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Preserving Attorney-Client Confidentiality at the Cost of Another's Innocence: A Systemic Approach

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PRESERVING ATTORNEY-CLIENT CONFIDENTIALITY AT THE COST OF ANOTHER'S INNOCENCE: A SYSTEMIC APPROACH

By Ken Strutin[1]

ABSTRACT

When a client admits to her lawyer that she is responsible for a crime that someone else has been charged with, it alters the geometry of the attorney-client relationship. A third party has now entered the room triangulating the lawyer's responsibilities to her client, to the innocent party and to the justice system. The idea of revealing a client's private confession is anathema to lawyers trained to carefully guard their clients' secrets. Fidelity to the client, preservation of confidences, and the right to counsel strongly militate in favor of nondisclosure. On the other hand, an innocent person is facing a wrongful prosecution, incarceration and, in some cases, execution. The pressures to protect the confessing client while at the same time preventing harm to a nonclient from a wrongful conviction are at the heart of a complex ethical and practical conundrum.

The ABA Model Rules of Professional Conduct allow discretionary disclosure where the lawyer believes that a third party faces "reasonably certain death or substantial bodily harm." And two states have gone so far as to expressly include "wrongful incarceration" in their exceptions to confidentiality. This Article will look at the ethical pathways and the multilayered constitutional and evidentiary analyses in assessing the propriety, necessity and method of disclosure. Other options will be considered that might avoid forcing an attorney to choose between client loyalty and confidentiality or preserving an innocent nonclient from substantial harm, such as transactional immunity for the confessor. Lastly, a review of the implications for the adjudication of innocence claims and systemic reform will be conducted, along with an examination of the constitutional imperatives surrounding the attorney-client and attorney-justice relationships.

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1. Director of Legal Information Services, New York State Defenders Association. J.D., Temple University School of Law, 1984; M.L.S. St. John's University, 1994; B.A., *summa cum laude*, St. John's University, 1981.

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I. INTRODUCTION

Nearly every Perry Mason case ended with the true culprit tearfully admitting guilt on the witness stand[2]—it was the DNA exoneration of its time.[3] Innocent people have been and are being convicted of crimes based on evidence that *might* later be found to have been faulty for one reason or another. But as the DNA cases have demonstrated, appeals and post-conviction motions are not sufficient safeguards.[4] Since unequivocal and credible admissions of responsibility are the cornerstones of many prosecutions,[5] it stands to reason that the persuasive confessions of alternate suspects offered by the defense

2. *See, e.g.*, Devine v. Wal-Mart Stores, Inc., 52 F. Supp. 2d 741, 744 n.4 (S.D. Miss. 1999) ("Popular lawyer television series of yesteryear starring defense lawyer Perry Mason who, skilled in the art of cross-examination, managed to exonerate his falsely accused clients by the show's end when either the true murderer or his/her accomplice would confess from the witness stand."). *See generally* Francis M. Nevins, *Samurai at Law: The World of Erle Stanley Gardner*, 24 LEGAL STUD. F. 43 (2000) (describing the evolution of the Perry Mason approach to practice and his staunch dedication to exonerating his clients).

3. Wrongful convictions brought to light through DNA exonerations have enabled scholars and practitioners to uncover multiple causes at the root of the problem, e.g., false confessions, faulty forensic analyses, and problematic eyewitness identifications. *See generally* Ken Strutin, *DNA Post-Conviction Resources*, LLRX.COM (Sept. 14, 2008), http://www.llrx.com/features/dnapostconviction.htm; Ken Strutin, *Wrongful Conviction and Innocence Resources on the Internet*, LLRX.COM (June 10, 2006), http://www.llrx.com/features/wrongfulconviction.htm.

4. Non-DNA based convictions are more difficult to undo without a gold standard forensic test to contradict the jury's findings. *See* Glenn A. Garber & Angharad Vaughan, *Actual-Innocence Policy, Non-DNA Innocence Claims*, N.Y. L.J. Apr. 4, 2008 at 4, col. 4 (stating that the lessons drawn from DNA exonerations should inspire the serious evaluation of "actual innocence" or free standing innocence claims by the courts).

5. "[T]rue confessions contain valuable information about the crime, its circumstances, and perpetrators, which assist law enforcement officials in their investigations. Thus, the confession has justly earned its title 'the queen of evidence.'" Talia Fisher & Issachar Rosen-Zvi, *The Confessional Penalty*, 30 CARDOZO L. REV. 871, 872 (2008) (stating that overuse of confessions, which increase the risk of wrongful prosecutions, might be remedied by the imposition of a penalty in the form of a sentence reduction as a disincentive against their central role in building a case).

can serve as the basis for exonerations under the right circumstances.[6] One likely source of these exonerating confessions is in the sanctuary of the attorney-client relationship.

Criminal and civil attorneys sometimes struggle with a peculiar and extremely difficult problem, namely, representing a client who has privately confessed to a crime for which someone else has been prosecuted. It applies to cases where the client has, in confidence, admitted guilt regarding an unrelated criminal charge or in a matter where the innocent person is their co-defendant.[7] The very utterance of a client's confession describing an uncharged crime or accepting principal responsibility for actions in a joint offense changes the professional dynamic for lawyer and defendant and creates a new putative party, the innocent accused.

The Model Rules of Professional Conduct (The Rules) have changed the landscape of attorney-client relationships by creating a new exception to confidentiality. Under Model Rule 1.6(b)(1) a lawyer may "reveal" or "use" confidential information "to prevent reasonably certain death or substantial bodily harm." But how will this rule inform counsel's conduct in the private confession case? What degree of harm will justify disclosure? Does this scenario erode the attorney-client relationship too far undermining the constitutional right to counsel and due process for the private confessor?

The competing interests of preserving confidentiality and maintaining the attorney-client relationship are being tested against the ends of justice. Arguably, a wrongful conviction should not stand regardless of a third party's confession.[8] But in some instances, the "queen of

6. The confession to a crime that exonerates an accused does carry significant weight based on its credibility and exclusion of the accused as the responsible party. It also falls in line with other types of exculpating admissions, such as a recantation of a prosecution witness' or alternate suspect evidence. *See, e.g., In re* Davis, No. CV409-130, 2010 WL 3385081 (S.D. Ga. Aug. 24, 2010) (This death penalty case, remanded by the U.S. Supreme Court for an evidentiary hearing, involved an actual innocence claim based on an alternate suspect theory, hearsay confession of another and prosecution witness recantations. *Id.* "Mr. Davis also offers evidence to directly prove his innocence, as opposed to simply diminishing the State's case. This evidence includes: (1) hearsay confessions by Mr. Coles, (2) statements regarding Mr. Coles conduct subsequent to the murder, (3) alternative eyewitness accounts, and (4) new evidence regarding the physical evidence in this case." *Id.* at 57.).

7. *See generally* Ken Strutin, *Wrongful Conviction and Attorney-Client Confidentiality*, LLRX.COM (Jan. 9, 2010), http://www.llrx.com/features/wrongfulconviction confidentiality.htm.

8. *See 250 Exonerated, Too Many Wrongfully Convicted*, THE INNOCENCE PROJECT (Feb. 4, 2010), http://www.innocenceproject.org/docs/Innocenceproject_250.pdf (describing the first 250 people who have been exonerated through the efforts of the Innocence Project and includes a statistical description of the principal causes for their wrongful convictions); *see also* Brandon L. Garrett, *Judging Innocence*, 108 COLUM. L. REV. 55, 60 (2008) ("This study examines the trials, appeals, postconviction proceedings, and exonerations of the 200 convicts in the innocence group. First, it identifies the crimes with which the exonerees were charged and what evidence supported their convictions. All were convicted of rape or murder, and all but the

evidence" may be the only decisive way to expose a defective prosecution.[9] The Rules raise additional problems about the knowledge and responsibility of other participants in the process. For example what are prosecutors' obligations[10] when they learn of a third party's admission in a proffer session,[11] and should they offer a grant of immunity to the confessor?

There are pragmatic issues too, such as whether the revelation is reliable, and ultimately admissible. Are there alternatives to disclosure that can preserve attorney-client confidentiality? And how does this affect the view of wrongful convictions and systemic shortcomings in criminal defense work? Should the justice system rely on private confessions to ferret out weak prosecutions? Will defense lawyers have to Mirandize their own clients? Perhaps the better policies would be to enlarge the jurisdiction of courts to hear actual innocence claims, establish more Innocence Commissions to review live cases, expand the right to counsel in post-conviction settings, and encourage greater use of clemency and pardon powers by the executive branch. And ultimately, it may be necessary to establish a practice of obtaining post-mortem releases from the confessor or seeking some legislative recognition of the right to transactional immunity for a living defendant who wishes to exonerate another.[12]

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nine who pleaded guilty were convicted after a trial. A few predictable types of unreliable or false evidence supported these convictions. The vast majority of the exonerees (79%) were convicted based on eyewitness testimony; we now know that all of these eyewitnesses were incorrect. Fifty-seven percent were convicted based on forensic evidence, chiefly serological analysis and microscopic hair comparison. Eighteen percent were convicted based on informant testimony and 16% of exonerees falsely confessed."); Brandon L. Garrett, *Judging Innocence*, VIRGINIA LAW, http://www.law.virginia.edu/html/librarysite/garrett_exonereedata.htm (last visited Feb. 26, 2010) ("This library collection contains updated data regarding appellate and post-conviction litigation by persons exonerated by post-conviction DNA testing.").

9. *Cf.* Boaz Sangero, *Miranda Is Not Enough: A New Justification for Demanding "Strong Corroboration" to a Confession*, 28 CARDOZO L. REV. 2791, 2794 (2007) ("At least in the past, courts have tended to view the confession of an accused person (extracted by police interrogators) as a trump card–namely, as very strong evidence that is (and should be) enough to sustain a conviction. The reasoning was that a voluntary confession is the result of the strongest feelings of guilt. Accordingly, the confession has been crowned the 'queen of evidence.'" (footnotes omitted)).

10. *See* MODEL RULES OF PROF'L CONDUCT R. 3.8 (2009) ("(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; . . . (h) When a prosecutor knows of clear and convincing evidence establishing that a defendant in the prosecutor's jurisdiction was convicted of an offense that the defendant did not commit, the prosecutor shall seek to remedy the conviction.").

11. *See, e.g.*, People v. Ennis, 900 N.E.2d 915, 923 (N.Y. 2008) (stating that although not the central issue, the court expressed concern over the prosecutor's failure to act on evidence from one co-defendant exculpating the other).

12. In practical terms, transactional immunity for a living defendant is equivalent to a post-mortem revelation by his attorney, since the confessor is beyond prosecution

Part II of this article will explore the boundaries of attorney-client privilege and confidentiality by using a hypothetical based on a crime from the early part of the last century[13] and then through notable cases, such as Alton Logan, in our time. The permutations that can arise when lawyers become privy to confessions in cases where no suspects have been charged; a former client makes the admission; and the complicated tangles of co-defendant representation are reviewed in Part III. In Part IV this article will take an in-depth look at a central decision addressing the myriad ethical, evidentiary and practical issues that arise in these situations. The efficacy of the posthumous revelation, where the confessing client is now deceased, will be considered from an ethical and litigation standpoint in Part V. Then the metrics of " reasonably certain death or substantial harm" will be scrutinized as they factor into the attorney's decision to risk disclosure, as well as other criteria for fulfilling their constitutional obligations to their own clients in Part VI. Finally, in parts VII and VIII, the article will address the need for a systemic approach to resolve an ethical issue for defense lawyers and the potential of transactional immunity as a workable procedural remedy.

II. PRIVATE CONFESSIONS

Oscar,[14] a 19 year old man, walks into lawyer A's office seeking representation. He is charged with petit larceny for stealing a Photostat of a newspaper from the public library archives. At his arraignment it was determined that he lacked the ability to hire a lawyer, so the judge assigned attorney A to represent him. When Oscar arrived at the lawyer's office, Attorney A had already reviewed the paper work, including Oscar's unblemished rap sheet. As she begins discussing the matter with Oscar, Attorney A is sanguine about the outcome. Oscar discloses that he stole the newspaper on impulse, the headline was very disturbing and he felt strongly that he had to get rid of it. The paper was dated March 2, 1932 and the banner read "Lindberg Baby Kidnapped."[15]

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in either circumstance. The difference is that an innocent person will not have to wait until the guilty party dies to be exonerated. While totally immunizing a defendant for a serious crime might seem extreme, it furthers the fundamental precept of preventing wrongfully accused persons from being convicted and imprisoned, or executed. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES *358 ("Better that ten guilty persons escape than that one innocent suffer."). *See generally* Alexander Volokh, *n Guilty Men*, 146 U. PA. L. REV. 173 (1997) (discussing the implications surrounding the Blackstone Ratio).

13. *See* Howard Chua-Eoan, *Crimes of the Century: The Lindbergh Kidnapping*, TIME MAG. (Mar. 1, 2007), http://www.time.com/time/2007/crimes/.

14. Oscar, in all his permutations, is a hypothetical character with a fictional connection to the Lindberg case. And at all times in this problem, MODEL RULES PROF'L CONDUCT R. 1.6(b) will be the guidepost for Attorney A's actions.

15. *Lindbergh Baby Kidnapped From Home of Parents on Farm Near Princeton; Taken From His Crib*, N.Y. TIMES, Mar. 2, 1932, http://graphics8.nytimes.com/images/

Attorney A was perplexed at Oscar's story, why should this young man have such a strong reaction to a news event that happened almost 80 years ago. Its relevance became clear when Oscar earnestly revealed that *he* had stolen the baby. Immediately, Attorney A rejected this confession as incredible, and began harboring doubts about her client's competency. From an ethical and practical standpoint, the analysis was simple, Oscar was not capable of having actually committed this other crime. His confession lacked credibility or relevance to a real time event or person.

Falsely confessing to newsworthy crimes, especially those drawing a national audience, is a real phenomenon. Over two hundred people confessed to the Lindbergh abduction, and more than 500 claimed involvement in the Black Dahlia murder.[16] Attention and notoriety are only a few reasons why someone might confess publicly or privately to another's crime. In private, other motivations rise to the surface, such as helping out someone else, a co-defendant with a long record or a family member, etc.; to gain leverage in their own case by closing an open investigation or to mount a psychological defense; the need to unburden themselves, ease their conscience by confiding in their attorney; or, as in Oscar's case, there might be an underlying mental health problem. In other words, a private confession to another's crime may have complicated origins and goals, all of which weigh in assessing its credibility.[17]

Oscar's confession has to fall on the incredible side of the fence. However, if Oscar had been 19 years old in 1932, and well into his 90's today, his admission would begin to take on a new significance. As Oscar's story unfolds, he reveals intimate details about the plot and feels the need to clear his conscience before he leaves this earth. So far, his confession lies within the confines of Attorney A's office, he can rely on the injunction of Model Rule of Professional Conduct 1.6(b) to preserve a very credible secret.

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section/learning/general/onthisday/big/0301_big.gif (listing the full headline that appeared in The New York Times).

16. *See* Miles Corwin, *False Confessions and Tips Still Flow in Simpson Case*, L.A. Times, Mar. 25, 1996, at A1 ("False confessions and dubious leads have been the byproducts of high-profile cases since the 1932 kidnapping of the Lindbergh baby, when about 250 people confessed to the crime." "[T]he 1947 Black Dahlia murder set the record for crank leads, worthless phone calls and false confessions. In the years after the slaying, more than 500 people confessed, some of whom were not even born when the body of a 22-year-old actress named Elizabeth Short was found neatly cut in half in a vacant lot.").

17. *See* Robert Kolker, *"I Did It" Why Do People Confess to Crimes They Didn't Commit?*, NEW YORKER MAG., (Oct. 3, 2010), http://nymag.com/news/crimelaw/68715 ("In recent years, the use of DNA evidence has allowed experts to identify false confessions in unprecedented and disturbing numbers. In the past two decades, researchers have documented some 250 instances of false confessions, many resulting in life sentences and at least four in wrongful executions. Of the 259 DNA exonerations tracked by a major advocacy group, 63 of them—or one out of every four—was found to have involved a false confession.").

Client-Lawyer Relationship

Rule 1.6 Confidentiality of Information

(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*[18]

Its revelation would help no one living, and it might possibly put Oscar at risk for prosecution or civil liability.[19] While 19 year old Oscar's claim of culpability in the first crime of the century was implausible, 98 year old Oscar's credible admission was slightly more impactful. Still, there was no concern over preventing "reasonably certain death or substantial bodily harm," except to Oscar.

The most challenging circumstance, and the one facing lawyers today, would have been for the attorney who had represented a 19 year old Oscar in March 1932 when the kidnapping occurred.[20] This was the time when everything was in play. Within three years, Bruno Hauptmann would be arrested, indicted and put on trial for capital murder.[21] During this time frame, Attorney A, representing our hypothetical Oscar, would have been in possession of knowledge gained in confidence from her client that might have exonerated Hauptmann.[22]

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18. MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (2009).

19. *See* N.J. STAT. ANN. § 2A:31-3 (2010) (indicating that New Jersey has no statute of limitations for murder). Still, the case against Oscar would likely be unprovable without his confession and corroborating evidence. The Hauptmann estate might have a cause of action, but it too would be near impossible to prosecute. *See, e.g.*, Hauptmann v. Wilentz, 570 F. Supp. 351, 362–63 (D.N.J. 1983) ("Plaintiff [Anna Hauptmann, widow of Bruno Hauptmann] seeks relief for alleged violations of both her own and her late husband's civil rights, pursuant to 42 U.S.C. §§ 1983, 1985 and 1986; she also asserts pendent state law claims. Although the complaint, in its various versions, is lengthy and diffuse, its gist is that Hauptmann was denied a fair trial and suffered violations of his first, fourth, fifth, sixth, eighth and fourteenth amendment rights.").

20. *See generally* Douglas O. Linder, *Famous American Trials: Richard Hauptmann (Lindbergh Kidnapping) Trial 1935*, UNIV. MO.-KAN. CITY SCH. LAW (2000), http://www.law.umkc.edu/faculty/projects/ftrials/Hauptmann/Hauptmann.htm.

21. Douglas O. Linder, *The Bruno Hauptmann Trial: A Chronology*, UNIV. MO.-KAN. CITY SCH. LAW (2000) [hereinafter *Bruno Hauptmann Trial Chronology*], http://www.law.umkc.edu/faculty/projects/ftrials/Hauptmann/chrono.html ("1934, Sept. 19 Bruno Richard Hauptmann is arrested for the crime. 1934, Sept. 24 Hauptmann arraigned before New York magistrate on extortion charge. 1934, Oct. 10 New Jersey grand jury indicts Hauptmann on murder and kidnapping charges.").

22. *See, e.g.*, Arthur J. W. Jones, Inmate #17966, *Who Said the Lindbergh Case was Solved?*, N.J. DIV. ARCHIVES & RECORDS MGMT. (Sept. 25, 1956), http://www.njarchives.org/links/guides/sintr003img24p1.html#top2.

This is the crux of the problem for every attorney who hears a private confession from their client that exculpates someone else. What should Attorney A have done? She could waited and hoped that the jury system would not convict an innocent man—all the while he was sitting in jail and enduring the ignominy for the crime of the century. And when a guilty verdict was returned,[23] she could have chosen to wait for the appeals court, possibly the U.S. Supreme Court, to correct this injustice.[24] Even on the night of the scheduled execution, all appeals having been denied, Attorney A might have believed that the Governor of New Jersey would grant a stay or even a pardon.[25] Or could she? This was the last, best chance she had to save an innocent man's life, and correct an error of law.[26] But she had to contend with the duty to her client, who if believed might find himself in the hot seat. Betray her client or save an innocent man? And at what point would she have been justified in making the disclosure? On the day Hauptmann was arrested? In the death house? And when would it have been most effective in the long term? The longer she waited to reveal the confession, the less impact it would have. Hauptmann would have already lost the presumption of innocence, and all his appeals and writs and clemency applications were legally viewed as the pleadings of a guilty man.

This hypothetical is not farfetched. There have been several cases in which lawyers have had to do battle at the brink of ethics and conscience. And these troubling scenarios continue to multiply as clients, attorneys, and society move into an age of extreme information sharing,[27] and multiple defendant prosecutions.

First adopted in 1983, the ABA's Model Rule 1.6(b)(1) disclosure exception applied to situations involving "*imminent* death or substan-

23. *Bruno Hauptmann Trial Chronology*, *supra* note 21 ("1935, Jan. 2 Hauptmann trial begins in Flemington, New Jersey. 1935, Feb. 14 Hauptmann is convicted and sentenced to death.").

24. *Id.* ("1935, June 20 Defense team appeals conviction to New Jersey's highest tribunal. 1935, Oct. 9 The first appeal is denied. 1935, Oct. 15 Defense team files second appeal to the U.S. Supreme Court. . . . 1935, Dec. 9 Second appeal is rejected by the U.S. Supreme Court.").

25. *Id.* ("1935, Dec. 5 New Jersey Governor asks the New Jersey Court of Pardons to grant Hauptmann a personal interview to assess clemency. . . . 1936, Jan. 11 Court of Pardons hears Hauptmann's plea and denies clemency. 1936, Jan. 16 Anna Hauptmann appeals to New Jersey Governor for a stay; stay is granted. 1936, March 30 Court of Pardons hears Hauptman's plea a second time and denies clemency.").

26. *Id.* ("1936, April 3 Hauptman is executed.").

