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ORDEAL BY INNOCENCE: WHY THERE SHOULD BE A WRONGFUL INCARCERATION/EXECUTION EXCEPTION TO ATTORNEY-CLIENT CONFIDENTIALITY

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INTRODUCTION

Two recent 60 Minutes stories have shed light on a dilemma that previously remained in the shadows for years, much like the innocent men it affected. In 1982, Alton Logan was convicted of first degree murder based upon being the trigger man in a robbery gone wrong at a Chicagoland McDonald's. What the jury that convicted Logan did not hear was that another man, Andrew Wilson, confessed to the crime Logan allegedly committed. The problem was that Wilson confessed to his attorneys, public defenders Dale Coventry and Jamie Kunz, who confirmed with the relevant authorities that they were bound by the rules of professional responsibility not to disclose their client's confession. Coventry and Kunz did prepare an affidavit detailing Wilson's guilt and in fact planned to come forward if Logan were given the death penalty. Ironically, two holdouts on the jury seemingly spared Logan's life by voting against capital punishment, but in fact dealt him the same fate that would befall the affidavit: being locked up—Logan in a prison cell; the affidavit in a lock box. Pained by guilt, the public defenders convinced Wilson to allow them to reveal his guilt after his death, resulting in Logan's eventual release from prison twenty-six years after he entered.[1]

A similar disposition still eludes Lee Wayne Hunt. Hunt and Jerry Cashwell were convicted in 1986 of murdering Lisa and Roland "Tadpole" Matthews in North Carolina based in part upon an FBI lead bullet analysis, which has since been found unreliable and potentially misleading. While the jurors who sentenced Hunt to two life sentences plus twenty years imprisonment heard this questionable evidence, they did not hear that Cash-

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[1] *See 60 Minutes*: *26-Year Secret Kept Innocent Man in Prison* (CBS television broadcast Mar. 9, 2008), *available at* http://www.cbsnews.com/stories/2008/03/06/60minutes/main3914719.shtml (last updated May 23, 2008) (link).

well confessed to being the sole killer to his attorney, appellate public defender Staples Hughes, in 1986. As in the Logan case, Hughes kept the confession under wraps until Cashwell's death. Unlike Coventry and Kunz, however, Hughes did not procure his client's consent to disclose the confession after Cashwell's death and had a disciplinary complaint leveled against him. Whereas the North Carolina State Bar dismissed the complaint against Hughes after a protracted investigation, Hunt remains in the Johnson Correctional Institute after the Supreme Court of North Carolina recently refused to hear his appeal without explanation.[2]

While the nationwide attention given to these cases is new, the dilemma they present is not. There are manifold examples of attorneys keeping proverbial smoking guns locked away while prison bars do the same to innocent men, but perhaps the most (in)famous is the case of George Reissfelder. In 1967, Reissfelder and William Sullivan were convicted of first degree murder and armed robbery in connection with a payroll holdup in Boston. Years later, as Sullivan was on his deathbed, he confessed to a jailhouse priest that Reissfelder was not involved in the holdup. Reissfelder's court-appointed attorney, Roanne Sragow, and her associate, future Presidential candidate John Kerry, later uncovered that Sullivan previously made a similar confession to his attorney, who felt duty bound to keep silent for over a decade. Indeed, even after Sragow and Kerry moved to release Sullivan's former attorney from his obligation of confidentiality, the judge denied the motion, and it took a waiver from Sullivan's family before Reissfelder was freed from the cell at Walpole State Prison that housed him for fifteen years.[3]

How do these injustices occur? Until recently, the Model Rules of Professional Responsibility prohibited an attorney from disclosing client information relating to a *completed* crime in which the attorney's services were not used, meaning that an attorney could not disclose that his client committed a crime for which another man was charged or convicted. And while the ABA amended Model Rule 1.6(b)(1) in 2002 to permit attorneys to reveal client information to prevent "reasonably certain death or substan-

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[2] *See* State v. Hunt, 659 S.E.2d 6 (N.C. 2008); John Solomon, *The End of a Failed Technique—But Not of a Prison Sentence*, Silent Injustice (Nov. 18, 2007), http://truthinjustice.org/lee-wayne-hunt.htm (link).

