**Attorney-Client Confidentiality: Protecting the Freedom of the Wrongfully Accused Individual**

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**Introduction**

The importance of attorney-client confidentiality is presumably called into question in all areas of law, but perhaps most significantly in criminal law. Criminal defense attorneys are expected to treat the interests of their clients as paramount, engaging in client-centered lawyering wherein the maintenance of client confidence takes precedence over competing interests. Criminal defense attorneys may be forced to choose between keeping their client’s secrets and preventing some serious harm, calling into question how traditional standards of morality apply to lawyers. The goal of this paper will be to examine the importance of attorney-client confidentiality within the context of one specific case which exhibits a significant moral dilemma for the criminal defense attorney. The case to which I am referring involves an attorney whom, by breaking their guilty client’s confidences, could prevent the wrongful conviction of an innocent person. I will argue that when faced with the opportunity to disclose their guilty client’s secrets, the attorney is morally required to do so if their betrayal of confidence could prevent an innocent individual being convicted.

Although I take my stance to be fairly intuitive, it is met with much scrutiny within the fields of law and philosophy. Thus, the purpose of this paper is to defend my view against a series of objections. These objections come mostly from legal scholars Monroe H. Freedman and Abbe Smith, who put forth a traditionalist view of criminal defense ethics which champions client-centered lawyering and strict confidentiality. The adversary system, which is the legal system used in the United States, is backed by traditionalists because of its respect for individual rights and dignity. The lawyer’s role within this legal framework is that of an adversarial advocate who works primarily to advance their client’s interests. Because traditionalists promote a criminal defense ethic of client-centered lawyering, wherein confidence is a priority, their view conflicts with my argument that attorneys are required to break their guilty client’s confidences in the interest of protecting an innocent person. I will incorporate rights forfeiture theory, which says that persons who do something seriously wrong surrender some of their rights, as a means of response to the view that individual rights are paramount within the adversary system.

 I will first provide explanation of the case which I am focusing. I will then discuss and respond to a number of arguments which conflict with my view. The objections will be presented as follows: 1) The argument for the adversary system’s respect for individual rights and dignity, 2) The emotional argument, 3) The argument for the importance of promise keeping, and 4) The argument for the importance of confidence and trust. Through my responses to these arguments, I aim to prove that attorneys should act as zealous adversarial advocates in all instances except for the specific case which I am focused on.

**The Case of The Wrongfully Accused**

 I am putting forth the view which simply states that attorney-client confidentiality should not result in wrongful convictions of innocent persons. Lawyers who are representing the guilty should share their client’s secrets if doing so could prevent the conviction of an innocent person. Consider the case of Alton Logan, who was wrongfully convicted in 1982 and sentenced to life in prison for murder. In 2008, 26 years after his conviction, Logan was released when two lawyers came forward with their knowledge of his innocence (McDonough 2008). Another accused individual, Andrew Wilson, had revealed to his attorneys at the time of Logan’s trial that he had in fact killed the security guard Alton Logan was convicted of murdering. Due to the privilege of attorney-client confidentiality, Wilson’s counsel kept quiet, respecting Wilson’s request that his attorneys only come forward after his death (McDonough 2008). Wilson died in 2008, prompting his counsel to disclose the fact of Logan’s innocence (“For First Time” 2017). Logan spent nearly three decades incarcerated for a crime he had no part in, and Wilson’s counsel had to knowingly watch an innocent man be sentenced to life in prison due to the privilege of attorney-client confidentiality. In cases such as Alton Logan’s, the guilty person’s counsel commits a serious moral wrong by keeping silent and letting the innocent person be sentenced rather than the guilty one. Considering the impact on an innocent person’s life when they are sent to prison, this view seems intuitive.

A summary of the basic view that is being put forth here goes as follows: When an innocent person is facing time in prison, and a guilty person has admitted or suggested their guilt to their counsel, the guilty person’s counsel is morally required to share their client’s secrets regarding his or her guilt. The act of sharing the guilty client’s secrets, as I will argue, is justified in its moral permissibility, with morally permissible meaning okay to do or not wrong insofar as moral standards go. As I have shown, this view can be stated quite simply, and I take it to be fairly commons sensical. The majority of the discussion, then, will be dedicated to responding to objections to my position.

The main objections which I will focus on come from Monroe H. Freedman and Abbe Smith. Freedman and Smith, through their extensive body of work, have come to be known as “the leading academic advocates” of zealous advocacy, which is the method of lawyering wherein attorneys focus all of their efforts in the legal process on the client (Bernstein, 2006, p. 1168). Under zealous advocacy, the attorney advocates on behalf of their client with zeal, taking all lawful methods to ensure that the interests of the client are met. Lord Brougham’s classic statement of the lawyer’s role says that the attorney “knows but one person in all the world, and that person is his client” (Freedman, 2006, p. 1322). This ideal embodies Freedman and Smith’s view on lawyering, which champions zealous advocacy wherein the lawyer-client relationship is strong, and trust is established between the two parties as soon as the attorney decides to take on the client’s case. Freedman and Smith are not alone in their view; when compared to a number of rivals, the ethic of “zeal has been amply acclaimed” (Bernstein, 2006, p. 1168). Because strong proponents of zealous advocacy prioritize the client in all situations, their view conflicts with the idea that a guilty individual’s counsel should give up their secrets to protect an innocent person. To do so would be for the attorney to abandon their ardent defense of their client, thus straying from the type of zealous advocacy that Freedman and Smith support. The arguments that Freedman and Smith make against this view can be explained in three parts. First is the argument in support of the adversary system. Second is the traditionalist view on zealous advocacy, which will be broken up into three parts: the emotional argument, the promise-keeping argument, and the arguments on confidence and trust.