27. The social networking phenomena typify the innate human need to talk about ourselves. Sharing incriminating revelations via YouTube, Twitter and Facebook have already enlarged the scope of evidence collection and criminal prosecutions. Lawyer-client communications are bound to expand into social media, complicating questions about confidentiality, attorney-client privilege and the discovery of incriminating evidence. *See generally* Ken Strutin, *Emerging Legal Issues in Social Media: Part I*, LLRX.com (Feb. 6, 2011), http://www.llrx.com/features/legalissuessocialmedia.htm; Ken Strutin, *Emerging Legal Issues in Social Media: Part II*, LLRX.com (Mar. 21, 2011), http://www.llrx.com/features/legalissuessocialmedia2.htm.

tial bodily harm."[28] The comments set the bar very high in the context of future crimes:

> [12] Third, the lawyer may learn that a client intends prospective conduct that is criminal and likely to result in imminent death or substantial bodily harm. As stated in paragraph (b)(1), the lawyer has professional discretion to reveal information in order to prevent such consequences. The lawyer may make a disclosure in order to prevent homicide or serious bodily injury which the lawyer reasonably believes is intended by a client. It is very difficult for a lawyer to "know" when such a heinous purpose will actually be carried out, for the client may have a change of mind.[29]

After the Ethics 2000 Commission, the disclosure language was changed to "*reasonably certain* death or substantial bodily harm." And the new comment adjusted the bar slightly:

> [6] Although the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients, the confidentiality rule is subject to limited exceptions. Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat. *Thus, a lawyer who knows that a client has accidentally discharged toxic waste into a town's water supply may reveal this information to the authorities if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease and the lawyer's disclosure is necessary to eliminate the threat or reduce the number of victims.*[30]

The focus shifted from immediate harm to future victims to ameliorating damage based on past conduct that continues to pose a threat of "substantial harm."[31]

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28. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2001) (emphasis added) ("The ABA Model Rules of Professional Conduct, including Preamble, Scope, Terminology and Comment, were adopted by the ABA House of Delegates on August 2, 1983, and amended in 1987, 1989, 1990, 1991, 1992, 1993, 1994, 1995, 1997, 1998, 2000, and 2002.").

29. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) cmt. (2001).

30. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) cmt. (2009)(emphasis added).

31. *See generally* Patrick T. Casey & Richard S. Dennison, *The Revision to ABA Rule 1.6 and the Conflicting Duties of the Lawyer to Both the Client and Society*, 16 GEO. J. LEGAL ETHICS 569, 571 (2003) ("Absent are the words 'criminal' and 'imminent,' which formerly made this exception more narrow. The new rule offers lawyers wider latitude to decide whether to reveal information where others are in serious danger. This greater latitude recognizing an 'overriding value of life and physical integrity' as compared with the value of strict lawyer-client confidentiality." (footnotes omitted)).

The necessity and urgency of when to proceed will be affected by whether the jurisdiction in which counsel is practicing or whose Rules of Professional Conduct would be controlling has adopted a discretionary[32] or mandatory[33] version of Rule 1.6(b)(1).[34] For example, the 2006 amendment to Washington state's Rule 1.6 only makes one section mandatory:

> (b) A lawyer to the extent the lawyer reasonably believes necessary:
> (1) *shall* reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm;
> (2) *may* reveal information relating to the representation of a client to prevent the client from committing a crime[.][35]

The individual lawyer's conscience is the fulcrum in these compelling and complex circumstances, and forcing a choice invokes the deepest concerns over the preservation of the attorney-client relationship.[36]

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32. *See* Brooks Holland, *Confidentiality and Candor Under the 2006 Washington Rules of Professional Conduct*, 43 GONZ. L. REV. 327, 343–44 (2008) ("Model Rule 1.6(b)(1)'s permissive authorization represents the majority rule, and reflects the judgment that for disciplinary purposes, lawyers sit in the best position to evaluate and counsel their clients, and to judge whether client confidentiality should yield to individual safety interests." (footnotes omitted)).

33. *Id.* at 344 ("In surely the most controversial amendment to [Washington State's] RPC 1.6, and perhaps to the RPC in their entirety, 2006 RPC 1.6(b)(1) dictates that '[a] lawyer to the extent the lawyer reasonably believes necessary . . . shall reveal information relating to the representation of a client to prevent reasonably certain death or substantial bodily harm.' This mandatory reporting duty to prevent serious physical harm is the minority rule, currently present in only twelve other states' ethical codes: Arizona, Connecticut, Florida, Illinois, Iowa, Nevada, New Jersey, North Dakota, Tennessee, Texas, Vermont, and Wisconsin." (footnotes omitted)).

34. *See generally* Colin Miller, *Ordeal By Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. 391, 395 (2008) ("As the attached Appendix indicates, twenty-six states have adopted some version of amended Model Rule 1.6(b)(1) while twenty-three states and D.C. still have Rules that only permit or require attorney disclosures to prevent future criminal (and sometimes fraudulent) conduct. Only five states still have an 'imminence' requirement, and eleven states have adopted some form of the 1981 Proposed Final Draft Rule 1.6(b)(1) and permit or require attorneys to disclose client information to prevent fraudulent acts, substantial injury to the financial interest or property of another, or both. Only one state [Massachusetts], however, has adopted some version of the 1979 discussion draft. Perhaps guided by its experience with George Reissfelder, Massachusetts has a version of Rule 1.6(b)(1) which permits a lawyer to disclose client information 'to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, *or to prevent the wrongful execution or incarceration of another.*'" (footnotes omitted)).

35. WASH.R.P.C. 1.6(b)(1)(2) (emphasis added), http://www.courts.wa.gov/court_rules/?fa=court_rules.display&group=ga&set=RPC&ruleid=garpc1.06.

36. *See* Anne I. Seidel, *Confidentiality Under the New Rules of Professional Conduct*, WASH. STATE B. ASS'N NEWS (Sept. 2006), http://www.wsba.org/media/publications/barnews/sept06-ethics.htm ("For the first time, Washington lawyers are not only permitted, but are required, to disclose information obtained through representing a client. Such information must be revealed 'to prevent reasonably certain death or

The additional elements of professional liability or malpractice[37] and possible disciplinary action are also heightened under a mandatory scheme that implies immediate action by the attorney.[38] It would also directly impact the timing of the disclosure and evaluation of "substantial harm." Waiting until justice took its course in the hopes of a dismissal or acquittal might not be feasible. The hill gets steeper the further a criminal case proceeds up the ladder of post-conviction remedies in terms of the jurisdiction of the court[39] and the position of the

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substantial bodily harm.' Previously, a lawyer was permitted, but not required, to reveal confidential information to prevent a client from committing a crime. Although not included in the Model Rules, 13 other states currently have similar mandatory disclosure rules. The rule does not specify to whom the disclosure must be made, e.g., is it sufficient to report a death threat to the police, or does the lawyer also need to contact the victim? Given the mandatory nature of the rule and the lack of any qualifying language, it appears that a lawyer must disclose the information to everyone necessary to prevent death or substantial bodily harm.").

37. *See, e.g.*, Scher v. Sindel, 837 S.W.2d 350, 353 (Mo. Ct. App. 1992)(The inmate in this case filed a lawsuit against his retained attorney for legal malpractice based, among other things, on claims that he "(3) violated appellant's attorney-client privilege by disclosure of appellant's confidential records to the postal inspection service; (4) violated appellant's attorney-client privilege by contacting the attorney general's office resulting in appellant's placement into indefinite punitive segregation (5) violated appellant's attorney-client privilege by discussing appellant's confidential matters with his former girlfriend Georganne Baker; (6) violated the attorney-client privilege by contacting the parole board's chairman and disclosing confidential matters about appellant to the board; and (7) violated the attorney-client privilege by testifying in open court against appellant in a federal case appellant had filed." *Id.*).

38. *Cf.* Sarah Buel & Margaret Drew, *Do Ask and Do Tell: Rethinking the Lawyer's Duty to Warn in Domestic Violence Cases*, 75 U. CIN. L. REV. 447, 495–96 ("Notwithstanding the social utility of maintaining confidential client relationships, it must be recognized that there is greater public benefit from providing immediate assistance to prevent harm to a third party, particularly a readily identifiable abuse victim. Lawyers ranging from in-house counsel for large manufacturing companies and corporate litigators to criminal and family law practitioners are uniquely positioned to determine their clients' plans due to the interview and investigation process inherent in representation. As our doctrinal, normative, and policy arguments indicate, it is inexcusable to permit continuing legal impunity for lawyers who fail to screen and attempt to dissuade potentially violent clients, and to warn the intended victims. Should jurisdictions wish to encourage client disclosures in the interests of individual and public safety, consideration must be given to statutory tort immunity for those lawyers who make good faith disclosures in the interests of preventing serious harm, including criminal acts. Given the astonishing levels of dangerous, criminal, recidivist behavior by domestic violence offenders, lawyers must take their place among the many professionals required to provide warning to their anticipated victims.").

39. The reasonable doubt standard at trial is based on a presumption of innocence that evaporates upon a guilty verdict; and actual innocence claims are the most difficult to litigate. A free standing innocence claim as a basis for post-conviction relief, unaccompanied by constitutional error, has yet to be endorsed by the U.S. Supreme Court. *See* Herrera v. Collins, 506 U.S. 390, 417 (1993) ("We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would

prosecution.[40] At the same time, it could wreck the course of the confessing client's principal case.[41] Where should the disclosure line be drawn?

Notably, many of the precedents in this area were created by attorneys acting under the Model Rules of Professional Responsibility or some personal interpretation of the lawyer's oath. The guiding principle of DR 4-101 enjoined attorneys against revealing confidences or secrets imparted by their clients unless she learned: "The intention of his client to commit a crime and the information necessary to prevent the crime." Of course, this begs the question of whether the wrongful prosecution, conviction, or punishment (including capital punishment)[42] of an innocent person qualifies as a "crime."[43] Under

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place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls far short of any such threshold."). *See generally* Sarah A. Mourer, *Gateway to Justice: Constitutional Claims to Actual Innocence*, 64 U. MIAMI L. REV. 1279 (2010) ("Blind faith in the justice system might lead one to assume that a trial in which constitutional rights are preserved would necessarily result in a just verdict. In other words, if a court protects the accused's constitutional rights, then no innocent man will ever be wrongly convicted. As a result of new technology (especially DNA testing), however, it is well recognized that innocent men and women are recurrently incarcerated and convicted even in the absence of factual or constitutional error. For the first time in history, the Supreme Court of the United States has come close to recognizing this reality.").

40. *See generally* Daniel S. Medwed, *The Zeal Deal: Prosecutorial Resistance to Post-Conviction Claims of Innocence*, 84 B.U. L. REV. 125, 127–28 (2004) ("[C]onduct by prosecutors can have a negative impact on the outcome of post-conviction innocence claims. First, in the post-conviction DNA testing context, the prosecution can affect the availability of this option by opposing the testing altogether or simply by stalling in turning over the biological evidence sought by the defense, which is almost invariably in the possession of law enforcement. Second, where post-conviction innocence claims are unrelated to DNA testing, such as those involving statements by previously unknown witnesses or confessions by the actual perpetrator, the prosecution can influence how courts will resolve the claims by deciding whether to cooperate with the defense, for instance, by joining — or at least not contesting — a defendant's request for an evidentiary hearing based on the newly discovered evidence." (footnotes omitted)).

41. 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, 295–96 (2010) ("A mandatory disclosure rule that requires attorneys to immediately come forward with exonerating information could seriously hurt a client's case. 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 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 . . . ." (footnotes omitted)).

42. *See In re* Davis, No. CV409-130, 2010 WL 3385081, at *1 (S.D. Ga. Aug. 24, 2010) ("[E]xecuting an innocent person would violate the United States Constitution . . . .").

43. In a footnote to this section, the ABA cited an opinion defining the guidelines for making the assessment that a crime has occurred: "16. ABA Opinion 314 (1965) indicates that a lawyer must disclose even the confidences of his clients if 'the facts in the attorney's possession indicate beyond reasonable doubt that a crime will be committed.'" MODEL CODE OF PROF'L RESPONSIBILITY DR 4-101 (C)(3) n. 16 (1983),

the new Rules, the debate centers on the meaning of "substantial harm."[44]

The Rules of Professional Conduct and the attorney-client privilege are guideposts for the behavior of lawyers earnestly representing their clients. The conflicts arise when information is revealed, or discovered, that pits the interests of their clients against the welfare of an innocent person. The balance between acceptable attorney conduct and morally responsible action is the crux of the problem.[45] The scenarios in which this wrenching choice has arisen have usually involved someone charged with a capital crime.

Alton Logan, along with Edgar Hope, had been arrested and charged with murder, attempted murder and armed robbery for killing a security guard in a Chicago McDonalds in January of 1982.[46]

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http://www.law.cornell.edu/ethics/aba/mcpr/MCPR.HTM. And to a lesser extent, the DR 7-102(B)(1) concerning "fraud": "(B) A lawyer who receives information clearly establishing that: (1) His client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the affected person or tribunal, except when the information is protected as a privileged communication." *Id.* (footnotes omitted).

44. Casey & Dennison, *supra* note 31, at 576–77 ("One of the major changes to Rule 1.6 proposed by the Commission was that the language of Rule 1.6(b)(1) be modified in order to expand the exception allowing for disclosure to prevent death or bodily harm. The particular language used in the proposal is that disclosure is permitted 'to prevent reasonably certain death or substantial bodily harm.' This provision departs from the previous rule in three ways. One, it eliminates some of the Rule's text, including the word 'criminal' and thereby 'allow[s] disclosures in circumstances of peril without a finding by the lawyer that the client conduct is a crime.' Two, the new proposal would no longer require that the death or substantial bodily harm be imminent. Finally, it enables a lawyer to disclose when 'reasonably certain' that death or serious injury might result, as opposed to this harm having to be 'likely,' which was required by the previous rule." (footnotes omitted)).

45. *See, e.g.*, *Prisoner's Dilemma*, STANFORD ENCYCLOPEDIA OF PHILOSOPHY (2007), http://plato.stanford.edu/entries/prisoner-dilemma/ ("Tanya and Cinque have been arrested for robbing the Hibernia Savings Bank and placed in separate isolation cells. Both care much more about their personal freedom than about the welfare of their accomplice. A clever prosecutor makes the following offer to each. 'You may choose to confess or remain silent. If you confess and your accomplice remains silent I will drop all charges against you and use your testimony to ensure that your accomplice does serious time. Likewise, if your accomplice confesses while you remain silent, they will go free while you do the time. If you both confess I get two convictions, but I'll see to it that you both get early parole. If you both remain silent, I'll have to settle for token sentences on firearms possession charges. If you wish to confess, you must leave a note with the jailer before my return tomorrow morning.' The 'dilemma' faced by the prisoners here is that, whatever the other does, each is better off confessing than remaining silent. But the outcome obtained when both confess is worse for each than the outcome they would have obtained had both remained silent."); Will M. Bennis et al., *The Costs and Benefits of Calculation and Moral Rules*, 5 PERSP. ON PSYCHOL. SCI. 187 (2010), http://pps.sagepub.com/content/5/2/187.full#aff-1 (discussing and analyzing the decision-making approaches to the "prisoner's dilemma" problem).

46. *See* People v. Logan, 586 N.E.2d 679, 680, 685 (Ill. App. Ct. 1991)(The issue on appeal concerned the improper admission of evidence regarding the victim's family. *Id.* at 681. "[T]he failure of defendant's counsel to challenge the admission of evi-

Three eyewitnesses claimed that he was the shooter. The prosecutor asked for the death penalty. At the same time that Logan went to trial, Andrew Wilson was facing charges in the shooting deaths of two police officers.[47] In the course of discussions with his attorneys, Dale Coventry and Jamie Kunz, Wilson admitted that he had killed the security guard, not Alton Logan.[48] In a news interview, years later, his attorneys described Wilson's demeanor as he revealed his involvement in the other uncharged crime:

> "He [Wilson] just about hugged himself and smiled. I mean he was kind of gleeful about it. It was a very strange response," Jamie Kunz said.
>
> "How did you interpret that response?" Bob Simon [CBS correspondent] asked.
>
> "That it was true and that he was tickled pink," Jamie Kunz said.
>
> "He was pleased that the wrong guy had been charged. It was like a game and he'd gotten away with something. But there was just no doubt whatsoever that it was true. I mean I said, 'It was you with the shotgun-you killed the guy?' And he said, 'Yes,' and then he giggled," Dale Coventry added.[49]

Convinced of Wilson's sincerity, the two defense lawyers shared an ethical and moral hot seat. An innocent man faced the death penalty and they possessed exculpatory information that might set him free, but it would mean putting their client's head on the chopping block.[50]

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dence and arguments concerning the victims' families was objectively unreasonable and that there was a reasonable probability that, but for the failure to raise the issue, defendant's conviction and sentence would have been reversed." *Id.* at 685. The case was remanded for a new trial. *Id.* at 686.).

47. *Id.* at 681 ("Prior to trial, the State and counsel for Hope filed motions in limine to preclude defendant's counsel from eliciting evidence of a connection between Hope and Andrew and Jackie Wilson. The Wilsons have been convicted of murdering Chicago police officers William Fahey and Richard O'Brien. The killings occurred on February 9, 1982, and in a statement made at the time of his arrest, Jackie Wilson claimed that a few hours before the killings, Andrew Wilson had devised a plan to help his friend Edgar Hope escape from Cook County Hospital. Hope was being held at the hospital in connection with murder of another Chicago police officer that occurred on February 5, 1982. In response to these motions, defendant pointed out that the shotgun used in the McDonald's robbery and the service revolvers belonging to Officers Fahey and O'Brien were discovered by the police in the beauty shop where Andrew Wilson lived and worked and that the weapons were recovered by the police when they went to the shop in an attempt to arrest the Wilsons for the murders of Fahey and O'Brien. Defendant argued that it was his theory of defense that one of the Wilson brothers, and not defendant, was involved in the robbery at the McDonald's restaurant and, therefore, he should be allowed to show the connection between Hope and the Wilsons." (footnotes omitted)).

48. Daniel Schorn, *26-Year Secret Kept Innocent Man in Prison*, CBS NEWS.COM (May 25, 2008), http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml.

49. *Id.*

50. *Id.* ("'The only thing we could have leaked is that Andrew Wilson confessed to us. And how could we leak that to anybody without putting him in jeopardy?' Kunz

After much research and thoughtful examination of the dilemma they faced, the attorneys came up with a compromise:

> Dale Coventry: "We wrote out an affidavit. We made an affidavit that we had gotten information through privileged sources, that Alton Logan was not in fact guilty of killing the officer, that in fact somebody else did it."
>
> Jamie Kunz: "We wanted to put in writing, to memorialize, you know, to get a notarized record of the fact that we had this information back then so that if, you know, 20 years later, 10 years later, if something allowed us to talk, as we are now, we could at least we we'd at least have an answer to someone who says, 'You're just making this up now.'"[51]

They took the exonerating affidavit, sealed it inside an envelope, and placed it in a lockbox under Dale Coventry's bed.[52] And there it remained as Alton Logan went on trial in 1982. The envelope was not opened when the jury returned a guilty verdict, nor were its contents revealed when they voted ten to two to spare Logan's life. He narrowly avoided the death penalty only to serve life in prison.[53]

If the jury had returned a death sentence, the seal would have been broken.[54] But as Coventry and Kunz explained they had to remain silent otherwise:

> "So it's just okay to prevent his execution if necessary, but it was not okay to prevent his going to prison for the rest of his life?" Bob Simon asked.
>
> "Morally there's very little difference and we were torn about that, but in terms of the canons of ethics, there is a difference, you can prevent a death," Dale Coventry replied.

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replied. 'It may cause us to lose some sleep. But, but I lose more sleep if I put Andrew Wilson's neck in the in the noose.'").

51. *Id.*

52. *Id.* It should be noted that there was a third name on the affidavit, Marc Miller, co-defendant Edgar Hope's attorney. Hope had confided in Miller that Alton Logan was not present at the killing of the security guard. *See* Michael Miner, *The Greater of Two Evils: When Is it OK to Let an Innocent Man Rot in Jail?*, CHICAGO READER, Jan. 31, 2008, http://www.chicagoreader.com/chicago/the-greater-of-two-evils/Content?oid=1212988.

53. Schorn, *supra* note 48 ("'It was a 10 to 2 vote. Ten for, two against. Two individuals saved my life,' Logan explained.").

54. The exact timing of a disclosure might have been debatable, since death cases take years before appeals are exhausted. *See generally Time on Death Row*, DEATH PENALTY INFO. CENTER, http://www.deathpenaltyinfo.org/time-death-row (last visited Apr. 1, 2011) ("Death row inmates in the U.S. typically spend over a decade awaiting execution. Some prisoners have been on death row for well over 20 years."). And it was always possible that one of Logan's post-conviction motions might have succeeded or his sentence commuted. The attorneys could have chosen to wait until the last possible moment, or chosen to act sooner depending on their view of the efficacy of their information. Would an appellate tribunal or trial court judge been more sympathetic to this type of evidence than the governor on the night of the execution?

> "But the minute he was not sentenced to death, the minute he was sentenced to life in prison, you decided to do nothing?" Bob Simon asked.
> "Yes," Jamie Kunz said. "I can't explain it. I don't know why that made the difference but I know it did."[55]

At the heart of their conflict was the reality that helping Logan meant setting up their client, Andrew Wilson, for a capital crime. The disclosure decision was also weighted down by the evidentiary problem. Wilson's statement was shielded by the attorney-client privilege and it was hearsay. He would not have been willing to waive the privilege or come forward to testify against himself for Logan's sake.[56] He boasted to his attorneys on the assumption that no one would ever find out what he had done.

Still, the defense lawyers would not let it rest there. They devised another strategy, a post-mortem release. Jamie Kunz and Dale Coventry convinced Andrew Wilson to release them from their confidentiality obligation upon his death. In 2007 Wilson died and Logan was still alive serving his life sentence. Coventry and Kunz opened the lockbox and gave their statement to Logan's lawyer Harold Winston, who used it to free Logan after twenty-six years in prison.[57] Essentially, these lawyers created the first confession donor card—instead of donating an organ, Wilson donated his guilt. Viewing their actions in retrospect, Jamie Kunz commented: "There may be other attorneys who have similar secrets that they're keeping. I don't wanna be too defensive but what makes this case so different, is that Dale and I came forward. And that Dale had the good sense to talk to Wilson before his death. And get his permission. 'If you die, can we talk?' Without that, we wouldn't be here today."[58]

III. TRIANGULAR ETHICS: ATTORNEY-CLIENT-NONCLIENT RELATIONSHIPS

This case and the others like it point up the importance of the attorney-client dynamic. The fundamental relationship between defense counsel and her client is founded on loyalty and confidentiality. It is these twin pillars that are tested when there is the revelation or discovery of privileged information concerning another's innocence.

