A - 5

UCLA School of Law
Public Law & Legal Theory Research Paper Series
Research Paper No. 06-44

~and~

Cardozo Law School
Legal Studies Research Paper Series
Research Paper No. 181

When the Lawyer Knows the Client is Guilty: David Mellinkoff's 'The Conscience of a Lawyer', Legal Ethics, Literature, and Popular Culture

---

MICHAEL ASIMOW
University of California, Los Angeles - School of Law

~and~

RICHARD WEISBERG
Cardozo Law School

When the Lawyer Knows the Client is Guilty: David Mellinkoff's *The Conscience of a Lawyer*, Legal Ethics, Literature, and Popular Culture

Michael Asimow and Richard Weisberg*

Abstract

David Mellinkoff's 1973 book The Conscience of a Lawyer concerned a classic puzzle in legal ethics: what should a criminal defense lawyer do when the lawyer is certain that the client is factually guilty, but the client insists on an all-out defense? Mellinkoff focused on the Courvoisier *case, a notorious English trial in 1840 in which defense counsel's tactics created an enormous public scandal. Legal ethicists have struggled with these issues ever since that time and they remain unresolved. This article draws a distinction between strong and weak adversarialism and explains how these two normative positions guide a lawyer's tactical decisionmaking in the certainly-guilty client situation. The article suggests that lawyers should have discretion to choose between the strong and weak positions, depending on context and their personal conscience. Both popular culture and great literature provide surprisingly interesting perspectives on the strong vs. weak adversarialism dilemma. Literature casts doubt on whether a lawyer can ever know with the requisite certainty whether a client is guilty. It presents numerous models of successful strong adversarialists and unsuccessful weak adversarialists. Few literary lawyers manage to be both skilled advocates and decent human beings. American popular culture, on the other hand, presents an emphatic answer to the question of what a lawyer with a certainly guilty client should do. According to pop culture, the lawyer's job is to betray the client to make sure the guilty criminal is convicted, dishonored, or killed. Pop culture's no-adversarialism model is a universe few lawyers would care to inhabit but which reflects popular views on the relationship of lawyering to truth.*

---

* Michael Asimow is Professor of Law Emeritus, UCLA School of Law. Richard Weisberg is Walter Floersheimer Professor of Constitutional Law, Cardozo Law School. This article is an expanded version of the annual Mellinkoff lecture delivered by the authors at UCLA Law School on February 15, 2006. The authors gratefully acknowledge the advice and assistance of Norman Abrams, Peter Arenella, Taunya Lovell Banks, Paul Bergman, Steve Derian, Sharon Dolovich, Steven Feldman, Monroe Freedman, Arthur Gilbert, William Graysen, Maximo Langer, Laurie Levenson, Dan Lowenstein, Tom Mesereau, Carrie Menkel-Meadow, Grant Nelson, Charles Rosenberg, William Simon, Brad Wendel, David Wintroub, and Steven Yeazell.

adversarialism and lose their cases. Part VII sums up what we have learned about strong vs. weak adversarialism in ethics, pop culture, and literature.

I. The *Courvoisier* and *Westerfield* Cases

The Conscience of a Lawyer is a spellbinding murder mystery and courtroom drama set in London in 1840. An English nobleman, Lord William Russell, was murdered, his throat cut while he slept. The police concluded that it was an inside job. Lord Russell's maid, Sarah Mancer awoke to discover disorder in the house. She roused the cook, Mary Hannell, and the valet-butler, Benjamin Courvoisier. They soon discovered Lord Russell's dead body and summoned the police.The front door was unlocked. A good deal of property was missing. Needless to say, the idea that a wealthy man could be murdered in his bed by the servants was terrifying to the upper classes. As a result, the case generated intense public and media interest.

Suspicion soon fell on Courvoisier. He was originally Swiss and had worked in London for a number of years. There was strong but not overwhelming circumstantial evidence against him. The most important evidence was that some but not all of the missing property was found inside the walls of the butler's pantry to which he had primary access. In addition, Courvoisier had said to the other servants, referring to his boss, "Old Billy is a rum chap, and if I had his money, I would not remain long in England." On the other hand, the police could not locate the murder weapon or some of the missing silver plate. No sign of blood appeared on any of Courvoisier's clothing. Courvoisier stoutly maintained his innocence.

He was represented at his trial in the Old Bailey by Charles Phillips, the leading criminal defense lawyer in England. Phillips, then aged 53, was Irish and had a well-deserved reputation for emotionalism and flamboyance. He was opposed by John Adolphus.[3] According to contemporary practice, Adolphus was selected and paid by the victim's family to prosecute the case. There was bad blood between the two lawyers, because Adolphus felt that Phillips had usurped his place as the premiere criminal lawyer of his time. He wrote to a colleague: "There was a time when you and I, Curwood, made a decent income out of this court until that Irish blackguard [Phillips], with his plausible brogue and slimy manner, deluded people into trusting him."

Amazingly to us, it was only in 1836, four years before *Courvoisier*, that the Prisoners' Counsel Bill authorized defense lawyers to address the jury on behalf of defendants in English felony cases.[4] Before that, the judge was supposed to represent the defendant! The relative unfamiliarity of the criminal defense function may explain the enormous ethical controversy stirred up by Phillips' conduct in *Courvoisier*.

---

[3] *See id.* at 40-47 for discussion about Phillips and Adolphus.

[4] Attorneys had previously been allowed to examine and cross-examine witnesses and to provide full representation in treason cases. *See* JOHN H. LANGBEIN, THE ORIGINS OF ADVERSARY CRIMINAL TRIAL 167-77, 291-310 (2003); *Conscience*, *supra* note 2, at 47-63. Phillips was one of the leading opponents of the bill. *Id.* at 48.

Table of Contents

Introduction

Our friend and colleague David Mellinkoff's most famous work is his 1963 classic, *The Language of the Law*.[1] This article was inspired by a lesser known but equally significant work, Mellinkoff's *The Conscience of a Lawyer*,[2] published ten years later, which exhumes the long-forgotten *Courvoisier* case. Both books clarify a dilemma experienced by all lawyers: how to infuse professional ethics into adversarial legal language. This fundamental question occupied a large part of Mellinkoff's academic and professional life.

The Conscience of a Lawyer concerns a classic puzzle in legal ethics: what should a criminal defense lawyer do when the lawyer becomes certain that the client is factually guilty, but the client nevertheless insists on a strong defense? Part I traces the guilty-client problem through *Courvoisier* as well as a notorious contemporary example, the *Westerfield* case. Part II explores the epistemological problem of how a lawyer can be certain of the client's guilt and examines literary treatments of that problem. Part III contrasts two ways to think about the lawyer's role in an adversary system: strong vs. weak adversarialism. Part IV traces the strong vs. weak distinction through four decisions that confront a defense lawyer who is certain of the client's guilt. Part V identifies the popular culture model for dealing with the guilty client dilemma: betray the client. The pop culture solution, in other words, is no adversarialism at all. Part VI turns to adversarialism in literature and observes that literary lawyers are usually strong adversarialist SOB's who win their cases or fine human beings who practice weak

[1] DAVID MELLINKOFF, THE LANGUAGE OF THE LAW (1963).
[2] DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER (1973) (hereinafter *Conscience*)

On the first day of trial,[5] Phillips aggressively cross-examined prosecution witness Sarah Mancer, Lord Russell's maid, attacking every detail of her testimony and exposing many minor differences between her testimony and previous versions of the story. It is said that Mancer never recovered from the trauma of the trial and died in an insane asylum. Phillips was equally effective in cross-examining Constable Baldwin, who denied knowing of the £400 reward being offered in the case—which everybody in London had heard about. At that point, a contemporary observer reported, the betting in the robing room was 3-1 that Courvoisier would be acquitted.

On the second day of trial,[6] everything changed. The prosecution brought in a surprise witness, a device dear to the hearts of novelists and screenwriters. Charlotte Piolaine and her husband owned a hotel in Leicester Square. She had previously employed Courvoisier (knowing him only as Jean). Six weeks before the murder, he appeared at her hotel and reminded her who he was. A week or so later, he stopped by again and asked her to hold a package for him. Piolaine claimed that she had heard nothing about the murder or the trial until the previous day. At that point, comments by a relative caused her to associate the man who had asked her to hold the package with the defendant Courvoisier. In the presence of a solicitor, she opened the package and found the missing silver plate. And she identified Courvoisier as the man she had known as Jean.

Phillips was entirely unprepared for this witness, but his impromptu cross-examination did considerable damage to her reputation. He suggested her testimony was false; how could she not have known about the case until the previous day given that people in London spoke of little else? He also suggested that her hotel, like the others in Leiceister Square, was a gambling den. In addition, Phillips scored points in cross-examining policemen who had bungled the investigation. They claimed they had discovered bloody gloves in Courvoisier's trunk—but only after the trunk had already been torn apart several times and nothing suspicious had been found. Rather obviously, the police had planted the incriminating items in hopes of collecting the reward.

