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WRONGFUL INCARCERATION CAUSES SUBSTANTIAL BODILY HARM: WHY LAWYERS SHOULD BE ALLOWED TO BREACH CONFIDENTIALITY TO HELP EXONERATE THE INNOCENT

Vania M. Smith[+]

"Because four attorneys signed [a] notarized forty-five word affidavit . . . on March 17, 1982—roughly only one month after my arrest—and felt duty-bound to keep it secret, I served twenty-six years in prison, almost half of my life at the time, for a murder I didn't commit."[1]

- Alton Logan

In February 1982, Alton Logan was arrested on the south side of Chicago, charged with the murder of a security guard.[2] In March 1982, Andrew Wilson was asked by his attorneys if he committed the crime for which Logan was awaiting trial.[3] Wilson confessed.[4] After this confession, the attorneys had to decide either to maintain the confidential relationship with their client by keeping this confession secret, or to disclose the confession in an effort to clear Logan. One of the attorneys met with a judge who advised that the client's confidence must be kept.[5] After consideration, the attorneys decided to create a signed affidavit, outlining the details of the confession, which was kept hidden in a strongbox.[6] At trial, Logan was convicted of the crime and sentenced to life

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1. ALTON LOGAN, JUSTICE FAILED xli (2016).

2. *Id.* at 11–15.

3. *Id.* at 29, 31–32. Two attorneys for an individual named Andrew Wilson (Dale Coventry and Jaime Kunz) were approached by Marc Miller, attorney for Logan's cellmate, Edgar Hope. *Id.* at 29–30. Hope admitted to being an accomplice of Wilson and asserted that Wilson, not Logan, was the perpetrator of the crime for which Logan was incarcerated. *Id.* at 29. After being approached by Miller with this information, Coventry and Kunz interviewed Wilson at which time Wilson admitted to the crime. *Id.* at 31–32.

4. *Id.*

5. *Id.* at 35. Kunz met with a judge who was a former defense attorney. The judge warned that there was nothing to be done—and whether or not Logan faced the death penalty had no bearing on the attorneys' obligation to maintain privilege. *Id.*

6. *Id.* at 32–33, 39.

in prison, narrowly escaping the death penalty by a 10-2 vote.[7] The affidavit remained sealed while Logan maintained his innocence in prison.[8] On November 19, 2007, Andrew Wilson died.[9] On December 17, 2007, Alton Logan's attorney filed a motion to have the affidavit disclosed.[10] Disclosure was finally granted on January 11, 2008.[11] This set in motion a series of events that would lead to the full exoneration of Alton Logan. Alton Logan spent twenty-six years in prison, convicted of a crime he didn't commit.[12] While Logan was serving time, the documented confession that could have led to his exoneration remained hidden for 25 years.[13] According to the attorneys involved, they had no choice but to remain silent.[14] The duty of confidentiality required them to keep their client's secret.[15]

The conduct of lawyers is governed by the American Bar Association's (ABA) Model Rules of Professional Conduct (MRPC).[16] The rules are critical to promoting a level of professionalism and continuity within the profession and are designed to operate in tandem with an attorney's duty to the administration of justice.[17] The rules are not laws.[18] They are guidelines that, if followed, can

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7. *Id.* at 43–45. In Illinois, at the time of the trial, the death penalty required a unanimous vote of the jury. *Id.* at 45.

8. *Id.* at 50–51.

9. *Id.* at 73.

10. *Id.* at 77.

11. *Id.* at 79. The order, granting the motion and ruling that Wilson had waived the attorney-client privilege, allowed Wilson's attorneys to discuss the affidavit's contents and Wilson's confession to the 1982 murder. *Id.* Wilson's attorneys had also obtained oral permission from Wilson to disclose the confession upon his death. *Id.* at 34.

12. *See generally id.* at 3 (Logan was arrested on February 7, 1982 at age twenty-eight, and not freed until September 4, 2008, at age fifty-five).

13. The focus in the Logan case was on attorneys Dale Coventry and Jamie Kunz, to whom Andrew Wilson confessed. Coventry and Kunz were not, however, the only individuals aware of the confession. Two other attorneys learned of the confession during Logan's incarceration and signed the affidavit: Marc Miller, attorney for Logan's cellmate Edgar Hope, and Andrea Lyon, a public defender who made the initial recommendation to Coventry and Kunz that an affidavit be drafted, "so that if Coventry and Kunz were ever to reveal the truth, it wouldn't look like they made up the story." *Id.* at 32. Ms. Lyon also served as the notary on the document. *Id.* at 33.

14. *60 Minutes: 26-Year Secret Kept Innocent Man in Prison* (CBS television broadcast May 23, 2008).

15. *Id.*

16. SUSAN R. MARTYN ET AL., THE LAW GOVERNING LAWYERS: MODEL RULES, STANDARDS, STATUTES, AND STATE LAWYER RULES OF PROFESSIONAL CONDUCT 1 (2018).

17. *Id.* However, while the Rules are critical, they are voluntary and non-exhaustive. *Id.* at 9 ("Compliance with the Rules, as with all law in an open society, depends primarily upon understanding and voluntary compliance . . . The Rules do not, however, exhaust the moral and ethical considerations that should inform a lawyer . . . The Rules simply provide a framework for the ethical practice of law").

18. David Rosenthal, *The Criminal Defense Attorney, Ethics And Maintaining Client Confidentiality: A Proposal to Amend Rule 1.6 of the Model Rules of Professional Conduct*, 6 ST. THOMAS L. REV. 153, 153 (1993).

prevent an attorney from facing professional discipline. Because the rules are not laws, attorneys are often placed in a position where a decision must be made that puts into conflict the legal ethics proscribed by the rules and the attorney's own moral obligation to seek justice.

This type of conflict arises in the interpretation of MRPC 1.6. Rule 1.6 outlines the attorney's duty to keep the confidences of a client.[19] It covers the client relationship from initial interaction to disposition of a legal matter, and the ongoing duty when a client's status changes from current to former.[20] Rule 1.6 requires that an attorney keep the confidences shared during client representation at all times, with very few exceptions.[21] Among these exceptions is the "substantial bodily harm" exception, which is the focus of this Comment.[22] This exception, found in the current iteration of MRPC 1.6(b)(1), allows an attorney to breach the duty of confidentiality owed to a client "to the extent the lawyer reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm . . . ."[23] This rule is precatory. It gives the attorney the option to decide if the circumstances warrant the breach.[24]

In 2017, "[a]t least 139 convicted defendants in the United States were exonerated . . . ."[25] Some of these exonerations were the result of the discovery of "false confessions."[26] What these statistics lack, however, is an understanding of the number of confessions that do not lead to exoneration because those confessions were made as a part of the attorney-client relationship and therefore kept confidential. MRPC 1.6 allows an attorney to disclose confidential information if the disclosure falls under an exception.[27] Some have argued that wrongful incarceration is one such exception.

Incarceration in the United States exposes an inmate to substandard medical care, a general lack of proper nutrition, the danger of inmate violence, and the psychological and physiological damage of confinement.[28] These factors,

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19. *See* MARTYN, *supra* note 16, at 21–22.

20. *Id.* at 22, 26.

21. *Id.* at 21–22.

22. *Id.* at 22.

23. *Id.* MRPC Rule 1.6(b)(1) is the first exception to the duty of confidentiality outlined by the rules. *Id.*

24. The rule uses the phrase "may reveal," thus leaving the breach to the discretion of the attorney. *Id.* Some state rules are mandatory, using the phrase "shall reveal" to require disclosure. *See generally Variations of the ABA Model Rules of Professional Conduct*, AMERICAN BAR ASSOCIATION (Jan. 2, 2020), https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_1_6.pdf [hereinafter *Variations of the ABA Model Rules*].

25. Niraj Chokshi, *False Confessions, Mistaken Witnesses, Corrupt Investigators: Why 139 Innocent People Went to Jail*, N.Y. TIMES, Mar. 14, 2018, https://www.nytimes.com/2018/03/14/us/convict-exonerations-2017.html.

26. *Id.*

27. *See* MARTYN, *supra* note 16, at 21.

28. Zieva Dauber Konvisser, *Psychological Consequences of Wrongful Conviction in Women and the Possibility of Positive Change*, 5 DEPAUL J. SOC. JUST. 221, 244 (2012).

compounded with the mental trauma of innocent imprisonment, result in substantial harm.[29] As of 2008, 26 states had adopted MRPC 1.6,[30] however, the general interpretation of the rule had not recognized wrongful incarceration as substantial bodily harm.[31] To date, only two states, Massachusetts and Alaska, have codified a wrongful incarceration exception into their versions of Rule 1.6.[32] In the rest of the country, ethics committees responsible for attorney discipline have been reluctant to read a wrongful incarceration exception into the existing rule.

This Comment will posit that MRPC 1.6, in its current form, gives an attorney the option to disclose a client confidence to help exonerate a third party. It will provide historical context on the promulgation and evolution of Rule 1.6, and support for the idea that the incarceration of the innocent causes substantial bodily harm. The Comment will argue that, while two states have written a wrongful incarceration exception into their equivalent laws, such a step is not necessary because the existing rule should be interpreted to already encompass wrongful incarceration.[33] The Comment will give fair analysis to the challenges of this interpretation, including the potential impact on the attorney-client

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29. *Id.* at 238–39.

