Marquette Law Review

Volume 83
Issue 4 *Summer 2000*

Article 5

Overriding the Posthumous Application of the Attorney-Client Privilege: Due Process for a Criminal Defendant

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OVERRIDING THE POSTHUMOUS APPLICATION OF THE ATTORNEY-CLIENT PRIVILEGE: DUE PROCESS FOR A CRIMINAL DEFENDANT

I. INTRODUCTION

Imagine the following scenario.[1] A client tells her attorney in confidence that she has committed a crime. The client dies before the government begins any prosecution for the crime. Later, the government institutes a criminal prosecution against another person for the crime at issue. The lawyer for the deceased becomes aware of the prosecution either because the criminal defendant attempts to call the lawyer as a witness or through other channels known or unknown to the defendant. In either case, the lawyer cannot disclose this information because of a duty of confidentiality to the deceased client,[2] and because of the attorney-client privilege.[3]

The above scenario serves as a hypothetical in law school ethics courses and also occurs in legal practice.[4] In practice, the quality of the

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1. The idea of a hypothetical as an introduction of this Comment was partly inspired by an excellent hypothetical in another student written article on this topic. *See* Brian R. Hood, Note and Comment, *The Attorney-Client Privilege and a Revised Rule 1.6: Permitting Limited Disclosure After the Death of the Client*, 7 GEO. J. LEGAL ETHICS 741, 741-42 (1994).

2. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.6 (1998) (hereinafter Model Rule 1.6).

3. *See, e.g.*, Upjohn Co. v. United States, 449 U.S. 383 (1981); Hunt v. Blackburn, 128 U.S. 464 (1888). The law of every state recognizes a testamentary exception to the attorney-client privilege. *See, e.g.*, Swidler & Berlin v. United States, 118 S.Ct. 2081, 2085 n.2 (1998). The Court acknowledged that California is somewhat of an anomaly. *See id.* California has codified such a testamentary exception, but, unlike other states, the California "statute is exceptional in that it apparently allows the attorney to assert the privilege only so long as a holder of the privilege (the estate's personal representative) exists, suggesting the privilege terminates when the estate is wound up." *Id.* (construing CAL. EVID. CODE §§ 954, 957 (West 1995)). Nationwide, the exception generally allows the personal representative of a decedent's estate to waive the privilege on behalf of the decedent. *See, e.g., Swidler & Berlin*, 118 S.Ct. at 2085 n.2. This exception is justified on the basis that it furthers the intent of the decedent-client. *See, e.g., id.*; Glover v. Patten, 165 U.S. 394, 406-408 (1897). The fact that an exception to the attorney-client privilege does exist is obviously important, as is the rationale behind such an exception. However, this Comment will argue for an override of the attorney-client privilege in criminal cases, not an exception. *See infra*, Parts IV through VI.

4. *See* Arizona v. Macumber, 544 P.2d 1084 (Ariz. 1976); New York v. Modzelewski, 611 N.Y.S.2d 22 (N.Y. 1994).

information expressed by the decedent-client to her attorney may vary. A client's communication might range from that which will surely exculpate a current defendant to information that might minimize a defendant's involvement in a crime. In addition, an attorney might not know how such a client communication would affect a current defendant, if at all.[5] Nonetheless, a criminal defendant may have a strong interest in the information.[6] What is a lawyer to do knowing that another person faces criminal sanctions, possibly severe ones, for a crime likely committed by a deceased client? The current answer is that an attorney is prohibited from disclosing the confession of the deceased client.[7] The question is troubling because it seems fundamentally unfair that an attorney, as an officer of the court,[8] would continue to shield a deceased client from criminal liability instead of trying to clear a wrongfully accused defendant by revealing the deceased client's communication.[9]

The attorney-client privilege ceases to prevent a criminal defendant, or a tribunal on behalf of the defendant, from obtaining exculpatory information that a lawyer learned from a deceased client. A lawyer should also have the ethical permission and duty to come forth to share such information. The thesis of this Comment is that the attorney-client privilege and the duty of confidentiality succumb to the constitutional rights of a criminal defendant in such a situation as the hypothetical one.[10] At the very least, failure by the prosecution to reveal exculpatory

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5. *See In re* John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990); South Carolina v. Doster, 284 S.E.2d 218 (S.C. 1981); *Swidler & Berlin*, 118 S.Ct. 2081.

6. *See John Doe*, 562 N.E.2d at 69; *Doster*, 284 S.E.2d at 218; *Swidler & Berlin*, 118 S.Ct. at 2081.

7. *See Macumber*, 544 P.2d at 1086; *Modzelewski*, 611 N.Y.S.2d at 23; *In re John Doe Grand Jury Investigation*, 562 N.E.2d at 69; *Doster*, 284 S.E.2d at 219; *Swidler & Berlin*, 118 S.Ct. at 2088.

8. *See* MODEL RULES OF PROFESSIONAL CONDUCT *Preamble* (1) (1998).

9. Another author published a better statement to describe what seems wrong about such a situation:

> There is something unsettling about the legal profession's priorities, which allow attorneys to break the confidence when the client consents, when the client discloses an intent to commit a crime in the future, or when disclosure is necessary to *collect a fee* or to *defend oneself* against an accusation of wrongful conduct but do not allow disclosure to protect an innocent person's life.

Julia-Thomas Fishburn, Comment, *Attorney-Client Confidences: Punishing the Innocent*, 61 U. COLO. L. REV. 185, 202 n.90 (1990).

10. This idea was conceived and suggested by Gregory J. O'Meara, S.J., former Assistant Visiting Professor at Marquette University Law School.

evidence in a criminal prosecution violates the due process requirements of the Fifth and Fourteenth Amendments.[11] More specifically, it is a violation of the *Brady* doctrine[12] for a prosecutor to fail to reveal information that "is material either to guilt or to punishment."[13]

This Comment will argue that it is a *Brady* violation for a prosecutor to prevent a defendant from either learning of information gained by an attorney from a now-deceased client or by objecting to such testimony in court. Moreover, a court also commits a *Brady* violation by refusing to admit such testimony as evidence or by refusing to compel such testimony by a lawyer. Such an argument includes an expansive view of the *Brady* doctrine, extending the doctrine beyond the mere suppression of evidence to include the courtroom and the prevention of evidence from entering a criminal proceeding.