55. Schorn, *supra* note 48.

56. *See id.* (stating that Kunz and Coventry, Wilson's attorneys, had to convince him to waive his privilege and Wilson only agreed to waive the attorney client privilege after his death). There might be scenarios where a co-defendant will decide to take the full blame for a criminal act to exonerate another, if strongly motivated by family ties or bonds of loyalty, but no such connection existed here.

57. *Id.* ("One month after this report had aired, the truth finally did set Alton Logan free. A judge, citing the new evidence, threw out his conviction and released Logan on just $1,000 bond. Illinois' attorney general will not appeal the ruling and is deciding whether to retry Alton or to simply drop the charges.").

58. Schorn, *supra* note 48.

And the entanglements can take on many forms, pitting attorney against client, current client against former client, and defendant against co-defendant.

An attorney, accompanied by his client James Cassas, had entered a New York police precinct one morning to inquire about reports of homicides, or attempted homicides, within the last 24 hours.[59] It was then that the attorney "informed the desk sergeant that there was a problem at defendant's home and that a prompt police response was necessary. The attorney accompanied the police to defendant's home where the police found Jan Cassas dead in the master bedroom. The attorney then returned to the precinct where defendant was waiting."[60] Back at the stationhouse, the lawyer, with his client standing beside him, informed the police: "I brought my client in to surrender. I believe he shot his wife. You'll find the gun in the room. It will have my client's prints on it."[61]

At his murder trial, the defendant moved to suppress his previous lawyer's admission of guilt. The trial judge found that Cassas attorney was acting as his agent, and authorized to make statements including admissions of guilt to the police on his behalf. The statements were admitted through the testimony of a detective.[62] And they provided the principal evidence of guilt. The trial court's ruling was affirmed on appeal. However, in the state's highest court, the judges took a different view.

The New York Court of Appeals reasoned that Cassas' admission of guilt could not be introduced in the prosecution's case in chief absent a waiver of the attorney-client privilege.[63] The preservation of privilege, along with recognition of a defendant's right to retain decision-making authority over fundamental choices, such as his communicative rights (pleading, testifying, etc), compelled suppression of the attorney's statement to the police.[64] The statement was offered as direct evidence through the detective, defendant's former attorney had not testified.[65] Since there was no evidence in the record that privilege

59. People v. Cassas, 646 N.E.2d 449, 450 (1995).

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.* at 451. *See* Jones v. Barnes, 463 U.S. 745, 751 (1983) ("It is also recognized that the accused has the ultimate authority to make certain fundamental decisions regarding the case, as to whether to plead guilty, waive a jury, testify in his or her own behalf, or take an appeal." (citations omitted)).

65. *See generally* Mitchell M. Simon, *Discreet Disclosures: Should Lawyers Who Disclose Confidential Information to Protect Third Parties Be Compelled to Testify Against Their Clients?*, 49 S. TEX. L. REV. 307 (2007) ("My research suggests two key points: (1) Lawyers are reluctant to disclose client information even if necessary to protect the interests of innocent third parties; and (2) A significant segment of those who might reveal such information will be dissuaded if they can be compelled to testify against their client due to the disclosure. In light of this, I argue that courts and

had been waived, it could not be presumed based on the law of agency. "The fact that the attorney is the agent of the client-principal does not alone equate to a waiver of this privilege. The specific authorization must come from defendant principal to attorney-agent to constitute a waiver of the attorney-client privilege."[66]

The Court of Appeals went on to add that nothing should have been inferred by the jury from defendant's silence while standing next to his attorney during the admission in the police station—admonishing the trial judge on the need for a cautionary jury instruction under these circumstances.[67] The judgment was reversed, the suppression motion granted and a new trial ordered.

If the lawyer's actions in *Cassas* had been prompted by the desire to free an innocent third party suspected of the wife's murder, and he had resolved the ethical Rule 1.6(1)(b) issues, the prosecution would still have been confounded by the unusability of the statement. While the admission might persuade a district attorney to forgo or at least reconsider the prosecution of the innocent party, she could not proffer the attorney's statement of his client's guilt in a prosecution against the innocent defendant. It would have been embargoed by attorney-client privilege, Fifth Amendment, and hearsay barriers. And if the prosecutor chose to go forward with the case against the innocent third party, the defense would also be unable to put the statement before the jury without the confessing defendant's waiver of privilege or taking the stand himself.

Two police officers on patrol in an unmarked car in the Bronx claimed that they saw Juan Ortiz standing on the front stoop of a building where he took a glassine envelope from a grey pouch and gave it to another man.[68] The layout of the building stoop became an issue at trial, and Ortiz's attorney went back to the scene to take pictures. While there he had been observed by a former client, John Gonzalez.[69] Later on, Gonzalez visited the attorney at his office and

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legislatures should not expand existing exceptions to the attorney-client privilege."); ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 10-456 (2010) (stating that defense attorney cannot breach confidentiality unilaterally in response to prosecution request for information regarding ineffectiveness of counsel claim raised by defendant).

66. *Id.* at 724.

67. *Id.* at 452 ("Although neither defendant nor his attorney testified at trial, the trial court nevertheless was aware from the hearing testimony that defendant's silence was at the instruction of his attorney. Although the proposition that defendant had adopted by silence his attorney's admission was not explicitly put before the jury, the jury nevertheless heard testimony from which it could have inferred that defendant's silence was an adoption or corroboration of his attorney's assertions about him. Thus, we conclude that the trial court was required to guard against the adverse inference that silence might be used as evidence against the defendant and to give a curative instruction." (citation omitted)).

68. People v. Ortiz, 564 N.E.2d 630, 632 (1990).

69. The Court of Appeals considered Gonzalez a former client. *Id.* at 632 n.1. ("In his testimony at the CPL 440.10 hearing, counsel was not entirely certain of his

revealed that the drugs found on Ortiz belonged to him. Moreover, he added that he had recognized the unmarked police car and then advised Ortiz to leave. However, he cautioned that "if called to testify and questioned about his confession, he would invoke his privilege against self-incrimination."[70]

Defense counsel chose to call his former client to the stand. "Gonzalez testified that, as a passerby at the arrest scene, he saw defendant descending the steps, that he saw several other men closer to the bag that contained the drugs, and that the other men ran or walked away when the arresting officers pulled up in an unmarked car."[71] He also stated, contrary to his private confession to the lawyer: "[H]e was near the arrest scene because he had been playing ball down the street and was on his way to buy soda."[72] Gonzalez did not admit owning the drugs. Ortiz was found guilty of felony drug possession.

In the post-conviction hearing, Ortiz's trial attorney testified that he did not believe that there was a conflict of interest in calling former client Gonzalez as a witness. His decision not to cross-examine him about the omissions in his confession (or to take the stand to reveal them) would not have been effective because the jury would not have found it credible; and he did not want to violate his duty to preserve Gonzalez's confidences, since he refused to retell his confession in court.[73] And the attorney discussed these strategic choices with Ortiz beforehand.

Ortiz's claim of ineffective assistance of counsel based on a conflict of interest were rejected by the trial and appellate courts. They found no prejudice to the defendant because neither his counsel nor new representation would have resolved the Fifth Amendment and attorney-client privilege claims of Gonzalez.[74] This rationale was rejected by the Court of Appeals. The core of the analysis was "whether the potential conflict affected the conduct of the defense."[75] This configuration put defense counsel in a minefield. There was no approach that he could have taken and still maintained undivided loyalty to his present and former clients:

> Here we [Court of Appeals] conclude that the potential conflict affected the conduct of the defense. Trial counsel's decision to call Gonzalez as a defense witness was a product of the conflict. On one

relationship with Gonzalez at the time of trial, but did recall that he had no pending or subsequent matters for Gonzalez. The trial court and Appellate Division treated the relationship as one with a former client, and we proceed on that basis, nothing that in this case the result is the same whether defendant was trial counsel's present or former client.")

70. *Id.* at 632.
71. *Id.*
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.* at 633.

> hand, his duty to defendant required him to make what use he could of Gonzalez's testimony to exculpate defendant, but on the other hand, he was obligated to maintain Gonzalez's confidences and secrets. He therefore put Gonzalez on the stand to exculpate defendant but in the process elicited false testimony. An attorney not laboring under the conflict would not have made that choice. If unaware of Gonzalez's involvement, such an attorney obviously would not have called Gonzalez to the stand. If aware of Gonzalez's involvement, the attorney could have made efforts to put the facts before the jury. Indeed, defense counsel himself testified that an attorney who represented only defendant could have subpoenaed Gonzalez and the persons to whom the confession was made in an effort to inform the jury of that confession. Whether or not those efforts would have succeeded, it is clear that the conduct of the defense would have been different in the absence of trial counsel's continuing professional responsibilities to Gonzalez.[76]

Finding an irreconcilable conflict, the court reversed the judgment and ordered a new trial.[77]

This entanglement would also confound the analysis under Rule 1.6(b)(1). The attorney who had represented the true confessor to the crime and the innocent accused was in the worst position to act. Protecting the interests of the confessor inevitably destroyed his ability to fully vindicate the innocent client. And it further painted the attorney into a corner when confronted with false testimony by the guilty client. All of which was compounded by the evidentiary, constitutional and statutory impediments to revealing the confession.

Ortiz demonstrates what can happen when the same attorney represents both parties in the confessor-innocent triangle and where only one party has been charged with the actual crime. In *People v. Ennis*,[78] the participants faced similar difficulties in representing co-defendants and failing to make the best use of an exculpatory confession by one of the parties.

Sheldon Ennis, the defendant, and his brother Aaron along with Keith Taylor were charged with conspiracy to sell drugs and assaulting and attempting to murder rival drug dealers. In the first incident, a pair of rival dealers was shot at by the Ennis brothers and possibly by Taylor, resulting in charges of attempted murder.[79] In the second encounter with another pair of rivals, the Ennis brothers were indicted

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76. *Id.* at 658.

77. The Court of Appeals recognized that there were serious issues with the use of false testimony but focused its decision on the ineffectiveness of counsel claim. *See generally* People v. DePallo, 754 N.E.2d 751, 753 (2001) (addressing "a defense attorney's responsibilities when confronted with the dilemma that a client intends to commit perjury").

78. People v. Ennis, 900 N.E.2d 915 (N.Y. 2008).

79. *Id.* at 918 ("The police retrieved numerous discharged shells and casings from the area of the shooting and, at trial, a ballistics expert testified that at least two and probably more guns were involved.").

for stabbing their victims.[80] Sheldon Ennis was convicted after trial for conspiracy, based on his role in the drug selling operation, and felony assault for the shooting and stabbing of the rival dealers.[81] Before sentencing, Sheldon's trial attorney, David Cooper, made a motion to set aside the verdict[82] for the shooting conviction due to a *Brady* violation. His lawyer asserted that:

> [D]uring the trial, he [David Cooper] learned that Aaron Ennis [Sheldon's brother] had participated in a proffer session with the District Attorney's office in which Aaron stated that he shot Billy Moody and that defendant was not present at the shooting. The People never turned over the statement as *Brady* material. Cooper explained that he was told about the statement in confidence and with the understanding that he would not disclose it until after the trial concluded. He claimed that, if the People had timely provided the *Brady* information, he would have sought a severance and a separate trial for defendant so that he could have called Aaron as a witness. Having learned of the statement late in the trial, however, Cooper contended there was no way he could get the statement before the jury because Aaron would have invoked his Fifth Amendment privilege against self-incrimination if Cooper had tried to call him as a witness at the joint trial.[83]

The trial judge found that the defense attorney had possessed the exculpatory information at a time when he could have acted on it. While the prosecutor's obligation under *Brady* was clear,[84] defense counsel did not pursue any remedies at the critical time, e.g., *ex parte* application to the court for relief.[85] Instead, counsel waited until after the jury returned its verdict to bring the motion. Therefore, the motion was denied.

Later, Sheldon Ennis raised the *Brady* as well as an ineffectiveness of counsel claims in a post-conviction motion. His former trial counsel took the opportunity in his affidavit to address the trial judge's assumptions about his motivations:

> [I]t was Aaron's attorney who told him that, in an attempt to enter into a cooperation agreement with the People, Aaron stated that he shot Billy Moody and that defendant was not involved in the shooting. Cooper [Sheldon's lawyer] averred that, because he had promised Aaron's attorney that he would not disclose this information until the trial was over, he felt constrained not to alert the trial

80. *Id.*
81. *Id.*
82. *See* N.Y. CRIM. PROC. LAW § 330.30(3) ("That new evidence has been discovered since the trial which could not have been produced by the defendant at the trial even with due diligence on his part and which is of such character as to create a probability that had such evidence been received at the trial the verdict would have been more favorable to the defendant.").
83. *Id.*
84. *Id.* at 919.
85. *Id.*

> court. He further claimed that he had no "tactical or strategic reason" for his failure to act on the information during the trial.[86]

The court denied this motion as well. The Appeals court also rejected these claims based on the same reasoning. They added that had the district attorney met their *Brady* obligations, the evidence would have been unusable, since the co-defendant would likely have asserted his Fifth Amendment rights if called in a separate trial against Sheldon, and the statements from the proffer session were inadmissible hearsay.[87]

The key issues for Sheldon Ennis on appeal were (1) a conflict of interest created when his attorney promised the co-defendant's lawyer not to use the proffer session exculpation until after trial; and (2) the failure to take advantage of the information during trial. Neither argument swayed New York's highest court. The promise by Ennis's trial lawyer to Aaron's attorney not to use the information was based on subjective personal values.[88] It lacked the objective weight of facts found in cases where a former client or the lawyer might testify as a witness. Defense counsel's "internal struggle" did not fit into that category:

> Many (perhaps most) attorneys would not have perceived any conflict; having learned information that they deemed useful to their client, they presumably would have pursued one of several available courses of action, including advising the trial court, *ex parte* and without necessarily divulging their source, that they had reason to believe there had been a proffer session in which exculpatory statements were made. For these lawyers, any personal concern stemming from the assurance of confidentiality would have been outweighed by the professional obligation to pursue the interests of a client who was on trial for serious offenses, including attempted murder.[89]

Notwithstanding, the second prong of the conflict argument and the ineffectiveness of counsel claim share something in common—measuring the value of the exculpatory evidence had it been used during trial. If counsel had asked for a severance, Aaron's proffer statement would still have been disallowed: (1) assertion of his Fifth Amendment right against self-incrimination; and (2) the hearsay problem created by a witness testifying about it.[90]

The Court of Appeals reiterated that the prosecution should have disclosed the exculpatory statement of the co-defendant,[91] but absent

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86. *Id.*

87. *Id.*

88. *Id.* at 920. *Cf.* United States v. Henke, 222 F.3d 633, 637 (9th Cir. 2000) ("A joint defense agreement establishes an implied attorney-client relationship with the co-defendant . . . .").

89. *Ennis*, 900 N.E.2d at 920.

90. *Id.*

91. *See generally* MODEL RULES OF PROF'L CONDUCT R. 3.8 (2009).

a specific defense request for the information, its nondisclosure was insufficient to grant relief.[92] In other words, since Aaron's statement could not have been put before the jury, the failure of the prosecution to reveal it did not contribute to the verdict, i.e., the exculpatory statement's inadmissibility made it immaterial.[93] The *Brady* problem was only considered in view of the ineffectiveness claim, since there was no objection made to preserve the nondisclosure issue during trial.[94]

The true picture of the prosecution's case might have forestalled a destructive disclosure by a defendant's attorney. While there was an agreement among defense counsel about the revelation of inculpatory/exculpatory information, the prosecution had the benefit of overseeing the entire case. From that perch, there were a few opportunities to rectify this situation. If Aaron Ennis had been called to the stand, the district attorney could have granted him use immunity. Or there could have been an *ex parte* hearing about the information that all the attorneys were already aware of, and the court could have entertained a motion to dismiss or fashioned some other remedy in the interests of justice.[95] Other questions come to mind. Did the lawyer representing Aaron Ennis (co-defendant) have any ethical obligation to reveal his client's admission under Rule 1.6(b)(1)? Did disclosing the information to co-counsel with a promise of post-trial delay discharge his responsibility? Did co-counsel violate attorney-client privilege, confidentiality?

Co-defendant cases are particularly ripe for these types of conflicts, especially when the offense being charged is based on a presumption

92. *Ennis*, 900 N.E.2d at 922–23 ("While the People have an ongoing obligation to turn over exculpatory information—and their failure to do so in this case cannot be condoned—noncompliance with this requirement will not rise to the level of a *Brady* violation unless the evidence was material which, in New York, turns on whether the defense made a specific request for the information." (citing People v. Vilardi, 555 N.E.2d 915 (1990)).

93. *Id.* at 923 ("Here, defense counsel sought disclosure of all statements made by participants in the crime that were exculpatory of defendant. As such, the People's failure to turn over Aaron's statement would be material if there is a 'reasonable possibility' that the nondisclosure contributed to the verdict. That standard is not met because, had the statement been turned over, there would have been no avenue for defense counsel to admit it into evidence, either in the joint trial of the Ennis brothers or in a separate trial of defendant had severance been granted." (citation omitted)).

94. *Id.* at 922 n.2.

95. *See* N.Y. CRIM. PRO. LAW § 210.20(1) (Consol. 1996) ("After arraignment upon an indictment, the superior court may, upon motion of the defendant, dismiss such indictment or any count thereof upon the ground that: . . . (i) Dismissal is required in the interest of justice, pursuant to section 210.40"); *id.* § 210.40(1) ("An indictment or any count thereof may be dismissed in furtherance of justice, as provided in paragraph (i) of subdivision one of section 210.20, when, even though there may be no basis for dismissal as a matter of law upon any ground specified in paragraphs (a) through (h) of said subdivision one of section 210.20, such dismissal is required as a matter of judicial discretion by the existence of some compelling factor, consideration or circumstance clearly demonstrating that conviction or prosecution of the defendant upon such indictment or count would constitute or result in injustice.").

of possession. In *People v. Nixon*[96] the defendant-driver had been charged, along with the co-defendant passenger, with possession of a weapon. The police had discovered a handgun under the passenger seat during a vehicular stop. In his severance motion, the defendant pointed an accusing finger at the passenger claiming that he was in sole possession of the gun. At the same time, the co-defendant asserted that it was the defendant's weapon, and he had stashed it under the passenger seat when the police stopped the car. Moreover, the defendant argued that allowing them to be tried together would put the co-defendant's attorney into the role of a "second prosecutor."[97] And this fear was borne out by co-counsel's "aggressive adversarial stance" during trial. Both defendants ended up blaming each other—it became an all-or-nothing theory of defense. The Appellate Division found that there was an "irreconcilable conflict" between the two defenses, painting the jury into a corner and compelling them to "infer" defendant's guilt, and acquit the co-defendant. A severance should have been granted, and so a new trial was ordered.

The "second prosecutor" concept in *Nixon* brings out the complexity and ethical quandaries facing attorneys in joint prosecutions that are really zero-sum situations. In a larger sense, whenever a client confesses to her lawyer and takes sole responsibility for a crime, either in a joint offense or in an unrelated case, the defense attorney's role is enlarged. In the immediacy of the situation in *Nixon*, it grew into a "second prosecutor" role. More abstractly from the distance of a case where someone else is under law-enforcement scrutiny, and the client is not charged, the attorney's motivation to do justice pits her against her client's best interests. This intra attorney-client conflict can refashion defense counsel into a prosecutor for the purpose of prevent-

96. People v. Nixon, 908 N.Y.S.2d 293, 294 (App. Div. 2010).

97. *See* Zafiro v. United States, 506 U.S. 534, 543–44 (1993) (Stevens, J., concurring) ("The burden of overcoming any individual defendant's presumption of innocence, by proving guilt beyond a reasonable doubt, rests solely on the shoulders of the prosecutor. Joinder is problematic in cases involving mutually antagonistic defenses because it may operate to reduce the burden on the prosecutor, in two general ways. First, joinder may introduce what is in effect a second prosecutor into a case, by turning each codefendant into the other's most forceful adversary. Second, joinder may invite a jury confronted with two defendants, at least one of whom is almost certainly guilty, to convict the defendant who appears the more guilty of the two regardless of whether the prosecutor has proven guilt beyond a reasonable doubt as to that particular defendant. Though the Court is surely correct that this second risk may be minimized by careful instructions insisting on separate consideration of the evidence as to each codefendant, the danger will remain relevant to the prejudice inquiry in some cases.") (footnotes omitted); *see also* People v. Cardwell, 580 N.E.2d 753, 754 (N.Y. 1991) ("While no one factor is dispositive in such matters, we note that in this case McCoy's attorney took an aggressive adversarial stance against both Goss and Cardwell, in effect becoming a second prosecutor. Goss' attorney then responded by attempting to impeach McCoy's story with evidence of a recantation, which elicited an assertion from McCoy that the recantation had been induced by Cardwell's threats—damaging evidence elicited not by the People, but by a co-defendant.").

ing harm to an innocent person—a conflict that goes to the heart of client trust and confidence.[98]

IV. "REMARKABLE CIRCUMSTANCES"

In nearly every case where a lawyer determines that disclosure of a client's confession is the correct and necessary choice, there are the three evidentiary hurdles: (1) attorney-client privilege; (2) Fifth Amendment privilege; and (3) hearsay. Rigid application of these rules without considering the costs to society and to the individual of allowing a wrongful prosecution to go forward or a wrongful incarceration to continue can be detrimental to the innocent and the administration of justice.[99] The story of Jose Morales and Ruben Montalvo is riddled with living and post-mortem confessions, constitutional and evidentiary conundrums, and offers a look at the intricate and interwoven problems of undoing an unjust conviction.