**The Adversary System’s Respect for Individual Rights and Dignity**

The adversary system in the United States refers to the legal system through which justice is said to be served, wherein two representatives advocate their opposing parties’ cases to an impartial judge and jury. The adversarial framework involves the criminally accused being defended by an attorney, against whom the opposing party makes their case. The system itself will require further explanation, which I will elaborate on in this section. The adversary system was developed by the nation’s framers and has since been expanded upon by the Supreme Court. This legal framework is based on basic human rights embedded in the U.S. constitution and is aimed at protecting personal dignity. More specifically, the system works to ensure that the autonomy, humanity, and dignity of the individual are respected by allowing the criminally accused to have a fair process under the law. Certain rights make up the adversary system, which include “…the right against involuntary self-incrimination, the right to require the government to prove guilt beyond a reasonable doubt, and the right to petition the government for redress of grievances” (Freedman & Smith, 2010a, p. 15). Freedman and Smith champion the adversary system for a number of reasons, namely for its ability to respect the rights and humanity of every individual.

The United States’ adversary system may be best explained through a comparison to the inquisitorial system, which is practiced by most countries that do not adhere to an adversarial model. Within an adversary system, the judge hearing a particular case is uninvolved in the gathering of facts and evidence regarding the case and is hearing the information for the first time when it is presented in court. The lawyer who is representing the accused individual assumes the investigatory responsibility, discovering the facts of the case and building the best defense of their client. The lawyer is not an agent of the state but rather is the client’s “’champion against a hostile world’- a zealous advocate against the government itself” (Freedman & Smith, 2010a, p. 20). Conversely, within the inquisitorial system, the judge is responsible for overseeing the evidence-gathering process (Parisi 2002). It is the judge, then, who finds evidence and facts regarding the case and questions witnesses themselves. The lawyer, within the inquisitorial system, takes a “more passive role”, providing suggestions to the judge in order to help determine all of the relevant facts regarding the case (“Inquisitorial System”). Although each of these systems aims to uncover the truth, the adversarial system does so by allowing lawyers and prosecutors to make their case to an impartial judge and jury, while the inquisitorial system has judges and lawyers work together to determine the truth. While the lawyer within the adversary system plays the role of an ‘adversarial advocate’ who serves only the client and is not a servant of the court, the attorney in the inquisitorial system plays the role of an advocate whose primary duty is to help the court, and the public, discover the facts of the case and determine the fairest ruling. Thus, in the adversarial system, the rights of the individual take precedence over the truths of the case in question. Each accused person is entitled to counsel who will defend their interests above all else. The adversary system puts first the respect of individual rights, allowing for the interests of each person to be respected. This model is said to prevail, then, by scholars such as Freedman and Smith, because it enables every citizen to have their equal rights under the law championed. Within the adversarial model, client-centered lawyering is encouraged, allowing the accused individual and their rights to have the chance to be defended first. An inquisitorial system inhibits this process of defense because it relies primarily on the judge to find the facts of the case themselves and determine their ruling based on these facts.

Both Freedman and Smith emphasize the ‘traditionalist view’ of criminal defense ethics. The adversary system, being rooted in the bill of rights, embodies fundamental human rights that protect the individual dignity of persons within a free society. The lawyer’s client-centered role requires that attorneys place the maintenance of trust and confidence between attorney and client above all other professional duties. Because of the system’s respect for each citizen under the law, traditionalists argue, the adversary system should be adhered to, with attorneys respecting their duty to ardently defend each client (Smith, 2003, p. 87). The rights embedded within this system, which include the right to counsel, are encompassed under the broad idea, fundamental to the adversary system, that “no person may be deprived of life, liberty, or property without due process of law” (Freedman & Smith, 2010a, p. 14). Proponents of the traditionalist view argue, in praise of this system, that it does just that: ensures that no person’s most basic rights will be infringed upon before they have had a fair opportunity to defend themselves under the law. The right to counsel is instrumental in this process, and it is this equal access to a lawyer who will defend one’s interests that allows for each individual, whether they be guilty or innocent, rich or poor, to have at least one person advocating for them. Under the right to counsel, clients are guaranteed confidentiality. The American Bar Association’s Model Rules of Professional Conduct for attorneys state that attorneys “shall not reveal information relating to the representation of a client unless the client gives informed consent” (“Rule 1.6”) As we saw in the case of Alton Logan, the duty to confidentiality is permanent, meaning that lawyers are required to keep information from or about a client confidential even after the representation has ended (Stevenson 2014). Because confidentiality is required of lawyers within the adversarial system, those that ardently support the system would starkly oppose the breach of confidence which I am arguing is morally required of attorneys. In order to save an innocent person, in the case I am focusing on, the lawyer would have to break the confidence that has traditionally been required of them. The right to counsel, among others, explain Freedman and Smith’s support for the system. Because the adversarial framework of justice is grounded in individual rights, they argue, each person is equally respected in legal proceedings. We are all granted a fair chance to defend our case due to the rights embedded in our constitution.

 Traditional proponents of the adversarial framework argue that the rights granted to individuals under the adversary system allow for the individual dignity and humanity of all persons to be respected. They say that the adversary system and its grounding in constitutional values “express the deeply moral ideals of individual dignity and autonomy and serve to safeguard individual liberties against oppressive government power” (Freedman & Smith, 2010b, p. 933). The humanity of the individual is particularly important as it pertains to guilty defendants, who may, understandably so, face moral condemnation within society. Without these rights, the humanity of the guilty defendant is lost as he is not granted the same respect and due process under the law as the innocent defendant, and thus is recognized as less of a person. Freedman and Smith take the respect of the guilty seriously because it epitomizes principles that our nation was founded on, namely that which says all humans are created equal. Because this system considers “the humanity of the guilty defendant” by allowing them to be seen and represented in the same way an innocent person would be, Freedman and Smith believe that the fairest version of law lies in the adversarial system (2010a, p. 21). When individuals are ostracized, treated differently because they are guilty, we lose touch with the basic value of equality for all persons within the United States.

