted under the various perjury and false-claims-to-law-enforcement statutes that are already on the books in most jurisdictions. Any state considering adopting the proposal should take a close look at the charges available to prosecutors to ensure that they adequately cover the risk of false confession, without unduly suppressing true claims. Additionally, the grant of immunity for a crime that the collusive cohort did not commit will cost the system time to sort out but is not in itself a guarantee that an actually guilty defendant will be released. The proposal is designed to bring new information into the system that was previously unavailable. It in no way prescribes an outcome. A truly persuasive false confession is possible, of course, but in my view, the upside outweighs the risk.

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<sup>51</sup> See *supra* notes 36–44 and accompanying text.

<sup>52</sup> See Stephen S. Trott, *Words of Warning for Prosecutors Using Criminals as Witnesses*, 47 HASTINGS L.J. 1381, 1382–85 (1996).

It is also possible that creating the mechanism will permit false confessions by an innocent person in the first instance, for the purpose of engineering a future grant of immunity to the actual perpetrator. This is the problem typified by the mob or gang member “fall guy.” A demonstrably innocent person falsely confesses and is wrongfully convicted. It is only then that the truly guilty actor comes forward and confesses to his attorney, provides the alibi evidence for the wrongfully convicted party, and seeks immunity under the statute. If the innocent defendant who is incarcerated falsely confessed in collusion with a third party for the purpose of obstructing a prosecution of the truly guilty, perjury, obstruction of justice, and fraud charges would remain available to the prosecution.

There are other possible practical objections. Some might be wary that the new mechanism will open the courthouse doors to a torrent of false confessions because it introduces a costless form of collateral attack. Others might fear that the defense bar will collude with such confessions to muddy the waters. Law enforcement and prosecutors might object to the loss of the opportunity to prosecute the actual guilty party because of the grant of immunity. Finally, there may be a concern that joint defense agreements will create the opportunity for well-insulated and carefully crafted assaults on the integrity of the process. Given these concerns, I expect the courts to be rightfully skeptical when determining whose confessions should be believed and whose convictions should be overturned. I would also expect the participants in the system to pay close attention to false confessions because those who tender them should be convicted of obstruction of justice.

Some prosecutors to whom I have described the proposal say they would oppose any grant of immunity unless they knew precisely what the witness had to say. Granting the power to make that decision to a judge and a defense attorney while cutting out the prosecution raises questions about the separation of powers. By removing the executive branch or the elected prosecutor from the immunity conversation, the court risks making an ill-informed decision. Structuring the statute to grant use immunity rather than transactional immunity would be one way to address this particular concern.

Finally, there are concerns regarding separation of powers and the retention of executive prerogatives belonging to the prosecutor. In states where the roles of elected prosecutors or attorneys general are defined by the state constitution, the proposal may raise state constitutional considerations.

### B. Defense-Side Objections

There is no doubt that the proposal may tend to alter the nature of attorney-client discussions if adopted. This is a necessary cost if we are going to make this information available. As the Court noted in *Fisher*:

As a practical matter, if the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice.<sup>53</sup>

The proposal does have the potential to alter the nature of the attorney-client relationship by requiring a somewhat more robust disclosure discussion between client and counsel. I sincerely doubt whether much discussion takes place now, notwithstanding all the attorney-protective exceptions to the privilege contained in the current version of Rule 1.6. From what I have been able to ascertain so far, few problems are reported with criminal practice in Alaska and Massachusetts under their versions of the rule, which permit, but do not require, reporting in wrongful conviction cases now. While the nature of disclosures made to the client has apparently not changed that much under permissive rules, it is possible that a mandatory reporting rule might change that.<sup>54</sup>

There is a risk that defense counsel who are hostile to the reporting obligation and want to be seen as strongly pro-defendant will give an even broader version of what is referred to in some defense circles as “the speech”: coaching clients not to confess to anything but to speak in hypotheticals only. Any change in the system is unlikely to reach those lawyers anyway. They prioritize other commitments over accurate outcomes.