In addition, to ensure that an attorney has guidance in such a situation, Model Rule 1.6 should require that a lawyer make such a disclosure if the lawyer knows or reasonably should know that such information could "potentially exculpate"[14] a criminal defendant.

Part II to follow discusses the United States Supreme Court's most recent examination of the posthumous application of the attorney-client privilege. Part III examines cases that demonstrate the need for an "overrid[e]"[15] of the attorney-client privilege and a modification to Model Rule 1.6. Then, Part IV explores cases that should allow a criminal defendant to invoke his or her due process rights to overcome the prohibition of disclosure by a lawyer who is either prevented from or unwilling to disclose client confidences based on the posthumous application of the attorney-client privilege. Last, the intersection between posthumous application of the attorney-client privilege, the Fifth Amendment rights of a criminal defendant, and the Model Rule 1.6 duty of confidentiality will be examined in Part V.

II. EVALUATION OF THE UNITED STATES SUPREME COURT'S RECENT INQUIRY INTO THE POSTHUMOUS APPLICATION OF THE PRIVILEGE

The United States Supreme Court has not granted a writ of certiorari to a case that frames the issues as the hypothetical above does.

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11. U.S. Const. amends. V and XIV.

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

13. *Id.* at 87.

14. Hood, *supra* note 1, at 778-79.

15. *In re* John Doe Grand Jury Investigation, 562 N.E.2d 69, 69 (Mass. 1990). The use of the term "overrid[e]" throughout this Comment can be traced to *John Doe.*

However, in *Swidler & Berlin v. United States*,[16] the Court decided that the attorney-client privilege survives the death of a client.[17] The facts of the case did not implicate the due process concerns of a particular criminal defendant in the manner that the hypothetical above does.[18] *Swidler & Berlin* reached the Court as a result of an investigation into "the 1993 dismissal of employees from the White House Travel Office. Vincent W. Foster, Jr., was Deputy White House Counsel when the firings occurred."[19] After the firings, Foster met with James Hamilton, a lawyer with the law firm of Swidler & Berlin.[20] Subsequently, Foster committed suicide.[21] The Office of the Independent Counsel, while investigating the White House Travel Office, urged a grand jury to issue subpoenas for the notes of the meeting between Foster and Hamilton.[22] The grand jury issued the subpoenas, but Hamilton and his firm refused to comply with them.[23] Hamilton and Swidler & Berlin relied on the attorney-client privilege in their refusal.[24] The firm and Hamilton filed a motion to quash the indictments in federal district court.[25] The court granted the motion based on the attorney-client privilege and the work product privilege.[26]

The Office of the Independent Counsel appealed the district court ruling.[27] In *Sealed Case*, the court of appeals reversed the ruling.[28] The court, instead of relying on precedent, used Federal Rule of Evidence 501[29] as a means to fashion a rule that applied differently in criminal

16. 118 S.Ct. 2081 (1998).
17. *See id.* at 2088.
18. *See id.*
19. *Id.* at 2083.
20. *See id.*
21. *See id.*
22. *See id.*
23. *See id.* at 2083.
24. *See id.* Swidler & Berlin and James Hamilton also asserted the work product privilege to protect the information. The Court never reached the question of work product privilege because it decided that the communications were protected by the attorney-client privilege. *See id.* at 2084. Like the Court, this Comment will focus solely on the attorney-client privilege. The additional analysis of work product privilege, though potentially implicated by the hypothetical above, is an additional step beyond the scope of this Comment.
25. *See id.* at 2083.
26. *See id.*
27. In re Sealed Case, 124 F.3d 230 (D.C. Cir. 1997).
28. *See id.* at 237.
29. FED. R. EVID. 501 (hereinafter referred to as Rule 501).

cases than civil disputes.[30] The court created an exception to the attorney-client privilege "within the discrete zone of criminal litigation."[31] *Sealed Case* developed a balancing test in which a judge would review confidential information in camera, balancing the decedent's continued confidentiality interest versus the need for the information in a criminal matter.[32] The test required at a minimum that the information be of "substantial"[33] importance to the criminal proceeding. In addition to framing a test contrary to other decisions on the privilege after client death, the parties to *Sealed Case* and the court itself also properly framed the arguments for cessation of the privilege after client death.[34]

Sealed Case dispelled the strongest arguments against continuation of the privilege posthumously. Those arguments include the following: reputational interests after death, civil liability of the decedent-client's estate, and the encouragement of communication between client and lawyer.[35] The court relied on secondary sources in determining that the needs of a criminal proceeding may sometimes outweigh the three arguments in support of posthumous application of the privilege.[36] Thus, the court remanded to the district court to "reexamine the documents in light"[37] of the new balancing test. Swidler & Berlin and James Hamilton appealed to the nation's high Court.

The Office of the Independent Counsel favored the balancing approach in criminal proceedings designed by the D.C. Circuit Court of Appeals.[38] The Independent Counsel offered a number of reasons why a balancing approach should be adopted. The Independent Counsel tried to use the widely accepted testamentary exception to the attorney-

30. *See In re Sealed Case*, 124 F.3d at 234.

31. *Id.*

32. *See id.*

33. *Id.* at 235.

34. *See id.* at 232-37. *Sealed Case* did properly analyze concerns of civil liability, reputation, and the encouragement of communication with an attorney. *See id.* However, the court used Rule 501 to develop a new law of evidence. *See id.*; FED. R. EVID. 501. This Comment will argue that the way to properly permit a criminal defendant to achieve access to information is not through a new exception to the attorney-client privilege, a law of evidence. Rather, the better way to gain access is by overriding the attorney-client privilege in the name of constitutional due process.

35. *See Sealed Case*, 124 F.3d at 231-35.

36. *See id.* at 233 (relying on several commentators and the tentative Restatement (Third) of the Law Governing Lawyers § 127 (1996) to conclude that a balancing test would be appropriate in criminal cases).

37. *Id.* at 237.