> The trauma of wrongful conviction has been compared to the trauma suffered by veterans of war, torture survivors, concentration camp survivors and refugees and asylees who similarly have been arrested, wrongfully incarcerated and released back into society—survivors of "'sustained catastrophes' that extend over long periods" and that can change their lives—and the lives of their loved ones—forever. Once an individual is isolated, interrogated, wrongfully convicted, imprisoned and released, his or her mental health symptoms upon reentry are like those of torture survivors—anxiety, depression and posttraumatic stress disorder.

Id.

30. Colin Miller, *Ordeal By Innocence: Why There Should Be A Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391, 403 (2008) (noting that the following states have adopted a version of MRPC Rule 1.6(b)(1): Colorado, Delaware, Florida, Georgia, Idaho, Illinois, Indiana, Iowa, Louisiana, Maryland, Minnesota, Missouri, Montana, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, Utah, Washington, Wisconsin).

31. *Id.* at 392–93. The ABA rules were modified in 2002, adding the "substantial bodily harm" exception, however this still hasn't translated into the use of the exception for the purposes of freeing the wrongfully incarcerated. *Id.*

32. *Variations of the ABA Model Rules*, *supra* note 24, at 2, 13.

33.

> Only one state—Massachusetts—has a wrongful incarceration exception in its confidentiality rule: 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.

Victoria Vuletich, *Is Property More Important Than People? The Moral Inadequacy of Model Rule of Professional Conduct 1.6*, 2 CHARLOTTE L. REV. 187, 192–93 (2010). This changed in 2017 when Alaska added a similar statute. *Variations of the ABA Model Rules*, *supra* note 24, at 2.

relationship and overall public confidence in the legal profession; issues of morality faced by attorneys in this particular scenario; the potential constitutional issues derived from self-incrimination by the guilty client; and matters of due process. The Comment will use an instructional hypothetical to highlight the viability of a universal interpretation of Rule 1.6. Upon analysis of this hypothetical, the Comment will conclude that Rule 1.6 provides the language needed for attorneys and ethics committees to read wrongful incarceration into the existing substantial bodily harm exception.

I. THE DUTY OF CONFIDENTIALITY AND THE CONCEPT OF SUBSTANTIAL BODILY HARM

A. MRPC Rule 1.6: Confidentiality of Information

1. The Evolution of the Duty of Confidentiality

The Model Rules of Professional Conduct are guidelines for attorney conduct. Though these guidelines are not laws, attorneys hold them in high regard, often giving them a "symbolic importance" that supersedes state ethics rules.[34] The rules were first promulgated in 1983 as an alternative to the Canons of Ethics that were widely used as the exemplar of attorney behavior.[35] The Canons of Ethics were created at a time where public esteem of the legal profession was low due to questions of ethics.[36] Of critical concern were guidelines for lawyers regarding client confidences.[37] The Canons of Ethics were the first time a rule regarding confidentiality was codified,[38] yet the idea of its importance was not a new one. In 1888, the United States Supreme Court in *Hunt v. Blackburn* noted that:

> The rule which places the seal of secrecy upon communications between client and attorney is founded upon the necessity, in the interest and administration of justice, of the aid of persons having knowledge of the law and skilled in its practice, which assistance can

34. David Lew, Note, *Revised Model Rule 1.6: What Effect Will the New Rule Have on Practicing Attorneys?*, 18 GEO. J. LEGAL ETHICS 881, 887 (2005).

35. Vuletich, *supra* note 33, at 189. "The current version of MRPC 1.6 has its roots in the comprehensive rewrite of the then-existing Canons of Ethics undertaken by the Kutak Commission in 1977." *Id.*

36. Gary Rowe, *Potential Expansion, or Modification, to the Permissive Exceptions of Model Rule 1.6: Client-Lawyer Confidentiality in Criminal Law and "The Gap"*, 39 J. LEGAL PROF. 291, 293 (2015).

37. *Id.*

38. Lew, *supra* note 34, at 882 ("The American Bar Association's *Canons of Professional Ethics ('Canons')* contained the nation's first codified rule of confidentiality. The Canons, as amended in 1928, stated that 'it is the duty of a lawyer to preserve his client's confidences.'").

> only be safely and readily availed of when free from the consequences or the apprehension of disclosure.[39]

Rules regarding attorney-client confidentiality were primarily designed to protect public confidence in the legal profession.[40] This early focus on maintaining confidentiality as integral to the success of the profession led to strict, narrowly interpreted exceptions that existed for generations. It was thought that the accused would not consent to legal services or maintain candor with their attorney if there weren't some safeguards that what was shared would be kept in confidence.[41] MRPC Rule 1.6 outlines the duty of confidentiality as follows:

> (a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).
>
> (b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:
>
> (1) to prevent reasonably certain death or substantial bodily harm.[42]

Rule 1.6 holds confidences shared between a client and an attorney as sacrosanct, and only provides limited exceptions for when a confidence can be breached.[43] Subsection (b)(1) of Rule 1.6 is one of those exceptions.[44] This exception has existed in varying forms in all iterations of the Model Rules of Professional Conduct.[45] In early versions of the rule, the information the attorney was privy to had to be related to their client's intent to commit a future crime that would result in death or substantial bodily harm.[46] This version of the rule was first submitted for consideration by the American College of Trial

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39. Hunt V. Blackburn, 128 U.S. 464, 470 (1888). *See also* Patrick Santos, Comment, *Why the ABA Should Permit Lawyers to Use Their Get-out-of-Jail Free Card: A Theoretical and Empirical Analysis*, 31 U. LA VERNE L. REV. 151, 156 (2009) (discussing the importance of confidentiality "[a]s early as 1888" when the Supreme Court decided *Hunt v. Blackburn*).

40. *See* Santos, *supra* note 39, at 156. In addition to preserving public confidence, legal scholars have maintained that the duty of confidentiality builds client trust and that "the right to counsel would be meaningless without the ability to communicate fully with one's attorney, and that that ability is contingent on the communications being protected." Sarah Helene Sharp, *On Being a Blab or a Babbler: The Ethics and Propriety of Divulging Client Confidences* 11 GEO. J. LEGAL ETHICS 79, 81 (1997).

41. Sharp, *supra* note 40, at 81.

42. *See* MARTYN, *supra* note 16, at 21.

43. *Id.* at 21–22.

44. *Id.* at 21. *See also* Sharp, *supra* note 40, at 81 (discussing the exceptions to Rule 1.6).

45. Vuletich, *supra* note 33, at 192.

46. *See* AMERICAN BAR ASSOCIATION, A LEGISLATIVE HISTORY: THE DEVELOPMENT OF THE ABA MODEL RULES OF PROFESSIONAL CONDUCT, 1982–2005 99–100 (2006) [hereinafter A LEGISLATIVE HISTORY]. The rule submitted by the Kutak Commission in 1982 did not include the current substantial bodily harm exception. *Id.* Rather, the Kutak Commission rule only allowed for disclosure to prevent a future crime on the part of the client that would result in death or substantial bodily harm. *Id.* at 100.

Lawyers (ACTL) in 1983.[47] The submission was the end result of significant debate where the ACTL attempted to "balance the sometimes competing interests of lawyer, client and the public."[48] The ACTL firmly believed that confidentiality should be maintained unless a breach could prevent a future criminal act on the part of the client.[49] The proposed rule was silent on past acts and thus, by extension, silent on wrongful incarceration.[50] In addition to the requirement that the breach of confidentiality be to prevent a future crime or act, there was also a requirement that the threat of death or substantial bodily harm be imminent.[51] During the course of debate on the 1983 amendments, several bar associations and other legal entities proposed changes to Rule 1.6, addressing "substantial bodily harm," however these amendments all centered on future acts: the prevention of a future crime was the sole basis for these exceptions.[52] In August 1983, after months of debate, the rule was formally adopted by the ABA House of Delegates with the future crime caveat in place.[53] At the time, the commission was simply unwilling to yield confidentiality to rectify past harms, particularly if the attorney's services were not used in any way to facilitate such acts.[54] The sole requirements (prevention of a future act and imminence of the harm) for a breach of confidentiality remained in the final version of the rules promulgated in 1983, and were unchanged until both were removed in the 2002 amendments to the MRPC.[55]

2. The Modern Rule 1.6: A New Exception Offers Flexibility

In the year 2000, the ABA formed the Commission on the Evaluation of the Rules of Professional Conduct, a working group that would later be called

47. *Id.*

48. *Id.*

49. *Id.* at 102.

50. *Id.*

51. *Id.* at 105. The ABA Section of General Practice introduced a proposal at the 1983 meetings to allow attorneys to reveal confidences "when the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life." *Id.* This language, again, did not allow for a wrongful incarceration interpretation.

52. *Id.* at 106–08.