[3] *See* John Vennochi & Diane Lewis, *Cleared of Murder Charge, He Wants to Forget the Past*, THE BOSTON GLOBE, Aug. 31, 1982, at 40, *available at* http://www.nodp.org/ma/stacks/g_reissfelder.html (link); Gilda M. Tuoni, *Society Versus the Lawyers: The Strange Hierarchy of of Protections of the "New" Client Confidentiality*, 8 ST. JOHN'S J. LEGAL COMMENT. 439, 471 (1993). The thirteen year wrongful incarcerations of Jose Morales and Ruben Montalvo in New York for a murder committed by Jesus Fornes were strikingly similar, with Fornes' legal aid attorney and priest not coming forward with word of Fornes' confession until after his death. *See* Jim Dwyer, *In Court, a Priest Reveals a Secret He Carried for 12 Years*, N.Y. TIMES, July 17, 2001, at B1, *available at* http://query.nytimes.com/gst/fullpage.html?res=990DE7DE1E3BF934A25754C0A9679C8B63 (link).

tial bodily harm,"[4] the few commentators to address the issue have curtly concluded that this exception would still not apply to the wrongful incarceration scenario presented by the preceding examples.[5] Conversely, Massachusetts Rule of Professional Conduct 1.6(b)(1) explicitly permits attorneys to disclose client information to, inter alia, "prevent the wrongful execution or incarceration of another."[6] This Essay argues that the twenty-six states that have adopted some form of amended Model Rule 1.6(b)(1) can and should read an implied wrongful incarceration/execution exception into their existing rules while the remaining twenty-three states (and the District of Columbia) that have not adopted some form of amended Model Rule 1.6(b)(1) should amend their rules to create such an exception and can do so while causing less violence to the rationales behind attorney-client confidentiality than existing exceptions.

I. THE DEVELOPMENT OF RULE OF PROFESSIONAL CONDUCT 1.6(B)(1)

The idea of allowing or requiring attorneys to disclose client information to prevent the wrongful incarceration or execution of another is not new. In 1979, the ABA's Kutak Commission prepared a discussion draft of the new proposed Model Rules of Professional Conduct, which provided, in relevant part, that a lawyer shall disclose information about a client to the extent "necessary to prevent the client from committing an act that would seriously endanger the life or safety of a person, result in the wrongful detention or incarceration of a person or wrongful destruction of substantial property or corrupt judicial or governmental procedure."[7]

After this draft provoked significant controversy, the Commission altered its language and proffered a Proposed Final Draft Rule 1.6(b)(1) in 1981, which stated that "[a] lawyer may reveal information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in

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[4] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2007), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6.html (last visited June 17, 2008) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm.") (link).

[5] Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477, 519 (2002) (link).

[6] *See* MASS. RULES PROF'L CONDUCT R. 1.6(b)(1) (2008), *available at* http://www.mass.gov/obcbbo/rpc1.htm#Rule%201.6 (last visited June 17, 2008) ("A lawyer may reveal . . . [confidential information relating to the representation of a client] . . . 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*.") (emphasis added) (link).

[7] *See* Daniel Walfish, *Making Lawyers Responsible for the Truth: The Influence of Marvin Frankel's Proposal for Reforming the Adversary System*, 35 SETON HALL L. REV. 613, 631 n.99 (2005) (link).

death or substantial bodily harm, or substantial injury to the financial interest or property of another."[8] In 1983, however, the American College of Trial Lawyers offered an amendment to remove the portion of the exception covering fraudulent acts, restricting the class of disclosable criminal acts. The amendment was adopted, and the enacted Rule 1.6(b)(1) indicated that "[a] lawyer may reveal information to the extent the lawyer reasonably believes necessary . . . to prevent the client from committing a criminal act that the lawyer believes is likely to result in *imminent* death or substantial bodily harm."[9]