38. *See* Swidler & Berlin v. United States, 118 S.Ct. 2081, 2087 (1998).

client privilege to carve out another exception for criminal proceedings.[39] He argued that

> the [testamentary] exception reflects a policy judgment that the interest in settling estates outweighs any posthumous interest in confidentiality. He then reason[ed] by analogy that in criminal proceedings, the interest in determining whether a crime has been committed should trump client confidentiality, particularly since the financial interests of the estate are not at stake.[40]

The Court, however, did not accept the argument because "cases consistently recognize that the rationale for the testamentary exception is that it furthers the client's intent . . . ."[41] The Independent Counsel also urged that the "proposed exception would have minimal impact if confined to criminal cases . . . ."[42] The Court rejected this argument for two reasons. No precedent existed to justify a distinction between civil and criminal cases.[43] Also, "a client may not know at the time that he discloses information to his attorney whether it will later be relevant to a civil or criminal matter . . . ."[44] The Court also rejected the contention that the existence of another exception to the privilege would have a "marginal" impact.[45] The current exceptions furthered the purposes of the attorney-client privilege while the proposed exception "appear[ed] at odds with the goals of encouraging full and frank communication and of protecting the client's interests."[46] The Court's consistent refusal of the Independent Counsel's arguments demonstrated its unwillingness to create another exception to the privilege.[47]

Swidler & Berlin does not square directly with the hypothetical posed above.[48] The case, however, fleshed out many of the issues that are pertinent to the analysis of postmortem application of the attorney-client privilege.[49] *Swidler & Berlin*, therefore, is important to any

39. *See id.* at 2085.
40. *Id.*
41. *Id.* at 2086.
42. *Id.* at 2087.
43. *See id.*
44. *Id.*
45. *Id.* at 2087.
46. *Id.* at 2087.
47. *See id.* at 2085-88.
48. *Id.* at 2081.
49. *See id.* at 2085-88.

discussion of posthumous application of attorney-client privilege because it indicates the current Court's feelings about the privilege. The Court refused to welcome an exception to the privilege based on a distinction between civil and criminal cases.[50] It is that very distinction that this Comment will rely on for compelling and permitting the disclosure of client confidences after death. While the facts of the hypothetical above and the *Swidler & Berlin* case are fundamentally different, the case did shed some light on when or if the United States Supreme Court will permit or compel the disclosure of privileged information of a decedent-client.[51] Next, Part III will examine cases that generate the need for disclosure of privileged information after the death of a client.

III. THE OCCASIONAL OVERWHELMING NEED OF CRIMINAL DEFENDANTS TO ACCESS PRIVILEGED INFORMATION

The hypothetical above occurs in practice, not just law school ethics courses. A decedent-client either confesses to a crime now charged to another person, or alternatively, shares other exculpatory information about another person now charged with that crime.[52] The following cases illustrate the substantial injustice that can occur when one of the following situations occurs: (1) an attorney who is willing to testify about a decedent-client's shared confidence is precluded from doing so, or (2) an attorney is unwilling to testify about a decedent-client's shared confidence and a court is unwilling to compel such testimony.[53]

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50. *See id.* at 2086-87.

51. *See id.* at 2087 n.3 (noting that Swidler & Berlin and James Hamilton conceded that "implicating a criminal defendant's constitutional rights might warrant breaching the privilege"); *see also id.* at 2089 (O'Connor, J., dissenting) (noting the same concession).

52. *See* Arizona v. Macumber, 544 P.2d 1084 (Ariz. 1976); *In re* John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990); New York v. Modzelewski, 611 N.Y.S.2d 22 (N.Y. 1994). The cases mentioned here mirror the posed hypothetical substantially. However, one also can imagine other scenarios in which a decedent-client shares information that could exculpate another, but the information does not rise to the level of a confession. Such a situation does not pose that different of a question from a confession scenario. The attorney-client privilege would still operate and the criminal defendant or suspect would still want the information. The only distinction may be that the accused may have a somewhat lesser desire to obtain the information and a tribunal or the attorney for the deceased may regard the exculpatory information as somewhat more 'shareable.'

53. Cases have been decided both ways. *Compare Macumber*, 544 P.2d 1084 (precluding two willing attorneys from testifying about a deceased client's confession), *with John Doe*, 562 N.E.2d 69 (refusing to compel an unwilling attorney to testify about a deceased client's meeting with the attorney shortly before the client's suicide), *and* Swidler & Berlin, 118 S.Ct. 2081 (refusing to compel an unwilling attorney to testify about a deceased client's meeting with the attorney shortly before the client's suicide).

A. Counsel Willing to Testify that a Deceased Client Confessed to the Crime Charged

In *Arizona v. Macumber*,[54] the state convicted the defendant "of two counts of first-degree murder."[55] Macumber appealed on the basis that, among other things, the trial court improperly excluded the testimony of two attorneys.[56] The attorneys were prepared to testify at Macumber's trial "that another individual had confessed to the crime for which Macumber was being tried."[57] At the time, Arizona had codified the attorney-client privilege.[58] The Supreme Court of Arizona ruled that the statute automatically barred the attorneys' potentially exculpatory testimony.[59]

Justice Holohan of the Supreme Court of Arizona filed a specially concurring opinion in *Macumber*.[60] He argued that the court should not automatically bar an attorney from testifying that a decedent-client confessed to a crime now charged to another for two reasons. First, he relied on the United State Supreme Court's decree in *Chambers v. Mississippi*[61] that "[a] state's rule of evidence cannot deny an accused's right to present a proper defense."[62] *Chambers* "ruled that it is a violation of due process for a state rule of evidence to preclude the admission of reliable hearsay declarations against penal interest when such evidence is offered to show the innocence of the accused."[63] Second, an argument based on a more general consideration of due

54. 544 P.2d 1084 (1976).

55. *Id.* at 1085.

56. *See id.*

57. *Id.* at 1086.

58. *See* ARIZ. REV. STAT. ANN. § 13-4062(2) (West 1989) (renumbered by 1977 Ariz. Sess. Laws Ch. 142, § 165).