53. *Id.* at 109. The Commission's comments to the rule revealed the rationale behind maintaining the tenet of confidentiality, which the public relies on to maintain confidence in the legal profession. *Id.* at 110.

54. *Id.* In 1991, the Standing Committee on Ethics and Professional Responsibility once again attempted to propose an amendment to Rule 1.6. *Id.* at 115. This amendment again focused solely on future acts, or past acts where the attorney's services had been used. *Id.* It was defeated. *Id.* at 117.

55. Miller, *supra* note 30, at 394. "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 . . . ." *Id.*

'Ethics 2000.'[56] Upon completion, the Commission amended Rule 1.6 to its current form.[57] The Ethics 2000 Commission saw its 2002 changes to Rule 1.6 as among its most significant, choosing to highlight the changes in the Chairperson's Executive Summary.[58] In that Summary, the Chair notes:

> There has always been a tension between the goal of keeping inviolate the client's confidences and the need to give the lawyer the ability to deal with situations where disclosure is necessary to protect third parties or the legal system from substantial harm. The Commission is proposing to broaden, in carefully circumscribed situations, the grounds for discretionary disclosure of client information under Rule 1.6 . . . .[59]

The amended rule included a revised comment to articulate the purpose of the new version of 1.6(b)(1) and how it addresses the conflict between confidentiality and the public interest.[60] In making these changes, the Commission also sought to better align with Section 66 of the American Law Institute's Restatement of the Law Governing Lawyers.[61] That section provides the clearest support for interpreting the rule to cover wrongful imprisonment, stating that "[s]erious bodily harm within the meaning of the Section [66] includes life-threatening illness and injuries and the consequences of events such as imprisonment for a substantial period . . . ."[62] The Restatement outlines the

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56. *See* AMERICAN BAR ASSOCIATION, REPORT OF THE COMMISSION ON EVALUATION OF THE RULES OF PROFESSIONAL CONDUCT xi (2000) [hereinafter ABA COMMISSION REPORT].

57. *Id.* at 164–70. The Ethics 2000 commission met over an almost forty month period to review the rules and suggest changes in an open and transparent process. *Id.* at xii. A majority vote was needed to effectuate the changes, but this was not done without "39 days of [open] meetings . . . eight public hearings[,]" and plenty of opportunities for public comment. *Id.* Key participants were members of the Advisory Council, comprised of over 250 legal professionals. *Id.* "Although Ethics 2000 was tasked with updating the *Model Rules* in their entirety, Ethics 2000 'addressed head-on one of the most frequently criticized aspects of the *Model Rules*—their narrow exceptions to the duty of confidentiality.'" Amanda Vance & Randi Wallach, Note, *Updating Confidentiality: An Overview of the Recent Changes to Model Rule 1.6*, 17 GEO. J. LEGAL ETHICS 1003, 1005 (2004).

58. ABA COMMISSION REPORT, *supra* note 56, at xiv.

59. *Id.*

60. *Id.* at 166. Here we find language that supports the use of the information to protect the wrongfully convicted/incarcerated without adding a separate, explicit exception. Comment six posits that:

> Paragraph (b)(1) recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm. Such harm is reasonably certain to occur if it will be suffered imminently or if there is a present and substantial threat that a person will suffer such harm at a later date if the lawyer fails to take action necessary to eliminate the threat.

Id.

61. *Id.* at 171.

62. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 66 cmt. c (AM. LAW INST. 2000).

duty of a lawyer to protect human life, even when such protections require a breach of confidentiality.[63]

A review of the scholarship on the duty of confidentiality indicates a concern for breaches of confidentiality that may implicate a client in a crime—as those breaches can run afoul of a client's constitutional rights. The Fifth Amendment to the United States Constitution protects citizens against self-incrimination.[64] In the context of a client's confession to their attorney, the due process rights of the Fifth Amendment are paramount.[65] A citizen is not required to confess to a crime, nor is an attorney required to advise a client to do so.[66] This creates an issue in cases involving the revelation of a client confession to help exonerate another. To address this issue, for example, the Massachusetts version of Rule 1.6 includes a caveat that a confession can be used to help exonerate another. However, the Massachusetts rule does not address if such a confession is admissible at a subsequent trial should the confessing party later be charged with the subject crime.[67] Another tenet of Fifth Amendment jurisprudence is due process. Courts have used both the confessing client's right to due process under the law and the presumption that the wrongly incarcerated received due process at trial to support an attorney's decision to keep a client confession confidential, even in instances where another individual is incarcerated for the crime.[68] One final question is whether a client's rights, with respect to a confession, survive death. As one observer has argued:

> There should be no absolute duty to maintain client confidences when representation has terminated because of the client's death. In

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63. *Id.* § 66 cmt. b (commenting that "[t]he exception recognized by this Section [66] is based on the overriding value of life and physical integrity"). Different from the modern rule of the MRPC, the Restatement went so far as to apply the exception to any confidential information, even if it was not related to the representation of a client, or the act of a client. *Id.* § 66 cmt. a. "In all such events, the ultimate threat is the same, and its existence suffices to warrant a lawyer's taking corrective steps to prevent the threatened death or serious bodily harm." *Id.* § 66 cmt. b.

64. U.S. CONST. amend. V.

65. *See People v. Belge*, 83 Misc. 2d 186, 189 (N.Y. Ct. Cl. 1975), *aff'd* 359 N.E.2d 377 (N.Y. 1976). "[T]he client's Fifth Amendment rights cannot be violated by his attorney . . . [t]he criminal defendant's self-incrimination rights become completely nugatory if compulsory disclosure can be exacted through his attorney." Rosenthal, *supra* note 18, at 164.

66. Jeffrey L. Kirchmeier, *Confession For The Soul?: A Lawyer's Moral Advice to a Guilty Client About Saving an Innocent Defendant*, 10 OHIO ST. J. CRIM. L. 219, 219 (2012).

67. *Variations of the ABA Model Rules*, *supra* note 24, at 13.

68. *See* Rosenthal, *supra* note 18, at 169 (commenting that in *Herrera v. Collins*, the Court "suggested that if a person, whether innocent or not, has been accorded procedural due process the Supreme Court will not block an execution"). In *Herrera v. Collins*, the opinion by Chief Justice Rehnquist showed deference to the proceedings of the lower court where there is a presumption that a defendant was given a fair trial. 506 U.S. 390, 407 (1993). Based on this presumption, the Court justified an attorney's choice to keep a confession confidential, despite the incarceration of another. *Id.* at 396. This case was particularly important on the matter, because it was a capital punishment case. *Id.* at 394. Here, despite the possibility that a prisoner would be executed for a crime to which another has confessed; the Court was unwilling to absolve the attorney of the duty of confidentiality.

> this instance, it is axiomatic that the attorney cannot impinge upon the client's Fifth and Sixth Amendment rights . . . An attorney should not have to risk the freedoms of a living human being for the sake of a decedent's name and bounty. Therefore, for example, an attorney should be at liberty to reveal a client's confession when another individual's rights are at stake, even if this might harm the decedent's reputation or expose the estate to civil liability.[69]

However, courts have repeatedly held that attorneys are not to reveal deceased client's confessions, even in situations where such a disclosure could free an incarcerated individual.[70] Attorneys are still required to obtain informed consent (to the confidentiality breach).[71]

B. Defining Substantial Bodily Harm

The substantial bodily harm exception allows a lawyer to breach confidentiality in an effort to "prevent reasonably certain death or substantial bodily harm."[72] The MRPC defines substantial bodily harm as that which "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 . . . ."[73] This differs slightly from prior iterations of the rule that required an imminence standard, using the concept of reasonable certainty. The comments to Rule 1.6 clarify the intent behind the language "reasonably certain," and why it is not a complete departure from the prior imminence standard, explaining that "'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."[74] These modifications to the rule, broadening the definition of what could be considered substantial bodily harm, laid the foundation for the modern debate on the application the "substantial bodily harm" exception to wrongful incarceration.[75]

> The ABA's 2002 amendments to Model Rule 1.6 opened a crack in the doctrinal wall, but a modest one. Now, a lawyer would be permitted to reveal client information when necessary to prevent certain future harms as well as crimes. Execution is plainly a future

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69. Sharp, *supra* note 40, at 85.

70. *Id.* at 83.

71. *See* MARTYN, *supra* note 16, at 21 (noting that MRPC Rule 1.6 requires that informed consent is given prior to revealing a client confidence, unless the confidence falls under one of the specific exceptions enumerated in the rule).

72. MARTYN, *supra* note 16, at 21.

73. *Id.* at 23. *See also* Vuletich, *supra* note 33, at 193 (discussing the standards of the "substantial bodily harm" exception).

74. Miller, *supra* note 30, at 395.

75. James E. Moliterno, *Rectifying Wrongful Convictions: May a Lawyer Reveal Her Client's Confidences to Rectify the Wrongful Conviction of Another*, 38 HASTINGS CONST. L.Q. 811, 812 (2011).