Under existing law, Courvoisier was not allowed to testify, so the defense case consisted of a few character witnesses. Phillips delivered a highly emotional 3-hour closing argument. He contended that the evidence against his client failed to meet the reasonable doubt standard. He fiercely attacked the testimony of Piolaine and the police and, while denying that he was casting blame on Mancer, he managed to suggest that she might well have had something to do with it. Mellinkoff quotes his lengthy address almost in full,[7] but we provide a few snippets here:

> Over every portion of this case doubt and darkness rest, and you will come to a conclusion against this man at the peril of your souls. . . Gentlemen, mine has been a painful and awful task, but still more awful is your responsibility. To violate the living temple which the lord hath made, to

[5] *Id.* at 64-87 (recounting events of the first day of the trial).
[6] *Id. at* 88-100 (recounting events of the second day of the trial).
[7] *Id.* at 101-21.

> quench the fire that his breath [hath] given, is an awful and tremendous responsibility. And the word 'guilty' once pronounced, let me remind you, is irrevocable. Speak not that word lightly. Speak it not on suspicion, however strong, upon moral conviction, however apparently well grounded—upon inference, upon doubt—nor upon anything but a clear irresistible bright noonday certain of the truth of what is alleged. . . I tell you that if you pronounce the word lightly, its memory will never die within you. It will accompany you in your walks. It will follow you in your solitary retirements like a shadow. It will haunt you in your sleep and hover round your bed. It will take the shape of an accusing spirit, and confront and condemn you before the judgment seat of your God. So beware what you do.

The force of these remarks was considerably diluted by the three and one-half hour summary of Lord Chief Justice Tindal. In England, the judge is allowed to sum up the evidence. Tindal's summary, though fair, left little doubt that he thought Courvoisier was guilty. In any event, Piolaine's evidence could not be overcome. The jury found Courvoisier guilty, his appeal failed, and shortly thereafter he was hanged.

For Phillips the case had just begun. An ethical scandal engulfed him and it haunted him to his grave. Courvoisier had maintained his innocence until the second day of trial when he saw Piolaine walk into the courtroom. He then confessed his guilt to Phillips, but insisted that Phillips continue to represent him.[8] Phillips had no idea how to handle the situation.

At first he considered withdrawal, but his co-counsel talked him out of it. Then, at co-counsel's suggestion, Phillips consulted Baron Parke (who was assisting Lord Chief Justice Tindal), thus breaching his duty of confidentiality. Parke told him to "use all fair arguments arising on the evidence." In other words, go and do your job. Thus Phillips carried on, harshly cross-examining both Piolaine (whose direct examination he knew had been truthful) and the policemen who evidently had planted incriminating evidence in hopes of getting the reward (but Phillips knew they had only incriminated a guilty man).

Soon word got out that Courvoisier had confessed to Phillips during the trial. There was an immense outcry against Phillips in the press.[9] Not only laymen but many lawyers condemned him, although he had a few defenders. The consensus was that had acted wrongly in aggressively defending Courvoisier, and his reputation never recovered.

Lest you think *Courvoisier* is interesting but irrelevant legal history, the current story of San Diego lawyer Steven Feldman and client David Westerfield is sobering. A seven-year old girl named Danielle van Dam was abducted from her home in the middle of the night. Substantial circumstantial evidence pointed to a neighbor, David Westerfield, who was charged with the crime. However, the police had not found

---

[8] *Id.* at 126-40.
[9] *Id.* at 141-49.

Danielle's body. During plea bargaining, the prosecutor offered not to seek the death penalty if Feldman would disclose the location of the body. Since Feldman had that information, he must have known that Westerfield was the killer.[10]

Before a deal could be struck, volunteers found the body and the plea bargain collapsed. The case went to trial and Feldman conducted an all-out defense. In his opening statement, Feldman said: "We have doubts. We have doubts as to the cause of death. We have doubts as to the identity of Danielle van Dam's killer. We have doubts as to who left her where. . . she remained. And we have doubts as to who took her."[11]

In cross-examining Danielle's parents, Feldman brought out the fact that they had a "swinging lifestyle" and held sex parties in their home, suggesting that a guest at one of these parties might have killed the girl. Obviously, this was highly damaging to the parents' reputation, yet Feldman knew the inference he was seeking to raise was false. He also introduced expert testimony from three entomologists who testified concerning the blowflies and maggots on the victim's body in order to fix the time of her death.[12] If the experts were right about the time of death, Westerfield could not have been the killer because he was under police surveillance at that time. However, Feldman knew that the testimony was wrong (even though the experts believed it was correct). Westerfield was convicted and is presently on death row.

The sequel to the trial mirrored *Courvoisier*: there was a thunderous outcry in the local press, with an editorial in the San Diego Union Tribune claiming that Feldman was as despised as Westerfield.[13] Conservative TV commentator Bill O'Reilly ran numerous segments about the case on Fox News[14] and filed an ethics complaint with the San Diego and the California State Bar Associations.[15] Feldman and his family were shunned. According to Feldman, the San Diego Bar Association's phone answering machine said "if you want information about the San Diego Bar Association, press 1; if you want to complain about Steven Feldman, press 2." In fact, Feldman's actions fell within the accepted conventions for criminal defense and the storm blew over. But the public

---

[10] The circumstances of *Westerfield* are reminiscent of those in People v. Belge, 376 N.Y.S.2d 771 (1975). A client disclosed the location of the bodies of murder victims to his attorney, but the attorneys refused to reveal the information despite anguished pleas from the victims' parents. The attorneys also tried to use the information in return for a favorable plea bargain. There was an enormous public outcry against the attorneys. One was prosecuted criminally. Their law practices were ruined. A New York appellate court voiced serious concern about their ethics. *See* DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 234-35 (4th ed. 2004); LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 121-28 (2005); TOM ALIBRANDI & FRANK H. ARMANI, PRIVILEGED INFORMATION (1984).

[11] Alex Roth, Copley News Service, Sept. 18, 2002, quoted in Talkleft, *On Westerfield's Lawyers' Conduct* (Sept. 19, 2002), http://talkleft.com/new_archives/000483.html (last visited Feb. 22, 2006).

[12] See Harriet Ryan, *Frustrated Prosecutor Swats at Final Bug*, COURT TV (Aug. 1, 2002), http://www.courttv.com/trials/westerfield/080102_ctv.html (last visited July 14, 2006).

[13] Alex Roth, *Attorney Breaks His Silence on Defending Westerfield*, SAN DIEGO UNION TRIBUNE (Dec. 1, 2002) http://www.signonsandiego.com/news/metro/danielle/20021201-9999_1m1feldman.html (last visited Feb. 22, 2006).

[14] See Bill O'Reilly, *Talking Points*, http://www.foxnews.com/story/0,2933,64435,00.html (last visited Feb. 22, 2006).

[15] Cathy Young, *A Lawyer's Obligation When the Client is Guilty*, REASON (Sept. 24, 2002), http://reason.com/cy/cy092402.shtmlq (last visited Feb. 22, 2006).

condemnation to Feldman's conduct bears an eerie resemblance to the public's response to the conduct of Charles Phillips in defending Courvoisier 165 years before.

What should Charles Phillips and Steven Feldman have done when they had to defend clients whom they knew beyond any doubt were factually guilty of the crime, but who insisted on a vigorous defense? This ethical issue remains hotly debated to the present day. Defense lawyers often suspect their clients are factually guilty (most of them are, of course), but they systematically avoid "knowing for sure."[16]

II. Can Anyone Really Know? The Case for "Epistemological Relativism"

We first confront a threshold question of epistemology: does a lawyer ever really "know" the client is guilty?[17] Even if the client has confessed to the lawyer, as Courvoisier did to Phillips or as Westerfield did to Feldman, the client might be protecting someone else, trying to facilitate a plea bargain, or be just plain deranged. Many ethicists have commented on the difficulty in deciding whether or not a client's confession can be taken at face value.[18] We agree and would trigger the guilty-client dilemmas only when the lawyer is virtually certain that the client is factually guilty.

We refer to this problem as "epistemological relativism." By this we mean the argument by which all certainties are relativized. It did not take the post-modernism of these past decades[19] to suggest that truth is in the eye of the beholder, if it exists at all. The defense lawyer's problem of deciding whether a client is guilty has often arisen in

---

[16] See MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LEGAL ETHICS 169 (3d ed. 2004), referring to the "Roy Cohn solution." Under Cohn's approach, the lawyer who needs to find out as much as possible about the case against the client, says: "If somebody was to get up on the stand and lie about you, who would it be? And what would they lie about? And if the client's got any brains, he'll know what I'm talking about it." For an elegant pop-cultural treatment of a criminal defense lawyer eliciting the facts while avoiding the need to ask the client whether he did it, see SCOTT TUROW, PRESUMED INNOCENT 160-64 (1987). In Trollope's *Orley Farm*, Mr. Furnival is careful to play the game. "Would it not have been natural now that he should have asked her to tell him the truth? And yet he did not dare to ask her. He thought that he knew it. He felt sure—almost sure, that he could look into her very heart, and read there the whole of her secret. But still there was a doubt,—enough of doubt to make wish to ask the question. Nevertheless he did not ask it." ANTHONY TROLLOPE, ORLEY FARM, Vol. 2, p. 9. See also Vol. II, p. 253 (Oxford Univ. Press, 1985).