**Rights Forfeiture Theory**

Simply put, rights forfeiture theory is the view that when a person does something seriously bad (or morally wrong), they surrender some rights that they would otherwise have (Wellman 2012). The idea that guilty persons do not have the same rights as innocent ones is fundamental to the theory of rights forfeiture and will help provide a response to the view which emphasizes the rights of the guilty individual within the adversarial system. While rights forfeiture theory is commonly used to justify punishment, I will employ it as a means of justification for the moral permissibility of infringing on a guilty person’s freedom. Because the guilty individual surrenders some of their rights, I will argue, that the lawyer is justified in betraying attorney-client confidentiality in order to protect an innocent person. First, I will aim to explain and defend rights forfeiture theory. I will then apply the theory to the specific case of the innocent vs. guilty person’s rights when they are each facing the same conviction. Rights forfeiture will function as my response to the claim that individual rights are paramount and should be ardently defended in all cases by criminal defense attorneys. The application of rights forfeiture will support my view that the guilty defendant does not have a right to absolute attorney-client confidentiality, and thus the attorney is justified in breaking the confidence established when doing so will prevent an innocent person’s conviction.

 Rights forfeiture theory puts forth the view that punishment is justified “when and because the criminal has forfeited her rights not to be subjected to” the hard treatment which punishment involves (Wellman, 2012, p. 371). Rights forfeiture faces numerous objections, and much of the literature regarding punishment dismisses the theory entirely (Wellman, 2012, p. 371). Resistance to rights forfeiture theory is accompanied by numerous theories which attempt, like rights forfeiture theory has, to provide an adequate defense of the moral permissibility of punishing persons who break the law (Boonin 2008). Scholars have mainly done so through an appeal to one of two claims. One camp takes the consequentialist route, claiming that “the presumed benefits of punishment are sufficient to render it morally permissible” (Boonin, 2008, p. 2). The consequentialist justification, then, simply argues that the positive outcomes which result from punishment are justification alone for its moral permissibility. Others have appealed to the retributivist idea that “punishment is justified because it is a fitting response to wrongdoing, regardless of its consequences” (Boonin, 2008, p. 2). Under this idea, punishing is morally permissible merely because it fits the bill. Additional attempts at justification include the claims that punishment functions as a type of moral education, or that it works to restore victims of crime (Wellman, 2012, p. 372). Rights forfeiture theory argues that these theories of punishment, while they may provide reason for why we should desire a system of institutionalized punishment, fail to explain why it is permissible to have such a system. Other theories fall short mainly because in order to justify punishment, we must show that punishment is permissible, and “it would be permissible only if it violated no one’s rights” (Wellman, 2012, p. 372). Rights forfeiture theory, as I hope to prove, is superior because it establishes a justification of punishment wherein no one’s rights are violated, which other theories fail to do.

Christopher Wellman, in his article “The Rights Forfeiture Theory of Punishment”, explains punishment as involving “visiting hard treatment upon those who are punished”, and since persons normally “have a right not to be subjected to this hard treatment”, it seems natural “to conclude that the permissibility of punishment is centrally a question of rights” (Wellman, 2012, pp. 371-372). Consequentialist justifications of punishment fall short because they are based on the weight of positive outcomes arising from punishment, which commits them to the justification of punishing the innocent. Because the consequentialist claims that punishment is permissible because it provides some benefits to society, or to the individual, they are committed to saying that any sort of punishment, if it brings some good to society, is justified. Imagine that the punishment of an innocent person would lead to everyone in society becoming a thousand dollars richer. It seems that this outcome would benefit society, however it comes at the cost of punishing an innocent person, which does not seem justified. Rights forfeiture theory avoids this problem, as it provides justification only for the punishment of the guilty.

 Retributivist theories, too, fall short in their justification of punishment because these theories explain the moral permissibility in terms of what we deserve. In other words, retributivists claim that punishment is justified because it works “to serve justice by giving criminals the hard treatment they deserve” (Wellman, 2012, p. 372). As Alan H. Goldman explains in his paper “Toward a New Theory of Punishment” (1982), the retributivist justification is problematic because it views punishment as being a mechanism for the state to “proportion reward and suffering to moral merit” (p. 61). So, to retributivists, punishment is permissible because it allows the state to judge our morality and dole out corresponding punishments or rewards as they see fit. But clearly, if the state’s imposition of punishments based on our moral standing were the goal of punishing people, the state would have “to do so over entire lifetimes, and not in reaction to specific criminal acts” (Goldman, 1982, p. 61). If punishment were there as a response to our morality, as retributivists argue it is, then it would surely have to extend far beyond the criminal acts which are punishable by law. Consider a man who cheats on his wife often, refuses to help around the house, and ignores his children. Surely, this man is acting immorally, however his actions are not legally punishable. If the point of and justification for punishment is that the state provides some social benefit by responding to immorality, it seems that this man would have to be punished for his actions. But, clearly, for the state to take legal action against a man just for being a bad father and bad husband, without him having done anything illegal, would be absurd. Thus, retributivism, like consequentialism, lacks an adequate justification for the moral permissibility of punishment. Rights forfeiture theory avoids the issues faced by retributivism because it provides a justification of punishment which does not refer to what we deserve or what the aims or social benefits of punishment are.

To understand the basic idea of rights forfeiture theory, imagine an individual, Joe, has robbed a bank. Prior to robbing the bank, Joe lived a life free of crime and was innocent by all legal accounts. As a result of his robbery, Joe is convicted and sentenced to five years in prison. This punishment seems reasonable, and based on his actions, no one is perplexed by this result. Now, imagine that Joe were summoned to court one year prior, when he had yet to commit a crime. He is convicted for ‘being Joe’ and is sentenced to five years in prison. People would surely express outrage at Joe’s imprisonment, because he has done nothing that would enable him to lose his free life, outside of prison. So, how can we explain the difference between the innocent Joe and the guilty Joe? What is it that determines whether or not Joe can remain free? Putting him in prison before he has robbed the bank is absurd and seems to be a serious violation of Joe’s basic human rights. However, when Joe *has* robbed the bank, punishment hardly seems absurd, but rather is expected. Because punishment itself involves forcibly removing someone from their free life, it seems intuitive that inflicting punishment on an individual inhibits the individual’s right not be placed in a confined institution, or to be subject to ‘hard treatment’. So, the permissibility of punishing Joe when he is guilty, and the wrongness of punishing him when he is innocent, can only be explained by his rights at the time of punishment.