Rule 1.6(b)(1) thus stood as one of several exceptions to the general principle of confidentiality contained in Rule 1.6(a), under which "[a] lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent."[10] Like the similar confidentiality rules for the doctor-patient and clergyperson-penitent relationships, attorney-client confidentiality has been viewed as essential to the development of client trust and the facilitation of open and honest communication in the rendering of services.[11] The 1983 version of the Model Rule remained unaltered until the ABA Ethics Commission 2000 suggested removal of the "future criminal act" and imminence requirements from Rule 1.6(b)(1). The ABA accepted this recommendation and amended Rule 1.6(b)(1) in 2002 so that "[a] lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary . . . to prevent reasonably certain death or substantial bodily harm."[12] Comment 6 to the rule explains the import of this change. Previously, an attorney could not disclose any past (non-attorney facilitated) act of a client and could not disclose any proposed future act unless it was criminal and likely to cause imminent death or substantial bodily harm. Under the amended rule, however, attorneys may disclose even past non-criminal acts by clients or third parties when death or substantial bodily harm is "reasonably certain."[13]

According to Comment 6,

> [s]uch 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

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[8] 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, 570 (2003), *available at* http://findarticles.com/p/articles/mi_qa3975/is_200307/ai_n9259205 (link).

[9] *Id.* (emphasis added).

[10] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2007), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6.html (last visited June 17, 2008) (link).

[11] *See* Leslie Levin, *Testing the Radical Experiment: A Study of Lawyer Response to Clients Who Intend to Harm Others*, 47 RUTGERS L. REV. 81, 97 (1994) (link).

[12] MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2007), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6.html (last visited June 17, 2008) (link).

[13] *See* Stephen D. Easton, *My Last Lecture*, 56 S.C. L. REV. 229, 253 n.60 (2004).

> 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.[14]

This comment indicates that "[s]uch harm" is "reasonably certain" when it is either "imminent" (*i.e.*, temporally close) or when failure to disclose will irreversibly set into motion a chain of events that could end in death or substantial bodily harm.

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, 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*."[15]

II. THE ARGUMENTS FOR ADOPTION OF A WRONGFUL INCARCERATION/EXECUTION EXCEPTION

A. States Adopting Some Version of Amended Model Rule 1.6(b)(1) Can Read a Wrongful Incarceration/Execution Exception Into Their Existing Rules

After the ABA amended Rule 1.6(b)(1), few commentators addressed the issue of whether the amended rule now permitted attorneys to disclose client information to prevent the wrongful execution of another person. Those that did merely mentioned in passing and without much explication that they thought that the amended rule now permitted such disclosure.[16] This position appears correct because disclosure would prevent death, but at

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[14] MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 6 (2007), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6_comm.html (last visited June 17, 2008) (link).

[15] MASS. RULE OF PROF'L CONDUCT R. 1.6(b)(1) (2008), *available at* http://www.mass.gov/obcbbo/rpc1.htm#Rule%201.6 (last visited June 17, 2008) (emphasis added) (link).

[16] *See, e.g.*, Snyder, *supra* note 5, at 518–19.

what point would such death be reasonably certain? These commentators claimed that under the amended rule, an attorney could not disclose client information until "all appeals have been exhausted and an execution date scheduled."[17]

This position again seems close to the mark because the low percentage of inmates sentenced to capital punishment who are actually executed indicates that the death to be prevented is not "reasonably certain."[18] Applying the two definitions of "reasonably certain" laid out in Comment 6, we first see that death is not necessarily "imminent" until a death sentenced prisoner has been incarcerated for many years because the extensive appellate process has made it so that "the average length of time from sentence to execution is over twelve years . . . ."[19] Second, until a death sentenced prisoner has lost his terminal appeal (or even later, based upon the possibility of, inter alia, a stay of execution or clemency), there is little risk that an attorney's failure to act will *irreversibly* set into motion a chain of events that could end in death. This means that innocent men and women could sit in prison cells for decades while attorneys, like the convicted, are bound to bide their time.