59. *See Macumber*, 544 P.2d at 1086. The court did overturn Macumber's conviction on other grounds. *See id.* On remand, the trial court held a hearing to determine the validity of the attorneys' testimony, despite the plain opinion of the Supreme Court of Arizona to the contrary. *See* Macumber v. Arizona, 582 P.2d 162 (Ariz. 1976). The trial court found the attorneys' testimony lacking in memory of details sufficient to allow their testimony. *See id.* at 166-167. Presumably, if either of the attorneys had testified the government could have won an appeal based on the rule developed in the first *Macumber* opinion. *See Macumber*, 544 P.2d at 1086 (ruling that the attorney-client privilege absolutely survives the death of the client in non-testamentary cases).

60. *Macumber*, 544 P.2d at 1087 (Holohan, J., specially concurring).

61. 410 U.S. 284 (1973).

62. *Macumber*, 544 P.2d at 1088 (Holohan, J., specially concurring) (construing the ruling in *Chambers*, 410 U.S. 284).

63. *Macumber*, 544 P.2d at 1088 (Holohan, J., specially concurring) (explaining the rule developed in *Chambers*).

process was made.[64] Due process considerations "should prevail over the property interest of a deceased client in keeping his disclosures private."[65] The majority, according to the concurrence, failed to properly consider that the *Macumber* facts required a weighing of the interests involved.[66] The two arguments offered by the Holohan concurrence partly inspired this Comment's point to follow – that the due process requirement of the Fifth and Fourteenth Amendments has the ability to supercede the posthumous application of the attorney-client privilege.[67]

B. A Court Unwilling to Compel an Attorney to Testify

In a well-publicized case involving facts similar to the posed hypothetical, the Supreme Judicial Court of Massachusetts ruled that the attorney-client privilege absolutely survives the death of a client.[68] In late 1989 Charles Stuart allegedly shot and killed his pregnant wife, Carol DiMaiti Staurt.[69] Initially, Charles Stuart told police that "a robber entered his car at a red light... [and] shot his wife in the head and then shot him in the abdomen before fleeing with their jewelry."[70] "[T]he police investigation focused on a paroled convict whom Charles picked out of a police lineup...."[71]

Later, Charles' brother Matthew Stuart went to police with a different story.[72] Matthew admitted that he was an unknowing accomplice in an insurance-scam murder of Carol and the Stuart's unborn child.[73] Matthew alleged that Charles planned the murders to get insurance money for valuables lost in a staged robbery.[74] However,

64. *See Macumber*, 544 P.2d at 1088.

65. *Id.*

66. *See id.*

67. *See infra*, Part IV through VI (discussing the Fifth Amendment and its effect on the attorney-client privilege in non-client criminal proceedings after client death).

68. *See* In re John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990).

69. *See* Frances M. Jewels, Case Comment, *Evidence–Attorney-Client Privilege Survives Death–In re John Doe Grand Jury Investigation, 408 Mass. 480, 562 N.E.2d 69 (1990)*, 25 SUFFOLK U. L. REV 1260, 1260-62 (1991) (telling the story behind John Doe, but not alleging that Stuart killed his wife and child). Jewels' article provides a succinct and fair assessment of the facts of *John Doe*. The author relies on newspaper accounts from the *Boston Globe* to relay the facts of the case. The published opinion of *John Doe* does not contain an extensive account of the facts leading to the litigation. *See John Doe*, 562 N.E.2d at 69-73.

70. Jewels, *supra* note 69, at 1260.

71. *Id.* at 1261 n.15.

72. *See id.* at 1260-61.

73. *See id.* at 1260-61 & nn.8-12.

74. *See id.*

Matthew said that he unknowingly helped his brother commit murder because he agreed to meet Charles at a pre-disclosed location without prior knowledge of the planned murder.[75] On the day that Matthew went to the police, Charles met with an attorney, John T. Dawley.[76] The following day Charles died when he fell from a bridge, allegedly by choice.[77]

Massachusetts prosecutors "sought Dawley's testimony concerning the substance of Charles' statements at their [Dawley's and Charles'] . . . meeting."[78] Until the time that Matthew went to the police, the investigation centered on the man Charles had fingered for the crimes.[79] Once Matthew revealed his story, however, "the police believed Charles was 'most likely guilty' of murdering his wife [and child]."[80] Nevertheless, a grand jury investigated "whether Matthew was more than an unwitting accomplice to the murder[s]."[81] The attorney, Dawley, refused to testify before the grand jury based on Charles' attorney-client privilege.[82] "Subsequently, the commonwealth filed a motion requesting the court override the privilege, arguing that society's interest in ascertaining the truth concerning Carol's death and in identifying the parties responsible outweighed the value protected by the privilege."[83]

The trial court "reported to the Appeals Court the question whether, in the circumstances of this case, the attorney-client privilege should be overridden."[84] The Supreme Judicial Court of Massachusetts ordered that the case skip the intermediate appellate court and pass immediately for its consideration.[85] The Commonwealth of Massachusetts had only one case, *Cohen v. Jenkintown Cab Co.*,[86] and

75. *See id.*

76. *See id.* at 1261 & n.13.

77. *See id.* at 1261 & n.14.

78. *Id.* at 1261.

79. *See id.* at 1261 n.15.

80. *Id.* (quoting *Boston Globe*, Jan. 5 1990, at 1).

81. *Id.*

82. *See id.* at 1261-62.

83. *Id.* at 1262 (footnote omitted).

84. In re John Doe Grand Jury Investigation, 562 N.E.2d 69, 69 (Mass. 1990).

85. *See id.* at 69.