> harm. But what of non-capital, wrongful convictions? Is the presence of the wrongly convicted in prison such a future harm? In particular, is the wrongly convicted "reasonably certain" to suffer "substantial bodily harm?"[76]

1. The Substantial Bodily Harm of Incarceration

Massachusetts and Alaska have codified a wrongful incarceration exception into their versions of Rule 1.6.[77] By doing so, the versions of the rule adopted by these states recognize that the effects of incarceration on the human body are substantial.[78] The National Institutes of Health has defined "prisons as 'toxic environments' with a negative impact on inmate health."[79] There have been multiple social and physical determinants of health identified.[80] Among these determinants, natural environment, social support, resources, and equitable healthcare access can all be negatively affected by incarceration. There is a wealth of research into the physical and physiological effects of incarceration. Prisoners suffer from "higher rates of communicable disease, chronic illness and physical impairment" than the general population.[81] In addition to these extreme issues, "there is a broader public health concern . . . the long-term health consequences of forcing incarcerated people to consume unhealthy food."[82]

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76. *Id.*

77. *Variations of the ABA Model Rules*, *supra* note 24, at 2, 13.

78. States that have codified this exception invariably recognize the ABA's view that public interest and "the overriding value of life and physical integrity" outweigh client trust. MARTYN, *supra* note 16, at 23; Peter A. Joy & Kevin C. McMunigal, *Confidentiality and Wrongful Incarceration*, 23 CRIM. JUST. 46, 49 (2008).

79. NATIONAL INSTITUTES OF HEALTH, HEALTH AND INCARCERATION: A WORKSHOP SUMMARY (2013), https://www.ncbi.nlm.nih.gov/books/NBK201966/ [hereinafter NIH HEALTH AND INCARCERATION]. In making the point that prisons are environments detrimental to health, NIH has gone on to say that:

> [S]ome prison environments "are so inhospitable that it is impossible to deliver effective medical and mental health care." Citing particularly the "two extremes of confinement: hopelessly overcrowded prison systems and conditions of long-term segregation or isolation," [an expert] argued that the norms, policies, culture, and even architecture of prisons can worsen health problems among the ill, and even generate problems among the healthy. Thus, it simply "becomes impossible to effectively deliver treatment in those kinds of environments."

Id.

80. *Social Determinants of Health*, OFF. OF DISEASE PREVENTION AND HEALTH PROMOTION, https://www.healthypeople.gov/2020/topics-objectives/topic/social-determinants-of-health (last visited October 24, 2020).

81. Jason Schnittker & Andrea John, *Enduring Stigma: The Long-Term Effects of Incarceration on Health*, 48 J. OF HEALTH & SOC. BEHAV. 115, 116 (2007).

82. *See generally Food for Thought: Prison Food is a Public Health Problem*, PRISON POL'Y INITIATIVE, https://www.prisonpolicy.org/blog/2017/03/03/prison-food/ (last visited Oct. 24, 2020). In addition to these issues,

> [i]ncarcerated people are at increased risk of chronic diseases, but rather than using Food Services to help control both health problems and the costs of medical treatment, prisons

Health issues facing prisoners also include mental health concerns.[83] "The experience of being locked in a cage has a psychological effect upon everyone made to endure it. No one leaves unscarred."[84] Researchers have found that inmates suffer from a variety of mental health conditions, including, but not limited, to paranoia, depression, and other psycho-social disorders.[85] Despite this, the statistics are alarming:

> Among state and federal inmates, only 60% of those in need reported receiving treatment while incarcerated. Half said they had received prescription medication, and 44% received counseling or therapy. Roughly one-quarter reported being admitted overnight to a mental hospital or treatment program. Among those in local jails, only 41% of those with mental illness received any form of treatment. Of those receiving treatment, one-third had been given medication, and only 16% had received counseling or therapy while in jail.[86]

Critical to accepting the hypothesis that substantial harm to the psyche equals substantial harm to the body is the recognition that mental illness is a disease of the body.[87] The notion that illnesses of the mind exist in a realm beyond that of physical science has long been debunked. Therefore, any discussion of the effects of incarceration on the body of the inmate must include the impact to the brain, and the psyche by extension. First, adjustment to incarceration generally causes irreparable psychological harm.[88] As a prison sentence continues, "[p]rolonged exposure to stress leaves the body in a heightened state of awareness that ultimately taxes the cardiovascular and immune systems. This leaves individuals at increased risk for both mental and physical health problems."[89] This increased risk, caused by the effects of incarceration is

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> exacerbate illnesses by serving and selling unhealthy foods. Half of all incarcerated people in state and federal prisons report having had a chronic illness and are 'potentially at risk for future medical problems.' Nearly as many—40%—report a *current* chronic condition.

Id. *See also* NIH HEALTH AND INCARCERATION, *supra* note 79.

83. NIH HEALTH AND INCARCERATION, *supra* note 79.

84. Mika'il DeVeaux, *The Trauma of the Incarceration Experience*, 48 HARV. C.R.-C.L. L. REV. 257, 257 (2013).

85. *Id.* at 259.

86. Joyce Kosak, Comment, *Mental Health Treatment and Mistreatment in Prisons*, 32 WM. MITCHELL L. REV. 389, 399 (2005).

87. *What is Mental Illness?*, AM. PSYCHIATRIC ASS'N, https://www.psychiatry.org/patients-families/what-is-mental-illness (last visited Sept. 14, 2020).

88. Konvisser, *supra* note 28, at 241. Research into the psychological effects of incarceration note that, from the very start of a prison sentence, the initial indoctrination into prison life and culture is beset with mental health triggers. *Id.*

89. Michael Massoglia, *Incarceration, Health, and Racial Disparities in Health*, 42 L. & SOC'Y REV. 275, 278 (2008).

irreversible.[90] While the stressors of incarceration differ from those after release, "the totality of the incarceration experience—from fear or isolation while incarcerated to labor market and family problems that released inmates face—may fundamentally alter an individual's ability to effectively regulate health functioning."[91]

2. The Unique Harm Caused by Wrongful Incarceration[92]

The effects of wrongful incarceration on the physical and mental health of an inmate can be devastating:

> The experience of being incarcerated can have long-lasting effects on all inmates, including relationship difficulties, concerns with physical and psychological deterioration, the indeterminate nature of sentences and the prison environment itself. All prisoners must learn to cope with imprisonment and the harsh conditions of prison standards and health care, solitary confinement, sexual abuse, and violence; however, the impact of imprisonment on the wrongfully convicted goes beyond that experienced by other long-term prisoners.[93]

Research on the health effects of incarceration often excludes the unique challenges faced by the innocent.[94] Prisoners who know they did not commit the crime for which they are incarcerated experience a trauma that has been likened to that experienced by combat veterans and others in high-impact, high-stress life events.[95] There is a distinct mental and physical toll inherent to the experience:

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90. *Id.* "More recently it has become clear that severe or chronic stress can fundamentally alter the body and permanently alter and weaken its ability to respond to additional stressors. That is, the body's ability to maintain health is permanently damaged." *Id.* (citation omitted).

91. *Id.* (citations omitted).

92. Between 1989 and 2017, over 2,000 people in America have been designated as wrongfully convicted. MARK GODSEY, BLIND INJUSTICE: A FORMER PROSECUTOR EXPOSES THE PSYCHOLOGY AND POLITICS OF WRONGFUL CONVICTIONS 5 (2017).

93. Konvisser, *supra* note 28, at 248.

94. *Id.* at 224. "There is a dearth of knowledge on the life-long implications, psychological impact and consequences of wrongful conviction on the innocent individuals themselves." *Id.*

> Although a number of researchers have studied the impact of long-term imprisonment . . . few have studied the impact of detention on prisoners who are wrongfully convicted. In addition to being punished for crimes that they did not commit, the wrongfully imprisoned can expect to experience the standard adverse psychological symptoms attendant to being detained for many years, separated from loved ones, and divorced from any sense of autonomy.

Leslie Scott, *It Never, Ever Ends: The Psychological Impact of Wrongful Conviction*, 5 CRIM. L. BRIEF 10, 13 (2009).

95. Konvisser, *supra* note 28, at 238–39, 250–51. *See also* Jon B. Gould & Richard A. Leo, *One Hundred Years Later: Wrongful Convictions After A Century of Research*, 100 J. CRIM. L. & CRIMINOLOGY 825, 836–37 (2010) ("[T]hose released following wrongful conviction and

> For many people who are wrongfully convicted, being arrested for a crime they did not commit is just the first in a series of tragic events . . . such events merely set the stage for what happens after the joyous day when an innocent prisoner is finally exonerated and released . . . . That is when they face the consequences of the inadequate medical and mental health care they received while incarcerated.[96]

Another indicator of the effect of incarceration is re-integration. The challenge of re-integration is profound for any prisoner upon release. Mental health and social reintegration services are scarce for exonerees, who frequently "get the worst of both worlds—the stigma of prison, with none of the support services available to those who have served time."[97] As exonerees attempt to navigate a world that has undoubtedly changed, many succumb to the weight of the experience.[98] One study conducted in 2000 on recently exonerated subjects revealed "[s]ubstantial psychiatric morbidity and problems of psychological and

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imprisonment may have significant psychiatric and adjustment difficulties of the kind described in other groups of people who have suffered chronic psychological trauma.").