How, then, do we avoid the "justice delayed is justice denied" conundrum, and what of innocent men such as Alton Logan, who are spared from the death penalty? My proposed solution is to construe wrongful incarceration as reasonably certain substantial bodily harm. In contrast, the few commentators to address the issue thus far have curtly concluded that, at best, the amended rule only covers wrongful convictions punctuated by execution.[20]

To determine whether or not wrongful incarceration should allow for disclosure under the rule, we must consider the typical acts that attorneys, the ABA, and states have concluded are likely or reasonably certain to result in substantial bodily harm. Leslie Levin's one of a kind 1993 survey of New Jersey lawyers revealed that since January 1985, 67 out of 776 responders had encountered at least one occasion in which they reasonably believed that a client was going to commit a specific wrongful act that was likely to result in death or substantial bodily harm, with by far the most common act being assault and battery.[21] As the aforementioned Comment 6 indicates, an act that will potentially result in innocent third parties contracting a disease is another act that could result in substantial bodily harm.

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[17] *Id.* at 519; *see also, e.g.*, David W. Raack, *The Ethics Commission's Proposed Revisions to the Model Rules: Substantive Change or Just a Makeover?*, 27 OHIO N.U. L. REV. 233, 239 (2001).

[18] Lawrence Katz, Steven D. Levitt & Ellen Shustorovich, *Prison Conditions, Capital Punishment, and Deterrence*, 5 AM. L. & ECON. REV. 318, 319 (2003) ("At the end of 1997 there were 3,335 inmates under a sentence of death, meaning that approximately 2% of those on death row were executed.").

[19] Marilyn Peterson Armour & Mark S. Umbreit, *The Ultimate Penal Sanction and "Closure" for Survivors of Homicide Victims*, 91 MARQ. L. REV. 381, 387 (2007) (link).

[20] *See, e.g.*, Snyder, *supra* note 16, at 519.

[21] *See* Levin, *supra* note 11, at 112.

Clearly forcible rape is another act that could result in substantial bodily harm, and Massachusetts has indicated in Comment 9A to its Rule 1.6 that statutory rape is an act that causes substantial bodily harm.[22]

Turning to wrongful incarceration, arguably, inmates are exposed to the risk of substantial bodily harm inherent in each of these three acts. First, in comparison to the non-incarcerated, inmates face an increased risk of physical violence based upon factors such as the concentration of violent individuals, overcrowding, prison culture, the inability of prisoners to physically separate themselves, the prevalence of drug use, and prison guard brutality.[23] One national study indicated that twenty-seven percent of inmates will suffer from a physically violent attack, excluding rape, while data from a Pontiac Correctional Institute report indicated that in Illinois in 1990 there were 588 assaults in a prison population of 1,924 inmates (31%); furthermore, both the study and report likely underestimate the problem based upon the "inmate norm against snitching and possible retaliation."[24]

Second, inmates experience heightened rates of communicable diseases contracted vis a vis the general population, perhaps explained by prison overcrowding (and prisoners accordingly living in close quarters) and compounded by generally poor medical screening and treatment in prisons.[25] According to a 2002 study by the National Commission on Correctional Health Care, the rates of HIV and Hepatitis C infections in prison are more than five times and between nine and ten times the corresponding rates in the general population, respectively.[26] And while incomplete reporting makes it impossible to determine the exact number of inmates who already had diseases before being incarcerated, it is known that many inmates do not contract communicable diseases until after they are imprisoned, in large part based upon same sex rape.[27] This leads to the third point, which is the

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[22] MASS. RULES OF PROF'L CONDUCT R. 1.6 cmt. 9A (2008), *available at* http://www.mass.gov/obcbbo/rpc1.htm#Rule%201.6 (last visited June 17, 2008) (link) [hereinafter Comment 9A].