86. 357 A.2d 689 (Pa. Super. Ct. 1976). *Cohen* was a personal injury action in which the plaintiff was struck by a taxi. *See id.* Subsequently, the driver of the cab died, but before his death he told his attorney that he was the driver in the accident at issue. *See id.* The plaintiff attempted only to sue the driver's employer, not the deceased driver's estate. *See id.* The plaintiff wanted to compel the testimony of the driver's attorney for the purpose of

no statutory basis to rely on in its bid to "overrid[e]"[87] the privilege.[88] The court in *John Doe* refused to rely on the rationale of *Cohen*.[89] First, the decision in *Cohen* was an anomaly; no other decision like it could be found and the case was from an intermediate appellate court in another state.[90] Second, the court declared that the survival of the attorney-client privilege was so well settled that it could not possibly "overrid[e]"[91] the privilege like the *Cohen* court did.[92] More generally, "the Commonwealth argued that the interests of justice require[d] that the privilege be overridden."[93] The court did not accept the Commonwealth's policy argument.[94] According to the court, the purpose of the attorney-client privilege is to encourage communication between attorney and client.[95] To allow disclosure, even posthumously, would impair communication between attorney and client.[96] The court looked as far back as 1833 when, in *Hatton v. Robinson*,[97] it declared that information shared by a client with an attorney is "for ever sealed" from disclosure by the attorney.[98]

In re John Doe Grand Jury Investigation[99] is not exactly like the hypothetical above, but it is substantially similar. There are two meaningful differences, however. First, in *John Doe*, the government–not the criminal defendant–sought the information in a grand jury

identifying the driver and his employer as the cause of injury. *See id.* The Pennsylvania court decided that "when it is shown that the interests of the administration of justice can only be frustrated by the exercise of the privilege, the trial judge may require that the communication be disclosed." *Id.* at 694 (citation omitted). The court developed a test that considered: (1) the impact the disclosure would have on the client's daily affairs, rights, and interests, (2) potential civil liability for the decedent's estate, and (3) whether the information would harm the reputation of the deceased. *See id.* at 693-94.

87. *John Doe*, 562 N.E.2d at 70.

88. *See id.* at 70-72.

89. *See id.* at 71.

90. *See id.*

91. *Id.* at 70.

92. *See id.* at 71.

93. *Id.* at 69.

94. *See id.* at 69-72.

95. *See id.* at 70-71.

96. *See id.*

97. 14 Pick. 416 (Mass. 1833). The court also relied on Hunt v. Blackburn, 128 U.S. 464 (1888). *See John Doe*, 562 N.E.2d at 70. *Hunt* is the case that courts often rely on to show that the absoluteness of the attorney-client privilege is a long-standing principle in American law. *See, e.g.*, Swidler & Berlin v. United States, 118 S.Ct. 2081 (1998); Upjohn Co. v. United States, 449 U.S. 383 (1981).

98. *Hatton*, 14 Pick. at 422.

99. 562 N.E.2d 69 (Mass. 1990).

investigation.[100] Second, the government probably did not regard Matthew Stuart as the main perpetrator.[101] The government was investigating Matthew Stuart in a criminal proceeding about whom a lawyer holding privileged information from a deceased client likely had information. The lawyer likely held information that could have had a substantial impact on the penal interests of Matthew Stuart. The attorney, however, was unwilling to share the confidence learned from the decedent-client. Thus, although *Macumber*[102] better fits the model posed by the hypothetical, *John Doe*[103] also serves as an example of the type of case that evokes substantially similar issues.

C. Convergence of the Cases Above

There are few published cases involving facts like the hypothetical and *Macumber*.[104] However, when such a scenario arises, the need of a criminal defendant like Macumber for such information is overwhelming. Reported cases in the United States do not offer an answer as to how a person like Macumber can gain access to privileged information.[105] The policy argument in *John Doe* failed.[106] The argument in *Macumber* failed due to solid state precedent and a statute codifying the attorney-client privilege.[107] The defendant in *Macumber* also failed to win a policy argument, similar to the policy argument in *John Doe*.[108] The Independent Counsel enjoyed only temporary success

100. In this way then *John Doe* is similar to *Swidler & Berlin*. *Compare John Doe*, 562 N.E.2d 69 (precluding prosecutors from obtaining information for a grand jury investigation), *with Swidler & Berlin*, 118 S.Ct. 2081 (precluding the Office of the Independent Counsel from obtaining information for a grand jury proceeding). The facts of either case are not exactly like the posed hypothetical. However, both cases had the potential for implicating the due process rights of a criminal defendant. Both also evoke similar issues to cases involving confessions. *But cf.* Arizona v. Macumber, 544 P.2d 1084 (Ariz. 1976) (barring the testimony of two attorneys prepared to testify about a decedent-client's confession); New York v. Modzelewski, 611 N.Y.S.2d 22 (N.Y. App. Div. 1994) (barring the testimony of an attorney of a dead client about a coperpetrator's confession).

101. *See* Jewels, *supra* note 69, at 1261 n.15.

102. Arizona v. Macumber, 544 P.2d 1084 (Ariz. 1976).

103. *John Doe*, 562 N.E.2d 69.

104. *Macumber*, 544 P.2d 1084; *Modzelewski*, 611 N.Y.S.2d 22.

105. *See Swidler & Berlin*, 118 S.Ct. 2081; *John Doe*, 562 N.E.2d 69; *Macumber*, 544 P.2d 1084; *Modzelewski*, 611 N.Y.S.2d 22; South Carolina v. Doster, 284 S.E.2d 218 (S.C. 1981).

106. *See John Doe*, 562 N.E.2d at 69-72. The dissent in *John Doe* embraced the policy reasoning and proposed that the court should have developed a rule like that in Cohen v. Jenkintown Cab Co., 357 A.2d 689, 692-94. *See John Doe*, 562 N.E.2d at 72-73 (Nolan, J., dissenting).

107. *See Macumber*, 544 P.2d at 1086-87.

108. *Id.*

when the court of appeals used its power under Rule 501[109] to fashion a balancing test.[110] The court in *Sealed Case* embraced the policy behind such an exception when it went to great lengths to refute the policy arguments in favor of posthumous application of the privilege.[111] However, the Independent Counsel's arguments in *Swidler & Berlin*[112] failed for a variety of reasons. First, the analogy to the testamentary exception suffered from the proposed exception's inability to act as other exceptions do.[113] Second, the Court did not accept the argument that the effect of a new exception would be "marginal."[114] Third, despite an effort to solidify the policy arguments in favor of an exception through a diverse set of legal arguments, the Court would not welcome the same policy reasoning rejected in *Macumber* and *John Doe*.[115] Last, the Independent Counsel could not convince the Court to distinguish between civil and criminal cases.[116]

The *Swidler & Berlin* Court acknowledged that a situation so grave, involving the constitutional rights of a criminal defendant, might permit disclosure of such privileged information.[117] The Court left at least two questions unanswered. First, what type of fact pattern involving what constitutional rights will permit such a disclosure of privileged information? Second, under what theory will a criminal defendant or a prosecutor argue in order to access such privileged information? One of the implications of the hypothetical above is the due process rights of a criminal defendant. The next section will explore a line of cases that prohibits the government from withholding exculpatory information from a criminal trial. Part IV proposes that this line of cases requires disclosure by a lawyer holding privileged information of a dead client if the information "is material either to guilt or to punishment."[118]

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109. FED. R. EVID. 501.