There are also possible defense objections from a slightly different angle. A witness who might be inclined to come forward from a moral obligation, particularly in multi-defendant cases where there may be someone who is innocent swept up with the guilty, may decide that it is now in his or her best interest to delay, because he or she can wait to see if there is a conviction before coming forward. Because staging the decision to come forward will depend on who is tried first, the proposal has the potential to create some new

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<sup>53</sup> *Fisher v. United States*, 425 U.S. 391, 403 (1976).

<sup>54</sup> See Leslie C. Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 97 (1994).

and awkward versions of the prisoners' dilemma. A defendant must be wrongfully convicted and the witness not yet convicted for the incentive structure to work, so guilty parties in joint trials or reverse-order scenarios will not receive the same benefits for true exculpatory testimony. The potential windfall to the guilty who happen to be tried second is an additional cost created by the proposal.

### C. Institutional Cost Objections

If there is an additional path to unwinding verdicts, prosecutors and judges may fear that the proposal will open a floodgate of collateral attacks on convictions. Even if there is a screen for removing false confessions, the rise in litigation, especially from *pro se* litigants who are not subject to bar discipline, may create a new burden for already overtaxed prosecutors' offices and for trial court chambers.

Is this objection well-founded? Will this proposal open floodgates to post-conviction challenges? I think that having two gatekeepers—defense counsel who will not be motivated to come forward unless it is actually necessary and courts who will be interested in preserving accurate convictions—will act to limit the number of cases where this will apply. However, the net benefits in terms of overturning wrongful convictions will exceed the marginal additional litigation we can expect to see. Ex parte, in camera review will cost some time for defense counsel and the court, and in the cohort of credible cases, may lead to significant new litigation.<sup>55</sup>

### CONCLUSION

The proposed statute trades two significant losses—a false conviction and a free and unsuspected perpetrator—for a single one, an identified and immunized perpetrator. The release of an innocent person and greater care for the truth-seeking function of the criminal justice system result. The legislation this Essay proposes has the potential to relieve a serious problem, the wrongful conviction of an innocent

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<sup>55</sup> There are other second-order effects of immunity that might apply. For example, depending on statutory compensation schemes, possible civil damages that were paid by a wrongfully convicted individual to a victim may have to be paid instead by the State (if, under the new scheme, the true perpetrator is immune from civil liability); marginal harms to the "system" may be perceived when the perpetrator, in "getting away" with a felony, will still have the right to vote, own firearms, and hold restricted jobs (including some government jobs or potentially serve in the military); and dangerous people may not have to register as sex-offenders, if they are immunized from civil liability as well.

person. It creates an incentive for true perpetrators to come forward to right the wrong and a mechanism whereby conscientious defense counsel can simultaneously serve their client and the interests of justice. The new regime would be administrable without overwhelming costs, and the judges and lawyers who would be tasked with making it work are certainly capable of doing so. Right now, the system is absorbing two wrongs—an innocent convicted and a guilty perpetrator avoiding justice. Under the new system, that cost is halved at the very least. If we really believe that a wrongful conviction is significantly worse than a missed conviction, then the scales tip much further in favor of implementing the proposal. There is some collateral risk to defendants who might not be as willing to confess the full course of their activities to their attorneys if they know the attorney-client privilege is not absolute. However, I believe that the risk is overstated and is more likely to be a concern for defense counsel who like the current rule than it is for defendants, who will be far less attuned to the nuance of the privilege. As it now stands, the privilege is not absolute, and any current claims to the contrary by defense counsel would be misleading. False confessions are possible, but they need not be believed, and perjury charges await lying confessors who seek to wrongfully undermine existing verdicts.

Additionally, this Essay is a proposal and will benefit from full discussion by the bench and the bar, airing concerns from both the defense and the prosecution. Ultimately, if the proposal frees innocent people who have been wrongfully convicted, the risks raised by objectors seem to be a price worth paying. On balance, then, creating an opportunity for a perpetrator to come forward and seek an *ex parte*, *in camera* review of his confession, followed by a grant of use and derivative use, or even transactional immunity, will solve more and worse problems than it creates. It is, I submit, a step worth taking.