Now that an explanation and defense of rights forfeiture theory have been provided, the theory can be applied to the specific case which is the focus of this paper. Ardent defenders of the adversarial system cite the importance of certain individual rights within a free society. Chief among these rights, as I have explained in section two, is the right to counsel, which encompasses the privilege of attorney-client confidentiality. Without the right to counsel, the accused individual would be unable to exercise all the other rights they possess in legal proceedings. The attorney possesses the knowledge necessary to advise their clients on how to best assert their rights in a court of law, and thus is said to enable the protection of the individual’s rights within the adversarial system. These rights, Freedman and Smith argue, are worth protecting because they are the great equalizer; every individual, no matter their background, enjoys the same rights within a free society such as the United States, fostering a sense of equality amongst all persons. The right to counsel is supposed to guarantee that each accused individual has competent representation who will commit to the “steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice”, with “the preservation undisclosed of the confidences communicated by his clients” being one of the most important of these principles (Freedman & Smith, 2010a, p. 131). Thus, the right to confidentiality is viewed as fundamental to the adversary system. The guarantee of confidence within the attorney-client relationship is valued because it allows the client to reveal truths which are embarrassing or could put them at risk. The client, understandably so, will be less likely to divulge these facts if they are not certain the information will be kept secret. Confidentiality, by helping to establish a relationship of trust, also allows the attorney to provide meaningful advice to the client. Once the client trusts their lawyer, they will be much more likely to take the attorney’s suggestions. The value which traditionalists place on individual rights, and thus the privilege of attorney-client confidentiality, will need to be weakened in order to support my claim that the lawyer does not have a moral obligation to keep their client’s confidences in all instances.

 Rights forfeiture theory refutes the traditionalist claim that all individuals possess equal rights at all times by arguing that individuals do *not* always experience the same rights. Rights forfeiture claims that persons give up certain rights when they do something seriously wrong. As such, when one violates the life, liberty, or property of another person, he loses his right to have his own life, liberty, or property respected. The state then “has no prima facie duty to spare him, as it has a prima facie duty to spare the innocent”, with prima facie duty meaning a duty that is not absolute, and thus can be outweighed by other factors (Wellman, 2012, p. 373). As explained, the rights which a person guilty of wrongdoing forfeits are not limited solely to the right to be free from punishment. In the case of the lawyer who may choose to divulge their guilty client’s secrets in order to protect an innocent person, the right in question is not necessarily the right to be free from punishment. More specifically, and for the purposes of this paper, I will focus on the guilty person’s forfeiture of the right to absolute and unwavering lawyer-client confidentiality.

The protection of the innocent defendant over the guilty one can be justified by rights forfeiture because the theory explains why innocent persons have a right to protection, whereas guilty persons do not. The guilty individual’s counsel, I am arguing, is morally required to divulge their client’s secrets in order to save an innocent person from conviction. The guilty person, having done something seriously morally wrong, gives up his right to have his freedom protected. It follows from the forfeiture of these rights that the guilty individual also gives up their right to absolute confidence. This is because the betrayal of confidence, in the specific case to which I have been referring, is a clear infringement on the individual’s right to freedom. By divulging the guilty client’s secrets, the lawyer is effectively putting the client at risk of punishment, thus violating their right to freedom. But, as rights forfeiture explains, the guilty individual no longer has this right, as an innocent person does. Because the guilty defendant has forfeited their right to freedom, the state is justified in punishing them, and thus the attorney is justified in revealing the guilty client’s secrets.

**The Obligation to Defend the Guilty Client**

 One may wonder why, based on the argument I have just made, the attorney has any obligation to defend the guilty client. Scholars such as Freedman and Smith, in particular, who strongly emphasize the importance of the guilty defendant’s right to counsel, would likely take issue with rights forfeiture as it has been applied here. Because rights forfeiture theory argues that the guilty individual has given up certain rights, namely the right to freedom from punishment, it may seem that I am committed to the claim that the guilty client has no right to be defended at all. If they do not have a right to freedom, then how can they have a right to counsel who will protect this freedom? Here, I must emphasize that while the guilty client gives up their right to freedom from punishment, they do not give up their rights embedded in the adversarial system, which include the right to counsel. I will attempt to prove that my application of rights forfeiture theory satisfies both the claim that 1) The attorney is justified in breaking their client’s confidences in order to protect an innocent person’s freedom, and that 2) The attorney has an obligation to defend guilty clients.

The guilty individual, having done something seriously morally wrong, forfeits their prima facie right to freedom from punishment. The guilty person does not, however, give up certain rights fundamental to the adversary system, namely the right to counsel. Although the lawyer does not have a prima facie obligation to keep the guilty person out of prison, then, he still has a prima facie obligation to defend the guilty individual. The right to counsel enables accused individuals to assert all other rights, and I do not wish to claim that the guilty individual gives up these rights embedded in the adversarial system when they do something morally wrong. The guilty individual, then, still possesses certain rights, such as the right to a quick and public trial, “by an impartial jury of the state and district wherein the crime” has been committed, and the right to counsel (“Sixth Amendment”). The right to counsel provides the criminally accused with a representative who will inform them of all other rights which they possess and of how to exercise these rights. What I wish to claim is just that the state is justified in punishing the guilty individual because he has given up his right to freedom from punishment. And because he has given up this right, the lawyer, too, is justified in breaking the guilty client’s confidences and putting him at risk of losing his freedom. But, as I hope to prove, the lawyer is only justified in betraying their guilty client’s confidences when the right to freedom of an innocent person is at risk of being violated by the state. The obligation to defend the guilty person still exists, meaning that the lawyer will likely still try to keep them out of prison even though they do not have an obligation to protect their freedom. Although there is no obligation to respect the guilty client’s freedom, the lawyer is not doing anything morally wrong by attempting to do so.

Unlike the guilty person, the innocent person *does* have a prima facie right to be free from prison, meaning that the lawyer has an obligation to protect this freedom if they can. The attorney still has an obligation to respect the guilty person’s rights to competent counsel and a fair trial under the law, but they do not have an obligation to keep their confidences over all else. This is because the lawyer does not have a prima facie obligation to keep their guilty client free from prison. And in the case which I am focusing on, the lawyer inhibits the guilty person’s chance of freedom by betraying their confidences. But, by disclosing their guilty client’s confidences, the lawyer is not doing anything morally wrong, because the client does not have a right to freedom. The innocent person does have this right, and thus the innocent person’s prima facie right to freedom conflicts with the guilty person’s right to confidentiality. The lawyer has an obligation to respect the innocent person’s right to freedom over the guilty person’s right to confidentiality because the right to freedom has not been forfeited, or weakened, whereas the guilty person has given up their right to absolute and unwavering confidentiality.