[23] *See* Jeff Potts, *American Penal Institutions and Two Alternative Proposals for Punishment*, 34 S. TEX. L. REV. 443, 462–65 (1993).

[24] *Id.* at 462 n.126; *see also* James E. Robertson, *Cruel and Unusual Punishment in United States Prisons: Sexual Harassment Among Male Inmates*, 36 AM. CRIM. L. REV. 1, 17 (1999) (link).

[25] *See* Potts, *supra* note 23, at 465–70; *Prison Rape Reduction Act of 2003: Hearing Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 108th Cong. 30 (2003) (statement of Frank A. Hall, Director, The Eagle Group) ("In 2001, more than six percent of all deaths in these institutions were attributable to these life-threatening illnesses. Infection rates for other sexually transmitted diseases, tuberculosis, and hepatitis B and C are also far greater for prisoners than the American population as a whole. Prison rape is often a death sentence for the victim.").

[26] *See* NAT'L COMM'N ON CORR. HEALTH CARE, THE HEALTH STATUS OF SOON-TO-BE-RELEASED INMATES: A REPORT TO CONGRESS, VOL. 1, at 18 (2002), *available at* http://www.ncchc.org/stbr/Volume1/Chapter3.pdf (noting that 17–18.6% of prisoners have Hepatitis C while only 1.8% of the general population has the disease) (link).

[27] *See* Rachel Wyatt, Note, *Male Rape in U.S. Prisons: Are Conjugal Visits the Answer?*, 37 CASE W. RES. J. I'NTL L. 579, 590 (2006) (link).

consensus that inmates are subjected to an increased risk of same sex rape, with one study revealing that 98% of an inmate sample was aware of at least one sexual assault occurring in the previous year.[28]

In deciding whether the increased risk of a prisoner suffering from any one of these three harms constitutes reasonably certain bodily harm, we must ask whether the increased risk is commensurate with the risks faced by intended victims in situations where we permit Rule 1.6(b)(1) disclosures. Taking the most typical situation, if we believe that the risk of an intended assault and battery victim actually suffering from substantial bodily harm is analogous to the aggregate increased risk of a prisoner suffering from violence, contracting a communicable disease, or being raped, disclosure should be permitted or required in the wrongful incarceration scenario. The statistics recounted in the previous paragraphs strongly indicate that this is the case, which is borne out by the fact that 52 out of the 67 responders in Levin's survey who believed that their clients were going to commit specific wrongful acts likely to result in death or substantial bodily harm had at least one client who did not ultimately commit the proposed acts.[29]

The advantage of having not only a wrongful execution exception but also a wrongful incarceration exception is it would apply to a broader range of cases and allow for swifter justice in death penalty cases. Comment 9A to Massachusetts Rule of Professional Conduct 1.6 indicates that the rule allows an attorney "to reveal client information in the specific situation where such information discloses that an innocent person has been convicted of a crime and has been sentenced to imprisonment or execution."[30] Going further, because of the large percentage of defendants detained at some point during the pre-trial period,[31] attorneys should frequently be able to disclose client information before a trial has even begun. In either of these cases, incarceration would be inevitable, making the risk of substantial bodily harm connected with such incarceration "reasonably certain" under both of the definitions laid out in Comment 6. Accordingly, states that have adopted some form of amended Model Rule 1.6(b)(1) can and should read a similar wrongful incarceration/execution exception into their existing rules.

Moreover, the states that have amended their rules to permit or require attorneys to disclose client information to prevent substantial injury to the financial interest or property of another can include the significant financial

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[28] Potts, *supra* note 23, at 471 n.185; *see also* Cheryl Bell et al., *Rape and Sexual Misconduct in the Prison System: Analyzing America's Most "Open" Secret*, 18 YALE L. & POL'Y REV. 195, 198 (2000) ("Don Lockwood's 1986 study of New York state prison inmates revealed that 22% of these maximum-security prisoners had been the victims of attempts to coerce them into a sexual act, compared to 23% in the Struckman-Johnson study.") (link).

[29] *See* Levin, *supra* note 11, at 111–12, 114 n.145.