[17] Mellinkoff himself was doubtful about the degree to which an attorney can trust a client's confession. *Conscience, supra* note 2, at 149-55.

[18] *See*. RHODE & LUBAN, *supra* note 10, at 330-31. Some ethicists argue that defense lawyers can know the truth with sufficient certainty, particularly if the defendant has confessed and counsel's investigation supports the confession. *See* William Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703, 1706 (1993); Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 527-33 (1987); Harry I. Subin, *The Criminal Lawyer's Different Mission: Reflections on the 'Right' to Present a False Case*, 1 GEO. J. LEG. ETHICS 125, 141-43 (1987). Monroe Freedman contends that lawyers are often quite certain that a client is factually guilty. MONROE H. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 51-59 (1975). Others argue that the lawyer should never conclude the client is factually guilty of the crime, regardless of the client's confession. *See, e.g.*, Jay Sterling Silver, *Truth, Justice and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 379-91 (1994).

[19] STANLEY FISH, IS THERE A TEXT IN THIS CLASS 43 (1980).

great literature (hereinafter "lit"). From Victor Hugo in the 19th century[20] to Albert Camus[21] and William Faulkner[22] only sixty years ago, lit has closely observed the way lawyers discover "truth," particularly in the charged arena of criminal investigations. In lit, lawyers and judges consistently do a poor job of determining whether criminals, especially alleged murderers, actually committed the crime.[23] False confessions, as well as incorrectly evaluated motives and poorly understood personalities, all play a role in literary trials that reach the wrong result.

In the paradigmatic story, Dostoevski's *Crime and Punishment*,[24] the reader knows that Raskolnikov has killed two women, one of them with malice aforethought. Yet, as the novel progresses, others confess to the crimes. It takes Dostoevski's brilliant examining judge, Porfiry Petrovich, to uncover Raskolnikov's true guilt. After a fascinating game of cat-and-mouse (Raskolnikov is the mouse), the lawyer catches his prey and sends him off to Siberia, not before permitting a beneficent lie about Raskolnikov's motives to prevail in court and limit the latter's punishment, indicating that smart lawyers who divine the truth can sometimes twist it for judicial consumption. Similarly, as Albert Camus (strongly influenced by Dostoevski) represents in *L'Etranger*,[25] a prosecutor might ratchet up the punishment for a man he knows to be guilty (Meursault, who kills an Arab) but decline to reveal or at least to emphasize some very real mitigating circumstances.

In Dostoevski's final masterpiece, *The Brothers Karamazov*,[26] Dmitri Karamazov is accused of the brutal killing of his own father. This time, the character's guilt or innocence is not transparent, but the careful reader has good reason to suspect that the prosecutor is making a bad mistake. Dmitri's own lawyer, Fetyukovitch, misjudges the truth. For the government, every piece of evidence—and indeed Dmitri's own statements, which fall just short of a confession—point to his guilt. Dmitri, who is known as to be sensual and irrational, squandered 1500 rubles on his girlfriend just after the murder and then told everyone he had spent 3000, exactly the amount that was taken from his father's bed-side at the murder site. When asked to explain, he admits that he hated his father and that he had boasted falsely about the 3000 rubles. For the reader who has come to know him in the fullness of his character, these faults would make him at worst "a scoundrel,"

---

[20] *See* VICTOR HUGO, LE DERNIER JOUR D'UN CONDAMNE (1829); LES MISERABLES (1861); HISTOIRE D'UN CRIME (1877-78).

[21] *See* ALBERT CAMUS, L'ETRANGER (1942); LA CHUTE (1956).

[22] *See* WILLIAM FAULKNER, INTRUDER IN THE DUST (1948); LIGHT IN AUGUST (1932); SANCTUARY (1931).

[23] For analyses of Camus' representation of legal epistemology, *see* RICHARD WEISBERG, THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION 5 (1984). See also W. WOLFGANG HOLDHEIM, DER JUSTIZIRRTUM ALS LITERARISCHE PROBLEMATIK [Judicial Error as a Literary Thematic] preface and passim (Berlin: de Gruyter, 1969). For analyses of Faulkner in this regard, see JAY WATSON, FORENSIC FICTIONS: THE LAWYER FIGURE IN FAULKNER (1993); Rob Atkinson, *Liberating Lawyers: Divergent Parallels in* Intruder in the Dust *and* To Kill a Mockingbird, 49 DUKE L.J. 601 (1999); Richard Weisberg, *The Quest for Silence: Faulkner's Lawyers in a Comparative Setting*, 4 MISS. COLL. L. REV. 193 (1984).

[24] FYODOR DOSTOEVSKI, CRIME AND PUNISHMENT (3d Norton Critical Ed, George Gibian, Editor 1989). This edition contains a critical analysis by one of the authors of this article.

[25] *See supra* note 21.

[26] FYODOR DOSTOEVSKI, THE BROTHERS KARAMAZOV (New York: Signet Edition 1957).

but not a thief and certainly not a murderer. The law, with its peculiar way of arriving at the "truth," sees things far differently. Capitalizing on Dmitri's every negative self-assessment—including especially his feelings about his father, who was courting the woman he adored—the prosecutor paints a word-picture that inexorably implies Dmitri's guilt.

The brilliant Fetyukovitch seems eminently up to the task of debunking an apparently airtight (but ultimately false) prosecutorial portrait. Here, perhaps, "truth" will out. As Fetyukovich puts it in his closing argument to the jury: "there is an overwhelming chain of evidence against the prisoner, and at the same time, not one fact that will stand criticism, if it is examined separately."[27]

Fetyukovitch manages to discern the web of resentments that have led to a false overall picture of his client. Above all, he sees that the prosecutor has been "weaving a romance" about his client,[28] a piece of artistry that serves only an adversarial and not a truth function. Unfortunately for Dmitri, and even more so for the hint of absolute truth that the reader craves, Fetyukovich declines to argue that Dmitri was not the murderer. He believes that his client committed the brutal act, but he also is convinced that the jury should acquit the client anyway because of mitigating circumstances.

In an analysis of lit's treatment of judicial error brilliantly propounded by the German literary critic W. Wolfgang Holdheim, [29] the inability of even a master lawyer like Fetyukovitch to fathom the literal truth behind Dmitri Karamazov's protestations of innocence leads to the high point of epistemological relativism in great fiction. Fetyukovitch not only exemplifies the difficulty of seeing the truth, he actually theorizes it for the jury. As Holdheim describes the defense counsel's closing argument, "there are not even any transparent facts, no meanings without interpreters—and that is the basic position of the defense counsel. The problem of outer and inner truth—both of data and of psychology—is strongly and systematically presented. There is no 'pure' reality, but only one posited by a subjective consciousness. He [Fetyukovitch] has no truth to present, saying nothing is true—or perhaps asking with Pontius Pilate: what is truth?"[30]

Dostoevski's chapter heading for the defense closing argument is "A corrupter of thought,"[31] but this heading only enhances Fetyukovitch's representative status as the

---

[27] *Id.* at 671.

[28] *Id.* at 658. "Of all the mass of facts heaped up by the prosecution against the prisoner, there is not a single one that is certain and irrefutable." Ippolit Kirollivich,, the prosecutor, responds to this assertion in his closing argument. *Id.* at 678.

[29] Holdheim, *supra* note 23. Holdheim's small masterpiece greatly influenced the Dostoevski chapters in Weisberg, *Failure of the Word*, *supra*, note 23 .

[30] This is our translation of the following passage from Holdheim, *Id.* at 18. "[For Fetyukovitch in his closing argument,] es gibt eben keine selbstredenden Tatsachen, keine Deutung ohne Deuter--und das ist der Ansatzpunkt des Verteidigers. Er teilt das Problem streng systematisch in die Frage der äusseren und der inneren Wahrheit, des Faktums und der Psychologie. Es gibt keine 'reine' Tatsache, sie ist immer durch ein subjektives Bewusstsein reflektiert. Er hat keine Wahrheit zu bieten, er sagt: nichts ist wahr--oder vielleicht fragt er mit Pontius Pilatus: was ist Wahrheit?"

[31] *The Brothers Karamazov, supra* note 26 at 671. The original Russian "Prelyubodei M'iusli" is harsher: "A perverter of thought."

clever lawyer whose job it is to create and not to accept truths. So both lawyers miss the point about Dmitri. They paint opposite pictures of him, both of which are false and both of which ultimately depict a guilty man. The result is judicial error, as the jury declines Fetyukovitch's exculpatory narration and instead accepts the prosecutor's conclusion: a premeditated parricide with the motives of jealousy and criminal enrichment. The law's inability to be certain, its shaky attitude about self-incrimination, its artistic proclivity to construct conflicting stories out of the same factual material—all of this Dostoevski brilliantly conveys in two of his late novels. They stand as object lessons for lawyers, who are trained to suspect all obvious truths. They are the paradigm for our phrase, "epistemological relativism."