**The Emotional Argument for Zealous Advocacy**

 When presented with the problem of whether or not to reveal a client’s guilt in order to save an innocent person, both Smith and Freedman, as well as numerous other scholars and lawyers, would say that the guilty person’s counsel should keep quiet. Tehe first argument in favor of Smith and Freedman’s view is an ‘emotional argument’ which appeals to the challenges an attorney will face should they choose to treat their cases with differing amounts of zeal. The emotional argument puts forth the view that the criminal defense lawyer will not be able to live with themselves if they treat various clients and cases in different ways, and thus the lawyer must treat every case with the same amount of zeal. If attorneys decide how to act based on the circumstances of each case, Smith and Freedman say, they will eventually misjudge a situation and realize they made the wrong decision, which will lead to a fairly miserable career. Smith speaks about her own experience as a defense attorney, making an emotional appeal based on her knowledge of the field. Zealous advocacy, she argues, is “comfortingly simple” (Smith, 2003, p. 118). Because it allows lawyers to know how they will act in every case, there is no worry about making tough calls on how zealously one should advocate. To advocate zealously, the attorney must keep their client’s confidences, establish a relationship of trust, and take all lawful means necessary to advance their client’s interests. With these responsibilities prioritized, attorneys have no worry of choosing what the best course of action is.

The issue of the attorney’s emotional burden when they choose to treat each case differently may be best illustrated through an example. Say a criminal defense attorney, Caroline, decides that she is going to do her best to stop serious injustice when she sees it. Caroline has now committed to choosing how to act on a case-by-case basis when Marcus asks her to represent him. Marcus is being charged with the rape of a teenage girl. Caroline agrees to represent him and plans on zealously advocating for his cause. She knows, however, that if she encounters an opportunity to prevent some serious injustice being done, such as the conviction of an innocent person or the rape of another girl, she will do what it takes to stop that injustice, even if it means compromising her clients’ interests. Caroline receives information from an outside source, Jim, regarding Marcus’ guilt. Jim, who is a friend of Marcus’ and was in contact with him the night of the alleged crime, claims that Marcus is in fact guilty. Marcus has told Caroline otherwise, but she believes Jim to be telling the truth based on his kind nature and the opinions of his friends and family. When Marcus’ case is brought to trial, Caroline sees the victim testify with a great deal of pain. Caroline herself has experienced sexual assault and seeing the victim on the stand brings to the surface her own trauma. The prosecution has little evidence of Marcus’ guilt, and it seems likely that he will not be convicted. Caroline, in a fit of panic, decides to reveal to the judge the information she received from Jim, who claimed that Marcus was in fact guilty. This news sways the judge and the jury, who rule that the defendant, Marcus, is guilty and sentenced to fifteen years in prison. Caroline questions her decision following the trial, realizing that she made a choice under pressure without knowing all of the facts. She lays awake at night, wondering if Marcus is actually innocent and if she singlehandedly orchestrated his being sent to prison for something he did not do.

Seven years later, after Marcus has served nearly half of his sentence, new DNA technology reveals information regarding the case. While Marcus’ DNA was not found at the crime scene, Jim’s was, strongly linking Jim to the rape and suggesting that Marcus had not even been at the scene of the crime. This new evidence results in Marcus’ retrial, where further evidence is presented which points toward his innocence. He is ultimately found not guilty. Caroline, having watched the whole trial, cries with guilt. She knows for certain that her decision was ill-informed and feels fully confident that Marcus’ wrongful conviction was her fault. Caroline now has to live with the significant emotional burden of her own role in this man’s mistaken sentencing. She cannot focus at work and avoids taking on complex cases for fear of making another wrong decision in her representation of a client. A serious toll has been taken on Caroline’s life, not to mention Marcus’. She has compromised any chance at a guilt-free life, and her career becomes unbearable. Proponents of consistent and equal zealous advocacy across all cases would starkly oppose Caroline’s decision to betray her zeal in the first place. The emotional burden alone is too much, scholars such as Freedman and Smith say. In order to be sure that they will not make the type of mistake Caroline has, attorneys should be consistent in their zealous representation and should fight for the interests of the client in all cases. This argument which appeals to the emotions of the attorney provides reason for lawyers remaining equally zealous across all cases, and thus conflicts with the view that says lawyers should abandon their zeal when they could save an innocent person from going to prison.

Though the emotional burden placed on an attorney such as Caroline may be taxing, it seems that even if she had chosen to act zealously all the time, Caroline would still face a similarly significant burden on her mental and professional state. Let’s consider another way this situation could have gone. Now we shall imagine that Marcus *is* guilty and has confessed his guilt to Caroline, who has chosen to act with equally strong zeal across all cases. Jim, in this imagined scenario, is now the innocent one. Caroline is aware that Jim is innocent, and yet she upholds her zealous advocacy even when Jim is put on trial and is facing fifteen years in prison. She then watches as Jim goes away and Marcus walks free. She knows the implications of Marcus’ freedom. He could go on to rape more women and girls, and yet she keeps quiet because of her dedication to zeal which requires that she keep her client’s confidences. The emotional burden suffered by Caroline surely eats away at her. She knows that an innocent man sits in prison, while a guilty one went free. She could have stopped this injustice, and her decision to remain silent eats away at her conscience. How are we to reconcile the guilt that could arise from either choosing to act zealously across all cases, or from picking how to act on a case by case basis? The potential for an emotional burden cannot be eliminated in either course of action, so perhaps criminal defense attorneys, with the knowledge of this risk, may just have to accept that by going into the field they will encounter guilt as a result of professional decisions they make. Because guilt seems to be inevitable whether an attorney acts zealously all the time or not, it seems that there is no benefit in this respect to choosing one method of lawyering over the other. I will argue that the lawyer is required to act zealously in all cases except for the one specific case to which this paper focuses on. Since the emotional burden of criminal defense is inevitable, it does not pose any more of a problem for the lawyer who follows what I will suggest they do than it does for the lawyer who either chooses to act zealously in all cases or who chooses how they will act in each case.