Jose Antonio Rivera was killed in the Bronx after he was surrounded by group of teenagers seeking revenge.[100] Among the witnesses were Rivera's wife and son. Mrs. Rivera would later identify Jose Morales as one of the assailants.[101] Morales along with Ruben Montalvo and Peter Ramirez were indicted for the death of Rivera. Morales and Montalvo were ultimately convicted of second-degree

98. Another facet of this problem occurs when defense counsel is confronted by an unrepresented co-defendant who confesses to her and takes sole responsibility for the indictment against the defendant, or whom she believes is solely responsible and needs to be investigated. *See, e.g.*, Grievance Comm. v. Simels, 48 F.3d 640, 642 (2d Cir. 1995) (noting that Attorney Robert M. Simels, appealed from the decision of a federal grievance committee that sanction him with censure for contacting a represented witness: "The Committee found that Simels violated Disciplinary Rule 7-104(A)(1) ('DR 7-104(A)(1)' or 'Rule') [no contact rule] of the American Bar Association's Code of Professional Responsibility ('Code') when he contacted one Aaron Harper, whom Simels knew to be represented by counsel. Harper had been charged with participating in the attempted murder of a government witness in a drug conspiracy trial in which Simels' client, Brooks Davis, was a defendant, had agreed to cooperate with the government and had implicated Davis in the shooting. Prior to Simels' contact with Harper, the government had informed Davis (and Simels) that it would be filing a complaint against Davis and two other codefendants in connection with the attempted murder of the government witness. Because in our view the Committee erroneously interpreted DR 7-104(A)(1), we reverse."). A lawyer's obligations to nonclients in the larger universe outside the confines of the attorney-client relationship is at the crux of the issue. *See generally* Geoffrey C. Hazard, Jr. & Dana Remus Irwin, *Toward a Revised 4.2 No-Contact Rule*, 60 HASTINGS L.J. 797, 798–99 (2009) ("Our thesis is that as now written, Rule 4.2 is overbroad and ambiguous in important respects. There is a strong argument that the Rule should be repealed and its work done by Rule 4.3 — that is, a lawyer should not present himself to a nonclient as disinterested, should not give legal advice (except to consult another lawyer), and should not negotiate with a person he knows to be represented.").

99. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("[W]here constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice.").

100. Morales v. Portuondo, 154 F. Supp. 2d 706, 710–11, 716 (S.D.N.Y. 2001).

101. *Id.* at 710–11.

murder; Peter Ramirez had killed himself before trial while playing Russian Roulette.[102]

A. *Fornes's Confession*

Before sentencing, another neighborhood teenager, Jesus Fornes had spoken with a Roman Catholic Priest, Father Towle, to unburden himself and seek advice about what he should do:

> Fornes told him [Father Towle] that he was upset because two members of his group had been convicted of a murder, that the two were not present at the scene and were not involved, and that he and two others had actually committed the murder. Fornes said that one of the other two individuals was Peter Ramirez. He told Towle that he and the other two used a baseball bat and a knife to take Rivera's life.[103]

The priest encouraged Fornes to come forward, confess and accept responsibility.[104] The teenager repeated his confession to Montalvo's mother, who relayed it to Morales's mother, and eventually it filtered down to the lawyers representing both defendants.[105] On the sentencing date, Morales's new attorney, retained for the appeal, met with Fornes to get his statement.[106] He asked the court to adjourn the sentence to allow a motion to set aside the verdict based on newly discovered evidence. Meanwhile Fornes decided to seek legal counsel of his own.

Fornes, along with Father Towle, met with an attorney from the Bronx Legal Aid Society and explained his predicament. He informed his lawyer that he resisted coming forward sooner because he believed that Morales and Montalvo would be acquitted, and he was "surprised" when they weren't.[107] The Legal Aid lawyer explained to Fornes the ramifications of voluntarily coming forward and exculpating these men by admitting responsibility:

> I said, look, you are 17, 18 years old, you have your entire life ahead of you.
> If you feel guilt, you have the priest here, you can feel guilt with the priest. It is not in your best interests to go any further. I recall

102. *Id.*
103. *Id.* (citing Keeney v. Tamayo-Reyes, 504 U.S. 1, 10–11, 16 (1992)).
104. *Id.* at 711.
105. *Id.*
106. *Id.* ("Fornes gave Servino [Morales' attorney] the following account of the murder: On the evening in question, Fornes happened upon Carlos Ocasio and Peter Ramirez near Kelly Park. The three saw Rivera, his wife, and her son across the street. When eye contact was made, Rivera pulled either a screwdriver or knife out of his pocket. The three approached and Ocasio hit Rivera in the head and the back with a baseball bat. After Rivera fell to the ground, his head split open, Fornes picked up the bat and hit Rivera in the back. Ramirez then 'went crazy' and stabbed Rivera, more than once." (citing *Keeney*, 504 U.S. at 10–11, 16).
107. *Id.* at 713.

> saying to him, look, you brought this information . . . to someone in court that day . . . .
> I said one of the problems that you have here is [that] by going forward [you may] not end up clearing the gentlemen who have been convicted . . . but what you may end up doing is putting yourself in the middle of the case, you would end up being prosecuted, the other two who you tell me didn't do anything would not necessarily end up being released . . . .
> I just said I thought it was—he should not step forward, he should not answer questions and he should invoke the Fifth Amendment.[108]

Fornes lawyer counseled silence. After meeting with the prosecutor, who believed that more than two people were responsible for Rivera's death, his attorney was convinced that Fornes confession might be futile. A conviction had already been obtained and his admission would not guarantee overturning it, while putting Fornes at risk for conviction as well.[109] At the post-verdict hearing in 1989, Fornes invoked the Fifth Amendment and remained silent. His statements never came to light in front of a jury, and he was never charged with the offense. Morales and Montalvo were sentenced to fifteen years to life in prison.

When Fornes was killed in 1997, under circumstances unconnected with the case, the primary records of his statements were in the minds of his priest and lawyer. Nearly a dozen years later, the priest, Father Towle, determined that his conversation with Jesus Fornes did not constitute a "formal confession" protected by the seal of the confessional.[110] Father Towle provided Morales's attorney with an affidavit reciting Fornes's admissions.

Other people tried to bring Fornes's confession into court. A post-verdict hearing was held and everyone who heard his story had contributed directly or indirectly to the testimony presented:

> Elizabeth Colon, Morales's mother, testified that on January 19, 1989, she received a phone call from Maria Montalvo, who told her Jesus Fornes (also known as "Chuito") had come to her home, confessed his participation in the murder, and stated that neither Morales nor Montalvo had been involved. Colon told her daughter, Maria Morales-Fowler, to inform Servino [Morales's appeals attorney].
> Servino testified to the events of January 24, 1989, when he spoke with Fornes at the courthouse prior to the scheduled sentencing. Two other attorneys for the defendants, Peter Gersten and Herman Rosen, testified as well. Gersten, counsel for Montalvo, testified that Maria Montalvo had informed him during the trial that "Chuito" was a witness to the murder, but he had not been able to

108. *Id.*
109. *Id.* at 713–14.
110. *Id.* at 714.

> locate him. Gersten further testified that he had not learned "Chuito" was Fornes until on or before January 24th. Rosen, trial counsel for Morales, also testified that he had never heard the name of Fornes or "Chuito." Finally, Detective Walter Cullen of the NYPD testified that he had interviewed Fornes the day after Rivera's murder and that Fornes had denied witnessing the crime. On cross-examination, Detective Cullen also stated that the police had interviewed a person who identified "Carlos" as one of Rivera's assailants.[111]

The trial judge found Fornes's hearsay statements "uncorroborated and untrustworthy" and therefore inadmissible in a new trial. Moreover, he did not think that a jury hearing that story would have rendered a more favorable verdict. The motion was denied.

B. *Ramirez's Confession*

Before trial, an *in limine* hearing was held to consider the admissibility of statements made by Peter Ramirez, the third indictee who died before trial, through the testimony of his mother and attorney. According to Ramirez's mother, he had admitted stabbing the victim and remembered later that neither Morales nor Montalvo were in the park at the time of the killing.[112] He revealed substantially the same facts to his attorney, albeit in a slightly different account.[113] However, the trial court ruled out their statements, which were "all over the place," in the absence of corroborating evidence.

The Appellate Division affirmed the conviction over claims that exclusion of Fornes's and Ramirez's confessions was prejudicial. After a series of unsuccessful federal habeas corpus proceedings, again claiming error based on exclusion of the confessions, the case ended up back in federal district court. Meanwhile, a separate state post-conviction motion had been filed on the grounds that Father Towle's revelation of Jesus Fornes's statement constituted newly discovered evidence.[114] An evidentiary hearing was held in federal court, where Father Towle, the defendants' lawyers, and their mothers, all who were privy to Fornes's admissions, testified. The key issue in federal court was a due process violation because the state trial judge prohib-

111. *Id.* at 716–17.

112. *Id.* at 715.

113. *Id.* ("Ramirez's lawyer, Donald Yeoman, testified that Ramirez told him that as Ramirez approached Rivera in the park, Rivera was on the ground injured with a knife next to him. Yeoman further testified that Ramirez then picked up the knife, at which point Jennifer Rodriguez jumped him from the back . . . . Ramirez struggled with both Rivera and Rodriguez. During the scuffle, Ramirez stabbed Rivera. Ramirez gave his attorney a list of those who were part of the group in Kelly Park at the time of the killing. Morales and Montalvo were not included in the list" (quotation marks omitted)).

114. *Id.* at 718–19.

ited introduction of Fornes's statements, which were evidence of actual innocence.[115]

In federal court, Judge Chin dismissed objections based on failure to exhaust state remedies in view of the likelihood of a "fundamental miscarriage of justice."[116] Noting that Morales had been incarcerated for thirteen years,[117] Judge Chin commented: "In the *extraordinary circumstances* of this case, the interests of justice require that this Court reach the issues presented without further delay."[118] The actual innocence claim based on a third party's confession and the time in prison spent by the defendants weighed heavily on the judge's decision to resolve the question expeditiously.[119]

The court's analysis focused on the constitutional dimension of the state court's evidentiary decisions. Citing Supreme Court precedent for the right to present a defense and the preeminence of constitutional rights over state evidence rules,[120] the judge had to determine whether the state court's exclusion of Fornes's statement rose to the level of a due process violation.[121] Initially, Fornes statement would

115. *Id.* at 719.

116. *Id.* at 720.

117. *See id.* at 717 n.4 ("Morales's co-defendant, Montalvo, filed a separate petition for a writ of habeas corpus, which was assigned to a different judge in this Court. The petition was dismissed on December 8, 1998. According to the docket sheet, judgment was entered on December 11, 1998, dismissing the petition, but Montalvo never appealed. Consequently, his conviction is not before me. Montalvo may wish to move pursuant to Fed. R. Civ. P. 60 for relief from the judgment dismissing his petition." (citation omitted)).

118. *Id.* at 720 (emphasis added).

119. *See id.* at 721 ("Morales has been in prison for almost thirteen years. He has presented substantial evidence of actual innocence. If he was wrongly convicted, any further delay—no matter how brief—would only compound the fundamental unfairness of the situation.").

120. *See* Chambers v. Mississippi, 410 U.S. 284, 302 (1973) ("Few rights are more fundamental than that of an accused to present witnesses in his own defense . . . . In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence. Although perhaps no rule of evidence has been more respected or more frequently applied in jury trials than that applicable to the exclusion of hearsay, exceptions tailored to allow the introduction of evidence which in fact is likely to be trustworthy have long existed. The testimony rejected by the trial court here bore persuasive assurances of trustworthiness and thus was well within the basic rationale of the exception for declarations against interest. That testimony also was critical to Chambers' defense. In these circumstances, where constitutional rights directly affecting the ascertainment of guilt are implicated, the hearsay rule may not be applied mechanistically to defeat the ends of justice." (citing Webb v. Texas, 409 U.S. 95 (1972); Washington v. Texas, 388 U.S. 14, 19 (1967); *In re* Oliver, 333 U.S. 257 (1948))).

121. *See Morales*, 154 F. Supp. 2d at 722 ("Because the right to present a defense necessarily implicates state evidentiary rulings, federal courts considering evidentiary claims on habeas review must be careful to differentiate between mere errors of state law and those of constitutional dimension.").

satisfy the criteria for either a declaration against penal interest[122] or New York's version of the residual exception to the hearsay rule.[123] After an extensive analysis of the technical requirements and the indicia of reliability, the District Court found that the state judge erred by excluding Fornes's statement to Morales's lawyer and Montalvo's mother as hearsay. As for Father Towle's evidence, it was not blocked by privilege, since it was not a formal confession and Fornes waived its privacy by repeating his confession to others.[124]

The all-important question was whether Fornes's attorney was prohibited from disclosure. The court found the conversations with the legal aid counsel to be privileged under New York law. Since Fornes did not repeat their contents to anyone afterwards and asserted his Fifth Amendment rights, there was no waiver. And the privilege survived Fornes's death.[125] However, the constitutional imperative declared in *Chambers v. Mississippi*, dictated a different result. Moreover, by the time that Fornes spoke with his attorney, he had already confessed to three other people—his privileged revelation was an open secret. His motivation and earnestness to help two innocent people while inculpating him added to the credibility of his admissions. Judge Chin ruled that Fornes's lawyer could reveal his statement and it was admissible notwithstanding privilege:

> Fornes has been deceased for some four years now, while two apparently innocent men have spent nearly thirteen years in prison for a crime that he committed. Under these *remarkable circumstances*, the attorney-client privilege must not stand in the way of the truth. Fornes's statements to Cohen [Legal Aid Society lawyer] are admissible.[126]

Finding that exclusion of the Fornes's statements was not harmless error, Judge Chin granted the habeas petition for Morales,[127] and ultimately, Montavlo.[128] They were both released unconditionally.[129]

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122. *Id.* at 724 ("Under New York law, a statement is admissible as a declaration against penal interest if it satisfies four elements: (1) the declarant is unavailable to testify; (2) the declarant was aware at the time he made the statement that it was contrary to his penal interest; (3) the declarant had competent knowledge of the underlying facts; and (4) there is sufficient evidence independent of the declaration to assure its trustworthiness and reliability." (citations omitted)).

123. *Id.* at 725 ("New York courts have recently recognized a constitutionally-based exception to the hearsay prohibition for certain evidence offered by defendants in criminal cases." (citations omitted)).

124. *Id.* at 729.

125. *Id.* at 730.

126. *Id.* at 731 (emphasis added).

127. *Id.* at 732.

128. *See* Morales v. Portuondo, 165 F. Supp. 2d 601, 602 (S.D.N.Y. 2001) ("As to Montalvo, I [Judge Chin] have not formally granted his habeas petition, but his circumstances are substantially similar to Morales's circumstances. Hence, Montalvo's petition must be granted as well." (citation omitted)).

129. *Id.* at 614–15 ("Accordingly, the petitions are granted unconditionally. Morales and Montalvo are hereby granted an unconditional discharge and the Bronx

V. "DEATH BE NOT PROUD" OR THE POST-MORTEM SOLUTION

Posthumous disclosure was a troubling obstacle for Judge Chin, two of the responsible parties had confessed before they died, but, strictly speaking, their privileged statements to their lawyers were inadmissible. Had not the judge relied on the supervening constitutional principles of *Chambers v. Mississippi*, those critical admissions might never have seen the light of day. The attorneys in Alton Logan's case had the presence of mind to record the evidence of their clients' statements for a time when he could no longer be harmed by its revelation. Still, they faced the hurdle of its admission twenty-six years later. For some, the post-mortem solution[130] presents one of the best compromises to resolve this dilemma.[131]

The post-mortem disclosure may end up being the option with the fewest risks to the client and rest on the most tenable ethical grounds.[132] Still, there are serious drawbacks for the innocent client who has lost appeals and post-conviction motions and serves their sentence without hope of relief. While the posthumous revelation ap-

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District Attorney's Office is hereby barred from re-trying Morales or Montalvo for the murder of Jose Antonio Rivera. Their convictions are vacated and the Bronx District Attorney's Office is ordered to take whatever steps are necessary to restore Morales and Montalvo to the status they were in prior to their arrest and prosecution in the underlying murder case. These steps shall include expungement of the convictions and all references to them in the public record.").

130. It almost sounds like the title of a Sherlock Holmes story. But interestingly, the idea might have been first inspired by one of fiction's greatest detectives. In *The Boscombe Valley Mystery*, Sherlock Holmes uncovered the real culprit involved in a murder for which someone else had been accused. The true murderer had hoped that justice would prevail and the innocent young man would be freed without his coming forward. More importantly, he was dying and he did not want to spend his last weeks in jail. Nonetheless, Holmes would not take any chances so he arrived at a solution. "Holmes rose and sat down at the table with his pen in his hand and a bundle of paper before him. 'Just tell us the truth,' he said. 'I shall jot down the facts. You will sign it, and Watson here can witness it. Then I could produce your confession at the last extremity to save young McCarthy. I promise you that I shall not use it unless it is absolutely needed.'" Sir Arthur Conan Doyle, *Six Notable Adventures of Sherlock Holmes* 486 (Platt & Munk Publishers: NY 1960).

131. There are risks to waiting and, without some independent credible record of the confession, the exculpatory evidence might become lost knowledge. And it might be only be uncovered at a time when it can only be used to restore the reputation of a deceased wrongfully convicted person. *See, e.g.*, Mary Alice Robbins, *Posthumous Exoneration Sought Through Court of Inquiry*, TEX. LAWYER (July 7, 2008), http://www.law.com/jsp/tx/PubArticleTX.jsp?id=1202422790640 ("Relatives of a man who died in prison while serving a 25-year sentence for aggravated sexual assault have petitioned the 99th District Court in Lubbock for a court of inquiry to exonerate the man because an inmate has confessed to the crime.").

132. *See, e.g.*, Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, 23 A.B.A. CRIM. JUST. 46 (Summer 2008) ("The current draft [proposed post-mortem exception to confidentiality under Rule 1.6 to correct a wrongful conviction], very narrowly drawn and discretionary rather than mandatory, seems unobjectionable. Our view is that a more expansive exception may possibly be justified, without the death and reputational harm limits found in the current proposal.").

proach has its virtues, it also has many legal hurdles to overcome before becoming a panacea.

In 1979, Amerigo Vespucci along with Dennis Carney and Richard Hogan had been talking and drinking at a local bar in Valley Stream, New York.[133] They all left about the same time. A short while later, Hogan was found stabbed to death outside the bar. Dennis Carney was indicted for Hogan's murder. He was represented by Edward Galison.[134] Eventually, the indictment was dismissed with leave to represent, which never occurred and the file was sealed. Carney committed suicide in 1991. Meanwhile, Vespucci vanished. The police finally located him in 2001, and the following year, he was indicted for the murder of Richard Hogan.[135] Vespucci was represented by Thomas Liotti.

In 1982, Carney admitted to his attorney, Galison, that Vespucci was innocent of the crime. In 2001, when Galison heard about Vespucci's apprehension and prosecution, he became concerned that an innocent person was being wrongfully prosecuted. A judge suggested that he seek expert advice from Roy Simon, Ethics Professor at Hofstra Law School. Professor Simon recommended that Galison get an advisory opinion on how to proceed from the Nassau County Bar Association Committee on federal ethics.[136]

The Committee offered the following advice: (1) notify the assistant district attorney and the defense lawyer handling the Vespucci case and inform them that he had exculpatory information; but (2) the attorney-client privilege prevented disclosure of his client's confession, i.e., the specific details, unless court ordered. Galison advised Vespucci's attorney that he had exculpatory information, but refused to reveal it because of privilege. Liotti filed an order to show cause to compel disclosure of the details, including Galison's notes. A hearing was ordered at which Attorney Galison testified about his involvement with Carney and his possession of exculpatory information, but without disclosing the contents of their discussions.[137]

133. People v. Vespucci, 745 N.Y.S.2d 391, 392 (County Ct. 2002).

134. *Id.* ("During Carney's criminal proceedings, he was represented by two attorneys, Mr. Edward Galison and Mr. Charles Chassen, who is now deceased."). An issue not considered here is when the client's private confession is discovered among the files transferred upon the sale of a practice or the demise of the representing attorney. While the privilege belongs to the client, the transfer and retention of information between and among lawyers and law firms increases the possibilities of discovery by someone who had not learned the information firsthand.

135. *Id.* at 393 ("The charges are murder in the second degree as an intentional act under N.Y. PENAL LAW § 125.25(1) (Consol. 1998), and murder in the second degree under circumstances involving a depraved indifference to human life under N.Y. PENAL LAW § 125.25(2) (Consol. 1998). The crime predates the 1995 statutory amendments to the Penal Law, and as such is not a capital offense.").

136. *Id.*

137. *Id.*

After the hearing, Liotti submitted the Affidavit of Doreen Ferranti, Carney's common law wife.[138] Her life with Carney was marred by violence and abuse.[139] During her time with him, he made revealing statements about his involvement in the Hogan murder:

> The defendant, Vespucci, was ridiculed by Carney as a "pussy, a punk and a junkie" and he, himself, took credit for killing Hogan. According to Ms. Ferranti, Carney said "I iced him, I did it once and got away with it and I can do it again and get away with it." He joked about the murder and referred to it as "Pulling a Hogan" in reference to a possible murder and getting away with the consequences.[140]

Carney's death followed the murder of Ms. Ferranti's father and brother.[141]

Similar to *Morales*, a principal in the crime made an admission to his attorney and a civilian. At the same time, an innocent person faced prosecution for that crime, and his freedom hinged on the admissibility and credibility of those statements. The dilemma for the court was whether to pierce the attorney-client privilege for a post-mortem disclosure. The only safety valve in this case was a court order legitimizing a breach of privilege. But did the privilege still exist once the client had died?

In the absence of a clear guideline under New York law,[142] Judge Belfi conducted an exhaustive analysis of national precedent and identified five different approaches to post-mortem privilege:

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138. *Id.* ("Significantly, the defense has attached an affidavit of one Doreen Ferranti, who had a child with Dennis Carney in 1986. She described how Carney had severely battered her during the course of their relationship. She claimed they lived together from 1982 to 1991 in Nassau County, New York. She claimed to have a common-law marriage, a concept not recognized in New York State.").

139. *Id.*

140. *Id.* at 394.

141. *Id.* ("In December 1991, Ms. Ferranti and her daughter were hiding from Carney. At that time, Carney broke into Ms. Ferranti's parent's house and killed her father and her brother. Carney then immediately turned the gun on himself and died as well.").