110. *See* In re Sealed Case, 124 F.3d 230 (D.C. Cir 1997).

111. *See id.* at 231-237.

112. Swidler & Berlin v. United States, 118 S.Ct. 2081 (1998).

113. *See id.* at 2085-86.

114. *Id.* at 2087.

115. *See id.* at 2084-88.

116. *See id.* at 2087.

117. *See id.* at 2087 n.3. The entire footnote reads as follows: "Petitioner [James Hamilton and Swidler & Berlin], while opposing wholesale abrogation of the privilege in criminal cases, concedes that exceptional circumstances implicating a criminal defendant's constitutional rights might warrant breaching this privilege. We do not, however, need to reach this issue, since such exceptional circumstances clearly are not present here." *Id.*

118. Brady v. Maryland, 373 U.S. 83, 87 (1963).

IV. DUTY OF THE GOVERNMENT TO PROVIDE EXCULPATORY INFORMATION

A. Constitutional Arguments

A variety of different sources have maintained that the constitutional rights of a criminal defendant can be violated in situations like the hypothetical and *Macumber.* The *Macumber* concurrence based its assertion on *Chambers v. Mississippi,*[119] which declared that a "it is a violation of due process for a state rule of evidence to preclude the admission of reliable hearsay declarations against penal interest when such evidence is offered to show the innocence of the accused."[120]

Another constitutional contention states that the Sixth Amendment[121] can be violated in such a situation. The argument relies on the requirement that, according to the Sixth Amendment, "'[i]n all criminal prosecutions, the accused shall enjoy the right... to be confronted with the witnesses against him... [and] to have compulsory process for obtaining witnesses in his favor....'"[122] The proponent of this argument went even a step further by arguing that the Sixth Amendment ought to require disclosure even while the client is living.[123] However, because the concept of the privilege is so entrenched in American law,[124] it seems unlikely that any state or federal law or rule of attorney conduct would ever permit such a disclosure based on the Sixth Amendment while the client is alive.[125] However, the thesis of this Comment is an alternative argument to the strong Sixth Amendment argument in favor of posthumous disclosure.

In *Swidler & Berlin*, the Independent Counsel tried to gain a new "exception" to the attorney-client privilege, but failed.[126] The Independent Counsel, however, did not frame his argument in constitutional parameters.[127] Instead, he argued that the Court should make a new exception based on its powers under Rule 501.[128]

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119. 410 U.S. 284 (1973).

120. Arizona v. Macumber, 544 P.2d 1084, 1088 (1976).

121. U.S. Const. amend. VI.

122. Thomas-Fishburn, *supra* note 9, at 200 (quoting the Sixth Amendment).

123. *See id.* at 200-201.

124. *See, e.g.,* Swidler & Berlin v. United States, 118 S.Ct. 2081 (1998); Upjohn Co. v. United Sates, 449 U.S. 383 (1981); Hunt v. Blackburn, 128 U.S. 464 (1888).

125. *See* Thomas-Fishburn, *supra* note 9, at 200.

126. Swidler & Berlin, 118 S.Ct. 2084.

127. *See id.* at 2083-88.

128. *See id.* at 2085-88.

Nonetheless, *Swidler & Berlin* did open the door to future consideration by the United States Supreme Court that the constitutional rights of a criminal defendant may require "breaching the privilege."[129] The Court, however, did not offer any avenue by which a criminal defendant may achieve a "breach" of the privilege.[130] This section will explore what may be a criminal defendant's best chance of achieving such a "breach."[131]

B. Brady *to* Kyles*: A Defendant's Right to Exculpatory Information*

The United States Supreme Court has developed a system of rules to protect the due process rights of a criminal defendant when the prosecution fails to disclose exculpatory evidence. Through four significant cases, the Court has outlined the duties imposed on the government when the prosecution fails to disclose exculpatory evidence. In *Brady v. Maryland*,[132] the Court held that "suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."[133] Brady and a co-perpetrator were convicted of murder.[134] Brady conceded that he participated in the crime, but he claimed that the companion did the actual killing.[135] He confessed only to avoid the death penalty.[136] Brady "requested the prosecution to allow him to examine one of [the companion's] extrajudicial statements."[137] The prosecutor complied with Brady's request except for one statement by his companion.[138] In that statement, the companion "admitted the actual homicide."[139] The Court found that "the suppression of this confession was a violation of the Due Process Clause of the Fourteenth Amendment."[140] The *Brady* Court found that "[a] prosecution that withholds evidence on demand of an accused which, if made available,

129. *Id.* at 2087 n.3.
130. *Id.*
131. *Id.*
132. 373 U.S. 83 (1963).
133. *Id.* at 87.
134. *See id.* at 84.
135. *See id.*
136. *See id.*
137. *Id.*
138. *See id.*
139. *Id.*
140. *Id.* at 86.

would tend to exculpate him or reduce the penalty helps shape a trial that bears heavily on the defendant."[141] The analogy that this Comment makes is that to withhold exculpatory information from a criminal defendant is like prohibiting an attorney or failing to compel an attorney from testifying about exculpatory information that a decedent-client has provided.[142] First, however, the Court's additions to the *Brady* doctrine must be examined.

In *United States v. Agurs*[143], the Court lessened the burden on the criminal defendant in *Brady* situations.[144] Agurs was convicted of second-degree murder in a stabbing death.[145] She defended herself solely on the basis that she acted in self-defense in killing the victim.[146] The defendant failed to request a copy of the victim's criminal record before and during the trial.[147] Three months after trial she moved for a new trial.[148] The defendant contended "(1) that [the victim] had a prior criminal record that would have further evidenced his violent character... [and] (2) that the prosecutor had failed to disclose this information to the defense...."[149] The victim did have a criminal record involving knife crime.[150] The Court decided that the government might have a duty to disclose exculpatory information even when a defendant does not request it.[151] In order to avoid constitutional error when a defendant has not made a specific request for an item, *Agurs* required that the government disclose information if it would create "a reasonable doubt that would not otherwise exist...."[152] The two cases to follow developed more extensively the duty of disclosure that the government must follow.