96. Matthew Clarke, *Tragic Justice: Wrongfully Convicted Prisoners Die Shortly After Exoneration*, PRISON LEGAL NEWS (Mar. 9, 2017), https://www.prisonlegalnews.org/news/2017/mar/9/tragic-justice-wrongfully-convicted-prisoners-die-shortly-after-exoneration.

97. *Making Up for Lost Time: What the Wrongfully Convicted Endure and How to Provide Fair Compensation*, INNOCENCE PROJECT 11, https://www.innocenceproject.org/wp-content/uploads/2016/06/innocence_project_compensation_report-6.pdf (last visited Sept. 14, 2020).

98. Clarke, *supra* note 97. Several anecdotal accounts of untimely death after a wrongful incarceration have been documented by Prison Legal News. *See generally id.* Cases of note include:

- *Sharif Wilson*: incarcerated at age eighteen, spent almost twenty years in prison before being exonerated by new DNA evidence. *Id.* Wilson had no inherent health problems prior to his incarceration; however, upon release he was morbidly obese. *Id.* Eleven months after his release, Wilson died of an asthma attack. *Id.*
- *William Lopez*: incarcerated for over twenty-three years before being exonerated because an eyewitness, the foundation of the prosecution's case, recanted. *Id.* Lopez died nineteen months after his release, just one day before his lawsuit against the City of New York was to go to trial. *Id.*
- *Timothy Howard*: incarcerated for twenty-six years before being exonerated after suppressed evidence was uncovered. *Id.* Howard died of a massive heart attack four years after his release. *Id.*
- *Glenn Ford*: incarcerated for almost thirty years on death row before being exonerated and released. *Id.* Ford died of lung cancer fifteen months later. *Id.*
- *Bobby Rae Dixon*: incarcerated for over 30 years before being exonerated by DNA evidence. *Id.* Dixon died of cancer just one month before his scheduled release. *Id.* One of his co-defendants (also cleared) died in prison nine years before exoneration. *Id.* The final co-defendant died four years after release. *Id.*

In sum, "[w]hether their deaths were due to poor medical care while incarcerated, the stress of the injustice of their wrongful convictions, or accidents or other causes, all of these exonerees were victims of a broken criminal justice system that robbed them of their freedom and, ultimately, their lives." *Id.*

social adjustment."[99] These problems can often manifest in strained interpersonal relationships, difficulties maintaining intimacy, and prolonged periods of social withdrawal.[100] Compounding these challenges are difficulties with financial security upon release.[101] Financial security has a direct impact on health. The ability to provide for one's personal needs, in tandem with any family obligations, is critical to a sense of well-being. While there are programs that exist to assist former inmates with meeting the challenges of re-entry, these programs are often closed to exonerees.[102]

3. Legal Challenges Reveal the True Harm of Wrongful Incarceration

a. George Reissfelder[103]

In a case made famous by then-future Presidential Candidate John Kerry's involvement, George Reissfelder was exonerated after fifteen years in prison for first degree murder.[104] The actual perpetrator of the crime confessed to his attorney ten years prior, but the attorney did not reveal the confession due to attorney-client privilege.[105] Despite the fact that the perpetrator confessed on his death bed, and was therefore deceased at the time when disclosure was sought, the judge hearing the case to disclose denied the motion, preventing Reissfelder's freedom until a confidentiality waiver was provided by the perpetrator's estate.[106]

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99. Adrian T. Grounds, *Understanding the Effects of Wrongful Imprisonment*, 32 CRIME & JUST. 1, abstract (2005). Significant mental health issues, including post-traumatic stress disorder, adjustment issues, depression, and personality changes, were prevalent. *Id.* at 2. The author notes through his research that a correlation has been accepted between trauma and clinical symptoms, positing that there are four features that determine the link:

> First, they seem incomprehensible: they threaten the individual's basic assumptions about himself and his world. Second, they rupture attachments to others, and subsequent long-term difficulties in forming relationships are common. Third, the traumatic situation is inescapable and overwhelming. Fourth, traumatic events cause extreme physiological arousal leading to a persistent hypervigilance and sense of threat. These features also characterized the experiences described by the wrongly convicted men.

Id. at 41.

100. *Id.* at 22.

101. *See* INNOCENCE PROJECT, *supra* note 98, at 15–19.

102. Gillian B. White, *Taxing the Wrongfully Convicted*, THE ATLANTIC (Feb. 22, 2016), https://www.theatlantic.com/business/archive/2016/02/taxing-the-wrongfullyconvicted/470397 (exonerated individuals are frequently disqualified from traditional re-entry programs and left "entirely on their own, with no guidance for finding jobs or housing, or even transportation"). In addition to the lack of social services, exonerees are not guaranteed any official monetary restitution for their time served, and many states do not have compensation statutes for people who have been wrongfully convicted. *See* INNOCENCE PROJECT, *supra* note 98, at 15–19.

103. Sullivan v. Scafati, 428 F.2d 1023, 1027 n.3 (1st Cir. 1970) (quoting the indictment that charged George Reissfelder with the murder of Michael Shaw).

104. Miller, *supra* note 30, at 392.

105. *Id.*

106. *Id.*

b. Lee Wayne Hunt[107]

In 1986, Lee Wayne Hunt was convicted of first degree murder and sentenced to life in prison.[108] Hunt's co-defendant, who was also serving a life sentence, committed suicide in 2002.[109] Upon his death, his attorney petitioned the court to disclose a confession he received from the co-defendant in 1985 (prior to the conviction) that he had acted alone and Hunt was not involved in the murder.[110] At the hearing, the judge denied the motion, citing the North Carolina Model Rules of Professional Conduct, and threatened the attorney with referral to the state bar for discipline if the confession was revealed.[111] It is important to note that, in this case, the attorney "ignored the judge's admonition. The judge refused to accept [the attorney's] testimony, ruling that [he] was guilty of professional misconduct . . . ."[112] Lee Wayne Hunt died in prison, having served 33 years of a life sentence.[113]

c. William Macumber[114]

William Macumber was convicted of double murder in Arizona in 1972 at the age of 40, sentenced to two consecutive life terms.[115] Macumber appealed his conviction and, on appeal, it was revealed that a deceased client had confessed to his two attorneys that he had committed the crime for which Macumber was incarcerated.[116] The trial judge denied the motion to admit evidence of the confession, commenting that attorney-client privilege survives the death of the

107. Hunt v. Jones, 692 F. App'x 723, 724 (4th Cir. 2017).

108. LOGAN, *supra* note 1, at 136.

109. *Id.*

110. *Id.*

111. *Id.* at 136–37.

112. *Id.* at 137.

113. Martha Waggoner, *Confession Failed to Free NC Man, Who Has Died as a Prisoner*, ABC 13 NEWS (April 10, 2019), http://www.wlos.com/news/local/confession-failed-to-free-nc-man-who-has-died-as-a-prisoner.

114. State v. Macumber, 544 P.2d 1084, 1085 (Ariz. 1976).

115. *Id.*

116. *Id.* at 1086.

client.[117] While Macumber was eventually freed, his exoneration was not based on the client confession.[118]

C. Codification of a Wrongful Incarceration Exception: Massachusetts & Alaska

Before the MRPC was adopted, an alternative to Rule 1.6 was proposed which allowed confidentiality to "yield to the duty to protect human life. [The] proposal specifically asserted that 'a lawyer may reveal a client's confidence when and to the extent that the lawyer reasonably believes that divulgence is necessary to prevent imminent danger to human life.'"[119] To directly address the subject harm, Massachusetts and Alaska have written wrongful incarceration exceptions into their versions of Rule 1.6.[120] These exceptions recognize the harm associated with incarceration, and the disparate impact of these harms on the innocent, while still acknowledging the sanctity of confidentiality.[121] The wording of the exception does not alter the rest of the existing rule, keeping all other safeguards of confidentiality in place. The simple addition of the phrase "or wrongful execution or incarceration of another" is all that is required.[122] Some argue that "[t]he ABA needs to make a clear determination in MRPC 1.6, as Massachusetts [and Alaska] ha[ve] done, as to whether an innocent person's wrongful incarceration is a tolerable 'cost of justice' that supports the principles underlying attorney-client confidentiality."[123] In formulating Massachusetts'

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117. *Id.* In this matter, Macumber was granted a new trial due to additional evidence that was discovered, unrelated to the client confession. *Id.* at 1087. In an important concurrence to the ruling, Justice Holohan noted:

> When the client died there was no chance of prosecution for other crimes, and any privilege is merely a matter of property interest. Opposed to the property interest of the deceased client is the vital interest of the accused in this case in defending himself against the charge of first degree murder. When the interests are weighed, I believe that the constitutional right of the accused to present a defense should prevail over the property interest of a deceased client in keeping his disclosures private. I would allow the defendant to offer the testimony of the attorneys concerning the confession of their deceased client.

Id. at 1088. Here, the death of the client was still required by the bench to warrant disclosure, despite the incarceration of an innocent man.