[30] Comment 9A, *supra* note 22.

[31] During fiscal-year 2001, approximately 72% of federal defendants were detained pre-trial. *See* BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, SOURCEBOOK OF CRIMINAL JUSTICE STATISTICS 414–15 (2003), *available at* http://www.albany.edu/sourcebook/pdf/t513.pdf (link).

effects of imprisonment as part of the harm to be prevented by a wrongful incarceration/execution exception.[32] Thus, as long as wrongful incarceration satisfies the substantial bodily harm or financial harm requirement, states with "future criminal act" requirements should be able to create wrongful incarceration/execution exceptions. Indeed, as the next section shows, a wrongful incarceration/execution exception upsets that the rationales behind attorney-client confidentiality less than the existing "future criminal acts" exception.

B. States Not Adopting Some Version of Amended Rule 1.6(b) Should Create a Wrongful Incarceration/Execution Exception Because It Would Be Consistent with the Rationales Behind "Future Criminal Act" Requirements

At first blush, it may seem a radical departure from the status quo to propose that states, which have not adopted the ABA's 2002 amendment to Rule 1.6(b)(1), should add an exception allowing attorney's to break confidentiality in order to prevent wrongful incarceration. By their language, these states' rules currently allow attorneys to disclose only future criminal acts by defendants, and therefore not simply failure to confess to a crime. But what is the purpose of the "future criminal act" requirement?

In order to justify breaking a client's confidence, there must be a sufficient countervailing interest outweighing the interests that attorney-client confidentiality advances—the "future criminal act" requirement creates such sufficiency by demanding criminal culpability and preventable peril.[33] In other words, when a client relays to his attorney a proposed negligent but non-criminal act (such as manufacturing an unsafe toy), Rule 1.6(b)(1) does not apply because the client does not intend to engage in sufficiently blameworthy behavior. Meanwhile, when a client informs his attorney that he has already committed a crime, Rule 1.6(b)(1) does not permit disclosure because the harm has already occurred and is non-preventable.

Cases involving wrongful incarceration or execution, on the other hand, satisfy both of these requirements. When a client confesses in confidence to a crime for which another has been convicted, that confession itself is evidence of criminal culpability. There is also a preventable harm because, by breaking confidence and revealing the client's confession, the attorney may be able to stop a wrongful incarceration or execution. Indeed,

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[32] Frontline: Burden of Innocence: Frequently Asked Questions, http://www.pbs.org/wgbh/pages/frontline/shows/burden/etc/faqsreal.html (May 1, 2003) ("Studies by the Life After Exoneration Project found that over 90 percent of exonerees lost all their assets—savings, vehicles, houses—while imprisoned.") (link).

[33] *See* Irma S. Russell, *Unreasonable Risk: Model Rule 1.6, Environmental Hazards, and Positive Law*, 55 WASH. & LEE. L. REV. 117, 169 (1998) (link); Irma S. Russell, *Cries and Whispers: Environmental Hazards, Model Rule 1.6, and the Attorney's Conflicting Duties to Clients and Others*, 72 WASH. L. REV. 409, 462 (1997) [hereinafter Russell, *Cries and Whispers*] (Rule 1.6(b)(1) disclosures "require[] two elements: (1) significant peril to a third party . . . and (2) culpable conduct by the client (a criminal act).").

a wrongful incarceration/execution exception arguably fulfils these purposes better than the "future criminal" act exception does.

Criminal culpability is *more* certain in wrongful incarceration/execution cases than in "future criminal act" cases. Comment 13 to the pre-2002 Model Rule 1.6 cautioned that when a client discloses an intention to commit a criminal act, "[i]t 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."[34] Still, the rule allows an attorney to make a Rule 1.6(b)(1) disclosure despite the fact that his client may never have acted upon his "heinous purpose." Conversely, in the case of wrongful incarceration/execution there is no risk of a change of mind; the crime has already been committed. Thus, a wrongful incarceration/execution exception is arguably more justifiable than the "future criminal act" exception.