Charles Phillips, a contemporary of the fictional Fetyukovitch, might have shared the latter's relativistic sense of truth. The real and the fictional are mirror images here, but doubt as to apparent realities joins the two. In both cases, the evidence points to guilt, but Fetyukovitch's client (justly) protests his innocence, while Courvoisier admits guilt. Both defense lawyers, however, have been trained to be skeptical of all appearances, including those presented by their clients' protestations of innocence or guilt. In fact, Fetyukovitch never credits Dmitri Karamazov's protestations; his job is to destroy, piece by piece, the seemingly logical edifice of guilt created by his adversary and in the process to destroy the entire idea of logic and reason in the service of truth. Conversely, Phillips and similarly situated defense counsel may well be professionally justified in looking skeptically at every seeming demonstration of guilt, up to and including an overt confession.[32]

Still, the examples of Courvoisier and Westerfield indicate that there are times when the defense attorney knows beyond any doubt of his client's guilt. As much as our personal instincts as lawyers impel us to distrust confessions, we proceed with these examples in mind to examine the ethical dilemmas faced by Charles Phillips, Steven Feldman, and other lawyers placed in their position.

III. Strong vs. Weak Adversarialism

Lawyers who are certain of the client's guilt confront inescapable ethical conflicts when the client insists on a vigorous defense. The lawyer's obligations to protect confidential client communications[33] and to conduct a zealous defense[34] come into

[32] Consider the penalty phase in the trial of convicted 9/11 conspirator Zacharias Moussaoui. Moussaoui's lawyers declined to credit his public confession. How did they know he might be lying when he declared in open court that he was a key player in the events of 9/11? They reversed the question, as most defense counsel would: How could they know he was telling the truth? Just days after the sentencing, Moussaoui turned around and asked for a completely new trial, stating that he had lied about his guilt! See http://en.wikipedia.org/wiki/Zacarias_Moussaoui (last visited September 19, 2006). Similarly, John Mark Karr's highly publicized confession to murdering JonBenet Ramsay turned out to be entirely bogus. http://en.wikipedia.org/wiki/John_Mark_Karr (last visited September 19, 2006). *See also* O. JOHN ROGGE, WHY MEN CONFESS (1975).

[33] See ABA, MODEL RULES OF PROFESSIONAL CONDUCT, Rule 1.6(a).

[34] The obligation of zealous advocacy has been demoted to a comment to the ABA's Model Rules. "A lawyer must also act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* Rule 1.3, Comment [1]. In earlier versions of the rules, however, the

conflict with the lawyer's duty of candor toward the court[35] and possibly the lawyer's own moral sensibility. How to reconcile these professional and moral obligations remains highly contested.[36] After all this time thinking about it, we still have not made sense of the problem. Public opinion, the rules of legal ethics,[37] and the views of legal ethicists all conflict. Meanwhile, popular culture and the broader literary tradition weigh in with surprisingly interesting perspectives on the dilemma.

We suggest a frame that may be helpful in thinking about the problem: strong vs. weak adversarialism. Strong and weak adversarialists agree that no person should be convicted unless the government proves its case beyond a reasonable doubt. Every criminal defendant has the right to a competent and ethical defense on reasonable doubt grounds.[38] But these axioms compel defense counsel neither to reveal nor to conceal the lawyer's knowledge of the client's guilt. What, in other words, constitutes "competent and ethical defense" when the lawyer is certain of the client's guilt? Our choice allows defense lawyers to exercise discretion in choosing whether to follow the strong or weak model.

The normative case for strong adversarialism emphasizes the objective of zealous representation and protection of client confidences above other values.[39] Strong adversarialists take their credo from the words of Lord Brougham in Queen Caroline's case in 1821:

> . . . [A]n advocate in the discharge of his duty knows but one person in all the world, and that person is his client. To save that client by all means and

---

obligation was foregrounded: An adversary shall have "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of the utmost learning and ability." ABA, CANONS OF PROFESSIONAL ETHICS Canon 15 (1908).

[35] Like the obligation of zealous advocacy, see *supra* note 34, the duty of candor is set forth in a comment to the Model Rules. "This rule sets forth the special duties of lawyers as officers of the court to avoid conduct that undermines the integrity of the adjudicative process. A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client's case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate's duty of candor to the tribunal. Consequently, although a lawyer in an adversary proceeding is not required to present an impartial exposition of the law or vouch for the evidence submitted in a cause, the lawyer must not allow the tribunal to be misled by false statements of law or fact or evidence that the lawyer knows to be false." ABA, Model Rules, *supra* note 34, Rule 3.3, Comment [2].

[36] For discussion of this conflict, see FREEDMAN & SMITH, *supra* note 16 at 160-61.

[37] See David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990) (discussing indeterminacy of the rules of legal ethics, particularly the problem of defining and enforcing the limits on partisanship).

[38] Thus we disagree with Randolph Braccialarghe who believes that the lawyer should not defend the case of a client who has confessed guilt to the lawyer. *Why Were Perry Mason's Clients Always Innocent? The Criminal Lawyer's Moral Dilemma—The Criminal Defendant Who Tells his Lawyer He is Guilty*, 39 VALP. UNIV. L. REV. 65 (2004).

[39] In Trollope's *Orley Farm*, Furnival, Chaffenbrass, and Aram are prototypical strong adversarialists. Although convinced that Lady Mason is guilty of perjury and forgery (though she never confessed to them), they furnish her with an all-out defense. Furnival has some reservations but Chaffenbrass and Aram have none. *Orley Farm, supra* note 16. For discussion of *Orley Farm, see* THOMAS SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 45-56 and passim (1981); David Luban, *A Midrash on Rabbi Shaffer and Rabbi Trollope*, 77 NOTRE DAME L. REV. 889 (2002).

> expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.[40]

Unsurprisingly, Lord Brougham was among the few lawyers who rose to the defense of Charles Phillips when Phillips was beset on all sides by vitriolic criticism for his role in *Courvoisier*.

A more modern statement of strong adversarialism is that of Justice White's dissenting opinion in *United States v. Wade*:[41]

> [Unlike prosecutors] defense counsel has no comparable obligation to ascertain or present the truth...[W]e also insist that he defend his client whether he is innocent or guilty. . . Defense counsel...need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks *or knows to be the truth*. Undoubtedly, there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, *even he thinks the witness is telling the truth*. . . As part of our modified adversary system, and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little if any relation to the search for truth.

The normative case for weak adversarialism, on the other hand, emphasizes the lawyer's obligation of candor toward the tribunal, safeguarding the truth-finding function of trials, and protecting the reputation of truthful witnesses or the interests of other third parties who may be damaged by the litigation. A weak adversarialist is less concerned with such values as zealous advocacy, protection of client confidences, and procedural justice, more concerned with the pursuit of substantive justice (that is, reaching the correct result rather than just using the correct procedures).[42]

---

[40] See Monroe H. Freedman, *Henry Lord Brougham: Written by Himself*, 19 GEO. J. OF LEGAL ETHICS 1213 (2006). Disagreeing with an earlier article by Zacharias and Green, Freedman insists that Lord Brougham never recanted these views. See Fred C. Zacharias & Bruce A. Green, *Reconceptualizing Advocacy Ethics* 74 GEO. WASH. L. REV. 1 (2005) and *"Anything Rather Than a Deliberate and Well-Considered Opinion"—Henry Lord Brougham, Written by Himself*, 19 GEO. J. OF LEGAL ETHICS 1221 (2006).

[41] 388 U.S. 218, 256-58 (1967) (emphasis added). .

[42] There is a long tradition of weak adversarialism in criminal law. *See* RHODE & LUBAN, *supra* note xx, at 301-02 (quoting David Hoffman's 1836 treatise on legal ethics). *See also Conscience*, *supra* note 2, at 257-59 (giving views of early weak adversarialists). Weak adversarialism serves as a heuristic in situations other than the guilty-client dilemmas discussed in this article and indeed beyond criminal law. A weak adversarialist, for example, might well disclose the location of the bodies of the children to their grieving parents in the *Belge* situation. See note 10, *supra*. A weak adversarialist might be willing to disclose a client confession to save an innocent third party from being executed for a crime he didn't commit. For

One of the authors of this article (Weisberg) regards himself as a strong adversarialist, the other (Asimow) as a weak adversarialist.[43] Each author sees the downside of his own position. We have adopted what we consider to be a principled position that relies on the ability of professionals to make ethical case-by-case choices. Our approach allows defense counsel discretion to choose between the strong or weak approach, depending on the dictates of the lawyer's conscience, the lawyer's perception as to what would be a just result, the interests of third parties, and the specific facts with which only the lawyer is conversant.[44] The choice, in other words, should depend on the particular context. As befits our emphasis here on lit and pop culture, we emphasize in what follows that the choice should be implemented through a careful use of the lawyer's rhetorical skills.[45]

The ABA Model Rules fall back on the discretionary approach in several situations, evidently striking a compromise between the views of different constituents or between different conceptions of the role of lawyers.[46] For example, suppose that during the initial interview between lawyer and client, the client says that he plans to kill a prosecution witness. Under recent revisions in the Rules, and in most states, the lawyer *may but need not* inform the police of the threat.[47] Thus the lawyer who wishes to do the

---

other situations in which weak adversarialism might permit disclosure of client confidences, see Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORD. L. REV. 1629, 1637 n.29 (2002).