 I will argue that attorneys can choose to act zealously in all cases except for those instances wherein they could prevent an innocent person’s conviction by betraying their zeal. In these cases (and only these cases), the lawyer is obligated to not act as a zealous advocate and instead is morally required to reveal their client’s secrets. I am confident that zealous advocacy, in most instances, is the best course of action for an attorney. Most objections to the adversarial framework involve some type of restructuring of the adversary system, rather than a complete replacement (Freedman & Smith, 2010a, p. 16). Reconstruction is the most appealing option because the adversary system, and the lawyer’s position within that framework, are superior to the alternatives. Exhibited through totalitarian nations and the like are systems where wrongful convictions occur at much higher rates than in the United States (Freedman & Smith, 2010a, p. 20). Further, zealous advocacy is inclusive in that it allows for all persons to be defended. The rich may have a better defense, creating inequality, but that is a discussion for another paper. In any instance, the indigent criminal still has a shot at defending themselves under the law, and they should have this chance, unless their chance at freedom conflicts with that of an innocent person’s.

Cases that involve an attorney stopping an innocent person’s conviction by betraying their zeal will likely arise rarely, allowing the attorney to act zealously in most instances. When the lawyer is considering betraying their clients’ confidence and trust, they must be sure of what they are doing and have access to all the available information regarding the case so as to minimize the chance of making the wrong decision (such as Caroline did in the first scenario). The course of action I have proposed faces obstacles, namely the problems of confidence and trust.

**The Problem of Promise-Keeping**

A point on the importance of promise-keeping falls under attorney-client trust and confidence, however the promise-keeping argument has little defense and will not pose a strong objection to my view. Advocates of zealous representation have cited the promise that is made by the attorney when taking on a client. When a lawyer decides to represent a client, they assume “the responsibility to make the client’s cause their own and to carry out the client’s lawful objectives by all lawful and ethical means that are reasonably available” (Freedman & Smith, 2010b, p. 934). This promise, it is argued, should not be ignored. This view rests on the idea that promises are generally seen as “among the heaviest moral obligations” (Freedman & Smith, 2010b, p. 934). Freedman and Smith reference Kant’s view that keeping promises is a moral imperative, meaning that the keeping of a promise is something that must happen, because it is what is right (Freedman & Smith 2010b). The lawyer has promised to do everything they legally can to advance their clients’ interests, and the authors argue that that the “moral and ethical imperative of the lawyer’s promise to the client and the client’s reliance on that promise” should not be ignored by critics of zealous advocacy (Freedman & Smith, 2010b, p. 934). Any argument that champions the importance of the lawyer-client promise clearly conflicts with the view that attorneys should break their clients’ trust, and thus the promise made, in order to save an innocent person from going to prison. The promise-keeping argument can be easily dismissed on the grounds that Kant’s view of promises is widely regarded as impermissible. While keeping promises may be a product of social norms and could be conducive to inspiring a more truthful society, it is widely accepted that there are many instances in which breaking promises is permitted. The permissibility of promise-breaking is particularly intuitive in instances where the promise-breaker is confronted with some other duty that seems to have more moral significance than the keeping of the promise.

Freedman and Smith’s view implies that promise-keeping, being a moral imperative, is more important than the preservation of freedom or justice. I will respond to this argument by refuting the claim that keeping a promise is more important than protecting freedom and justice. Let us consider a case analogous to the case of the lawyer’s promise to their client. Suppose that I have promised my friend Sam that I will be at her wedding on April 18th. Around the same time that I make my promise to Sam, my sister Emily is accused of a crime, which I know her to be innocent of. A week later, Emily asks me to testify in court as a character witness on April 18th, the same day as Sam’s wedding. If I testify, I know that I could seriously reduce Emily’s chances of being accused for a crime that she did not commit. By doing so, I would be promoting Emily’s rights to freedom and justice within our adversarial system. Although I have made a promise to Sam, I choose to testify. Because I am helping Emily to be free from punishment and wrongful conviction, it seems fair to claim that the promise I have made to Sam is much less important than testifying on behalf of Emily. Although Sam is disappointed, she agrees that I should act on my opportunity to protect Emily’s freedom. The lawyer’s promise to the client, similarly, may have some symbolic significance, meaning that the promise itself makes the client feel reassured about their representation. This significance does not mean, however, that the promise itself is more important than justice and freedom.

**The Problems of Confidence and Trust**

 The next set of arguments which conflict with my view regard the confidence and trust which are established within the relationship between lawyer and client. First, the issue of trust between the two parties will be discussed. The ethic of lawyer-client trust is said by traditionalists to benefit not only attorney and client, but society as a whole. In their book *Understanding Lawyers’ Ethics*, Freedman and Smith explain how the zealously fostered relationship of trust between lawyer and client enables the attorney to “give advice that is not only important to the client but is also socially desirable” (2010a, p. 128). This type of advising, however, is only beneficial if a relationship of “mutuality and trust” has been fostered, as they will be much less likely to follow the advice of an attorney whom they are not certain is looking out for them (Smith, 2003, p. 114). Only when the client trusts their lawyer can the lawyer begin to provide meaningful advice that will benefit both the client and society as a whole. Let’s say an attorney, who I will refer to as ‘Attorney’ is representing a client, ‘Client’, and Client has been accused of murdering a person who we will call P. Attorney has not made much of an effort to instill trust in his relationship with Client. Attorney shows up late for meetings, makes little effort to reassure Client that he is on her (Client’s) side, and hardly speaks of how he is going to help Client. A week before trial, Client tells Attorney that she is planning on committing perjury (lying on the stand in court after taking an oath of truth). Client intends on telling the court, falsely, that P was in fact murdered by an innocent person, N. This lie would implicate N in the killing and could lead to Client killing more people in the future should she walk free. Further, if Client’s perjured statement were discovered to be false, Client herself could end up with a longer prison sentence than if she were to tell the truth. Client’s intention to perjure her statement is not only illegal but also may be seriously immoral, as she would be putting N’s freedom at risk as well as society’s safety. Attorney advises Client against lying on the stand and informs her of the potential consequences of this decision. Client has no reason to trust Attorney, though, and chooses to go ahead with her perjured statement, creating risks for society, herself, and N. If Attorney had fostered a trusting relationship with Client from the start, she could have better advised Client and may have been able to eliminate these risks completely. Trust within the attorney-client relationship, then, is viewed as crucial in persuading the client to do the right thing. Without it, clients will be more likely to act immorally and illegally, as Client has in this scenario.