142. *Id.* at 394–95; *see* N.Y. C.P.L.R. § 4503(a) ("Confidential communication privileged; non-judicial proceedings. Unless the client waives the privilege, an attorney or his employee, or any person who obtains without the knowledge of the client evidence of a confidential communication made between the attorney or his employee and the client in the course of professional employment, shall not disclose, or be allowed to disclose such communication, nor shall the client be compelled to disclose such communication, in any action, disciplinary trial or hearing, or administrative action, proceeding or hearing conducted by or on behalf of any state, municipal or local governmental agency or by the legislature or any committee or body thereof. Evidence of any such communication obtained by any such person, and evidence resulting therefrom, shall not be disclosed by any state, municipal or local governmental agency or by the legislature or any committee or body thereof. The relationship of an attorney and client shall exist between a professional service corporation organized under article fifteen of the business corporation law to practice as an attorney and counselor-at-law and the clients to whom it renders legal services.").

(1) Property Theory: "The first theory allows for the privilege to be passed down like property to one's heirs, who become joint successor holders. (*Walton v Van Camp,* 283 SW2d 493 [Mo 1955].) Popular in the midwest, the position is that some persons might be deterred from disclosure had they known that what they said could be revealed after their death to the embarrassment of their own reputations and in the interests of their survivors. (*Buuck v. Kruckeberg,* 121 Ind. App. 262, 95 N.E.2d 304 [1950]; *State v. McDermott,* 79 Ohio App 3d 772, 607 N.E.2d 1164 [1992]; *Mayberry v. State,* 670 NE2d 1262 [Ind 1996].)"[143]

(2) Estate Theory: "A second view is that the privilege temporarily survives and it ceases to exist when the client's estate is finally distributed and his personal representative (executive or administrator) is discharged (*see* Cal Evid Code § 954; Colo L. Rev. Comm. on Courts; Or Evid. Code rule 503 [3]). This west coast approach limits the duration of the privilege. It is established by statute and enables the personal representative to use the privilege in the same manner as the deceased holder, with no need to establish any affirmative showing to exert it."[144]

(3) Expiration Theory: "The third viewpoint is that the privilege ceases upon the death of the original holder (*see* 1 Imwinkelried, New Wigmore: A Treatise on Evidence § 6.5.2 [2002]). This is the extreme minority viewpoint and usually makes its appearance in dissenting opinions (*see Swidler & Berlin v United States,* 524 US 399, 411 [1998] [O'Connor, J., dissenting]; *Matter of John Doe Grand Jury Investigation,* 408 Mass 480, 486, 562 NE2d 69, 72 [1990] [Nolan, J., dissenting])."[145]

(4) Absolute Privilege Theory: "The fourth theory is the exact opposite of the third approach, and considers the attorney-client privilege as absolute. Some courts have held that "(1) where legal advice of any kind is sought (2) from a professional legal advisor in his capacity as such, (3) the communications relating to that purpose (4) made in confidence (5) by the client, (6) are at this instance permanently protected (7) from disclosure by himself or by his legal advisor." (*State v Doster,* 276 SC 647, 651, 284 SE2d 218, 220 [1981], citing 8 Wigmore, Evidence § 2292 [1961].)"[146]

(5) Balancing Test Theory: "The fifth and final view is what could be referred to as a compromise or 'balancing of interests' approach. This was the opinion of the United States Court of Appeals in *In re Sealed Case* (124 F3d 230 [DC Cir 1997], *revd sub nom. Swidler & Berlin v United States,* 524 US 399 [1998]). Here the District of Columbia Court of Appeals ruled that upon the death of the original holder, the absolute privilege expires and converts into a conditional privilege, at least when it falls 'within the discrete zone of criminal litigation' (*Sealed Case*

143. *Vespucci*, 745 N.Y.S.2d at 395.
144. *Id.*
145. *Id.*
146. *Id.* at 396.

> at 234). In such a situation, even if there is a prima facie case for applying the privilege, the trial judge could surmount the privilege if he or she balanced the factors and found a compelling case—specific need for the relevance of the privileged information."[147]

The first three theories had not been considered by New York courts, so Judge Belfi limited his analysis to the Absolute Privilege and Balancing Test theories. The absolutist viewpoint would sustain the Bar Association view that Carney's statement to Galison was sacrosanct even after his demise. As for the balancing approach, the court gave credence to the viewpoint of a Pennsylvania decision followed by the New York Court of Appeals in *Belge*,[148] which encompassed the property and estate theories:

> The landmark decision of *Cohen v Jenkintown Cab Co.* (238 Pa Super 456, 357 A2d 689 [1976]) set the standard that is generally followed by most jurisdictions. According to Cohen, in deciding whether to sustain or overrule the privilege, a judge may consider such factors as (1) the import the disclosure would have had on the client's daily life, (2) whether the disclosure would likely lead to liability for the client or his estate, (3) whether disclosure would blacken the memory of the deceased client, and (4) the need for the testimony must be clearly established by the moving party. (Cohen, supra, 238 Pa Super at 461-464, 357 A2d at 692-694.)[149]

Under the *Belge/Cohen* test the privilege could not be pierced. Factors one, two and three did not militate in favor of preserving the privilege, since Carney was dead, his estate might be liable but it was not a significant issue and he died after killing two innocent persons. However, the fourth factor was the critical one. The testimony was not necessary in light of his ex-wife's affidavit.

Conceivably, if the wife's report of Carney's confession had been inadmissible, the result might have been different. But the judge held that those statements were declarations against interest, since Carney was subject to being reindicted for the crime at the time he spoke. And since the affiant and declarant were common-law man and wife, they were not covered by privilege.[150] Uniquely, the decisions in *Vespucci* and *Morales* were made in the context of multiple sources of alternate secondary confessions from lawyers and laypeople. However, in many instances, the secret will be shared only between the attorney and her client.

Swidler & Berlin[151] and *Belge* both represent mainstream views on the sanctity of privilege, while acknowledging room to reexamine the

147. *Id.*

148. *See* People v. Belge, 372 N.Y.S.2d 798, 799 (County Ct.), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976).

149. *Id.* at 798.

150. *Id.* at 798–99.

151. Swidler & Berlin v. United States, 524 U.S. 399 (1998).

issue when needed. The first case arose from the investigation into the firing of staff from the White House Travel Office in 1993 known as Travelgate.[152] Vince Foster, Deputy White House counsel at the time, sought advice from James Hamilton, an attorney with Swidler & Berlin, in anticipation of the inquiries to come. Hamilton met with Foster for two hours and took three pages of handwritten notes.[153] A little more than a week later Foster killed himself.[154] By the end of 1995, a federal grand jury had been convened and the Independent Counsel subpoenaed Hamilton and Swidler & Berlin to obtain the Foster interview notes.

After an *in camera* inspection, the judge found that the notes were protected by attorney-client privilege. However, the Court of Appeals for the District of Columbia Circuit reversed and held that the privilege's posthumous survival hinged on a balancing of interests.[155] In the Supreme Court, Chief Justice Rehnquist writing for the majority upheld the absolutist view of the privilege after the client's death, recognizing only a testamentary exception.[156] Interestingly, it was the prosecution that sought an exception to the privilege because of the importance of those notes to a criminal investigation,[157] relying on the balancing test in *Cohen*, which had been cited by Judge Belfi in *Vespucci*. And the defense counsel was put in the position of calling for strict adherence to the privilege post-mortem.[158]

152. *Id.* at 401 ("This dispute arises out of an investigation conducted by the Office of the Independent Counsel into whether various individuals made false statements, obstructed justice, or committed other crimes during investigations of the 1993 dismissal of employees from the White House Travel Office. Vincent W. Foster, Jr., was Deputy White House Counsel when the firings occurred.").

153. *Id.* at 401–02.

154. *See Whitewater: The Foster Report: 1993 Park Police Investigation*, WASHINGTON POST, http://www.washingtonpost.com/wp-srv/politics/special/whitewater/docs/fosterii.htm (last viewed on February 26, 2011) ("This is the full text of the report on the 1993 death of White House counsel Vincent W. Foster, Jr., compiled by Whitewater independent counsel Kenneth Starr. After an exhaustive three-year investigation, Starr reaffirmed that Foster's death was a suicide.").

155. *Swidler*, 524 U.S. at 402.

156. *Id.* at 405.

157. *Id.* at 403–04 ("The Independent Counsel argues that the attorney-client privilege should not prevent disclosure of confidential communications where the client has died and the information is relevant to a criminal proceeding. There is some authority for this position. One state appellate court and the Court of Appeals below have held the privilege may be subject to posthumous exceptions in certain circumstances. In *Cohen*, a civil case, the court recognized that the privilege generally survives death, but concluded that it could make an exception where the interest of justice was compelling and the interest of the client in preserving the confidence was insignificant." (citations omitted)).

158. Just how far could a prosecutor ethically go in trying to pierce attorney-client privilege to unearth exculpatory information? *Cf.* ABA Comm. on Ethics & Prof'l Responsibility, Formal Opinion 10-456 (2010), at 1 ("Although an ineffective assistance of counsel claim ordinarily waives the attorney-client privilege with regard to some otherwise privileged information, that information still is protected by Model Rule 1.6(a) unless the defendant gives informed consent to its disclosure or an excep-

Justice Rehnquist focused on the importance of full and frank disclosures between client and attorney in life, and the potential liability created by revealing those confidences posthumously.[159] It was the fear of uncertainty about how that information might be used in the future, in either a civil or criminal context, that encouraged adherence to a conservative view of the privilege. Opposing the Independent Counsel's argument that there should be a limited exception for criminal cases and matters of "substantial importance," the petitioner, Hamilton, conceded that there might be "exceptional circumstances implicating a criminal defendant's constitutional rights that might warrant breaching the privilege."[160] The Supreme Court did not address this point because it did not find any "exceptional circumstances."

In *Vespucci*, Judge Belfi was quick to point out that under the absolutist view in *Swidler & Berlin*, privilege would stand no matter the cost to an innocent person.[161] And he cited *State v. Macumber*[162] to highlight it, as did Justice Rehnquist. In this Arizona decision, the trial judge presiding over a murder case prohibited two attorneys from testifying to the confession of someone who had died[163] based on the legislative intent of the privilege statute:

> The attorney-client privilege is statutory and an attorney is not allowed to waive the privilege under the circumstances of this case. The legislature has presumably weighed the possibility of hampering justice in originally providing for the privilege. *See State v. Alexander*, 503 P.2d 777 (1972).[164]

The harsh application of any rule of evidence can be ameliorated by the overarching mandate of constitutional principles such as due process and the right to present a defense underscored by the Supreme

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tion to the confidentiality rule applies. Under Rule 1.6(b)(5), a lawyer may disclose information protected by the rule only if the lawyer 'reasonably believes [it is] necessary' to do so in the lawyer's self-defense. The lawyer may have a reasonable need to disclose relevant client information in a judicial proceeding to prevent harm to the lawyer that may result from a finding of ineffective assistance of counsel. However, it is highly unlikely that a disclosure in response to a prosecution request, prior to a court-supervised response by way of testimony or otherwise, will be justifiable.").

159. *Swidler*, 524 U.S. at 407 ("Knowing that communications will remain confidential even after death encourages the client to communicate fully and frankly with counsel. While the fear of disclosure, and the consequent withholding of information from counsel, may be reduced if disclosure is limited to posthumous disclosure in a criminal context, it seems unreasonable to assume that it vanishes altogether. Clients may be concerned about reputation, civil liability, or possible harm to friends or family. Posthumous disclosure of such communications may be as feared as disclosure during the client's lifetime.").

160. *Id.* at 409. The phrase "exceptional circumstances" resembles Judge Chin's observation about the "remarkable circumstances" in the *Morales-Montalvo* litigation. *See* Morales v. Portuondo, 154 F. Supp. 2d 706, 731 (S.D.N.Y. 2001).

161. People v. Vespucci, 745 N.Y.S.2d 391, 396 (County Ct. 2002).

162. State v. Macumber, 544 P.2d 1084 (Ariz. 1976).

163. *Id.* at 1085.

164. *Id.* at 1086.

Court in *Chambers v. Mississippi*.[165] And Justice O'Connor, along with Justices Scalia and Thomas, dissenting in *Swidler & Berlin* recognized the necessity of constitutional abrogation of a state privilege in a compelling criminal case. She agreed with the value of recognizing attorney-client privilege after death. But she was also cognizant of when it must give way:

> Although the attorney-client privilege ordinarily will survive the death of the client, I do not agree with the Court that it inevitably precludes disclosure of a deceased client's communications in criminal proceedings. In my view, a criminal defendant's right to exculpatory evidence or a compelling law enforcement need for information may, where the testimony is not available from other sources, override a client's posthumous interest in confidentiality.[166]

The "personal, reputational, and economic interest in confidentiality" were minimized, and the risks of criminal liability eliminated after the client has died.[167] Thus it would not undermine any of the rationales for preserving the privilege, i.e., full disclosure and trust between attorney and client. Even in life, a prosecutorial grant of immunity might have unearthed the information from an unwilling witness. But post-mortem, an unbreachable wall of privilege closed off an invaluable avenue of critical evidence.[168] "In my [Justice O'Connor] 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."[169] For Justice O'Connor, the test was whether the factual information was "necessary" to exonerate the innocent or pursue an investigation[170] and unavailable from any other source, e.g., a witness unencumbered by privilege or hearsay, which would permit a judge to decide if the "interests in fairness and accuracy" outbalanced the sanctity of the privilege.[171]

The dissenters showed insight into the scenario faced by attorneys cited in the other cases discussed so far when Justice O'Connor wrote: "*Extreme injustice* may occur, for example, where a criminal defendant seeks disclosure of a deceased client's confession to the offense."[172].

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165. Chambers v. Mississippi, 410 U.S. 284, 302 (1973).

166. Swidler & Berlin v. United States, 524 U.S. 399, 411 (1998).

167. *Id.* at 412.

168. *Id.* at 412–13.

169. *Id.* at 413.

170. *Id.* at 416 (O'Connor, J., dissenting) ("Where the exoneration of an innocent criminal defendant or a compelling law enforcement interest is at stake, the harm of precluding critical evidence that is unavailable by any other means outweighs the potential disincentive to forthright communication.").

171. *Id.* at 413–14.

172. *See* State v. Macumber, 544 P.2d 1084, 1086 (1976); cf. In the Matter of a John Doe Grand Jury Investigation, 486, 562 N.E.2d 69, 72 (1990) (Nolan, J., dissenting).

The balancing test envisioned by the dissenting Justices in *Swidler & Berlin* and the D.C. Circuit Court would have to be circumspectly applied in criminal prosecutions. First, upon the death of the original holder (or client confessor), the absolute privilege expired and converted into a conditional privilege, at least when it fell "within the discrete zone of criminal litigation." Then the trial judge could override the privilege if she balanced the factors and found a compelling case, i.e., a specific need for relevant privileged information.[173]

While the balancing test concept is a minority view, the mechanics behind its application can find support in cases where the welfare of another party, effective assistance of counsel, and client loyalty have all played key roles.

In *People v. Belge*,[174] Robert F. Garrow, Jr., had been indicted for murder in upstate New York. Two attorneys had been assigned to represent him, Frank H. Armani and Francis R. Belge. In their discussions with Garrow, he confessed to committing three other murders. Independently, Attorney Belge investigated the claim and found the body of one of the victims described by Garrow.[175] He did not inform anyone about his discovery. A year later, in the course of mounting an insanity defense, the admissions concerning the three additional homicides were presented to the jury.[176] This revelation led to an indictment against Attorney Belge (Armani was no billed) for a Public Health law violation, i.e., failing to notify the authorities about his discovery. Ultimately, the trial judge dismissed the indictment on the grounds of attorney-client privilege and in the interests of justice.[177]

While upholding the dismissal of the indictment, the appeals court addressed the danger of an unassailable privilege:

> In view of the fact that the claim of absolute privilege was proffered, we note that the privilege is not all-encompassing and that in a given case there may be conflicting considerations. *We believe that an attorney must protect his client's interests, but also must observe basic human standards of decency, having due regard to the need that the legal system accord justice to the interests of society and its individual members.*[178]

It is the criminal context that weighs on the minds of judges who must decide whether to further the ends of justice by strict adherence to a

173. *In re* Sealed Case, 124 F.3d 230, 234 (D.C. Cir. 1997), *rev'd sub nom.* Swidler & Berlin v. United States, 524 U.S. 399 (1998).

174. People v. Belge, 372 N.Y.S.2d 798, 799 (County Ct.), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976).

175. *Id.*

176. *Id.*

177. *Id.* at 803 ("It is the decision of this court that Francis R. Belge conducted himself as an officer of the court with all the zeal at his command to protect the constitutional rights of his client.").

178. *Belge*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976) (emphasis added).

statutory rule of exclusion or the compelling mandates of the constitution. The Appellate Division went out of its way to assert a need to protect the "interests of society and its individual members." In this instance, it meant protecting Garrow's right to counsel and right to present an insanity defense by preserving his attorney-client relationship against criminal prosecution.

What if someone else had been indicted for those other murders that Garrow admitted? His attorneys kept quiet to preserve their client's ability to present a mental disease or defect defense. Early revelation would have destroyed the value of presenting that admission to the jury. Meanwhile, an innocent person would have been paying the price for nondisclosure. Garrow confessed to something that happened in the past, a completed crime. There were no other exigencies, except the future harm facing our hypothetical wrongfully accused defendant. Still, there have been cases where a completed act continued to have repercussions in the present and future. How would the existence of a continuing crime impact the decision to disclose a client's admission of a past offense?

In the Oregon case of *McClure v. Thompson*,[179] the attorney, Christopher Mecca, was confronted with this continuum problem. His client, Robert McClure, had been charged with murdering a woman, whom he had known.[180] At the same time the police believed that McClure had done something with the woman's two young children, who could not be found. In the course of the Mecca's representation, he learned from McClure where the children were located. Eventually, McClure's lawyer chose to anonymously reveal this information to the sheriff because he believed there was a chance they might still be alive. However, when the sheriff, acting on this tip, found them they were both dead from gunshot wounds to the head. McClure's attorney withdrew from the case, and the defendant was indicted for the murders of the woman and her children. The phone call and a large amount of derivative evidence from the crime scenes were introduced in the prosecution's case. McClure was convicted and sentenced to three consecutive life sentences.[181] And the conviction was affirmed on appeal.

McClure brought a federal habeas writ claiming that Mecca had been ineffective because he breached client-confidentiality by informing law enforcement about the location of the missing children. But the district court rejected his argument that a conflict of interest created by his attorney violated his constitutional right to counsel. Hearings and affidavits submitted in the state court and federal evidentiary

179. McClure v. Thompson, 323 F.3d 1233 (9th Cir. 2003).

180. *Id.* at 1235 ("The fingerprints of Robert McClure, a friend of Jones, were found in the blood in the home. On Saturday, April 28, McClure was arrested in connection with the death of Carol Jones and the disappearance of the children.").

181. *Id.* at 1236.

hearings revealed two different stories. According to the attorney, he had spoken with McClure over a period of about three days.[182] In that time, the defendant claimed that he was being "framed." Later his sister made a desperate call to the lawyer because she believed that the children were still alive, although her brother had probably been responsible for killing the mother.[183] Still, McClure continued to protest his innocence as to the murder and the disappeared children. As discussions with McClure continued, the defendant seemed to ramble and drift into bizarreries, leading his attorney to believe that he was guilty of the murder and raised the stakes as to the status of the children. The attorney, Mecca, was able to get his client to draw a map of where the children might be. Then McClure made a revelation that cemented his lawyer's belief that the children were alive: "McClure told Mecca that 'Satan killed Carol.' When Mecca asked, 'What about the kids?' McClure replied, 'Jesus saved the kids.' Mecca wrote in his notes that this statement 'hit me so abruptly, I immediately assumed that if Jesus saved the kids, that the kids are alive[.]'"[184] Failing to secure a plea deal in exchange for the undisclosed information,[185] the lawyer resolved the potential ethical problems and went forward with his anonymous tip.[186]

On the other hand, McClure disputed Mecca's version of events. He claimed that his attorney had promised confidentiality and that nothing he told him would be revealed. McClure also claimed that the lawyer pressured him into talking and to disclose incriminating details without his consent.[187] He suggested that his attorney had cooperated with law enforcement, or at least put his interests ahead of the defendant's.[188] This sharp contrast in stories had been resolved by the fed-

182. *Id.* at 1255 n.12 (Ferguson, J., dissenting).

183. *Id.* at 1236 (majority opinion).

184. *Id.* at 1237.

185. *Id.*

186. *Id.* at 1238 ("Mecca testified in his deposition that he thought that if the children were alive, it might relieve McClure of additional murder charges, but that the children were his main concern.").

187. *Id.* at 1239 ("McClure disagreed with Mecca's account of the events leading up to the anonymous call. In testimony in both the state and federal district court proceedings, he repeatedly insisted that he did not give Mecca permission to disclose any information and that he was reassured that everything he told Mecca would remain confidential. He said Mecca pressured him into disclosing information by setting up the meeting with his sister and mother, and then disseminated that information to his detriment without his knowledge or consent.").

188. This might be considered a variation or extension of the "second prosecutor" conflict that sometimes arises in co-defense cases. *C.f.* Scott Hamilton Dewey, *Irreconcilable Differences: The Ninth Circuit's Conflicting Case Law Regarding Mutually Exclusive Defenses of Criminal Codefendants*, 8 BOALT J. CRIM. L. 2, 4 (2004) ("Inconsistent, conflicting defenses are yet another factor posing risk of prejudice in joint trials. Various courts have used different terms to describe the issue of conflicting defenses, but usually one of three constructions is used: mutually antagonistic defenses, mutually exclusive defenses, and irreconcilable defenses. These three terms often are used interchangeably, but they should not be. 'Mutually antagonistic' de-

eral judge in favor of defense counsel,[189] resulting in the court's finding that either McClure consented to disclosure, and if not, it was a reasonable course of action for the attorney to take—discovery of the children while alive would have forestalled two additional murder charges.[190]

The Ninth Circuit in reviewing these circumstances emphasized that an ethical breach did not automatically support a finding of ineffectiveness of counsel.[191] It was not prepared to find a rule of professional responsibility coterminous with the Sixth Amendment.[192] Examining the disclosure issue, the court first noted that the confidential relationship defined in ABA Model Rule of Professional Conduct 1.6 was not absolute, i.e., consent, waiver, and codified exceptions, such as crime-fraud under Rule 1.6(b)(1).[193] There were implied statements by McClure and inferences by his attorney that formed the basis for the conclusion that the authorities ought to be informed about the children's whereabouts, and although McClure's contradictory impression of their meetings challenged this assumption, the lower courts found the attorney to be more credible.