118. Richard Ruelas, *William Macumber, Arizona Inmate Freed After 37 Years, Dies in Prison*, ARIZ. CENT. (Jan. 10, 2017, 4:24 PM), https://www.azcentral.com/story/news/local/scottsdale/2017/01/10/william-macumber-arizona-inmate-freed-dies-prison/96406122/.

119. Rosenthal, *supra* note 18, at 169.

120. *Variations of the ABA Model Rules*, *supra* note 24, at 2, 13. The Massachusetts and Alaska exceptions are nearly identical, simply allowing disclosure to prevent "the wrongful execution or incarceration of another" in addition to the existing exceptions of Rule 1.6(b)(1). *Id.*

121. *See* MASS. R. PRO. CONDUCT 1.6 cmt. 6. The Massachusetts version of MRPC 1.6 acknowledges that it is in the public interest to maintain rules of confidentiality, but also "recognizes the overriding value of life and physical integrity and permits disclosure reasonably necessary to prevent reasonably certain death or substantial bodily harm." *Id.*

122. *See Variations of the ABA Model Rules*, *supra* note 24, at 2, 10.

123. Vuletich, *supra* note 33, at 194.

version of the rule, the committee noted that this was not a tolerable cost.[124] While some dissented during the adoption of the Massachusetts rule, fifteen years after its implementation supporters of the rule noted that there has been no documented negative impact of the rule on the perception of attorney-client confidentiality.[125]

In states where such an explicitly worded exception has not been adopted, there are generally four ways state versions of the MRPC address this provision. States either match their rule to the current iteration of MRPC 1.6(b)(1), modify to make the disclosure mandatory, limit disclosure to prevention of a future act on the part of the client, or eliminate the provision entirely.[126]

II. MRPC RULE 1.6 (B)(1) PROVIDES AN EXCEPTION FOR WRONGFUL INCARCERATION

A. Two Approaches to the Interpretation of Rule 1.6(b)(1)

There are two distinct approaches used by the states in relations to a wrongful incarceration exception to Rule 1.6. These approaches are best described as Traditional and Revised.[127] Traditional states have adopted the ABA version of Rule 1.6 and do not read the rule to include an exception for wrongful incarceration.[128] Revised states, Massachusetts and Alaska, have codified the interpretation of Rule 1.6 that allows for disclosure in the event of wrongful incarceration by directly adding that language to their versions of the rule.[129]

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124. MASSACHUSETTS ADVISORY COMMITTEE ON THE RULES OF PROFESSIONAL CONDUCT, REPORT A-1 (2013), https://lawdigitalcommons.bc.edu/cgi/viewcontent.cgi?article=1718&context=lsfp [hereinafter MASS. ADVISORY COMMITTEE] (noting that the goal of allowing disclosure was "to prevent harm to third parties"). Massachusetts removed the "future act" restriction, as well as the requirement that the lawyer's services be used in some way to effectuate the harm. *Id.*

125. *Id.* The advisory committed noted that "[a]lthough our version of Rule 1.6(b)(1) has been in effect for fifteen years, the dissenting members offer no empirical evidence that the Rule's permission to disclose confidential information has been abused or that attorney-client confidentiality has been eroded." *Id.*

126. *See generally Variations of the ABA Model Rules*, *supra* note 24. As of January 2, 2020, a majority of states have adopted the current version of MRPC 1.6(b)(1). *Id.* Fourteen states have adopted a variation of current version, but changed "may" to "must" or "shall," making the attorney's action mandatory. *Id.* Twenty-two states have a version of MRPC 1.6(b)(1) that only allows the attorney to disclose in order to prevent a client's future crime or act that is likely to result in death or substantial bodily harm. *Id.* A few states have eliminated exception (b)(1) entirely, while Alaska and Massachusetts have directly written "wrongful incarceration" into their respective versions of the rule. *Id.* Finally, North Carolina has the broadest version of Rule 1.6(b)(1), opting to drop the word "substantial," and allowing an attorney to disclose in order to prevent "reasonably certain death or bodily harm." *Id.* at 19.

127. MASS. ADVISORY COMMITTEE, *supra* note 125, at A-14 (contrasting the Massachusetts approach with the traditional approach of the dissenters).

128. *See, e.g.*, *Variations of the ABA Model Rules*, *supra* note 24, at 5 (noting that Delaware adopted MRPC 1.6 without any changes).

129. *Id.* at 2, 13.

1. The Traditional Approach

States that have maintained a traditional approach to the rule hold that confidentiality supersedes all other third party considerations.[130] Knowledge of a third party's incarceration for a crime a client has confessed to has no bearing on the confidentiality rules; there is no exception that is interpreted to allow disclosure.[131] In these states, disclosure becomes a question of morality, not the model rules. "[E]vidence suggests that lawyers do not base their decisions on whether or not to disclose confidential information primarily upon adherence to ethical rules, but rather, upon their previously formulated notions of right and wrong."[132] Thus, considerations of individual morality play a role in decision making regarding confidentiality.

> Most systems of morality would likely dictate that a guilty person should confess to save an innocent person from being convicted. On the other hand, one might argue that the guilty person has no moral obligation to correct a problem with the justice system that allowed the innocent defendant to be convicted . . . . The guilty client's dilemma also raises moral issues for the attorney who knows that an innocent person is going to prison.[133]

Many perceive the MRPC as devoid of moral quandaries, but this may not be true in matters of confidentiality. "[T]he Model Rules were developed and promulgated in an effort to achieve moral neutrality in governing attorney behavior. However, moral neutrality in the realm of client confidentiality is not crystallized within the framework of the Model Rules."[134] While it is accurate that the MRPC does not directly take up the issue of morality, the precatory nature of the substantial bodily harm exception leaves the ultimate decision in the hands of the attorney.[135] These moral dilemmas that attorneys face are compounded by other sections of the MRPC that seem to allow disclosure of a client confidence when the stakes are much lower than the life of an innocent

130. *See* Lew, *supra* note 34, at 884.

131. J. Vincent Aprile II, *Confidential Information and Wrongful Convictions*, 25 CRIM. JUST. 50, 50–51 (2010). *See also* Joy & McMunigal, *supra* note 78, at 48 (discussing multiple cases where courts have used "attorney-client privilege to prevent lawyer[s] from testifying about deceased client[] statements that may have exonerated [a] defendant"); *see, e.g.*, State v. Valdez, 618 P.2d 1234, 1236 (N.M. 1980); State v. Doster, 284 S.E.2d 218, 220 (S.C. 1981); Morales v. Portunondo, 154 F. Supp. 2d 706, 729–30 (S.D.N.Y. 2001).

132. Lew, *supra* note 34, at 885.

133. Kirchmeier, *supra* note 66, at 221 (expanding on the concept that by confessing to one's attorney, the defendant puts a burden on the attorney that is unique because it puts the attorney's obligations to the client, the justice system, and society at large in direct conflict).

134. Rosenthal, *supra* note 18, at 158–59.

135. *Id.* at 160–61 (explaining that "attorneys still have moral obligations to society and to themselves"). While the MRPC guides conduct and is not explicit on morality, the ultimate decision to disclose a confidence rests within that particular attorney's conscience. *See id.*

person.[136] On the issue of morality and the MRPC it is also important to note that because the rules are not laws, the decision to keep a client confidence is one of maintaining a professional license and avoiding sanction by an ethical review or disciplinary board.[137] "Thus, an attorney faces a Hobson's choice between: (1) doing the morally right thing of disclosing client confidences in situations of wrongful incarceration, with the significant possibility that doing so will buy an attorney a possible professional discipline or malpractice claim, or (2) doing nothing."[138]

2. The Revised Approach

Massachusetts and Alaska have recognized wrongful incarceration to be substantial bodily harm and have codified that belief into their versions of MRPC 1.6.[139] The rules in these states have been in place for over fourteen years, yet there is no evidence of attorneys using them to help exonerate someone wrongfully convicted of a crime.[140] One can infer from this data that there still exists a reluctance on the part of attorneys to breach confidentiality; however, the exception provides an option that did not exist in prior versions of the rule. For those who believe that such an exception erodes public confidence in the legal system, there exists strong evidence to the contrary. There has been no "empirical evidence that these varied exceptions to the confidentiality rule in effect over the years have undermined the basic principle of lawyer-client confidentiality or eroded clients' trust in lawyers."[141] Opponents to the revised approach often raise questions of the utility of a lawyer coming forward with information obtained from a client.[142] While it is correct that there may be

136. Sharp, *supra* note 40, at 82 (commenting that there are rules that allow an attorney to breach confidentiality when a client is using the attorney's services in a way that advances or assists in the commission of a fraud). The other rules allowing breach of confidentiality imply that saving the lawyer's own reputation, income, or license is paramount to saving the life of another human being. Other exceptions to confidentiality rules—including MRPC 1.6(b)(2)–(5), and 1.6(b)(7)—seem to suggest that if the attorney is not directly involved, then the confidence must be kept. MARTYN, *supra* note 16, at 21–22. All of these exceptions only apply when the attorney is in some way directly involved in the actions of the client. *Id.*

137. Vuletich, *supra* note 33, at 194.

138. *Id.*

139. *Variations of the ABA Model Rules*, *supra* note 24, at 2, 13.