The point on trust is closely intertwined with the argument for the importance of attorney-client confidentiality. Both trust and confidentiality create issues for my view that the lawyer should give up their client’s secret if they can save an innocent person. To reveal the client’s secrets would be to betray the trust and the confidence established between the two parties, and many lawyers and scholars alike would agree that an attorney should not do so, even if an innocent person’s freedom could be preserved. The importance of confidence is embedded in the legal rules themselves, which require lawyers “who learn information while representing a client” to keep the information secret “except in the most unusual and extraordinary circumstances” (Fischel, 1998, p. 1). In regard to confidence, the traditionalist view of criminal defense ethics argues that the maintenance of confidentiality, like trust, trumps nearly all other duties an attorney will encounter (Smith, 2003, p. 89). Viewing confidentiality as a sort of “sacred trust” requires that lawyers keep their client’s secrets, even when confronted by public or professional condemnation (Freedman, 1966, p. 1475). The importance of attorney-client confidentiality stems largely from the value placed on the adversary system. As has been explained, in order to maintain the adversarial system, attorneys must act as zealous advocates who will fight to defend their client’s interests. Truly zealous advocacy requires, then, that lawyers do what their client wants. The rules require that attorneys keep their client’s information confidential unless the client has consented to disclosure (Fischel, 1998, p. 1). Even if the rules did not require confidentiality, zealous advocates would keep their client’s secrets based on the idea, fundamental to zealous advocacy, that “client confidence and trust are paramount” (Smith, 2003, p. 89). Because the lawyer plays the role of adversarial advocate within our country’s system of law, they should take all means necessary to protect their client’s interests. Confidentiality, then, is essential to zealous advocacy because it enables the client to trust the lawyer. At an even simpler level, if confidentiality is what the client wants, a zealous advocate will undoubtedly keep their confidences in the interest of serving their client’s desires over all else. The assertion of the criminal defense lawyering paradigm in which zealous advocacy and client confidence and trust take priority is “among the most important techniques for effective client representation” (Smith, 2003, p. 120).

Without the promise of confidence, traditionalists argue, a client will be less likely to disclose “facts that could be incriminating or embarrassing” (Freedman & Smith, 2010a, p. 128). Confidentiality, then, is stressed in part for what it provides to the attorney. In order to competently represent a client, the lawyer should be informed of all the facts regarding the case that they are handling (Freedman & Smith, 2010a, p. 128). Without confidence, it will be much harder to obtain these facts, and thus, more difficult to adequately represent the client. Extensive empirical research tells us that without the promise of confidentiality, clients will be unwilling to divulge truths that are embarrassing or incriminating (Freedman & Smith, 2010a, p. 137). The experience of the non-lawyer, as well, shows this consensus to be intuitive. A young girl from a Mormon family that strictly forbids consumption of alcohol will surely be unwilling to reveal to her doctor that she has been drinking alcohol without the promise of confidentiality. Even with this promise, she may not be willing. Similarly, I know I would not be likely to divulge my secrets to a therapist could she not promise that the information would be confidential. Attorneys, thus, rely on confidentiality as their means to discovering the truth.

Lawyers typically know many facts regarding the case and their client, and they are only able to discover these facts because “clients feel secure in entrusting their lawyers with damaging truths” (Freedman & Smith, 2010a, p. 136). Thus, to deny the privilege of confidentiality would be to hinder the search for truth which is essential to the adversary system. If attorneys were required to betray “their clients’ confidences, lawyers would seldom have truths of any importance to reveal” (Freedman & Smith, 2010a, p. 136). In other words, attorneys would hardly be able to bring anything useful to court if they were continuously required to break the confidences of their clients, because accused individuals would be even more wary of lawyers, thus entrusting them with less information. Further, without the trusting communication which results from confidentiality, lawyers would be less able to guide clients through the legal process, which is said to be necessary to protecting the rights of the client (Subin, 1985, p. 3). The reluctance of the client, which results from the lack of confidentiality, hinders the lawyer’s ability to provide meaningful advice for how the client’s rights can be protected and asserted. Thus, confidentiality is argued to be “fundamentally important to preserving individual autonomy” (Subin, 1985, p. 3).

Another point on the importance of confidence regards the negative consequences on future potential clients should lawyers choose to, or be required to, betray attorney-client confidentiality. For the lawyer to establish a relationship of confidence is a difficult undertaking (Smith, 2003, p. 119). Clients are often unwilling to trust attorneys, particularly so when they have not chosen their representation and instead have been appointed an attorney by the court (Smith, 2003, p. 119). The lawyer, oftentimes, must work to convince their client that confidentiality will be upheld. Many philosophers and legal scholars, then, argue that once the lawyer has convinced the client of confidentiality, the client’s “confidences must ‘upon all occasions be inviolable’” (Freedman, 1966, p. 1475). If attorneys were to betray this confidence, Freedman argues, “a man would not venture to consult any skillful person”’ (Freedman, 1966, p. 1475). In other words, if the precedent of confidentiality is broken, a fundamental principle of the attorney-client relationship collapses, inciting doubt in the professionalism of lawyers. Further, a fear exists that should lawyers begin to betray their client’s confidences, clients in need will be distrustful and reluctant to share incriminating or embarrassing information with attorneys. This emphasis on confidentiality and trust create obvious issues for the lawyer who plans to reveal their guilty client’s secrets if presented with the opportunity to save an innocent person from conviction.