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fenses include all defenses that conflict, such that the jury's acceptance of one will make it harder for them to accept the other. 'Mutually exclusive' and 'irreconcilable' defenses represent an extreme subcategory of 'mutually antagonistic' defenses: defenses that are truly irreconcilable, such that for the jury to believe and acquit one defendant, it must convict the other. By contrast, other antagonistic defenses may be difficult but not impossible to reconcile." (footnotes omitted)).

189. *McClure*, 323 F.3d at 1240.

190. *Id.* ("The federal district court accepted as not clearly erroneous the state habeas court's finding that Mecca received permission to disclose anonymously the whereabouts of the children, and stated that, even if McClure did not consent to disclosure, the disclosure was reasonable in light of the circumstances, including the facts that there was a potential benefit to McClure if the children were alive and that the decision was made 'in response to a rapid and extraordinary chain of events as they unfolded.'").

191. Strickland v. Washington, 466 U.S. 668, 687–88 (1984) (holding that ineffectiveness of counsel must be based on findings of deficient performance and sufficient prejudice from that deficiency to violate the right to counsel under the Sixth Amendment).

192. *See* Nix v. Whiteside, 475 U.S. 157, 165–66 (1986) ("Under the *Strickland* standard, breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. When examining attorney conduct, a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct and thereby intrude into the state's proper authority to define and apply the standards of professional conduct applicable to those it admits to practice in its courts. In some future case challenging attorney conduct in the course of a state-court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct.").

193. *McClure*, 323 F.3d at 1242.

Still, under these "exceptional circumstances," *informed* consent was paramount.[194] There was no justification for suspending counsel's basic obligation to consult with his client to enable the latter to make a knowing and intelligent decision.[195] This had not been done, and it was not excused by the urgency of the situation. The court commented that heightened risks militated in favor of a thorough consultation before McClure consented.[196] Finding no basis for client consent or waiver after consultation, nonetheless, the court believed that the attorney had satisfied the requirements for the crime-fraud exception.[197]

Strictly speaking, McClure had not admitted to a future crime. His attorney was concerned about the escalation of a past criminal act, kidnapping, into an aggravated offense, murder. Taking this concept further, if a wrongful prosecution were to fall within the definition of Rule 1.6(b)(1)'s "reasonably certain death or substantial bodily harm," a client's unrevealed confession to an offense attributed to another might be framed as a future crime—a complete and separate act that will be triggered and exacerbated solely by the passage of time.[198]

194. *Id.* at 1243–44 ("Further, Mecca's account of the circumstances from which he inferred McClure's consent changed over the years. His initial account stated that he inferred consent from the fact that McClure called him at home, drew the map, and gave it to him. It is a significant leap to infer McClure's consent to disclose the map to law enforcement authorities from the fact that McClure gave the map to Mecca. Virtually all clients provide information to their attorneys, but they do so assuming that the attorneys will not breach their duty of confidentiality. Further, Mecca's behavior at the time of the disclosure suggested that he thought he lacked the kind of informed consent that would give him the legal authority to act.").

195. *See, e.g.*, Faretta v. California, 422 U.S. 806, 835 (1975) ("When an accused manages his own defense, he relinquishes, as a purely factual matter, many of the traditional benefits associated with the right to counsel. For this reason, in order to represent himself, the accused must 'knowingly and intelligently' forgo those relinquished benefits. Although a defendant need not himself have the skill and experience of a lawyer in order competently and intelligently to choose self-representation, *he should be made aware* of the dangers and disadvantages of self-representation, so that the record will establish that 'he knows what he is doing and his choice is made with eyes open.'" (emphasis added) (citations omitted)); Johnson v. Zerbst, 304 U.S. 458, 464 (1938) ("A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience, and conduct of the accused.").

196. *McClure*, 323 F.3d at 1245.

197. *Id.* at 1243.

198. *Id.* at 1245 ("This is not a traditional 'prevention of further criminal acts' case, because all of the affirmative criminal acts performed by McClure had been completed at the time Mecca made his disclosure. Mecca was thus acting to prevent an earlier criminal act from being transformed by the passage of time into a more serious criminal offense. Nonetheless, we believe that where an attorney's or a client's omission to act could result in 'imminent death or substantial bodily harm' constituting a separate and more severe crime from the one already committed, the exception to the duty of confidentiality may be triggered." (citing MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (Discussion Draft 1983)).

The Ninth Circuit's analysis is instructive for innocence cases. They began with a requirement of "objective reasonableness" of the attorney's belief under the circumstances that disclosure was necessary to prevent the harm described by the rule.[199] The basis for this belief is predicated on a "reasonable investigation and inquiry" before reaching that conclusion.[200]

McClure's statements and behavior provided the fountainhead for Mecca's responses. From those clues and admissions, he began to formulate his belief about the status of the children, and the need for helping them while they were alive. If his belief was unfounded, and there was no basis for believing that the children were still alive, Mecca's decisions would have fallen into a *Belge* type scenario—where a discrete investigation of the facts might have led to evidence of additional homicides, which did not warrant ethical sanctions. Nonetheless, this was not the case, and Mecca's choices, which might have benefited from further investigation,[201] were a close call. Still the Ninth Circuit held that there was no reason to disturb the lower courts finding that his violation of confidentiality did not rise to the level of ineffectiveness of counsel.[202] Nor was there a conflict of interest. Concededly, Mecca maintained two goals, finding the children alive and preventing the filing of additional homicide charges. Crime prevention, mandated by the Rules of Professional Conduct, under these circumstances was not contrary to client loyalty.[203]

Therein lies the problem, an attorney must balance the competing and conflicting interests of his client within the larger context of an ethical obligation to the lives and well being of third parties or innocent victims. Whether this concept extends to someone wrongfully charged with a crime rather than the victim of one is the key question.[204] The values society places on wrongful convictions underlie the ethical approach attorneys must take towards this question. But the

199. *Id.*

200. *Id.* at 1246.

201. *Id.* at 1254 (Ferguson, J. dissenting) ("Besides directly inquiring with McClure, Mecca could have also conducted some investigation outside of the jail cell. Mecca could have armed himself with the map and driven to the locations on the map to determine once and for all if the children were alive. Moreover, both Mecca and McClure testified that they discussed the option of Mecca doing so; why Mecca chose not to and instead went to the authorities is beyond reason. Indeed, if he truly believed the children were alive in the woods, at risk of exposure and starvation, it is inexplicable that he would not have immediately gone to assist them. While locating the bodies himself would undeniably have been a great burden, criminal defense attorneys should be prepared to meet the myriad challenges of their vocation — investigating and uncovering disturbing evidence related to their representation is but one; confronting moral and ethical dilemmas competently is another.").

202. *Id.* at 1247 (majority opinion).

203. *Id.* at 1248.

204. *Cf.* Shawn Armburst, Note, *When Money Isn't Enough: The Case for Holistic Compensation of the Wrongfully Convicted*, 41 AM. CRIM. L. REV. 157, 180 (2004) (discussing the need for "holistic" mechanisms for providing funds and assistance to

entire burden should not rest with defense counsel. As will be discussed later, systemic reform is the better solution to this scenario rather than conscripting attorneys into the roles of prosecutors (or second prosecutors) against their clients.

In a universe of competing moral and ethical values, the Ninth Circuit in *McClure* laid out the importance of attorneys taking careful conscientious steps before reaching the most extreme of options, breaching client confidentiality. First, a clear definition of "reasonably certain death or substantial harm" has to be established. With that guidepost in mind, an attorney confronting this situation can start out on the right path: (1) full evaluation of the client's mental state; unambiguous discussion of the disclosure option, without tainting the client's story;[205] and informed consent, if feasible; (2) investigation and confirmation, as in *Belge*, which might have to be expedited depending on the status of the victim;[206] and (3) disclosure, whether based on informed consent or exigency under the Rules; and choosing an appropriate mode of revelation, e.g., anonymously through negotiations with the prosecutor or in court *ex parte* or before the jury as in *Belge*.

In each of these cases, the attorney-client privilege and the conduct of the attorneys were approved in the end, and the privilege survived. But the categorical approach to perpetually shielding privileged information might only be overcome in exceptional or remarkable circumstances—like wrongful conviction. In another sense, a client's confession to a past crime that has continuing consequences might be likened to a future crime, although the legal system is a long way from

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persons wrongfully convicted of crimes similar to the damages awarded to toxic tort victims).

205. *Cf.* ANATOMY OF A MURDER (Carlyle Productions 1959). In *Anatomy of a Murder*, there is a scene where the defense attorney, Paul Biegler (portrayed by James Stewart), cautions (or coaches) the accused, Lt. Frederick "Manny" Manion (played by Ben Gazzara), about his defense options before telling his story—otherwise the lawyer would be bound by what the client said. *Id.* Paul Biegler: "Lieutenant, there are four ways I can defend murder. Number one: it wasn't murder—it was suicide or accidental. Number two: you didn't do it. Number three: you were legally justified like self-defense or protection of your home. Number four: the killing was excusable." *Id.* The following day when Biegler returns, Manion tells his story, which implies his choice of defense: Lt. Manion: "I blacked out, I mean, after we talked yesterday, I went back over the whole thing in my mind. You see, I hadn't done that before—I was trying to forget about it. But when I tried remembering it, there were some pieces missing." *Id.*

206. *See* People v. Belge, 372 N.Y.S.2d 798, 799 (County Ct.), *aff'd*, 376 N.Y.S.2d 771 (App. Div. 1975), *aff'd*, 359 N.E.2d 377 (N.Y. 1976) (noting that Belge, Garrow's attorney, investigated the area and discovered a body after Garrow confessed to additional murders). The exigency of time, like the police responding to an emergency call, might create a sliding scale of reasonableness. Just as some courts have urged that the attorney-client privilege should not be viewed in absolute terms, the same might be said of the "reasonableness calculus" an attorney undergoes before reaching the decision when to reveal a client's confidence.

endorsing the criminalization of wrongful prosecutions.[207] In the present, the choice that seems to balance the equities, while not fully addressing the immediate harm to a wrongful accused, is the post-mortem exception.

The New York City Bar's Committee on Professional Responsibility recently issued a report[208] in which they considered a posthumous disclosure amendment to their state's version of the confidentiality rule:

> Rule 1.6(b)(6) This rule does not prohibit a lawyer from revealing or using confidential information, to the extent that the lawyer reasonably believes necessary, to prevent or rectify the conviction of another person for an offense that the lawyer reasonably believes the other person did not commit, where the client to whom the confidential information relates is deceased.[209]

It is a broadly phrased exception that allows an attorney to act, i.e., "prevent or rectify," at any stage of a prosecution against an innocent accused, tempered by the fact that the information was gained from a "deceased" client. In their commentary to the proposed amendment, the committee addressed the key factors that a lawyer must consider to support a "reasonable" belief in their client's admission and the necessity of disclosure:

> In exercising discretion under this subsection, a lawyer shall give due consideration to: (1) the wishes of the deceased client, if known; (2) the magnitude of the punishment or other harm resulting from the wrongful conviction; (3) the credibility of the deceased client's admissions and the degree to which such admissions exculpate the convicted person; (4) the likelihood that revealing the confidential information will actually prevent or rectify the wrongful conviction; and (5) the likely effect, if any, of the disclosure on the estate of the deceased client, such as the financial or economic effects that could arise from a lawsuit or other claim against the estate, and any effect

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207. *See, e.g.*, Jennifer Emily & Steve McGonigle, *Dallas County District Attorney Wants Unethical Prosecutors Punished*, DALL. MORNING NEWS, May 4, 2008, *available at* http://truthinjustice.org/dallasda.htm ("State Sen. Rodney Ellis, chief author of the Texas law that created the compensation system for wrongfully convicted inmates, said he, too, would support criminalizing the intentional withholding of evidence by prosecutors. No criminal charge exists in Texas for a prosecutor who intentionally commits a 'Brady violation.'").

208. N.Y. CITY BAR, PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 1.6 — AUTHORIZING DISCLOSURE OF CONFIDENTIAL INFORMATION OF DECEASED CLIENTS (2010) [hereinafter PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 1.6], http://www.nycbar.org/pdf/report/uploads/20071914-ProposedAmendmenttoRuleofProfessionalConduct1.6.pdf; *see also* Joy & McMunigal, *supra* note 131 (discussing the debate within the American Bar Association over whether to adopt a proposed amendment a similar amendment to the Model Rules of Professional Conduct 1.6(c) "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").

209. PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 1.6, *supra* note 207, at 1.

> on the reputation or other intangible interests of the client's beneficiaries.[210]

All of their criteria have foundations in cases that have examined this problem, such as Alton Logan, *Morales*, *Vespucci* and Lee Wayne Hunt.[211] Such a rule would provide clarity to counsel and lessen the specter of disciplinary action when an attorney is faced with this choice. The attorney-client relationship, the administration of justice, and the welfare of the innocent accused all justified a posthumous ethical exception in the eyes of the committee.[212] And yet, the amendment cannot address the evidentiary limitations created by attorney-client privilege and hearsay or the decision on how much harm an innocent person must be subjected to before the choice to act becomes compelling.

VI. "REASONABLY CERTAIN DEATH OR SUBSTANTIAL BODILY HARM"

Without clear ethical guidelines and safeguards, the uncovering of this exculpatory evidence, buried in the confidences of the attorney-client relationship, will be fortuitous at best. The saga of George Reissfelder is a case in point. A Railway Express clerk in Boston's South Station was shot in the head during a robbery in 1966.[213] William (Silky) Sullivan had been identified by witnesses as the culprit.

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210. *Id.* at 2.

211. *See* Adam Liptak, *When Law Prevents Righting a Wrong*, N.Y. TIMES, May 4, 2008, http://www.nytimes.com/2008/05/04/weekinreview/04liptak.html (A North Carolina defense lawyer was prevented by a trial judge from disclosing his deceased client's confession to a murder attributed to Wayne Hunt. "Mr. Cashwell, Mr. Hughes's client, committed suicide in 2002, more than a decade after he pleaded guilty to the 1984 killings of Roland and Lisa Matthews. Prosecutors had maintained that Mr. Hunt also participated in the killings, and Mr. Cashwell did nothing to refute them. But Mr. Hughes said that Mr. Cashwell confessed in private that he single-handedly killed the couple after an argument over whether a television was playing too loud. 'Lee Wayne Hunt had nothing to do with it,' Mr. Hughes said.").

212. PROPOSED AMENDMENT TO RULE OF PROFESSIONAL CONDUCT 1.6, *supra* note 207, at 8 ("We believe that our proposal is necessary to prevent the professional discipline of attorneys who come forward, after the death of a client, to reveal confidential information that would exonerate a wrongfully convicted person. We further believe that the value in rectifying such wrongful convictions outweighs the breach of attorney-client confidence, after the death of the client. The proposed rule would be discretionary, rather than mandatory, meaning that an attorney would exercise discretion when deciding whether to reveal confidential information, in accordance with such considerations as the nature of the information, the client's expressed wishes, the extent of the punishment faced by the wrongly convicted individual, and the extent to which disclosure would adversely affect interests of the client or client's estate even after the client's death.").

213. Jeffrey Toobin, *Kerry's Trials: What the Candidate Learned as a Lawyer*, NEW YORKER (May 10, 2004), http://www.newyorker.com/archive/2004/05/10/040510fa_fact1; *Imprisoned in '66 Killing, He Goes Free in Boston*, N.Y. TIMES, Aug. 31, 1982, http://www.nytimes.com/1982/08/31/us/imprisoned-in-66-killing-he-goes-free-in-boston.html.

George Reissfelder, who had a criminal record, was turned in by his girlfriend's father for planning a robbery in "South Boston." Sullivan and Reissfelder were tried and convicted of murder and sentenced to life. Ten years later, Reissfelder brought a motion challenging his conviction and a lawyer was assigned, Roanne Sragow.[214] John Zamparelli, who had represented Silky Sullivan at trial in 1967, contacted Sragow in 1982 and told her that everyone involved knew that Reissfelder was innocent, but Reissfelder had a record and they wanted to close the case. More importantly, before Silky died of leukemia in 1972, he made a deathbed confession to a priest. Reissfelder's lawyers tracked down Reverend Edward Cowhig, who signed an affidavit repeating Sullivan's admission that Reissfelder was not involved. At a post-conviction hearing held in 1982, ten witnesses were called to testify about Reissfelder's innocence. The judge ordered a new trial, but the district attorney decided not to prosecute. Reissfelder was freed.

This case, like Alton Logan's, signals the importance of the private confession in the adjudication of innocence claims. And exonerations like these may have been the impetus behind Massachusetts's, and later Alaska's, amendments to their versions of Rule 1.6(b)(1):

> (b) A lawyer may reveal, and to the extent required by Rule 3.3, Rule 4.1(b), or Rule 8.3 must reveal, such information:
>
> (1) to prevent the commission of a criminal or fraudulent act that the lawyer reasonably believes is likely to result in death or substantial bodily harm, or in substantial injury to the financial interests or property of another, or *to prevent the wrongful execution or incarceration of another*[215]

However, the majority of jurisdictions have not followed suit and instead rely on an interpretation of the "reasonably certain death or substantial bodily harm" language.[216] This formulation lacks the specificity of the Massachusetts and Alaska amendments, which target and recognize the implication of cases like Logan's, Reissfelder's, and Morales/Montalvo's. And it places a heavier burden on attorneys struggling to divine whether and when to take action based on a private confession.

What can "substantial bodily harm" mean? Punishing an innocent person entails everything from a suspended sentence, fine, or probation to imprisonment and even execution. And incarceration has endemic qualities that are aggravated by length and the conditions of

214. Toobin, *supra* note 212; *Imprisoned in '66 Killing*, *supra* note 212.

215. MASS. RULES OF PROF'L CONDUCT R. 1.6 (emphasis added); *see also* ALASKA RULES OF PROF'L CONDUCT R. 1.6(b)(1)(c) (stating that a lawyer may reveal a confidence to prevent reasonably certain "wrongful execution or incarceration of another").

216. *See generally* Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391, 395 (2008).

confinement, e.g., exposure to violence, disease, sexual assault, mental trauma, solitary confinement, extended sentence based on misconduct while inside, and potentially death.[217] Then there are the consequences of a conviction unrelated to punishment, but still severe: risk of reincarceration for violating probation or parole, deportation, loss of employment, denial of government benefits, disenfranchisement and disqualification for other citizenship rights, harm to reputation, mandatory registration, civil commitment as in the case of sex offenders, and other ensigns of civil death.

Prison is one of the most dangerous environments on earth,[218] and it puts incarcerated persons at significantly high risks in terms of health problems, violence, and death.[219] An innocent person would also likely be ineligible for parole or early release or admission to ben-

217. *See generally* Jamila Johnson & Peter Moreno, *Wrongful Incarceration and Client Confidence Under RPC 1.6*, Kings County Bar Bulletin (March 2010), http://www.kcba.org/newsevents/barbulletin/archive/2010/10-03/article22.aspx ("There is no case law or any ethics opinion that addresses whether the Washington rule requires disclosure of information that could overturn or prevent conviction of an innocent individual. There is, however, evidence to support the assertion that prison inmates, in general, are subject to a present and substantial threat of bodily harm. The leading support for this interpretation is the *Restatement (Third) of The Law Governing Lawyers § 66*, comment c (2000), which provides that 'serious bodily harm,' in the context of exceptions to the general rule of confidentiality, 'includes life-threatening illness and injuries and the consequences of events such as imprisonment for a substantial period and child sexual abuse.'"); Hasbani, *supra* note 41, at 292 ("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.").

218. *See* Lewis v. Casey, 518 U.S. 343, 391 (1996) ("Prisons are inherently dangerous institutions . . . ."). *See generally* Ken Strutin, *Solitary Confinement*, LLRX.COM (Aug. 10, 2010), http://www.llrx.com/features/solitaryconfinement.htm.

219. *See, e.g.*, Ingrid A. Bingswanger, *Chronic Medical Diseases Among Jail and Prison Inmates*, SOC'Y CORRECTIONAL PHYSICIANS (Mar. 13, 2010), http://www.corrdocs.org/framework.php?pagetype=newsstory&newsid=12170&bgn=1 ("Our findings suggest that jail and prison inmates have a disproportionate burden of many chronic medical conditions compared to the general population, including hypertension, asthma, arthritis, cervical cancer and hepatitis. We found no differences in diabetes and that obesity was less common among jail and prison inmates."). *See generally Deaths in Custody Reporting Act*, U.S. DEP'T JUST., http://bjs.ojp.usdoj.gov/index.Cfm?ty=TP&tid=19 (last updated Apr. 1, 2011) ("BJS collects and disseminates data on deaths that occur in local jails, state prisons, and during the process of arrests by state and local law enforcement agencies through its Deaths in Custody Reporting Program (DCRP)."); *Prison Rape Elimination Act (Sexual Violence in Correctional Facilities)*, U.S. DEP'T JUST., http://bjs.ojp.usdoj.gov/index.Cfm?ty=tp&tid=20 (last updated Apr. 1, 2011) ("[National Prison Rape Statistics Program] NPRSP includes five separate data collection efforts: the SURVEY ON SEXUAL VIOLENCE (SSV), the NATIONAL INMATE SURVEY (NIS), the NATIONAL SURVEY OF YOUTH IN CUSTODY (NSYC), the FORMER PRISONER SURVEY (FPS), and CLINICAL INDICATORS OF SEXUAL VIOLENCE IN CUSTODY (CISVC). Each of these collections is an independent effort and, while not directly comparable, will provide various measures of the prevalence and characteristics of sexual assault in correctional facilities.").

eficial programs because they would probably be unwilling to admit guilt, which would undermine their claims of innocence.[220] As for "reasonably certain death," the longer the term of life spent inside will increase the mortality risk for the incarcerated.[221] Given the amount of violence concentrated within prison walls, and a host of other conditions detrimental to health and well being, leading in some cases to a very high rate of suicide,[222] imprisonment might still represent a reasonably certain risk of death.