[43] See Michael Asimow, *Popular Culture and the American Adversarial Ideology*, in LAW AND POPULAR CULTURE, Michael Freeman ed., 609-21 (2004); Michael Asimow, *Popular Culture and the Adversary System*, -- LOYOLA L.A. L. REV. -- (forthcoming, 2007).

[44] Thus our approach follows that of a number of ethicists who take the contextual approach to difficult ethical decisions. We particularly acknowledge our debt to William Simon. *See* WILLIAM SIMON, THE PRACTICE OF JUSTICE (1998); William Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988). Simon argues that lawyers in civil cases should have *ethical discretion* to refuse to assist in the pursuit of legally permissible courses of action or in the assertion of potentially enforceable legal claims, after taking into account both the merits of the client's position, its effect on third parties, and the likelihood that institutions empowered to deal with the problem (such as courts or administrative agencies) can be trusted to resolve it fairly. "The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice." *Id.* at 1090. Unlike some other ethicists, Simon extends the argument to criminal defense. THE PRACTICE OF JUSTICE, *supra*, ch. 7; William Simon, The Ethics of Criminal Defense," *supra* note 10. See also DEBORAH RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 66-80, 106-15 (2000); Dolovich, *supra* note 42; Samuel J. Levine, *Taking Ethical Discretion Seriously: Ethical Deliberation As Ethical Obligation*, 37 IND. L. REV. 21, 21-24 (2003) (citing numerous scholarly works that call for a contextual approach to ethical issues).

We agree with Simon that (despite many tragic historical examples where lawyers have forgotten this) lawyers have a wide range of choices that permit them to follow their individual conscience. This has proven true even under the worst dictatorial regimes. See, e.g., RICHARD WEISBERG, VICHY LAW AND THE HOLOCAUST IN FRANCE, ch. 2 and 10 (1996); Richard Weisberg, *The Risks of Adjudicating Vichy*, 5 ROG. WILL. LAW SCH. L. REV. 127, 139-40 (1999).

[45] Thus both of us see a possible reading of Mellinkoff that counsels even strong adversarialist lawyers to modify their discourse during closing argument when they "know" the client is guilty. See *infra* note 102.

[46] See Fred C. Zacharias, *The Images of Lawyers* – GEORGETOWN L. R. – (2007) [forthcoming, ms. At 8-9]

[47] ABA Model Rule 1.6(b) now provides: "A lawyer *may* reveal information relating to the representation of a client to the extent the lawyer reasonable believes necessary: (1) to prevent reasonably certain death or substantial bodily harm..." The rule also permits but does not require disclosure "to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer's services."

moral thing and protect an endangered third party can betray the client's confidence,[48] but the lawyer who believes that client confidence trumps all other values need not do so. The rules *permit but do not require* a lawyer to refuse to offer testimony (other than the testimony of a defendant in a criminal case) that the lawyer "reasonably believes is false."[49] Here again, the rules provide an option for a lawyer to do what the lawyer's conscience dictates while protecting other lawyers who believe they have a duty to their clients to introduce testimony they reasonably believe (but do not know for certain) is false. In certain circumstances a lawyer for an organization "may" disclose confidential information detrimental to the organization's interests to outside authorities.[50] In the lawyer's advisory or counseling role, the lawyer "may refer not only to law but to other considerations, such as moral, economic, social and political factors, that may be relevant to the client's situation."[51]

The discretionary approach honors the individual lawyer's conscience by allowing the lawyer to choose the weak adversarial path. As William Simon says, "My approach [which gives defense lawyers an option to do less than their best when they are certain a client is guilty] would lead defense lawyers to express more directly and consistently their deepest motivations and commitments. That ought to be counted as an important benefit."[52] The discretionary approach also recognizes that in many situations the lawyer simply cannot be sure whether the client is truly guilty or (to anticipate the trial dilemmas we discuss below) whether the client's direct testimony will be perjured, or whether the testimony of a particular witness is truthful. Under the discretionary approach, a lawyer cannot be subjected to professional discipline for the difficult decision (which sometimes arises unexpectedly during trial) of whether to take a strong or a weak approach.[53] Adoption of the discretionary approach would also signal the Bar's conviction that the choice of a weak adversarial approach is not ineffective assistance of counsel for Sixth Amendment purposes.

We think that counsel's decision to choose the weak adversarial option should be communicated to the client as soon as the lawyer has made that decision. Thus, we think a defense lawyer should conduct a conversation with a client that warns the client of the choice the lawyer has made. The client should be told, for example, that the lawyer will not allow the client to introduce perjured testimony in the normal question and answer form or that the lawyer will not engage in a crushing cross-examination of a witness

---

Model Rule 1.6(b)(2). However, New Jersey requires disclosure of the information itemized in Rule 1.6(b). New Jersey Rules of Professional Conduct § 1.6(b), http://www.judiciary.state.nj.us/rpc97.htm#1.6, last visited October 6, 2006.

[48] The lawyer may also fear tort liability to the third party if the lawyer fails to reveal the threat. *See* Tarasoff v. Bd. Of Regents of University of California, 551 P.2d 334 (Calif. Supr. Ct. 1976) (imposing tort liability on psychiatrist for failure to warn intended victim of threats made by patient).

[49] ABA Model Rule 3.3(a)(3). See Comment [9] to Rule 3.3.

[50] *Id.* Rule 1.13(c).

[51] *Id.* Rule 2.1.

[52] William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767, 1772 (1993).

[53] Granted, there are few if any recorded instances in which a defense lawyer's choices of strong or weak adversarial tactics resulted in professional discipline. Nevertheless, lawyers worry a lot about the potential of discipline for apparent violations of the ethical rules.

confronted the problem, because they always take care not to elicit a client's confession or because they have talked the defendant out of testifying.[56] Despite the rarity of the situation, however, both ethicists and the rules of legal ethics devote considerable attention to the problem, and the Supreme Court has rendered a major decision on the subject.[57] Nevertheless, the problem resists a satisfactory solution.

The standard response is that the lawyer should withdraw when the client insists on testifying falsely. Obviously the lawyer's threat of withdrawal has a powerful coercive effect on the client and it probably induces many clients to testify truthfully or not to testify at all. The threat to withdraw is most powerful when directed against poorer, less sophisticated, and relatively helpless clients, less effective against more sophisticated and more affluent clients.

Nevertheless, the withdrawal solution is often impracticable and does not solve the problem if the client insists on giving perjured testimony.[58] If the lawyer is a public defender or other appointed counsel, as is true in the vast majority of cases, he or she will probably not be allowed to withdraw.[59] A noisy withdrawal may betray client confidences.[60] Moreover, a judge may refuse to allow withdrawal during the trial. Even if the lawyer withdraws, the client will now be wised up and will lie to the new lawyer, so little is accomplished except for salving the conscience of the withdrawing lawyer. Alternatively, the client can delay matters indefinitely by forcing sequential withdrawals of lawyer after lawyer.

The ABA Model Rules take a *weak adversarial* approach to the client perjury problem, but none of the means by which counsel can implement the weak approach are satisfactory. Model Rule 3.3 prohibits a lawyer from offering evidence that the lawyer knows to be false.[61] The lawyer should try to talk the client out of committing perjury.[62]

---

[56] Perhaps more revealing is a survey of D.C. lawyers. When asked what they would do when the client indicates an intention to commit perjury, 88% of those responding would question their client on the stand as they would any other witness. Only 10% would ask the client to tell his story in narrative form. Over half of the attorneys would argue the perjured testimony to the jury, while almost an equal number would simply concentrate on attacking the government's case. Steven Allen Friedman, *Professional Responsibility in D.C.: A Survey*, 1972 RES IPSA LOQUITUR 60, 68 (Fall 1972).

[57] Nix v. Whiteside, 475 U.S. 157 (1986), discussed further in text accompanying notes 70-71, *infra*.

[58] See Lefcourt, *supra* note 18 at 525-27; Silver, *supra* note 18 at 413-19.

[59] A comment to ABA Model Rule 1.16 states: "When a lawyer has been appointed to represent a client, withdrawal ordinarily requires approval of the appointing authority."

[60] Comment [3] to ABA Model Rule 1.16 states: "Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. . ."

[61] ABA Model Rule 3.3(a) provides: "A lawyer shall not knowingly:...(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. . ." Rule 3.3(b) imposes a broad duty of disclosure to the tribunal in the perjury situation: "A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."

If remonstrance fails, however, it is unclear what is supposed to happen if the client insists on testifying over the lawyer's opposition.[63] Apparently, the lawyer should disclose the client's intention to the judge.[64] If perjury has already occurred, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."[65]

But what is the judge supposed to do with this information, assuming the client insists that the testimony (which the client proposes to offer or has already offered) is *not* perjured? On that, the Model Rules are noncommittal. Rather than just take counsel's word for it, the judge (or a different judge) probably should conduct some sort of mini-trial that tests whether the client's testimony will be (or, in the case of testimony already introduced, was) perjured.[66] This mini-trial pits the lawyer against the client and destroys the relationship between them, perhaps necessitating the lawyer's withdrawal in mid-trial.[67] Such a hearing would insure disclosure of a wide range of client confidences. It would force the attorney to be a witness in the same case the attorney is serving as counsel.[68] If the judge finds that the testimony will be perjured, the judge presumably

---

[62] "If a lawyer knows that the client intends to testify falsely or wants the lawyer to introduce false evidence, the lawyer should seek to persuade the client that the evidence should not be offered. If the persuasion is ineffective and the lawyer continues to represent the client, the lawyer must refuse to offer the false evidence. . ." ABA Model Rule 3.3, Comment [6].