The view I have put forth up to this point can be summarized as follows: When an attorney is faced with the opportunity to reveal their client’s secrets in order to save an innocent person from being wrongfully convicted, they are morally required to do so. The attorney is justified in this decision because their guilty client has forfeited their right to freedom, and thus their right to absolute attorney-client confidentiality. The traditionalist view, championed by Freedman and Smith, has been outlined with a focus on those arguments which directly oppose and create issues for my view. I will now respond to the problems of trust and confidentiality within the lawyer-client relationship.

**In Response to Arguments on Confidentiality and Trust**

The issue of confidence, as I hope I have shown, cannot be argued against solely through the use of rights forfeiture theory. Many lawyers and philosophers would object to my position because of the value they place on confidentiality and the trusting relationship between attorney and client. Rights forfeiture, as I have explained, can provide a justification for the attorney breaking their client’s confidences in order to protect an innocent person’s freedom. The theory cannot, however, adequately respond to all of the claims regarding the benefits of confidence and trust. Attorney-client confidentiality and trust are valued because they 1) Enable the lawyer to advise the client on the right thing to do, 2) Allow the client to feel comfortable revealing embarrassing or incriminating truths, which helps to maintain values fundamental to the adversary system, and 3) Prevent future clients from being distrustful of lawyers’ professionalism and commitment to their clients. I will address these claims in order to support my view that the maintenance of confidentiality, while it may be important, is not morally required of attorneys across all cases.

The claims made by scholars such as Freedman and Smith regarding the benefits of confidentiality and trust hold some truth, and I do not deny that the maintenance of these principles is of value to both lawyers and clients. I agree with the first claim, which says that a trusting attorney-client relationship allows lawyers to persuade their client to do the right thing. It seems intuitive that the client, like most reasonable people, will only follow the advice of someone whom they trust. The problem with the traditionalist’s view, however, is the idea that the benefits of confidentiality and trust justify the maintenance of attorney-client confidentiality over all else. Confidentiality need not be the top priority. As I hope I have shown through the use of rights forfeiture theory, the guilty person’s right to absolute and unwavering confidentiality is forfeited when they do something bad enough. Because they lose the right to such strong confidentiality, the innocent person’s right to freedom from punishment takes precedence over any remaining right the guilty individual has to confidence. So, while I do not disagree that confidentiality and trust are beneficial, I do disagree that the guilty client’s right to confidentiality is more important than the innocent individuals right to freedom.

The second claim, which says that confidentiality allows for the client to reveal truths to their attorney, thus enabling the lawyer to play “a critical role in a system that depends on adversarial zeal in order to function properly”, is too strong of a claim to make (Smith, 2003, p. 119). I take issue with the view that confidentiality is absolutely necessary to the adversary system’s success. While it may be beneficial in preserving the individual’s autonomy and rights, it cannot be entirely crucial. Deborah L. Rhode and David Lubin note that, “Public defenders report that many clients commonly lie and withhold information despite” attorney-client confidentiality, and yet the system still functions (as cited in Stevenson, 2014, p. 347). So, while the preservation of confidentiality may be helpful in upholding individual rights, evidently it is not absolutely necessary, as traditionalists argue that it is.

Scholars such as Freedman and Smith have additional concerns regarding future clients, should attorneys be morally required to break confidentiality in instances such as the one I have been focused on. But lawyers could seemingly still establish relationships of trust and confidentiality in their future professional relationships even if they disclose their client’s secrets in this one instance. First, the specific case which I am focusing on will likely not come along in a lawyer’s professional career often, if at all. The consequences which traditionalists fear would come as a result of weakened attorney-client confidentiality do not seem to pose as strong of a threat if attorneys are only required to reveal their guilty client’s confidences when faced with the opportunity to prevent an innocent person from going to prison. Second, as humans, we are inclined to trust when it will provide some benefit to us at a relatively low cost. Part of the concern which traditionalists have regards future innocent clients being unwilling to trust, and thus not receiving adequate representation. But it would seem that a person who has not done anything wrong would not be too fearful of entrusting an attorney with their secrets. If the attorney had only betrayed the confidences of a guilty client, in order to protect an innocent one, future innocent clients would likely get the impression that the attorney prioritizes the interests of individuals who are innocent. Future guilty clients may have a harder time trusting, but this concern seems that it would not actualize based on the infrequency of the lawyer breaking their client’s confidences under the argument that I put forth. Even if this fear does come to be, I believe that the preservation of the innocent person’s freedom over the guilty person’s is of much greater significance.

**Conclusion**

 In this paper I have put forth the view that attorneys are morally required to betray the confidences of their guilty client in order to protect an innocent individual’s freedom. I argued for my view by first discussing the traditionalist’s support for the adversarial system and its respect for individual rights and dignity. In response, I applied rights forfeiture theory in order to display how the rights of the guilty individual are lesser than the rights of the innocent. The innocent individual has a prima facie right to freedom, while the guilty person does not. Thus, the lawyer has a duty to respect the freedom of the innocent person. When this duty conflicts with the guilty individual’s right to confidentiality, the lawyer is justified in revealing their client’s secrets. The objection regarding why the attorney has any obligation to defend the guilty client was then addressed, with my response acknowledging that the guilty individual does not forfeit *all* of their rights (and thus they still have a right to counsel). The emotional argument for zealous advocacy was shown to provide equal issue to each method of lawyering, and thus it does not function as a reason against breaking client confidences as I have suggested. Promise-keeping was briefly discussed and proved to be a minor issue for my view. The additional arguments for confidence and trust, discussed in the previous section, did not incite significant tension with my view. I agree that confidence and trust are beneficial to the maintenance of the adversarial system’s principles and enable the lawyer to do their job. I contend, however, that the principles of confidentiality and trust are not as significant as the traditionalists believe them to be.

 Innocent individuals, such as Alton Logan, have a right to be free from punishment. The adversarial system, and thus the lawyer, have a duty to protect such rights. What I hope I have proven here is that attorneys are morally required to respect the freedom of the innocent over the freedom of the guilty. To do so would not require a large departure from zealous advocacy, as the attorney would still lawyer with zeal in nearly all cases. Attorneys have a moral duty to prevent someone like Alton Logan spending time in prison for a crime that they did not commit, and this duty outweighs the duty to keep a guilty client’s confidences.

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