140. Joy & McMunigal, *supra* note 78, at 47 (stating that there were no examples of an attorney disclosing confidential information under the Massachusetts rule in the first six years since its inception).

141. MASS. ADVISORY COMMITTEE, *supra* note 125, at A-3.

142. *See* Richard E. Myers II, *The Attorney-Client Privilege, Client Confessions and Wrongful Convictions: Immunity as a Statutory Solution*, 104 CORNELL L. REV. ONLINE 101, 103–05 (2018) (discussing a proposal by which a lawyer in possession of confidential information from a client can use that information in proceedings to exonerate another without compromising the representation of their own client, through the use of immunity). Lawyers, armed with information that may exonerate another, still have the hurdle of having that evidence admitted in some proceeding that can affect the incarcerated individual. *See id.* at 104.

evidentiary hurdles to using the client's confession in court, "one can argue that revelation of the confession may produce benefits other than its use as evidence in a court proceeding. The revelation might help a wrongfully charged or convicted person attract public support, lead to other admissible evidence, or simply prompt the prosecution to reexamine a case."[143]

B. Two Approaches, One Interpretation: Wrongful Incarceration as Substantial Bodily Harm

MRPC Rule 1.6 permits an attorney to reveal a client confidence to prevent harm to another person.[144] Comment Six to the rule provides a hypothetical to illustrate the intended use of the provision and can be extended to encompass wrongful incarceration.[145] In the hypothetical, the commission proposes that if the lawyer is made aware that their client allowed toxic waste to infiltrate the town's water supply, the lawyer can reveal this information "if there is a present and substantial risk that a person who drinks the water will contract a life-threatening or debilitating disease . . . ."[146]

Extending this line of reasoning to a wrongful incarceration scenario, we find that in an instance of wrongful incarceration we are *closer*, not further from the lawyer preventing harm by revealing a confidence. In the water example, you have to assume that a) the toxic waste was significant enough to cause physical harm, b) the harm would be experienced by anyone coming into contact with the water, c) the harm would be substantial, and d) other mitigating factors could not affect the occurrence of the harm (medications, genetic adaptation, water filtration, etc.). In a wrongful incarceration scenario, the same level of mental gymnastics simply is not necessary: a) Is someone incarcerated for a crime your client committed? b) Does imprisonment alone expose an individual to substantial bodily harm? c) Is that harm worse for the wrongfully incarcerated? Answering yes to these three questions seems to comport with the intent of Rule 1.6.[147]

One difficulty with construing the exception to apply to wrongful incarceration can be found in the triggering standard, "reasonable certainty." While some argue that "[n]o one can predict with reasonable certainty that an inmate will suffer harm 'imminently' and whether the harm will be 'substantial bodily injury[,]'" data on the general effects of incarceration on prisoners provides valuable insight.[148] To date, while some cases have argued that wrongful incarceration falls under this exception, these cases have largely

143. Joy & McMunigal, *supra* note 78, at 48.

144. MARTYN, *supra* note 16, at 21.

145. ABA COMMISSION REPORT, *supra* note 56, at 166.

146. *Id.*

147. *Id.*

148. Vuletich, *supra* note 33, at 193 (noting that even though the proposition that inmates face increased risk of harm may be "common sense, it does not meet the 'reasonably certain'" threshold required by the exception).

centered around preventing the reasonably certain death of a prisoner sentenced to the death penalty.[149] Outside of the certainty and finality of execution, there is limited scholarship on the concept of incarceration alone equaling substantial bodily harm.[150] Another challenge to the assertion that wrongful incarceration causes substantial bodily harm is the prevalence of literature on the topic that has isolated the harm of incarceration to three distinct factors: exposure to communicable diseases, sexual assault, and inmate violence.[151] Because these three factors are not guaranteed to be a part of every inmate's experience, a focus on these factors alone widens the gap between wrongful incarceration and substantial bodily harm. The issue with this approach is that it is possible for a prisoner to be incarcerated for an extended period of time, wrongfully or not, and not contract a communicable disease or fall victim to sexual assault or inmate violence. Because of this possibility, judges and tribunals have been reluctant to read a wrongful incarceration exception into the rule.[152] Thus, "[i]n any state other than Massachusetts [or Alaska], an attorney disclosing client confidences to rectify wrongful incarceration may later be [disciplined] for violating MRPC 1.6 or be held liable for malpractice by a judge or jury that does not agree that wrongful incarceration equals 'reasonably certain death or substantial bodily harm.'"[153] Instead of isolating the harm of incarceration to these three factors, it is critical to look at the totality of the inmate experience to effectively evaluate the impact on heath.[154] Incarceration in the United States

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149. *See id.* at 191. In the Alton Logan case, for example, attorneys Coventry and Kunz indicated that their handling of the confession may have been different if Logan was facing the death penalty. *Id.* The Illinois version of Rule 1.6, in place at the time of Logan's conviction, included an exception for death or serious bodily harm, which encompasses execution. *Id.*

150. *See* Massoglia, *supra* note 90, at 275. Most research on the health effects of incarceration focuses on statistics and literature that point to prison violence, sexual assault, and the prevalence of communicable diseases. *Id.* "Little research . . . examines exposure to the penal system as an explanatory factor in health outcomes . . . ." *Id.*

> To the extent that research has examined the health consequences of incarceration, the focus has been on the rather immediate impact of prisons on health outcomes such as suicide, depression, and coping or problems that impact a relatively small percentage of the population such as severe health limitations. Emerging work has considered how incarceration may contribute to patterns of HIV infections.

Id. at 277 (citations omitted).

151. *See, e.g.*, Miller, *supra* note 30, at 396–97. This presents an issue for attorneys who attempt to use exposure to the penal system generally as an example of "substantial bodily harm" to meet the standard of the exception. Arguments using this approach do not hold up to judicial/ethics committee scrutiny because of the counterargument that every prisoner does not directly encounter prison violence, sexual assault or a communicable disease. Therefore, revealing the confidence would not automatically prevent 'substantial bodily harm.'

152. *See* Vuletich, *supra* note 33, at 193–94. "[T]he rule provides no guidance whatsoever to attorneys hoping to construe a wrongful incarceration exception into MRPC 1.6. As it stands, only a tenuous argument can be made that the 'death or substantial bodily harm' exception applies." *Id.*

153. *Id.*; see also *supra* text accompanying note 24.

154. *See* Miller, *supra* note 30, at 397. Inmates are exposed to the risk of sexual assault, inmate violence and communicable diseases from the start of their sentences: "[f]irst, in comparison to the

has been found to have a profound impact on individual health, morbidity, and stress-related illness.[155] These substantial risk factors are amplified for those dealing with the added stressors of being innocent behind bars.[156] In analyzing the totality of the incarceration experience, data on the long-term health of exonerees after release strengthens the argument that wrongful incarceration causes substantial bodily harm. Through a thorough analysis of all the mitigating factors, in tandem with existing scientific data on the effects of incarceration on the health of the inmate generally, and life after exoneration, we find a correlation strong enough to support wrongful incarceration as a "reasonably certain" cause of "substantial bodily harm."[157]

III. MRPC RULE 1.6 SHOULD BE UNIVERSALLY INTERPRETED TO ENCOMPASS WRONGFUL INCARCERATION AS AN EXCEPTION TO THE CONFIDENTIALITY RULE

Arguably, "one of the most powerful arguments in favor of an attorney's right to reveal confidential information about a wrongful incarceration is that Model Rule 1.6(b)(1)'s exception to prevent 'reasonably certain death or substantial bodily harm' already encapsulates such a right."[158] When an attorney is faced with the choice between breaching the duty of confidentiality or allowing

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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." *Id.* Sexual assault risk is prevalent, yet often under reported to due to unwritten "inmate norm[s] against snitching and possible retaliation." *Id.* Finally, the increased threat of communicable diseases can be attributed to overcrowded conditions and poor health care in general. *Id.*

155. *See generally* Michael Massoglia & William Alex Pridemore, *Incarceration and Health*, 41 ANN. REV. OF SOCIO. 291 (2018).

156. Konvisser, *supra* note 28, at 250–51. Because of "this extreme, abrupt discontinuity in a person's life experience, psychiatric disorders, particularly dissociative disorders, may occur; PTSD, adjustment disorders, generalized anxiety disorder, and dysthymic disorder also frequently arise. In addition to the acute trauma of a false arrest and imprisonment, long term consequences ensue that are pathogenic themselves . . . ." *Id.*

157. Exonerated Nation has looked at the impact of incarceration on the wrongfully convicted, and determined that there are significant negative physical and mental health effects of incarceration that are unique to this population. *See generally* EXONERATED NATION, https://exoneratednation.org/ (last visited, Oct. 24, 2020).

> The trauma of wrongful imprisonment is irreversible: This trauma manifested in multiple ways, including in feelings of being re-victimized upon release due to the refusal of the jurisdictions that wrongly convicted them to accept accountability for their unjust actions. In fact, some jurisdictions continued to pursue charges against the exonerees, resulting in on-going trauma.