[63] Normally the decision of a defendant whether or not to testify is for the client, not the attorney. ABA Model Rule 1.2(a); ABA, STANDARDS FOR CRIMINAL JUSTICE, Standard 4-5.2(a)(iv). Consequently, if the client wants to testify, but the attorney refuses to let the client do so on the ground that the testimony will be perjured, it would appear that there must be a judicial inquiry into the matter. Lefcourt, *supra* note 18, at 537.

[64] If client perjury is considered to be "criminal or fraudulent conduct," which it apparently is, the lawyer must take "reasonable remedial measures, including, if necessary, disclosure to the tribunal" if the client insists on committing perjury. ABA Model Rule 3.3(b). If, however, "criminal or fraudulent conduct" applies only to other misconduct, such as jury tampering or witness intimidation, and not to proposed perjury, the rules are unclear whether the lawyer must disclose this intention to the judge.

[65] ABA Model Rule 3.3(b). The lawyer is expected to remonstrate with the client and seek the client's cooperation with respect to correction of the false statements. *Id.* Rule 3.3, Comment [10]. If that fails and if withdrawal is not permitted, the advocate "must make such disclosure to the tribunal as is reasonably necessary to remedy the situation, even if doing so requires the lawyer to reveal information that otherwise would be protected by Rule 1.6. It is for the tribunal to determine what should be done—making a statement to the trier of fact, ordering a mistrial or perhaps nothing." The comments acknowledge that disclosure of perjury to the judge "can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury. But the alternative is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement." The rule was otherwise under the prior ABA Model Code of Professional Responsibility. See DR 7-102(B)(1) and ABA Formal Opinions 341, which states that the rules requiring confidentiality of client communication trump the obligation to disclose completed perjury to the judge. See ABA, Formal Opinion 87-353, ABA STANDING COMM. ON ETHICS AND PROFESSIONAL RESPONSIBILITY, FORMAL AND INFORMAL ETHICS OPINIONS 1983-1998, 14, 16-20 (2000), which disapproves Opinion 341 and acknowledges that the Model Rules changed former law.

[66] See Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 151-62; Lefcourt, note 18 at 534-41; Silver, note 18 at 396-400.

[67] See Comment [15] to ABA Model Rule 3.3 which acknowledges that the lawyer's compliance with the duty of candor may result "in such an extreme deterioration of the client-lawyer relationship that the lawyer can no longer competently represent the client."

[68] "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness..." ABA Model Rule 3.7(a).

would refuse to let the defendant testify, creating a serious issue on appeal of denial of the right of a criminal defendant to testify.[69] If the perjury has already occurred, presumably the judge will caution the jury to disregard the testimony or declare a mistrial, again seriously prejudicing the interests of a criminal defendant.

All in all, disclosure of proposed or completed perjury to the tribunal seems impractical. However, it is supported by the Supreme Court's decision in *Nix v. Whiteside*.[70] In that case, counsel was certain that the defendant planned to offer perjured testimony. He threatened to go to the judge if the client committed perjury and also to impeach the client's testimony or to withdraw during the trial. The Supreme Court held that these threats did not add up to ineffective assistance of counsel and thus did not entail a due process violation. Dictum in *Nix* indicates that such behavior by the lawyer is ethically appropriate. "In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard."[71]

A number of states, including California, fall back on what is known as the narrative approach. The lawyer should not disclose the perjury to the judge but instead should allow the client to testify in narrative (without the usual questions and answers).[72] The lawyer should not refer to the client's perjured testimony in closing argument. The narrative approach was formerly incorporated in the ABA's Standards for Criminal Justice but was dropped in 1980.[73] Comments to the Model Rules disapprove it,[74] as does

---

[69] *See* Rock v. Arkansas, 483 U.S. 44, 51 (1987) (establishing due process right of defendant to testify); People v. Johnson, 72 Cal.Rptr.2d 805 (CA Ct. App. 1998) (court denied due process by refusing to let defendant testify after counsel made clear that he thought the testimony would be perjured—but error not prejudicial). Rieger, *supra* note 65 at 128-43.

[70] 475 U.S. 157 (1986).

[71] *Id.* at 174. Similarly, in People v. DePallo, 754 N.E.2d 751 (NY Ct. App. 2001), the New York court approved counsel's disclosure of completed perjury to the judge after both sides had rested; the client was not permitted to be present during this disclosure. The four concurring justices in *Nix* argued that the majority's dicta on legal ethics were unnecessary and improper, since the only issue in the case was ineffective assistance of counsel. 475 U.S. at 188-90.

[72] For detailed treatment of the narrative approach, see People v. Guzman, 248 Cal.Rptr. 467, 482-85 (CA Supr. Court 1988) (approving the narrative approach and distinguishing *Nix*); People v. Johnson, 72 Cal. Rptr.2d 805 (Ct. of App. 1998) (narrative approach is best accommodation of competing interests). In People v. Andrades, 828 N.E.2d 599 (NY Ct. App. 2005), counsel presented defendant's perjured testimony at a confession-suppression hearing before the judge in narrative form, after unsuccessfully seeking to withdraw from the case. The Court held the lawyer acted appropriately. Similarly, in People v. DePallo, 754 N.E.2d 751 (NY Ct. App. 2001), counsel tried to dissuade his client from committing perjury in a jury trial, but ultimately introduced perjured testimony in narrative form. The lawyer did not refer to the perjured testimony in closing argument and disclosed the perjury to the judge after both sides had rested. The Court of Appeals approved his conduct. In European criminal law, defendant narrativity is the norm. The defendant is encouraged to testify at his trial and is not placed under oath. See, e.g,, Mirjan Damaška, *Presentation of Evidence and Factfinding Precision*, 123 U. PA. L. REV. 1083, 1088-90 (1975).

[73] See Freedman & Smith, *supra* note 16 at 166-69; Lefcourt, *supra* note 18 at 523 n. 12; Lowery v. Campbell, 575 F.2d 727, 730 n.3 (9th Cir. 1978); People v. Guzman, 248 Cal.Rptr. 467, 484 n.8 (CA Supr. Ct. 1988).

Nix v. Whiteside.[75] This method of presentation tips off the judge and prosecutor to what is going on, but it is unclear what the jury will make of it. Given that the narrative gambit has appeared on television,[76] the jury may well catch on that the lawyer thinks the testimony is perjured.

Asimow casts a weak vote for this obviously suboptimal scheme,[77] while Weisberg votes against the whole idea.[78] He believes that the narrative approach poses too great a danger to even the certainly guilty defendant.[79] Asimow, on the other hand, believes that the narrative approach does less damage to the lawyer-client relationship than disclosure of potential perjury to the judge. Presenting perjured testimony in narrative form avoids the need for a mini-trial or the compelled silencing of the defendant or disclosure to the judge of confidential client information. It also does less damage to the justice system in the event that the lawyer is wrong about whether the client is lying. The narrative approach encourages the lawyer to remonstrate with the client not to take the stand and commit perjury. And the lawyer has some leverage here, given that the jury may figure out that something is amiss from the narrative presentation and counsel's

---

[74] The ABA Model Rules disapprove of the narrative approach but recognize that it is required in some states. Consequently, the comments defer to state law: "The duties stated in paragraphs (a) and (b) [not to offer evidence the lawyer knows to be false] apply to all lawyers, including defense counsel in criminal cases. In some jurisdictions, however, courts have required counsel to present the accused as a witness or to give a narrative statement if the accused so desired, even if counsel knows that the testimony or statement will be false. The obligation of the advocate under the rules of Professional Conduct is subordinate to such requirements..." Model Rule 3.3, Comment [7]

[75] *Nix*, supra note 69, at 170 n.6. Lefcourt criticizes the Supreme Court's negative treatment of the narrative approach in *Nix*. Lefcourt, *supra* note 18 at 1541-51.

[76] "Dog Bite," *The Practice* (Oct. 4, 1997). Eugene Young defended a one-legged mugger who insisted on giving false testimony.

[77] Another grudging vote in favor of narrativity is cast by Prof. Henning. *See* Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J. OF LAW, ETHICS & PUBLIC POLICY 209, 266 (2006).

[78] Weisberg's vote may seem ironic to those familiar with his long-standing support in other contexts for a "narrative jurisprudence." See RICHARD WEISBERG, POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE passim (1992); Richard Weisberg, *Coming of Age Some More: Law and Literature Beyond the Cradle*, 13 NOVA L. REV. 107, 115-16 (1988). However, Weisberg believes that witness-stand narratives unchallenged by normal adversarial questioning are a bad idea. His narrative jurisprudence, as this article reiterates, re-enforces the adversarialism that this practice would violate if adopted and is opposed especially to such weak adversarial narrativists as Thane Rosenbaum, who believe witnesses should be liberated to "tell their story" untrammeled by interruptions of counsel or rules of evidence. *See* THANE ROSENBAUM, THE MYTH OF MORAL JUSTICE 154-55 (2004). *See, e.g.* in a discussion particularly pertinent to this Article, Renee Lettow Lerner, *The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour d'Assises*, 2001 U. ILL. L. REV. 791, 827: "The defendant's not being under oath has interesting implications for the attorney-client relationship in France. It is permissible to advise the defendant to lie, and in fact defense lawyers in France sometimes recommend it on certain points."