How much harm, short of execution, is enough to trigger an attorney's duty to act, as in the matter of crime prevention?[223] In the civil sphere, precedent suggests that the bar is very high, perhaps unassailable. The Minnesota Supreme Court had been called upon to decide whether a settlement from an auto accident should have been vacated once it was learned that the doctors for the defendant insurance company withheld critical information about the plaintiff/victim's medical condition.[224] Their approach to this question went to the heart of an attorney's obligations to non-clients facing significant danger.

David Spaulding, a minor, was involved in an auto collision and his father filed suit against John Zimmerman, the man who was driving

220. *See, e.g.*, McKune v. Lile, 536 U.S. 24, 29–30 (2002) (holding that the Kansas state prison sexual abuse treatment program that required inmates to a sign an "Admission of Responsibility" form, requiring an admission of guilt to the crime and uncharged sex offenses, did not violate Fifth Amendment privilege against self-incrimination).

221. *See, e.g.*, CHRISTOPHER J. MUMOLA, U.S. DEP'T JUST., MEDICAL CAUSES OF DEATH IN STATE PRISONS, 2001–2004 2 (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/mcdsp04.pdf ("The death rate from illness rose sharply for prisoners serving lengthy terms. For inmates who had served at least 10 years in State prison, the mortality rate due to illness (503 deaths per 100,000 inmates) was triple that of inmates who had served less than 5 years in prison (162 per 100,000). Long-serving inmates showed similar increases in death rates for many of the leading fatal illnesses. AIDS-related causes had the smallest increase in mortality for long-serving inmates.").

222. *See, e.g.*, CHRISTOPHER J. MUMOLA, U.S. DEP'T JUST., SUICIDE AND HOMICIDE IN STATE PRISONS AND LOCAL JAILS 7–8 (2005), http://bjs.ojp.usdoj.gov/content/pub/pdf/shsplj.pdf ("Jail inmate suicides were heavily concentrated in the first week spent in custody. Forty-eight percent of all jail suicides during 2000-02 took place during the inmate's first week following admission. In particular, almost a quarter of all jail suicides took place either on the date of admission to jail (14%) or the following day (9%). . . . The suicide rate of violent jail inmates (92 per 100,000) was nearly triple that of nonviolent offenders (31). Kidnaping [sic] offenders had the highest suicide rate (275), followed by those inmates held for rape (252) or homicide (182).").

223. Hasbani, *supra* note 41, at 294 ("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.").

224. Spaulding v. Zimmerman, 116 N.W.2d 704, 707 (Minn. 1962).

the car. Their family doctor examined David after the crash and reported on his injuries, mostly fractures and a head injury, observing that his heart and aorta were normal.[225] The defendant's attorneys requested an examination as well. And their neurologist uncovered something overlooked by the plaintiff's physician, the presence of an aortic aneurysm.[226] The doctor only disclosed this fact to the driver's attorneys. Without revealing their neurologist's report, the defendant's lawyers reached a settlement with the plaintiff for $6,500.

Since Spaulding was a minor, he was only twenty years old at the time of the accident, counsel for both parties had to submit a petition to the court for approval of the settlement. The document's description of plaintiff's injuries referred only to the head injuries and rib fractures.[227] Two years later, during David Spaulding's physical exam, required for the army reserves, his family doctor discovered the aortic aneurysm. After reexamining the X-rays from the accident, he deduced that it had originated at that time.[228] The problem was swiftly addressed by a surgical procedure. As a result, Spaulding filed a new action seeking to reopen the settlement and receive additional damages.[229] The trial court vacated the settlement after finding a causal connection between the injuries and the accident, and that plaintiff's counsel was unaware of it when the petition for settlement had originally been submitted for approval. While ultimately granting plaintiff relief based on the defendant's concealment of a material fact, the court was critical of plaintiff's attorney for not uncovering the information through diligent investigation and discovery.[230]

Both parties were adversarial and the defendant's attorneys were under no ethical or legal obligation to aid the plaintiff to the disadvantage of their own client.[231] Yet, since a joint application was made to

225. *Id.* at 707.

226. *Id.* ("On February 26, 1957, the latter reported to Messrs. Field, Arvesen & Donoho, attorneys for defendant John Zimmerman, as follows: 'The one feature of the case which bothers me more than any other part of the case is the fact that this boy of 20 years of age has an aneurysm, which means a dilatation of the aorta and the arch of the aorta. Whether this came out of this accident I cannot say with any degree of certainty and I have discussed it with the Roentgenologist and a couple of Internists. Of course an aneurysm or dilatation of the aorta in a boy of this age is a serious matter as far as his life. This aneurysm may dilate further and it might rupture with further dilatation and this would cause his death.'").

227. *Id.* at 708.

228. *Id.*

229. *Id.*

230. *Id.* at 708–09 ("'The mistake concerning the existence of the aneurysm was not mutual. For reasons which do not appear, plaintiff's doctor failed to ascertain its existence. By reason of the failure of plaintiff's counsel to use available rules of discovery, plaintiff's doctor and all his representatives did not learn that defendants and their agents knew of its existence and possible serious consequences. Except for the character of the concealment in the light of plaintiff's minority, the Court would, I believe, be justified in denying plaintiff's motion to vacate, leaving him to whatever questionable remedy he may have against his doctor and against his lawyer.'").

231. *Id.* at 709.

the court, the defendant's concealment took on a new importance. "To hold that the concealment was not of such character as to result in an unconscionable advantage over plaintiff's ignorance or mistake, would be to penalize innocence and incompetence and reward less than full performance of an officer of the Court's duty to make full disclosure to the Court when applying for approval in minor settlement proceedings."[232]

The trial court did not abuse its discretion in vacating the settlement—despite the recognition of preserving the confidentiality of advantageous information in a civil suit that also imperiled the plaintiff's well being. The Minnesota Supreme Court was concerned about the misrepresentation to the court, not the ethics of adversaries towards each other:

> While no canon of ethics or legal obligation may have required them to inform plaintiff or his counsel with respect thereto, or to advise the court therein, it did become obvious to them at the time that the settlement then made did not contemplate or take into consideration the disability described. This fact opened the way for the court to later exercise its discretion in vacating the settlement and under the circumstances described we cannot say that there was any abuse of discretion on the part of the court in so doing under Rule 60.02(6) of Rules of Civil Procedure.[233]

The civil contest described here, an action for money damages, was waged against a subtext of life or death for the plaintiff. The principal concern of the Minnesota Supreme Court was with the effect of the non-disclosure on the trial court's approval of the settlement, i.e., judicial administration. As potentially serious as Spaulding's condition had been, its discovery by the defendant was not enough to trigger disclosure, except when it affected the decision of the court. This undergirds the notion that a defendant's attorney can and should protect the confidentiality of even the most detrimental facts for the benefit of their client.[234]

Notably, the trial judge intimated that the plaintiff's attorney might have found the same facts through greater diligence and use of discovery and investigation. And he went so far as to suggest that Spaulding might have had recourse against his own attorney for not uncovering

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232. *Id.*

233. *Id.* at 710 (footnote omitted).

234. *See* Peter A. Joy, Spaulding v. Zimmerman*: Exploring the Ethics and Morality of Lawyers and Physicians in Practice*, UNIV. TOKYO FAC. L. & GRADUATE SCH. FOR L. & POL., 7 n.13, http://www.j.u-tokyo.ac.jp/biolaw/Spaulding%20v.%20Zimmerman finaljoy.pdf (last visited Apr. 2, 2011) ("Although not discussed by the court in its decision, the defense lawyers in *Spauling v. Zimmerman* are believed to have withheld information concerning their aneurysm from their clients. If they failed to discuss the aneurysm with their clients, Zimmerman and Ledermann, then they breached their ethical duty to keep their clients advised of the status of the case. This breach of an ethical duty to their clients, however, would not provide Spaulding with any rights.").

it, i.e., legal malpractice. On the criminal side of the fence, the prosecution has the onus of bringing cases and conducting investigations that weed out the innocent from the guilty. Failure of the prosecutorial function should not shift the burden to the defense, i.e., relying on a breach of confidentiality to correct a wrongful prosecution. While adversaries in a civil suit can withhold information to gain advantage, there are constitutional and ethical prescriptions, like *Brady*,[235] that impose duties on the prosecution to see that justice is done and disclose exculpatory evidence relating to guilt or punishment.

Where does this leave the criminal defense lawyer? Some steps have to be taken to make this assessment in a consistent way for all lawyers and their clients to assure a bedrock application of confidentiality and its most important exceptions. In counseling clients, the lawyer who learns of a private confession might have to warn the client about the limits of confidentiality. In other words, it would be a complementary warning accompanying an explanation of the future crime exception. As for the standard for assessing the client's confession, the Model Rules would suggest a reasonableness measure. But in view of the stakes involved, i.e., the client's potential exposure to new criminal charges, and exculpating an innocently accused person, a higher standard might be required, such as beyond a reasonable doubt.[236]

And once those hurdles have been overcome, i.e., the client's confession has been determined to be credible and the attorney has decided it was time to come forward, how should she proceed? In *Vespucci*, the attorney sought the court's guidance and later an advisory ethics opinion. A judge could review the matter under seal and *in camera*, leaving the source of the disclosure anonymous. Lastly, counsel could approach the prosecutor along the same lines as in *Morales* and *McClure*, perhaps seeking immunity or a favorable plea and sentence recommendation.[237]

VII. SYSTEMIC APPROACH: "IN THE INTERESTS OF JUSTICE"

The problem in all of these cases is the lack of means and guidance for addressing the causes and remedies of wrongful convictions. Ac-

235. *See* Brady v. Maryland, 373 U.S. 83, 84 (1963) (holding that prosecution withholding from defense confession of accomplice stating that he, not Brady, committed the homicide necessitated reversal of conviction).

236. *See* McClure v. Thompson, 323 F.3d 1233, 1252 (9th Cir. 2003) ("[H]ow convinced was the attorney that their client was going to commit a crime (for example, did he believe beyond a reasonable doubt?)?").

237. *See id.* at 1237 (nothing that McClure's attorney contacted the prosecutor and told him there he might have information on other murders if the state was willing to make a deal). Again, it would provide an opportunity to evaluate the strength of the state's case against the innocent accused, which can factor in the timing of the disclosure.

tual innocence claims are a steep climb and find little support in the courts in the face of a constitutionally fair trial.[238] Lawyers privy to exonerating information have few options with hopes for success, thus disinclining them from coming forward. The North Carolina attorney who attempted to testify about his deceased client's confession in order to free Lee Wayne Hunt from his sentence for murder was rebuffed by the prosecution and the courts.[239] Hunt's remaining option, after a series of failed post-conviction motions,[240] was to submit his claim to the North Carolina Innocence Inquiry Commission.[241] Clemency or pardon applications are another route, but they have as little chance of succeeding as an actual innocence claim.[242]

The Innocence Commission is an excellent idea, a kind of specialty court providing effective remedies while addressing the causes of con-

238. *See generally* Brandon L. Garrett, *Claiming Innocence*, 92 MINN. L. REV. 1629, 1632 (2008) ("Our system remains at a crossroads, not yet fully adopting an approach that directly assesses the probative impact of evidence of innocence, but failing to discard many of the traditional limitations on innocence claims.").

239. *See* Liptak, *supra* note 210 ("Mr. Cashwell, Mr. Hughes's client, committed suicide in 2002, more than a decade after he pleaded guilty to the 1984 killings of Roland and Lisa Matthews. Prosecutors had maintained that Mr. Hunt also participated in the killings, and Mr. Cashwell did nothing to refute them. But Mr. Hughes said that Mr. Cashwell confessed in private that he single-handedly killed the couple after an argument over whether a television was playing too loud. 'Lee Wayne Hunt had nothing to do with it,' Mr. Hughes said.").

240. *See* John Solomon, *The End of a Failed Technique — But Not of a Prison Sentence*, WASH. POST, Nov. 18, 2007, http://www.washingtonpost.com/wp-dyn/content/article/2007/11/17/AR2007111701641.html. In 1986, bullet matching was the principle forensic evidence used to corroborate the circumstantial double homicide charges against Hunt. *Id.* "In 2005, the [FBI] bureau ended its bullet-lead-matching technique after experts concluded that the very type of testimony given in Hunt's case — matching a crime-scene bullet to those in a suspect's box—was scientifically invalid." *Id.* Nonetheless, the courts refused to grant him a new trial, as well as rejecting the private confession of his deceased co-perpetrator. *Id.*

241. Liptak, *supra* note 210 ("Mr. Hunt has one novel avenue left — applying to the recently created North Carolina Innocence Inquiry Commission. That board makes recommendations to a three-judge panel that can free exonerated prisoners."); *see also* Bkrueger, *Hunt Appeals to Innocence Commission*, NEWS & OBSERVER.COM (Mar. 31, 2008), http://projects.newsobserver.com/under_the_dome/hunt_appeals_to_innocence_commission ("After losing his final appeal in state court, Lee Wayne Hunt — who says he was wrongly convicted and imprisoned for a double murder — has submitted his case to the N.C. Innocence Inquiry Commission, said Rich Rosen, a law professor at UNC-Chapel Hill handling the case, reports Titan Barksdale."). *See generally* N.C. INNOCENCE INQUIRY COMMISSION, http://www. innocencecommission-nc.gov/index.html (last visited Apr. 1, 2011) (providing a forum for post-conviction innocence claims in North Carolina).

242. *See* Rachel E. Barkow, *The Politics of Forgiveness: Reconceptualizing Clemency*, 21 FED. SENT'G REP. 153 (2009) ("Recent decades have seen a precipitous drop in the number of clemency requests being granted by state executives and the president. The number of pardons has decreased, and commutations are particularly rare, with the president and the vast majority of states governors granting only a handful of commutations in the past decade — all while the number of people being sentenced escalates at a rapid rate." (footnotes omitted)).

stitutionally sound but factually wrong verdicts.[243] The Commission or Innocence Court is only one model that straddles between judicial post-conviction review and discretionary executive clemency.[244] It is equally necessary to revamp the existing laws to adequately address the unique scenarios in which exculpatory evidence emerges. Perhaps a confessional for lawyers, where they could anonymously divulge exonerating facts learned from their clients in a discipline free zone, suggested by the outcomes in *McClure* and *Vespucci*. Still, an anonymous tip line is no guarantor of the client's privacy. A connection between the disclosure, the guilty client, and the attorney could somehow leak out uncovering their identities. In which case, there should be a recognized protection for the original source of the information, a kind of peace bond, in the form of transactional immunity.[245] It is not a free pass, although it shields a living defendant from criminal prosecution,[246] the same outcome would have been true if it were a post-

243. *See generally Criminal Justice Reform Commissions*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/fix/Innocence-Commissions.php (last visited Apr. 1, 2011) (identifying and describing various state-formed commissions, created to help ensure the fairness and accuracy of the administration of criminal justice in those states); *Innocence Commissions in the U.S*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Innocence_Commissions_in_the_US.php (last visited Apr. 1, 2011) ("In order to identify, isolate, and address the flaws in the criminal justice system that lead to wrongful convictions, several states have formed commissions—Innocence Commissions or Criminal Justice Reform Commissions—that help ensure the fairness and accuracy of the administration of criminal justice in that state.").

244. *See generally* David Wolitz, *Innocence Commissions and the Future of Post-Conviction Review*, 52 ARIZ. L. REV. (forthcoming 2010), http://scholarship.law.georgetown.edu/cgi/viewcontent.cgi?article=1336&context=facpub ("By itself, the commission approach cannot solve the Innocence Problem, for the sources of wrongful conviction are too diverse, and not all errors can be caught after trial. But North Carolina's approach has the potential to recast the debate about the Innocence Problem from one about Constitutional rights, the limits of habeas corpus, and judicial resources to a pragmatic discussion of how an expert agency can best deliver accurate, efficient, and accountable results. The North Carolina commission, along with the process that brought it into existence, ought to serve as a model for other states as they wrestle with the difficulties of the Innocence Problem.").

245. Depending on the merits of the prosecutor's evidence, the confession-corroboration rule might block a successful case against a new defendant despite their admission of guilt, thus deflecting the onus of granting transactional immunity. *See* Smith v. United States, 348 U.S. 147, 153 (1954) ("The general rule that an accused may not be convicted on his own uncorroborated confession has previously been recognized by this Court, and has been consistently applied in the lower federal courts and in the overwhelming majority of state courts. Its purpose is to prevent 'errors in convictions based upon untrue confessions alone'; its foundation lies in a long history of judicial experience with confessions and in the realization that sound law enforcement requires police investigations which extend beyond the words of the accused." (citations omitted)).

246. Transactional immunity, the equivalent of an acquittal in a criminal trial, does not leave victims or their families without remedies. *See, e.g.*, Rufo v. Simpson, 103 Cal. Rptr. 2d 492 (Ct. App. 2001)("In a prior criminal trial, [Orenthal James] Simpson was acquitted of the murders of Nicole [Brown Simpson] and Ronald [Goldman]. In the present civil trial, the jury concluded that Simpson killed Nicole and Ronald." *Id.*

mortem disclosure. In either case the confessor would be beyond criminal legal process.

In addition, the rules for the admission of newly discovered evidence ought to be modified to embrace exculpatory confessions revealed in this way.[247] In *Macumber*, the judge disallowed lawyer testimony repeating an admission made by his deceased client exculpating another. And in the Lee Wayne Hunt case, the court forewarned the lawyer that he faced disciplinary charges for attempting to do the same. However, in cases such as *Morales* and *Vespucci*, the courts were willing to consider the evidence and hear testimony before reaching a conclusion. This type of inconsistency in approaches only leads to confusion and anxiety for counsel already under enormous pressure in trying to determine the best course of action. In these situations, attorney-client privilege and the ethical constraint of confidentiality were the lynchpin issues. A statute that permitted the admission of posthumous exculpatory evidence for *ex parte* review, similar to the one conducted in *Swidler & Berlin*, would at least provide an opportunity for the statement to be entered into the record. This would give the innocent accused or convicted the chance to raise legal challenges seeking admission of that disclosure through post-conviction motions based on newly discovered evidence; presented in a petition to an Innocence Commission; or submitted as part of a plea for clemency or release on parole. A post-mortem release allows an attorney to reveal a client's secret after their death, but counsel is not immortal, and someone will administer that crucial information after she is gone.[248] Placing that information before the

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at 497. The appeals court affirmed the trial judge's judgment in favor of the plaintiffs and damage awards. *Id.* "Sharon Rufo and Fredric Goldman, the parents and heirs of Ronald Goldman, were awarded $8.5 million compensatory damages on their cause of action for wrongful death. Fredric Goldman as personal representative of the estate of Ronald Goldman was awarded minor compensatory damages and $12.5 million punitive damages on the survival action, the cause of action Ronald Goldman would have had if he survived. Louis H. Brown as personal representative of the estate of Nicole Brown Simpson was awarded minor compensatory damages and $ 12.5 million punitive damages on the survival action, the cause of action Nicole Brown Simpson would have had if she survived." *Id.* (citations omitted).).

247. *See, e.g.*, Daniel S. Medwed, *California Dreaming? The Golden State's Restless Approach to Newly Discovered Evidence of Innocence*, 40 U.C. DAVIS L. REV. 1437, 1477 ("As a result, California should weigh the option of developing a single remedy for newly discovered non-DNA evidence claims — a remedy that fuses attributes of the new trial, habeas corpus, and *coram nobis* procedures. New York already embraces this type of model. In the past, New York recognized a litany of post-trial remedies, such as common law *coram nobis* and motions for a new trial on the grounds of newly discovered evidence. The New York state legislature passed article 440 of the Criminal Procedure Law in 1970 to 'collectively . . . embrace all extant non-appellate post-judgment remedies and motions to challenge the validity of a judgment of conviction.'" (footnotes omitted)).

248. Lawyers are cautioned to make some provision for the transfer and responsibility of client files after a firm dissolves or an attorney dies. *See, e.g.*, Terence M. Troyer, *Picking up the Pieces After the Death or Disability of a Lawyer*, MASS.GOV

court, where testimony can be transcribed and affidavits filed,[249] removes uncertainty and risk that might occur when all the secret sharers have passed on.[250]

Preserving the information is paramount. Alton Logan's lawyers, along with his co-defendant's counsel, wrote out an affidavit and locked it away for twenty-six years. In *Belge*, the defense lawyer visited the location where Garrow claimed the undiscovered bodies were hidden. He might have photographed the scene or preserved his observations in writing. Moreover, he might have taken several precautionary steps, such as seeking the counsel of jurists, legal scholars, and bar ethics committees before proceeding as in *Vespucci*. Conveying the information subtly to the prosecution through plea negotiation as in *McClure*, or even the private assurance between co-defense counsels as in *Ennis*, might be the next stage. Inviting an *ex parte* review by the court in the innocent person's case might be another route, as in *Swidler & Berlin*, where counsel could get an advanced ruling, or a hearing to preserve the statement, which occurred in *Morales*. Each choice would have to be tempered by the outcome for the guilty cli-

(Feb. 2002), http://www.mass.gov/obcbbo/pieces.htm ("The duties of a commissioner [appointed by the Supreme Judicial Court] who takes charge of a deceased or disabled lawyer's practice are set out in summary fashion in S.J.C. Rule 4:01, § 14 and apply by analogy to any lawyer performing a similar function. That rule specifies three general tasks: (1) to make an inventory of the files, (2) to take appropriate action to protect the interests of clients, and (3) to take appropriate action to protect the interests of the lawyer. In addition, the rule directs the commissioner not to 'disclose any information contained in any files . . . without the consent of the client . . . except as necessary to carry out the order of this court.'"). The sage wisdom for preserving confidential client files applies with greater force to courts where they can be accessed by a convicted person attempting to prove their innocence.