In *United States v. Bagley*,[153] the Court modified the standard developed in *Brady* and *Agurs*. The defendant was charged with

141. *Id.* at 87-88.

142. Whether the prosecutor argues against the testimony of a willing attorney or a judge refuses to compel the testimony of an unwilling attorney, the government would still be acting in violation of the due process rights of the criminal defendant.

143. 427 U.S. 97 (1976).

144. *See id.* at 103-14.

145. *See id.* at 98.

146. *See id.* at 100.

147. *See id.*

148. *See id.*

149. *Id.*

150. *See id.* at 100-01.

151. *See id.* at 108-14.

152. *Id.* at 112.

153. 473 U.S. 667 (1985).

"violating federal narcotics and firearms statutes."[154] Bagley requested the names of any witnesses with whom the government made any deals with in exchange for their testimony.[155] The government failed to reveal that it had paid two private security officers for their assistance in investigating the defendant and testifying against him at his trial.[156] The Court used this case to develop a new materiality standard of mandatory disclosure. Borrowing its own standard for ineffective assistance of counsel jurisprudence,[157] the Court declared that "evidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome."[158] Thus, *Bagley* expanded the bounds of what the government must share with a criminal defendant. The new materiality standard enabled a defendant to better argue a *Brady* violation because of that extensive burden on the government.

According to *Kyles v. Whitley*,[159] the next case in this line of exculpatory evidence cases, "[f]our aspects of materiality under *Bagley* bear emphasis."[160] First, the defendant only needs to show that, absent the suppressed evidence, he did not "receiv[e] a fair trial, understood as a trial resulting in a verdict worthy of confidence."[161] The defendant does not need to show that if the government had made the evidence available he would have been acquitted, only that the trial would have been different.[162] Second, *Kyles* recognized that *Bagley* materiality does not require the defendant show that, "after discounting the inculpatory evidence in light of the undisclosed evidence, there would not have been enough left to convict."[163] Third, a violation of *Bagley* materiality, by definition, can never be harmless.[164] To violate *Bagley* materiality means that confidence in the outcome has been undermined.[165] Fourth, *Bagley* materiality is defined "in terms of suppressed evidence considered

154. *Id.* at 669.
155. *See id.*
156. *See id.* at 671-72.
157. *See* Strickland v. Washington, 466 U.S. 668 (1984).
158. *Bagley*, 473 U.S. at 682.
159. 514 U.S. 419 (1995).
160. *Id.* at 434.
161. *Id.*
162. *See id.*
163. *Id.* at 434-35.
164. *See id.* at 435.
165. *See id.*

collectively, not item by item."[166] In addition to modifying the materiality standard, *Bagley* also eliminated a number of distinctions based on (1) whether or not the defendant requested the information and (2) with what specificity the defendant made such requests.[167]

Kyles v. Whitley[168] is the final significant case in this course of jurisprudence. First, *Kyles* effectively affirmed and outlined the *Bagley* materiality standard.[169] Second, the Court demonstrated its willingness to conduct a fact-intensive approach to ensuring that suppressed exculpatory evidence did not undermine the due process requirements of a criminal proceeding.[170] The facts of *Kyles* are complex.[171] A concise version of them is appropriate, however. Kyles was convicted of first-degree murder in Louisiana.[172] An informant notified police that Kyles had committed a murder already known to the police.[173] The informant told police and prosecutors a variety of different versions about events relating to the crime.[174] The informant, an acquaintance of Kyles', could himself have been a suspect in the murder.[175] Prosecutors withheld from Kyles' certain conflicting statements made by the informant and conflicting eyewitness reports about the identity of the killer.[176] The United States Supreme Court reversed his conviction based on *Brady*.[177] The Court also ruled that a prosecutor is responsible for knowing all exculpatory information that the government has in a case, even if the police, as government actors, fail to pass the information on to the prosecutor.[178] The rationale behind such a rule is that "'procedures and regulations can be established to carry [the prosecutor's burden] and to insure communication of all relevant information . . . .'"[179] Thus, *Kyles* continued the Court's defendant-favorable approach to disclosure of exculpatory evidence known by the government.

166. *Id.* at 436.
167. *See* Bagley v. United States, 473 U.S. 667, 681-82.
168. 514 U.S. 419 (1995).
169. *See id.* at 434-36.
170. *See id.* at 421-34.
171. *See id.*
172. *See id.* at 422.
173. *See id.* at 424.
174. *See id.* at 424-30.
175. *See id.* at 430.
176. *See id.* at 441-45.
177. *See id.* at 421-22.
178. *See id.* at 438.
179. *Id.* at 438 (citation omitted).

V. THE INTERSECTION BETWEEN DUE PROCESS, PRIVILEGE, AND CONFIDENTIALITY

In 1994, a law student argued persuasively for a revised Rule 1.6 that would permit a lawyer to reveal information gained from a client "to potentially exculpate a criminal defendant whom the lawyer has reason to believe is innocent based upon information the lawyer knows about a client who has subsequently died."[180] The author based his argument on the proposed revision being consistent with "confidentiality's [underlying] purpose of furthering justice."[181] However, unless the American Bar Association changes Rule 1.6 and the law of privilege follows suit in recognizing the exception, the argument will fail in court. The *Swidler & Berlin* Court showed that it was not eager to create a new exception to the privilege.[182] *Swidler & Berlin* also refused to accept a distinction based on whether a matter was civil or criminal.[183] What then will it take for a criminal defendant to gain access to the privileged information held by an attorney for a deceased client? The case will have to have the right facts – a situation rivaling *Macumber* or the hypothetical above, probably not *John Doe* or *Swidler*. The best scenario would involve an outright confession by the decedent and made only to the attorney. Add a prosecutor and a court unwilling to let the attorney testify, and the best case is born.