[79] There are grave risks to the defendant in permitting even a guilty one to ramble unguided by his or her counsel, risks that tend to show up especially at the penalty phase. Lit distrusts witness narratives, and particularly defendant-narratives, that tend to distort the defendants' message. See, e.g., Camus, *supra* note 25, Part I; *BROTHERS KARAMAZOV*, *supra* note 26, Book VIII. Balancing the risks of introducing known falsehoods into evidence against the damage to defendants when they are allowed to talk freely, Weisberg votes for strong adversarialism. On the complementarity of lit, ethics and strong adversarialism, see Richard Weisberg, *Cardozo's Judicial Poetics*, 1 CARDOZO L. REV. 283, 335-36 (1979?), citing Morningstar v. Lafayette Hotel, 105 N.E. 656, 657 (1914) (N.Y. Ct. App.) (Cardozo, J.).

failure to argue the defendant's story during closing argument. Narrativity allows the judge, during sentencing, to take account of the probably-perjured testimony. Yet this approach preserves the client's right to tell the story as the client sees it, and somewhat minimizes the chances that the jury will acquit a guilty person as compared to presentation of the perjured testimony in normal question-and-answer form.

Finally, another solution—famously urged by Monroe Freedman—takes a *strong adversarial* approach.[80] Freedman makes clear that the lawyer should first try to talk the client out of testifying or of committing perjury. But if this remonstrance fails, the lawyer should introduce the perjured testimony in the usual question-and-answer form. Freedman recognizes that client perjury is undesirable, but argues his is the best solution because it fully protects confidentiality. Weisberg, agreeing with Freedman,[81] would emphasize that the lying defendant will often be subjected to cross-examination that debunks or at least weakens the effect of the falsehoods on the fact-finder.[82]

Freedman's strongest argument is that the strong adversarial position will facilitate lawyer-client communication in all cases—including the much more common type of case in which guilty clients know enough to lie to their lawyer.[83] Only under Freedman's approach can the lawyer say to the client: "Tell me the whole truth, because I won't use the information to your disadvantage no matter what happens at trial." Freedman argues that the resulting candor will enhance communication between lawyer and client in all cases, not just the relatively rare situation of the client who confesses to

---

[80] Freedman favors a strong adversarial approach to all of the ethical dilemmas we discuss in this article given the imbalance of resources between prosecution and defense. In addition to the arguments in the text, Freedman's position is based on the privilege against self- incrimination, the critical value of trust and confidence between lawyer and client, and the de facto effects of weak adversarial rules on poor clients. See Freedman & Smith, *supra* note 16 at 159-195; Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) (hereinafter *The Three Hardest Questions*). See also Silver, *supra*, note 18. On entirely different grounds arising from the lawyer's moral duty to minister to the client, Thomas Shaffer argues that the lawyer should allow the client to commit perjury if remonstrance has failed. The lawyer should neither withdraw nor disclose the perjury but should not argue the client's false account to the jury. Shaffer, *supra* note 39, ch. 9; See also JAMES S. KUNEN, "HOW CAN YOU DEFEND THESE PEOPLE?" THE MAKING OF A CRIMINAL LAWYER 188-89 (1983) (asserting that everybody involved with criminal trials including the police, the witnesses, and the jurors are lying much of the time, so a little more perjury won't make much difference).

[81] However, Weisberg does not agree that counsel should knowingly introduce perjured testimony from a witness other than the client or that the lawyer should suborn perjury by suggesting the false story to the client in the first place. For excellent literary treatments of the subtle issues relating to subornation of perjury, see Joyce Carol Oates, *Do With Me What You Will*, in THE BEST AMERICAN MYSTERY STORIES 556 (Tony Hillerman ed.,, 2000); ROBERT TRAVER, ANATOMY OF A MURDER 35, 44-49 (1958). *But see The Three Hardest Questions, supra*, note 79 at 1478-82; Freedman & Smith, *supra* note 16, at 211-14 (approving lawyer's conduct in *Anatomy of a Murder*); Kunen, *supra* note 79 at 244, 256 (lawyer's admission that he suggested a fictitious defense to the defendant and that he erred in doing so).

[82] Note that in European criminal procedure, the defendant is expected to testify but is not placed under oath, since it is assumed that the defendant will lie. See Weisberg, Coming of Age, *supra* note 77 [need page cite & better *cite to European crim procedure]*

[83] Freedman & Smith, *supra* note 16 at 161-64, 169; *The Three Hardest Questions*, *supra* note 79 at 1470-74.

the lawyer.[84] The present system, of course, strongly motivates lawyers to avoid finding out the truth and smart clients to lie to their lawyers.[85] As long as the lawyer is not certain of the client's guilt, the lawyer can disingenuously conduct a zealous defense, freely presenting the client's probably perjured testimony. As a result, the lawyer is left in the dark about what really happened and may overlook legitimate defenses.[86]

We believe the defense lawyer should have discretion to adopt the strong or the weak approach. The discretionary approach recognizes that some criminal defense lawyers agree with Freedman's strong adversarial line.[87] Others prefer a weak adversarial solution—either following the ABA rule requiring withdrawal or disclosure to the judge or the narrative approach. The discretionary approach allows lawyers to follow the promptings of their conscience and furnishes them with substantial cover from professional and personal criticism no matter which route they follow.[88] It also takes account of the fact that it is difficult, in many cases, for a lawyer to know with sufficient certainty whether a client's testimony is or will be perjured (for example, where the client has abruptly changed his story).

B. Cross-examining truthful witnesses

The Model Rules maintain a discreet silence on the question of whether a lawyer can impeach a witness whom the lawyer knows is truthful.[89] However, the ABA's non-

---

[84] Indeed, Freedman argues that this approach will produce less perjury rather than more because the lawyer will more often be aware that the client intends to commit perjury and thus can try to talk the client out of doing so.

[85] See *supra* note 16.

[86] Simon, *supra* note 18 at 1719-21 challenges Freedman on this point, arguing that clients almost always manage to communicate essential information to the lawyer without confessing guilt.

[87] See Friedman, *supra* note 55.

[88] See Zacharias & Green, *supra* note 40 (distinguishing a lawyer's professional conscience from personal moral code); W. Bradley Wendel, *Institutional and Individual Justification in Legal Ethics: The Problem of Client Selection*, -- HOF. L. REV. -- (forthcoming, 2006). Wendel argues that the rules of law practice should determine whether lawyers should be permitted to make particular moral choices or whether such choices are precluded. Once the rules of practice establish the permissibility of such choices, the lawyer cannot be criticized for making them. [ms. at p. 7] "It is essential to build some limited capacity for the exercise of moral discretion into the normative framework of the legal profession, as a safety valve to prevent catastrophic moral breakdowns in the system. One way to do this is to recognize plural visions of professional excellence within the role of lawyer, so that people can opt into different sub-roles, as it were, which express different sorts of moral virtues." At 40: "There may also be a middle ground here [between requiring lawyers to act in ways morally offensive to them and allowing them to decide all issues based on their own moral judgments] in which the professional role establishes some limitation on the extent of moral discretion that would be permissible in ordinary life, but which also provides some breathing space for plural conceptions of professional identity to be developed." [also at 47]

[89] The Restatement of the Law Governing Lawyers appears to take a weak adversarial position on this issue. *See* ALI, RESTATEMENT OF THE LAW GOVERNING LAWYERS, §106, comm. c.: "A particularly difficult problem is presented when a lawyer has an opportunity to cross-examine a witness with respect to testimony that the lawyer knows to be truthful, including harsh implied criticism of the witness's testimony, character, or capacity for truth-telling. . . . Moreover, a lawyer is never required to conduct such examination, and the lawyer may withdraw if the lawyer's client insists on such a course of action in a setting in which the lawyer considers it imprudent or repugnant." This comment appears to draw no distinction between a civil and criminal case.

binding Standards for Criminal Justice apparently take a strong adversarial position: "Defense counsel's belief *or knowledge* that the witness is telling the truth does not preclude cross-examination."[90] Thus the Standards appear to direct lawyers to cross-examine a witness as if the lawyer does not know the client is guilty and the witness is truthful, as Phillips did in *Courvoisier* and Feldman did in *Westerfield,* even if doing so destroys a witness' reputation or casts blame for committing the crime on the witness.[91]

The strong adversarial approach taken by the Standards on the question of cross-examination seems inconsistent with the prohibition in the Model Rules on introducing direct testimony that the lawyer knows is perjured.[92] Impeachment of the testimony of a witness whom the lawyer knows to be truthful has the same practical effect as the introduction of perjured direct testimony. It is just as likely to mislead the jury and impede the truth-finding process. If anything, the cross-examination of a truthful witness seems worse because of the potential that it can unfairly damage the witness' reputation. Moreover, a lawyer cross-examines with active, leading questions, whereas on direct the lawyer asks non-leading questions. Thus the lawyer takes a more active role in eliciting misleading responses on cross than in eliciting false testimony on direct. Yet, perhaps because perjury and subornation of perjury are crimes, ethicists and rule draftsmen take seemingly inconsistent positions.[93]

In the legal ethics literature, John Mitchell,[94] Abbe Smith,[95] and Monroe Freedman[96] are the leading spokesmen for the strong adversarial view. Mitchell argues that strong adversarialism has a tonic effect on the system of criminal justice. The likelihood that a defense lawyer will mount an aggressive defense forces law enforcement

---

[90] ABA Standards, *supra* note 62, Standard 4-7.6(b) (1991) (emphasis added). The 1979 version of the same standard included the qualification that the lawyer's belief about the witness' truthfulness "should, if possible, be taken into consideration by counsel in conducting the cross-examination." And the 1974 version of the Standard provided that the lawyer "should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully." Thus the Standards have reversed themselves 180 degrees. The actual practice of lawyers appears to support the position taken by the current Standards. See Friedman, *supra* note 55 at 71. Friedman's survey indicated that 96% of the lawyers would affirmatively attempt to make a truthful witness appear to be untruthful or mistaken as opposed to merely testing the government's case.