249. This also supports the argument for permanent retention of court files in criminal cases, since a post-conviction motion based on newly discovered evidence can be raised at almost any time. *See generally Records Retention and Disposition Schedule: Criminal Records of the Supreme and County Courts*, N.Y. ST. UNIFIED CT. SYS. (May 2009), http://www.courts.state.ny.us/admin/recordsmanagement/court_records/SUPERIOR%20CRIMINAL%20MAY%202009%20REVISION%20-%20COLOR%20ADOBE%20PDF%20VERSION.pdf ("Post-1949 [felony] cases with the exception of Capital Cases which result in a conviction: Retain for fifty years from date of disposition, then destroy, except for cases to be retained as a permanent research sample."). *Cf. Evidence Preservation*, THE INNOCENCE PROJECT, http://www.innocenceproject.org/fix/Evidence-Handling.php (last viewed on March 27, 2011). And the death of a private confessor, their attorney, and potential independent witnesses to the statement will likely result in the confession fading into oblivion under the current records retention schedules for attorneys. *See generally* Lee R. Nemchek, *Records Retention in the Private Legal Environment: Annotated Bibliography and Program Implementation Tools*, 93 LAW LIBR. J. 7 (2001).

250. This will also help the prosecution in their efforts to prevent spoliation of *Brady* evidence. *See* Cynthia E. Jones, *A Reason to Doubt: The Suppression of Evidence and the Inference of Innocence*, 100 J. CRIM. L. & CRIMINOLOGY 415, 423 (2010) ("The *Brady* doctrine imposes an affirmative duty on the trial prosecutor to investigate, *preserve*, and disclose favorable information located in the prosecutor's files, as well as information in the possession of any member of the prosecution team." (emphasis added) (footnotes omitted)).

ent, along the lines of the advice that the legal aid attorney in *Morales* gave to Fornes before coming forward. In multiple offender crimes, a confession might do no more than add another name to the indictment. These disclosures would be most effective in binary situations, where only one or the other could have been responsible for the crime.

VIII: TRANSACTIONAL IMMUNITY OR THE INCLUSIONARY RULE[251]

Assuming the absence of client cooperation or a post-mortem release, the client whose lawyer reveals an incriminating confidence to preserve another's innocence is now subject to prosecution, or at least investigation, concerning that crime. However, from a systemic point of view, there are mechanisms that can rebalance the interests of justice. For example, transactional immunity would compensate the confessing client for the collective loss of: (1) Fifth Amendment privilege against incrimination;[252] (2) confidentiality and attorney-client privilege; (3) right to counsel; (4) right to present a defense; (5) loyalty of counsel; (6) confidence in her attorney; and (7) faith in due process and the justice system.[253] Still, this would only be an adjunct to fundmental changes that expand the scope of safeguards to prevent wrongful prosecutions in the first instance, such as increased oversight

251. A grant of transactional immunity allows a witness to give exculpatory evidence without fear of prosecution or loss of Fifth Amendment privilege. It represents a rule of inclusion, encouraging the revelation and admission of exonerating testimony. Unlike rules of exclusion that keep out otherwise relevant and credible evidence because of a constitutional violation, this rule would uphold constitutional values, i.e., Fifth Amendment and Due Process, by opening the door to confessions for the purpose of preventing a wrongful conviction and proving actual innocence.

252. *But see* Kastigar v. United States, 406 U.S. 441, 453 (1972) ("We hold that such immunity from use and derivative use is coextensive with the scope of the privilege against self-incrimination, and therefore is sufficient to compel testimony over a claim of the privilege. While a grant of immunity must afford protection commensurate with that afforded by the privilege, it need not be broader. Transactional immunity, which accords full immunity from prosecution for the offense to which the compelled testimony relates, affords the witness considerably broader protection than does the Fifth Amendment privilege.").

253. *Cf.* Simmons v. United States, 390 U.S. 377, 394 (1968) ("In these circumstances, we find it intolerable that one constitutional right [defendant's standing to raise a Fourth Amendment claim and testify at a suppression hearing] should have to be surrendered in order to assert another [Fifth Amendment privilege against self-incrimination at trial]. We therefore hold that when a defendant testifies in support of a motion to suppress evidence on Fourth Amendment grounds, his testimony may not thereafter be admitted against him at trial on the issue of guilt unless he makes no objection.").

of criminal cases[254] and effective remedies for violations of due process.[255]

It might be possible to balance the equities for disclosing client confidences, in order to free an innocent accused, through transactional immunity. It affords the same level of protections for the living client that the post-mortem release provides. "Use immunity" would prohibit the statements from coming in as direct evidence, but once the client was on the prosecution's radar, they could build a case without them.[256] In view of the sacrifices and the risk of harm to an innocent accused, only blanket immunity will suffice to provide the confessing client whose statements are revealed through their attorney with the same level of safeguards found in the Fifth Amendment, due process, and the attorney-client relationship.[257]

As a starting point, a prosecutor might be compelled to grant use immunity to defense witnesses possessing exculpatory information,

254. *See, e.g.*, Kathleen M. Ridolfi & Maurice Possley, *Preventable Error: A Report on Prosecutorial Misconduct in California 1997-2009*, N. CAL. INNOCENCE PROJECT, SANTA CLARA U. SCH. L., 44–45 (Oct. 2010) (describes the roles of prosecutors, courts and the bar in addressing prosecutorial misconduct).

255. *See, e.g.*, Sonja B. Starr, *Sentence Reduction as a Remedy for Prosecutorial Misconduct*, 97 GEO. L.J. 1509, 1511 (2009)(The author proposes a compromise solution to prosecutorial misconduct in cases where the faults were procedural and independent of factual innocence: "To address this problem, this Article proposes adding to courts' remedial toolkit an intermediate remedy for prosecutorial misconduct: reduction of the defendant's sentence. I do not propose sentence reduction where misconduct has undermined the reliability of the conviction. In such cases, the defendant should not be sentenced at all. But misconduct often inflicts serious dignitary and emotional harms independent of the effect on the verdict. For instance, a defendant who learns that the prosecution has hidden potentially exculpatory evidence may suffer lifelong distrust and resentment of the government, even if the defendant discovers the evidence in time to avoid any effect on the verdict. Likewise, long delays in trial can cause major stress and inconvenience for defendants. And even when misconduct is truly 'harmless' to the particular defendant, sanctions may be necessary to condemn it effectively and to deter its repetition. Sentence reduction could serve these corrective, expressive, and deterrent purposes." *Id.*).

256. *See, e.g.*, United States v. Herman, 589 F.2d 1191, 1202 (3d Cir. 1978) ("The legislative history of the [federal] immunity statutes also shows no sign of a purpose to benefit defendants. The narrow purpose of the use immunity provisions was twofold: to eliminate those federal immunity statutes that required conferral of transactional rather than use immunity and to reduce the number and complexity of immunity statutes. The shift to use immunity was intended to take advantage of the more favorable view of use immunity expressed by the Supreme Court in *Murphy v. Waterfront Commission*. The clear intent of the shift to use immunity was to make it less costly for the United States Attorney to grant immunity, by allowing for fuller prosecution of both the defendant and the immunized witness. In broader perspective, it is apparent that the immunity statute was part of a massive program of legislation whose central purpose, as its opponents recognized, was to strengthen the hand of the prosecution and to weaken that of the criminal defendant, in many cases to the full extent permitted by the protections of the Bill of Rights." (citations and footnotes omitted)).

257. In other words, the remedy would be to create a "Fifth Amendment plus" protection for confessing defendants that will help to maintain the very foundational rights undergirding the presumption of innocence, proof beyond a reasonable doubt and due process.

under the right circumstances. Judge Garth of the Third Circuit noted two due process theories that would apply:

> (1) [I]n cases where government actions denying use immunity to defense witnesses were undertaken with the "deliberate intention of distorting the judicial fact finding process," the court has the remedial power to order acquittal unless on retrial the government grants statutory immunity. (citation omitted).
> (2) [I]n certain cases a court may have "inherent authority to effectuate the defendant's compulsory process right by conferring a judicially fashioned immunity upon a witness whose testimony is essential to an effective defense."[258]

The statutory remedy for prosecutorial misconduct or distortion of the trial process, where the prosecution refused to grant immunity for defense witnesses offering relevant or exculpatory evidence, was a new trial.[259] But where "unconstitutional abuse" occurred, i.e. barring exonerating evidence, due process empowered the court to grant a form of "judicially fashioned immunity."[260]

The basis of this formulation was derived from the constitutional right to present a defense, and hence exculpatory evidence,[261] rooted in *Chambers* and other pillars, such as *Gideon*[262] and *Brady*.[263] The key difference from those cases is that a new trial would only bring the parties back to square one, i.e., inadmissible exonerating testimony barred by Fifth Amendment privilege.

Preceding the grant of immunity and admission of defense evidence, the Court of Appeals suggested that certain safeguards had to be taken: "[I]mmunity must be properly sought in the district court; the defense witness must be available to testify; the proffered testimony must be clearly exculpatory; the testimony must be essential; and there must be no strong governmental interests which countervail against a grant of immunity."[264] The problem faced in some of the

258. Virgin Islands v. Smith, 615 F.2d 964, 966 (3d Cir. 1980) United States v. Herman, 589 F.2d 1191, 1204 (3d Cir. 1978) (holding "the evidentiary showing required to justify reversal on that ground must be a substantial one. The defendant must be prepared to show that the government's decisions were made with the deliberate intention of distorting the judicial fact finding process. Where such a showing is made, the court has inherent remedial power to require that the distortion be redressed by requiring a grant of use immunity to defense witnesses as an alternative to dismissal." The burden had not been met in this case.).

259. *Id.*

260. *Id.* at 969–70. ("First the need for 'judicial' immunity is triggered, not by prosecutorial misconduct or intentional distortion of the trial process, but by the fact that the defendant is prevented from presenting exculpatory evidence which is crucial to his case. Second, the immunity granted is court decreed immunity; it is not achieved by any order directed to the executive, requiring the executive to provide statutory immunity.")

261. *Id.* at 971.

262. Gideon v. Wainwright, 372 U.S. 335 (1963).

263. Brady v. Maryland, 373 U.S. 83 (1963).

264. *Smith*, 615 F.2d at 972 (footnote omitted).

post-mortem admission cases was addressed by the Third Circuit, namely defining the nature of the evidence and its potential benefit in exculpating the defendant: "Immunity will be denied if the proffered testimony is found to be ambiguous, not clearly exculpatory, cumulative or if it is found to relate only to the credibility of the government's witnesses."[265] Another basis for denying immunity would be a "strong countervailing interest" presented by the government.

The ability to prosecute the defense witness (confessing client) would be influenced by a string of variables, only a few of which were raised by Judge Garth:

In many instances, use immunity, which was all that was sought here and is all that is constitutionally required, *Kastigar v. United States*, 406 U.S. 441, 92 S. Ct. 1653, 32 L. Ed. 2d 212 (1972), is virtually costless to the government. For example, the government may have already assembled all the evidence necessary to prosecute the witness independent of the witness' testimony. Or the government may be able to "sterilize" the testimony of the immunized witness and so isolate it from any future testimony of the witness that it would not trench upon any of the witness' constitutional rights if he were subsequently to be prosecuted. *See Kastigar v. United States*, supra. Finally, the government may seek a postponement of the defendant's trial so that it may complete its investigation of the defense witness who is the subject of an immunity application. While these options are not intended to be all inclusive, if any of these options are available to the government, then it would appear to us that the government would have no significant interests which countervail the defendant's due process rights. Any interest the government may have in withholding immunity in such a situation would be purely formal, possibly suspect and should not, without close scrutiny, impede a judicial grant of immunity.[266]

The principal interest of the prosecution is justice.[267] Therefore, the court's reasoning can be taken further. There is no supportable "countervailing interest" for prosecuting an innocent person. Excluding the confession of a third party to maintain the integrity of the prosecutor's case is less important than the overriding due process interest in halting those prosecutions before an innocent defendant experiences "substantial harm." Under the test described above and on due process grounds, when a third party's confession would provide a zero sum result, complete exoneration for the innocent accused, then there is no rationale for withholding immunity, either by the prosecution or the court. Only a "mechanical application" of procedure

265. *Id.* (footnote omitted).

266. *Id.* at 973 (footnote omitted).

267. *See Brady*, 373 U.S. at 87 ("Society wins not only when the guilty are convicted but when criminal trials are fair; our system of the administration of justice suffers when any accused is treated unfairly.").

would allow conviction of the innocent in the face of unambiguous exculpatory evidence, e.g., DNA exonerations.

Finally, assuming the privilege and hearsay objections have been overcome, what should be the remedy? Judge Garth pointed out the inefficacy of a new trial unless the admissibility issues were resolved. Depending on the stage of the case, the prosecution could withdraw the indictment or agree to a dismissal in the interests of justice. If it went to trial, the jury might still doubt the credibility of the admission[268] and find the accused guilty—leaving the judge to direct a verdict. Barring success at any of these pretrial stages, the confession evidence could wend its way through appeals, writs, parole board hearings, and eventually clemency applications, slowly losing vitality on its long climb through the post-conviction procedural morass.

CONCLUSION

The Rules of Professional Conduct, bar committee ethics opinions, court rulings, and anecdotal cases paint a complex mosaic for an attorney newly confronting a client who reveals responsibility for another's criminal charge. Judging by the cases already discussed, lawyers have taken different and difficult paths at this ethical juncture. Having overcome the initial hurdles of evaluating and investigating the credibility of the client's confession, and deciding that the innocent person faces "reasonably certain death or substantial harm," counsel must set about choosing a method to deliver the information. The client will determine this in large part.[269] A living confessor might give informed consent, outlined by the Ninth Circuit in *McClure*, or agree to sign a post-mortem release as in Alton Logan's

268. A client taking the stand, as Fornes did in *Morales*, will likely be more persuasive than a second hand statement from an attorney. And in either case, the witness's credibility in the eyes of the jury is not a foregone conclusion regardless of their motive in testifying. *Cf.* WITNESS FOR THE PROSECUTION (MGM Pictures 1957) (portraying a wife who exculpates her husband by first becoming a witness against him in a murder trial and then setting herself up for impeachment to discredit her testimony).

269. *See generally* J. Vincent Aprile II, *Confidential Information and Wrongful Convictions*, 25 CRIM. JUST. 50, 51 (Summer 2010) ("[C]ounsel must place the client's interests first and use counsel's experience and expertise to design alternative approaches to protect the client from adverse fallout from the client revealing that he or she was the perpetrator and the convicted individual is factually innocent. Immunity from prosecution or a gubernatorial pardon or commutation are but some approaches for counsel to consider and investigate as a means of protecting the client. Faced with a client who is unwilling to disclose committing the crime for which another has been sentenced, counsel should not abandon the client but agree to maintain the client's confidences while working to create a 'win-win' situation where the client's disclosures will ensure the exoneration of the wrongly convicted individual but protect and, if possible, benefit the client.").

case. However, if the client chooses not to act against his or her interests, then the lawyer will take the next step alone.[270]

In every case where a client confesses to a crime attributed to another, the lawyer is confronted by the trilemma:

(1) **Evaluation:** The client's story must be credible. The attorney has a duty to reasonably investigate the facts, principally for his client's sake; obtain some kind of confirmation; and assess the client's motivation and mental state behind making the disclosure. In the last analysis, the client's credibility has to rest on some standard that will convince the attorney she is being sincere, e.g., beyond a reasonable doubt.

(2) **Analysis:** Counsel must reconnoiter their position from an ethical standpoint, i.e., confidentiality and duty of loyalty; an evidentiary perspective, i.e., attorney-client privilege and hearsay; and finally, the systemic impact of preventing wrongful convictions and unjust punishments (or executions), of innocent parties.

(3) **Decision:** Under what circumstances can and should an attorney make this disclosure? Several factors to be addressed will be the information's value, would it result in exculpation or only incriminate the client-confessor; admissibility, will a jury get to hear the statement over privilege and hearsay objections; and lastly, persuasiveness, what impact might it have if any, perhaps the client will be unconvincing? The confession might be a total acceptance of responsibility for the crime or only provide partial exculpation of another, making the outcome for total exoneration less certain.

The cross-section of ethics where an attorney's obligation to their client collides with their sense of duty to the innocent highlights the need for equity in criminal practice.[271] While the Model Rules of Pro-

270. A client is not obligated to adopt his lawyer's code of ethics or morale stance. And it is reasonable for someone already facing criminal charges to avoid the risk of additional punishment. When there is a conflict with the client who will not agree to disclosure, limited or full or post-mortem, the attorney's decision to act contrary to those wishes is one of the most difficult decisions to face. *Cf.* John H. Blume, *Killing the Willing: "Volunteers," Suicide and Competency*, 103 MICH. L. REV. 939, 939–40 (2005) ("Since *Gregg v. Georgia* ushered in the 'modern era' of capital punishment, there have been 885 executions, 106 of which, including the first, involved 'volunteers,' or inmates who waived their appeals and permitted the death sentence to be carried out. Moreover, for every successful volunteer, there have been numerous death-row inmates who took affirmative steps to waive their appeals but subsequently changed their minds, and even more who contemplated forgoing additional legal challenges to their death sentence and submitting to execution. Every death-row volunteer inevitably presents us with the following question: Should a death-row inmate who wishes to waive his appeals be viewed as a client making a legal decision to accept the justness of his punishment, or as a person seeking the aid of the state in committing suicide?" (footnotes omitted)).

271. *See, e.g.*, *In re* Flournoy, 1 Ga. 606, 607 (1846) ("The effect of a pardon is, to restore the citizen to the condition in which he was before conviction; it proceeds upon the idea of innocence. The power is given to the Executive to relieve against the possible contingency, under all systems of laws, of a wrongful conviction. And as all

fessional Conduct have changed and liberalized the approach to confidentiality, Rule 1.6(b)(1) has not gone far enough to guide lawyers confronted with private confessions exonerating third parties. Attorneys are forced to fall back on their own resources and select from a cafeteria of options that often confound their best intentions. Every confidentiality problem implicates evidentiary and constitutional issues. And the complexity of this scenario makes it even harder to find a resolution that preserves the innocent and guards the sacred tenet of a counsel's duty of loyalty to their confessing client.

This scenario will become more common as we have entered an age of extreme information sharing, where lawyers will be able to learn incriminating information about their clients that has not been volunteered. Thus, an attorney may be put in the position of asking her client about a confession to another's crime that has been posted on Facebook.[272] It is an abridgment of reason to reach a categorical conclusion about how to respond to situations where two equally valid principles are at stake. Confidentiality and innocence should not be held hostage by each other. The remedy lies in improving the system of justice so that the principal responsibility for preventing and righting wrongful convictions is not shifted from the prosecution to the defense. Otherwise, the dividends of undivided loyalty to clients, preservation of their confidences, and protection of their right to counsel will be lost.

The defense attorney embargoed from revealing the confidences of her guilty client has been transformed into a safety valve for the government. The case against the innocent accused can proceed without any knowledge that this exculpatory evidence exists, or when it does come to light, with very little chance of it being admissible. But the sanctum of the attorney-client relationship should not be breached to remedy deficiencies in the justice system. The metrics of due process and culpability are seldom black and white. This is why all prosecutions require heightened vetting and unencumbered post-conviction

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good governments are founded upon essential *equity*, the sovereign authority will not permit, so far as it can be prevented consistently with the maintenance of general laws, injustice to be done." (emphasis added)).

272. *See generally* Thomas G. Frongillo & Daniel K. Gelb, *It's Time to Level the Playing Field — The Defense's Use of Evidence from Social Networking Sites*, CHAMPION (Aug. 2010), http://www.nacdl.org/public.nsf/01c1e7698280d20385256d0b00789923/363336b5ff64b443852577c100550272 ("One of defense counsel's first tasks during an investigation or case is to learn whether the client has used any social networking sites and posted any harmful information on them. With the client's assistance, defense counsel should review the information on the client's past and current social networking accounts."). Ken Strutin, *Social Media and the Vanishing Points of Ethical and Constitutional Boundaries*, 31 Pace L. Rev. 228, 254 (2011)("Similarly, information impeaching a witness or providing leads to exculpatory evidence might only be found in unique places like Facebook or MySpace. Someone's online profile might be the only place that an inconsistent statement or contradictory version of testimony can be found, or even a confession pointing to someone else's guilt.").

review, without reliance on a safety-valve that could undermine a foundation of the justice system.[273]

The vexatious problems created by this scenario should be the launching point for systemic reform. The impetus would lead to expanding the scope of post-conviction review, innocence courts, and safe harbors for uncovering exculpatory evidence, without requiring inculpation of the confessor or putting her counsel at risk of ethical and civil liability. The confessor's rights under the Fifth and Sixth Amendments, no less than the duties imposed on her attorney of loyalty and confidentiality instilled by the Rules of Professional Conduct, dictate the need for added protections, such as transactional immunity, which will assure a constitutionally sanctioned flow of information. Due process demands that the innocence of an accused should not be constrained by the ensigns of another attorney's relationship with her client. And a criminal defense attorney, like a cleric, is in a position to receive all of a client's secrets. But this privity does not justify conscripting attorneys into the role of a whistleblower. It is a delicate balance and the blurred lines left by Rule 1.6(b)(1) and current practices demand a clear approach that lifts the onus from defense counsel and the sacrosanct relationship as her client's advocate and places it squarely on the justice system as a whole.

273. Justice Rehnquist in one decision wrote about the efficacy of executive clemency as a safety valve or "fail safe" for unjust convictions. *See* Herrera v. Collins, 506 U.S. 390, 415 (1993). This rationalized the refusal of the Court to accept freestanding claims of innocence based on factual errors regardless of constitutional infirmities. However, the anemic use of the pardon power demonstrates the fault in this approach. *See* Barkow, *supra* note 241, at 153.