Newsletter of the California Exoneree Health & Well-Being Project, TOURO UNIV. CAL. PUB. HEALTH PROGRAM & EXONERATED NATION, https://exoneratednation.org/wp-content/uploads/2020/03/CEHW-Project-Newsletter-2.pdf (last visited Oct. 24, 2020).

158. Inbal Hasbani, *When the Law Preserves Injustice: Issues Raised by a Wrongful Incarceration Exception to Attorney-Client Confidentiality*, 100 J. CRIM. L. & CRIMINOLOGY 277, 288 (2010).

another to remain in prison, the attorney should have the option to choose disclosure. If the information is credible, justice demands that the attorney have the option to report that information so an investigation can be conducted to determine if an error was made in the conviction of another.[159]

A specific, codified exception to MRPC 1.6 for wrongful incarceration is not necessary. "[P]rolonged incarceration already falls under the existing exception. Th[is] argument is predicated on the likelihood of death or bodily harm increasing exponentially when a person is imprisoned."[160] MRPC Rule 1.6 in its current form provides the language needed for attorneys facing a disclosure dilemma when in possession of confidential information that could exonerate another. All states should interpret the substantial bodily harm exception in MRPC Rule 1.6 to include wrongful incarceration. To illustrate this point, consider the following hypothetical.

Client A is represented by Attorney 1. Client B is represented by Attorney 2. The clients and attorneys do not know each other, and have no connections. Client A is tried and convicted for the non-capital crime of armed robbery (therefore there is no death penalty issue to consider). Client A maintains her innocence throughout trial, but the jury returns a unanimous guilty verdict. While Client A is awaiting sentencing, Client B is arrested and charged with assault. Because this is a third offense, Client B is facing prison. During a meeting with her attorney, Client B is distracted by the news ticker on the office television. She reads that Client A has just been sentenced to ten years in prison for the armed robbery of a local restaurant. Client B immediately breathes a loud sigh of relief and informs her attorney that "at least that job won't be tacked on to this one." Attorney 2 asks Client B what she means and she replies, "Client A didn't rob that joint, I did. But oh well." Attorney 2 tells Client B about her right to remain silent and the duty of confidentiality, but also asks Client B to allow her to breach this confidence and notify the District Attorney that the wrong person is going to prison. Client B refuses, saying "the only way you can reveal this secret is if I'm dead."

In this scenario, Attorney 2 should be able to rely on MRPC 1.6(b)(1) to reveal the confidence in an effort to exonerate Client A. "The idea of allowing or requiring attorneys to disclose client information to prevent the wrongful incarceration or execution of another is not new."[161] There have been multiple attempts to amend the MRPC to allow for such an interpretation.[162] Proponents

159. Kirchmeier, *supra* note 66, at 222 ("[A]n attorney should consider one's own obligation as someone who knows that an innocent person has been convicted of a crime . . . a lawyer may have a moral obligation to sacrifice a bar license to save an innocent person.").

160. Rowe, *supra* note 36, at 300.

161. Miller, *supra* note 30, at 393.

162. *Id.* at 393–94 (outlining the history of proposed changes to the model rules that paved the way for the current rules in Massachusetts and Alaska). Earlier discussions about changing MRPC 1.6 date back to 1979 when such an amendment was first proposed. *Id.* at 393. When this amendment was met with controversy, it was tabled until 1981. *Id.* In 1981, a new proposal was

of this type of interpretation, particularly in cases involving wrongful incarceration, look to issues of attorney morality in framing their support.[163] Parallel to questions of morality are balancing tests that consider other instances under the rules where breaches of confidentiality are permitted. "For example . . . an attorney may disclose the confidences of a client who is defrauding Chase Home Mortgage via mortgage fraud, but is barred from disclosing the confidences of a client who has confessed to a murder for which an innocent person is incarcerated."[164] This seems to imply that financial considerations supersede the moral conundrum of allowing an innocent person to remain in prison. If the goal of the MRPC is to maintain the integrity of the profession in the eyes of the public, it is necessary to restructure this seeming hierarchy.[165] As Professor Colin Miller, argues,

> [S]tates that have adopted some form of amended Model Rule 1.6 can and should read an implied wrongful incarceration/execution exception into their existing rules while the remaining . . . states (and the District of Columbia) that have not adopted some form of amended Model Rule 1.6 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.[166]

In fairness, the idea that Rule 1.6(b)(1) covers wrongful incarceration as an exception to the confidentiality rule must be viewed in tandem with the reality

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presented however, this iteration only addressed future acts by the 'confessing' client. *Id.* Such language did not find its way into the rule until 1983, but remained forward thinking; only addressing an act by the client that was set to occur, not a prior criminal act. *Id.* at 394. It was not until the 2002 version that all future tense was removed, creating the present rule. *Id.*

163. Vuletich, *supra* note 33, at 188.

> It is unethical, with few exceptions, for attorneys to reveal client confidences . . . This ethical rule may pose an obstacle to responsible lawyering. It prevents attorneys from revealing knowledge that they feel a moral obligation to divulge and that might not be protected in court. It fosters an amoral approach to representation that feeds the public's perception that attorneys are a mercenary breed. Its application sometimes has results that neither practitioners nor lay persons expect or welcome. Finally, it unreasonably impinges on the First Amendment rights of individuals who are obligated to uphold the Constitution.

Sharp, *supra* note 38, at 79.

164. Vuletich, *supra* note 33, at 188. "In other words, the rule creates a hierarchy where the property interests of a giant corporate entity are more important than the liberty interests of an innocent, incarcerated human being." *Id.*; *see also* Miller, *supra* note 30, at 393 (discussing the stark contrast between instances where confidentiality can be breached to protect financial interests, but not to exonerate the wrongfully incarcerated).

165. Kirchmeier, *supra* note 66, at 222–23.

> [O]ne might argue that the lawyer does a job where confidentiality is essential to the system and if the lawyer breaches that confidentiality, it harms the system. But one might respond that saving an innocent person from a life in prison is more important than playing a role in the legal system.

Id.

166. Miller, *supra* note 30, at 393.

that an attorney coming forward with a client's confession does not guarantee exoneration.[167] The rules of evidence regarding the admissibility of any information provided by the attorney still must be taken into account. In the Alton Logan case, the confession alone was not enough to secure his release.[168] Because of this, it can be argued that the breach of confidentiality harms the judicial system in any scenario where the prevention of substantial bodily harm (in this case wrongful incarceration) is not guaranteed.[169] This also puts the attorney in a position to second-guess both the decisions of a lower court and the efficacy of the incarcerated individual's prior representation.[170] Finally, the confessing client's constitutional right against self-incrimination must be taken into account. In the hypothetical, Client B was never tried for the crime for which Client A was wrongfully convicted, therefore there was no issue of double jeopardy.[171] However, because a citizen does not have to self-incriminate, does that ultimately mean that no one will be held accountable for the subject crime?

IV. CONCLUSION

Incarceration for a crime one did not commit causes substantial bodily harm. The constant threat of physical and sexual violence, the fear of being in an environment without autonomy, the lack of sound nutrition, the substandard medical care, and mental health disorders all manifest in physical detriment that rises to the bar of "reasonable certainty" required by the MRCP 1.6 substantial bodily harm exception. Massachusetts and Alaska have codified a specific wrongful incarceration exception into their model rules, but such an act is not necessary. A universal interpretation of the existing rule to read in a wrongful incarceration exception can alleviate the moral and professional dilemma faced by attorneys who are in possession of client confessions that could help save an innocent life from harm. This can be accomplished while maintaining the integrity of the profession and the long standing tenet of attorney-client privilege. Humanity should weigh just as heavily as duty. There should be a

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167. Rosenthal, *supra* note 18, at 168–69 (expanding on the point that disclosure does not equal exoneration). The currently incarcerated individual who is claiming innocence was already found guilty by a court of law beyond a reasonable doubt, and, to challenge that conviction, one would essentially be second-guessing the decision of the lower court. *Id.*

168. LOGAN, *supra* note 1, at 95. While the hidden affidavit was pivotal in obtaining a new trial, that evidence was viewed in tandem with new physical evidence that, when viewed together, ultimately secured Logan's release. *Id.* at 95, 98. There was in fact no guarantee that the confession alone would exonerate.

169. Kirchmeier, *supra* note 66, at 227 (discussing the deleterious effects of breaking attorney-client privilege on the overall integrity of the profession).

170. Vuletich, *supra* note 33, at 193 (stating that "construing an exception in the rule—absent a specific exception—leaves an attorney who is struggling with whether to disclose a client's confidences to rectify wrongful incarceration vulnerable to the 'after the fact,' 'second guessing' of attorney-discipline prosecutors and courts").

171. *Double Jeopardy*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining double jeopardy as a second prosecution or sentence for the same offense).

sense of moral outrage at the thought of leaving the innocent, languishing in prison, for the self-serving interest of avoiding professional sanction. Above all, disclosure should be an attorney's choice. MRPC 1.6 makes that choice possible.