There is also a stronger guarantee of preventable harm in wrongful incarceration/execution cases than in "future criminal act" cases. A client disclosing an intention to commit a crime might never have successfully completed that crime and thus there would be no actual peril to prevent in some "future criminal act" cases. On the other hand, in the proposed wrongful incarceration/execution scenario, an attorney would not be permitted or required to disclose client information until after the wrong person has been sentenced or incarcerated, meaning that there will always be a peril to prevent or correct.

III. A WRONGFUL INCARCERATION/EXECUTION EXCEPTION WOULD NOT UNDULY HINDER THE RENDERING OF LEGAL SERVICES

One might argue that a wrongful incarceration/execution exception would chill the client trust and communication that attorney-client confidentiality is intended to preserve. Such concern, however, is unfounded. "[T]here is no evidence that clients are discouraged from talking to their lawyers as a result of exceptions to confidentiality rules,"[35] because for better or for worse, most laypeople believe that attorney-client communications are more protected than they are. One might further argue that the current exceptions, which seemingly do not affect client decision-making, are somehow different than a wrongful incarceration/execution exception, which, in contrast and if implemented, would hinder the rendering of legal advice. The argument actually cuts the other way.

The long standing "future criminal act" confidentiality exception typically involves an attorney disclosing client information used in rendering legal advice. To wit, the survey results from Leslie Levin's aforementioned survey of New Jersey lawyers revealed that 92.4% of responders who believed that their clients were going to commit wrongful acts that were likely

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[34] Russell, *Cries and Whispers*, *supra* note 33, at 431 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.6 cmt. 13 (1994)).

[35] Levin, *supra* note 11, at 98.

to cause substantial bodily harm discussed this belief with their clients, with 96.7% of that group discussing the legal consequences of the act.[36] Furthermore, existing exceptions to attorney-client confidentiality that allow an attorney to prevent, mitigate, or rectify certain acts or their consequences, when a client used the attorney's services to commit the act, by definition involve an attorney disclosing statements made by his client for the purpose of receiving legal advice.[37] Similarly, the existing exception that allows an attorney to disclose client information to, inter alia, "respond to allegations in any proceeding concerning the lawyer's representation of the client" also by definition allows an attorney to disclose statements made by his client for the purpose of receiving legal advice.[38] For each of these situations, breaking client confidence is allowable on information obtained for the purpose of rendering legal advice.

By contrast, the client information at issue under a wrongful incarceration/execution exception frequently will not come from the client for the purpose of receiving legal advice and will not result in such advice. For example, Andrew Wilson, the confessing client in the Alton Logan case, was not pursued as a suspect in the McDonald's robbery/shooting and bragged to his public defenders (who were representing him in an unrelated matter) about his undetected commission of the crime rather than seeking advice about how to defend himself. In these cases, my proposed exception would do little to hinder the rendering of legal advice and would certainly do less harm than existing exceptions.

On the other hand, if the information to be disclosed in a wrongful incarceration/execution case did come from the client for the purpose of receiving legal advice, like in the Lee Wayne Hunt case, the confessing client will be a co-defendant, and disclosure would likely impede the rendering of legal advice. While this might seem to argue against the use of such an exception, addition of a wrongful incarceration/execution exception would likely have little or no impact on a client's willingness to speak with his attorney. Clients unaware of the exceptions would certainly not be affected by an exception they do not know exists. Clients who are aware of the exceptions to attorney-client confidentiality already have good reason not to admit to a crime for which another person has been charged or convicted. Thus, the argument that adding a wrongful incarceration/execution exception would chill trust and communication between attorney and client is unfounded.

For example, pursuant to Model Rule of Professional Responsibility 1.2(d),[39] an attorney shall not, among other things, assist a client in conduct

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[36] *See id.* at 117 & nn.156–57.

[37] *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2)–(3) (2007), *available at* http://www.abanet.org/cpr/mrpc/rule_1_6.html (link).