The theory upon which a defendant must argue such a case must be based upon constitutional grounds. The majority of the *Swidler & Berlin* Court acted entirely uninterested in creating a new exception to the attorney-client privilege under Rule 501.[184] Thus, such a defendant must look for another theory to access the information. The cases from *Brady* to *Kyles* offer such an avenue. Those cases consistently recognize that if the government, acting through the prosecutor, fails to share exculpatory information with a criminal defendant a violation of due process occurs.[185] If the information is material to guilt or punishment the defendant must receive the information from the government, regardless of whether he or she requests it.[186] While the client is alive, his or her due process concerns still exist and an override of the

180. Hood, *supra* note 1, at 779.
181. *Id.* at 780.
182. Swidler & Berlin v. United States, 118 S.Ct. 2081 (1998).
183. *Id.* at 2087.
184. *See id.*
185. *See* Kyles v. Whitley, 514 U.S. 419, 433-37 (1995).
186. *See* United States v. Bagley, 473 U.S. 667 (1985).

privilege cannot occur based on the due process concerns of client confidentiality and privilege. Once the client dies, however, the due process rights in the privilege cease to exist. It should then be a violation of the non-client criminal defendant's due process rights if a prosecutor moves to prohibit the testimony of an attorney willing to testify that a deceased client shared information that would exculpate the current defendant. Just like in *Brady* situations, a prosecutor withholds exculpatory information from a criminal proceeding by contesting such testimony. Such an act by a prosecutor is also like a typical *Brady* situation because it is an effort to preclude a defendant from presenting a complete argument to a fact-finder. In *Brady* scenarios, courts call it a violation of due process and say that confidence in the outcome of the trial is undermined. So long as the information that an attorney would have supplied satisfies the *Bagley* materiality test,[187] the unwillingness of a prosecutor, acting as a government agent, must be regarded as a violation of due process as well.

A court that is unwilling to compel the testimony of an attorney who has learned of exculpatory information from a deceased client can also violate the due process concerns of a criminal defendant. If a court is willing to enforce a law of evidence, the attorney-client privilege, instead of protecting the due process rights of a criminal defendant, a constitutional violation has occurred. In *Chambers*, the United States Supreme Court declared that a rule of evidence cannot deny a defendant's right to due process in a criminal proceeding.[188] Despite basing its holding in the Sixth Amendment,[189] the Court still accepted an argument based on due process to override[190] an evidentiary rule. If a *Brady* violation occurs when the government, including both prosecutors and courts, refuses to accept exculpatory evidence, then a court cannot enforce the attorney-client privilege for a deceased client. The due process concerns of client confidentiality during the client's life will enable a judge to enforce the privilege. After death, however, that is no longer the case. As mentioned previously, the due process concerns of a client seek to exist after death. Thus, the due process

187. *See id.*

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

189. U.S. CONST. amend VI.

190. The Commonwealth of Massachusetts, in In re John Doe Grand Jury Investigation, 562 N.E.2d 69 (Mass. 1990) asked for an 'override' of the attorney-client privilege. It is used somewhat differently in the discussion here because of the argument's constitutional grounding as opposed to *John Doe's* grounding in the interests of justice. *See id.*

rights of the current criminal defendant override continuation of the attorney-client privilege.

In *Sealed Case* and *Swidler & Berlin*, James Hamilton and his law firm exposed and relied on the rationale behind posthumous application of the privilege.[191] The concerns for the deceased client's reputation and civil liability remain even after death. In addition, society's interest in encouraging communication between lawyer and client is a strong reason for continuation of the privilege after death. When others have argued for an exception to the privilege they faced those strong arguments and lost, except for the anomaly of *Cohen*.[192] A case based on a *Brady* violation, a foul against constitutional due process, does not face those arguments in the same way. Asking for a new rule of evidence, an exception to the attorney-client privilege, is a much different, and more burdensome, task than asking a court to enforce the already existing constitutional standards of *Brady* and its subsidiary cases. The rationale behind the privilege, therefore, becomes a less meaningful consideration in a due process analysis.

After losing out to the due process rights of a criminal defendant, concerns for reputation and civil liability still remain as a practical matter. First, as to reputation, does a decedent really deserve a good reputation if she has committed a crime that another is being prosecuted for? Second, as to civil liability, in most cases involving these types of fact situations there is probably no sizeable estate that will suffer civil reduction. If there is an estate of measurable size is it not more important that the victim of a crime receive restitution before the heirs of an estate enjoy their inheritance?

Finally, encouragement of communication between lawyer and attorney remains a concern. First, the due process concerns of a criminal defendant should trump our concern for such encouragement. Nonetheless, this concern could at least be resolved by the modification to Rule 1.6 posed above.[193] That is, Rule 1.6 should allow an attorney to share information "to potentially exculpate a criminal defendant whom the lawyer has reason to believe is innocent based upon information the lawyer knows about a client who has subsequently died."[194] Surely, if clients were advised that only when they died and only in the rarest of

191. *See* In re Sealed Case, 124 F.3d 230, 232-35 (D.C. Cir. 1997); Swidler & Berlin v. United States, 118 S.Ct. 2081 (1998).

192. Cohen v. Jenkintown Cab Co., 357 A.2d 689 (Pa. Super. Ct. 1976).

193. *See* Hood, *supra* note 1, at 779 and text accompanying note 180.

194. Hood, *supra* note 1, at 779.

circumstances could their communication possibly be shared, they would regard the posthumous cessation of the privilege as trivial.[195]

VI. CONCLUSION

The attorney-client privilege and the duty of confidentiality serve valid and useful purposes. The facts of some cases are so compelling, however, that a criminal defendant must be allowed to access otherwise privileged exculpatory information and offer such information as evidence in court. Under the current law of the privilege, a new exception does not offer an opportunity to access such information. However, if a defendant can utilize the teachings of *Brady*, *Agurs*, *Bagley*, and *Kyles* she may have a chance to override the privilege by asserting her constitutional right to exculpatory information in a criminal proceeding. If either the prosecutor or the court will not comply with the defendant's request, the defendant can allege a *Brady* violation of her due process rights.

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195. *See* Fred C. Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 352 (1989).