[38] *See id.* R. 1.6(b)(5).

[39] *See id.* R. 1.2(d), *available at* http://www.abanet.org/cpr/mrpc/rule_1_2.html (link).

that the attorney knows is criminal or fraudulent, and under Model Rule of Professional Responsibility 4.1(b), an attorney shall not knowingly "fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.[40]

These rules mean that if Jerry Cashwell wanted to testify that he did not kill Lisa and Roland "Tadpole" Matthews or that Lee Wayne Hunt committed the crime, his attorney would have needed to prevent him from testifying lest he suborn perjury. If Cashwell nonetheless perjured himself, his attorney would have needed to withdraw from representing him and may have needed to make a "noisy withdrawal," under which he would have been required to "give notice of the fact of withdrawal and to disaffirm an opinion, document, affirmation or the like."[41] Of course, the purpose of the "noisy withdrawal," and its likely collateral effect, is to "inferentially [disclose] client confidences."[42] Because a client aware of these existing exceptions already has reason not to incriminate himself or exculpate his co-defendant, there is no reason to believe that a wrongful incarceration/execution exception would negatively alter the attorney-client dynamic in these situations.

CONCLUSION

While men such as Alton Logan and Lee Wayne Hunt have endured inordinate suffering, perhaps we can derive a quantum of solace from their plights if they lead to the recognition of a wrongful incarceration/execution exception to attorney-client confidentiality. That recognition might come in the form of states articulating new rationales for the adoption of such an exception. This article, however, has laid out a theory under which states that have adopted some form of amended Model Rule 1.6(b)(1) can read a wrongful incarceration/execution exception into their existing rules while the states that have not adopted some form of amended Model Rule 1.6(b)(1) can create such an exception while causing less violence to the rationales behind attorney-client confidentiality than existing exceptions.

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[40] *See id.* R. 4.1(b), *available at* http://www.abanet.org/cpr/mrpc/rule_4_1.html (link).

[41] *See id.* R. 4.1(b) cmt. 3 (2007), *available at* http://www.abanet.org/cpr/mrpc/rule_4_1_comm.html (link).

[42] *See* Thomas Andrews, *The Limits of Confidentiality: Recent Developments in the United States Relating to a Lawyer's Right to Disclose Confidences to Prevent Property Damage and Fraud*, 21 RITSUMEIKAN L. REV. 19, 25 (2004) (quoting ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 92–366), *available at* http://www.asianlii.org/jp/journals/RitsLRev/2004/2.pdf (link).

APPENDIX

A. States Adopting Some Version of Amended Model Rule 1.6(b)(1)

Colorado
Delaware
Florida
Georgia (also has a financial harm exception)
Idaho
Illinois
Indiana
Iowa
Louisiana
Maryland
Minnesota
Missouri
Montana
Nebraska
Nevada
New Hampshire (exception also covers financial harm)
North Carolina
North Dakota
Ohio
Oklahoma
Oregon
Pennsylvania
South Carolina
Utah
Washington
Wisconsin (exception also covers financial harm)

B. States Which Still Have a "Future Criminal Act" Requirement

Alabama (has an imminence requirement)

Alaska (exception also covers fraudulent acts/financial harm/property harm)

Arizona

Arkansas

California

Connecticut (exception also covers fraudulent acts/financial harm/property harm)

D.C.

Hawaii (exception also covers fraudulent acts/financial harm/property harm)

Kansas

Kentucky (has an imminence requirement)

Maine

Michigan

Mississippi

New Jersey (exception also covers fraudulent acts/financial harm/property harm)

New Mexico (exception also covers financial harm)

New York

Rhode Island (has an imminence requirement)

South Dakota (has an imminence requirement)

Tennessee (exception also covers financial harm/property harm)

Texas (exception also covers fraudulent acts)

Vermont (has an imminence requirement)

Virginia

West Virginia

Wyoming

C. States With a Wrongful Incarceration/Execution Exception

Massachusetts (exception also covers fraudulent acts/financial harm/property harm)