[91] In Trollope's *Orley Farm,* a strong adversarial lawyer crushes a witness on cross-examination, even though he is certain the witness is telling the truth. This inflicts severe psychological harm on the witness and detrimentally affects his entire life. *Orley Farm, supra* note 16, at Vol. II 312-18, 373-83.

[92] See Monroe Freedman, *supra* note 18 at 44-46 (1975) (pointing out inconsistency of prohibition on introducing perjured testimony with allowing cross-examination of truthful witness); Murray L. Schwartz, *On Making the True Look False and the False Look True,* 41 SW. L. J. 1135, 1138 (1988) (linking rules on perjury with rules on impeachment).

[93] See, e.g., A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth,* 1978 DUKE L.J. 921, 942-45, 947-57 (distinguishing the two situations).

[94] John B. Mitchell, *Reasonable Doubts are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's Different Mission,* 1 GEO. J. LEG. ETHICS 339 (1987); John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*" 32 STANFORD L. REV. 293 (1980).

[95] See Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things,* 28 HOF. L. REV. 925, 948-57 (2000) (defense lawyer should not hold back from using homophobic or racist defenses, no matter how damaging to witnesses and regardless of moral concerns).

[96] *The Three Hardest Questions, supra* note 79 at 1474-75.

to respect the "legal screens" of the criminal justice system by insisting on thorough investigation or by dismissing weak cases. Also a strong defense teaches that every criminal defendant will be treated with respect rather than merely shuffled through the system as quickly as possible.

A number of ethicists, including Harry Subin,[97] William Simon,[98] David Luban,[99] Deborah Rhode,[100] and Murray Schwartz,[101] favor the weak adversarial position.[102] They argue that a lawyer's cross-examination of a witness whose direct testimony is known to be truthful should be limited to undermining the prosecution's reasonable doubt case (for example by questioning whether the witness accurately perceived the events to which the witness testified). Weak adversarialists argue that the lawyer should not cross-examine prosecution witnesses in a way that supports a theory of the facts that the lawyer knows to be false or that harms the reputation of witnesses who the lawyer knows to be truthful or that attempts to cast blame on persons the lawyer knows to be innocent. Their argument is that aggressive defense tactics may lead to acquittal of the guilty and harm to the reputation or psyche of a truthful witness,[103] neither of which promotes any valid societal interest.[104]

---

[97] Subin, *supra* note 18.

[98] Simon, *supra*, note 18 (arguing that criminal defense lawyer should not engage in any form of deception).

[99] Luban's position in favor of weak adversarialism is limited to rape cases. David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 COLUM. L. REV. 1004, 1018-43 (1990). Aggressive cross of a rape victim on the issue of consent (and on issues of prior sexual history where this is permitted by rape shield laws) can have a detrimental psychological effect on the victim and will deter other rape victims from complaining to the police. However, Luban maintains the strong adversarial position with respect to the defense of crimes other than rape. See David Luban, *Are Criminal Defenders Different?* 91 MICH. L. REV. 1729 (1993).

[100] DEBORAH RHODE, IN THE INTERESTS OF JUSTICE 100-03 (2000).

[101] Schwartz, *supra* note 91, at 1145 (defense lawyer should be permitted to cross-examine only for purpose of undermining the certainty of the truthful witness' testimony).

[102] Even David Mellinkoff (who is generally a strong adversarialist) apparently had reservations about Phillips' cross-examination of Piolaine in Courvoisier. In uncharacteristically guarded language, he wrote: "The anguish of the lawyers and their critics and friends points at least to some principle of accommodation, that the lawyer has no absolute duty to client inexorably separating him from the human race. The duty to client exists as part of a system of justice; and while that duty calls upon the lawyer to perform more than one task that purses some pious lips and gives some faint hearts the trembles, it does not ask him to forget that many generations of lawyers have practiced this profession and lived in honor among their neighbors. *Conscience, supra* note 2, at 218.

[103] Mr. Furnival's cross-examination of John Kenneby in Trollope's *Orley Farm* is a vivid example of extreme psychological harm imposed on a witness known to be truthful. See note 16, *supra*, ch. 712 & 77..

[104] Under the Canadian Code of Professional conduct, if a client has confessed to the lawyer, the latter must not suggest that some other person committed the offense or adduce any evidence that, by reason of the client's admissions, the lawyer believes to be false, nor set up an affirmative case inconsistent with such admissions. "Such admissions will also impose a limit upon the extent to which the lawyer may attack the evidence for the prosecution. The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offense charged, *but the lawyer should go no further than that.*" Chapter IX, Comment 11 (emphasis added). See ALLAN C. HUTCHINSON, LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 152-57 (1999); GAVIN MACKENZIE, LAWYERS AND ETHICS §7.4 (2005).

Once again, our compromise position suggests that the ethical rules should provide a defense lawyer with discretion to do less than the lawyer's best on cross-examination when the lawyer knows that the client is factually guilty and the witness is truthful. A lawyer who wishes to take the weak adversarial approach should question truthful witnesses in order to establish that the prosecution has failed to prove guilt beyond a reasonable doubt, but need go no further. However, a lawyer who opts for the strong adversarial approach can conduct a full throttle cross. Some lawyers may decide to make a case-by-case determination of which approach to pursue. For example, a weak adversarialist might conduct an all out defense when the guilty client would be subjected to a grossly excessive punishment (such as life imprisonment for a non-violent crime under three-strikes laws) or possibly in a death penalty case.[105] It allows lawyers like Luban to conduct a strongly adversarial defense in most criminal cases but less than that in a rape case.[106]

The option approach recognizes that the line between questioning a witness to establish reasonable doubt and questioning a witness to establish a false defense can be difficult to draw, a point that John Mitchell has made persuasively.[107] However, sometimes that line is fairly clear. We think that Phillips should have had discretion not to ask questions designed to establish that Piolaine was a liar or that her hotel was a gambling den and that Feldman should have had discretion not to have exposed the lifestyle of Danielle van Dam's parents. Such cross-examination gravely harms the witness with no compensating benefit to the truth-finding process of the criminal justice system.

Our suggestion entails a relatively small incursion on the adversary system because of the rarity of the situation in which a client is sufficiently certain that the client is guilty and the witness is truthful. Moreover, the client may choose to replace the reluctant lawyer. Our compromise option would not encourage police and prosecutors to prepare their cases poorly, as Mitchell fears, since the lawyer retains the option to choose a strong rather than weak approach and because the situation is so unusual.[108]

A weak adversarial option provides flexibility for the lawyer whose professional conscience is offended by the obligation, under existing ethical understandings, to engage in aggressive or damaging cross of a truthful witness. Under the option approach, a lawyer need not fear professional discipline or criticism whether the lawyer chooses the

---

[105] Simon, *supra* note 18, at 1722-28 argues for ad hoc strong adversarialism in cases involving disproportionate punishment or the death penalty. Similarly, *see* Barbara Allen Babcock, *Defending the Guilty*, 32 CLEVE. ST. L. REV. 175, 178-79 (1983-84). Our view generalizes Simon's: we would allow criminal defense lawyers discretion to pursue strong or weak adversarial tactics when they are certain the client is guilty.

[106] See note 98, *supra*.

[107] Mitchell, *supra* note 93, 1 GEO. J. LEG. ETHICS 339, 343-46, 351-59.

[108] The lawyer's insistence on pursuing a weak adversarial approach may open the way for the client to assert the defense of ineffective assistance of counsel on appeal. However, it is unlikely that a choice sanctioned by ethical rules would be considered ineffective assistance of counsel. In Nix v. Whiteside, 475 U.S. 157 (1986), the Supreme Court rejected an ineffective assistance defense when the lawyer selected a weak adversarial approach to attempted client perjury. The Court equated the 6th amendment right to counsel with the rules of legal ethics. See note 70, *supra*.

strong or the weak route.[109] Surely some defense lawyers will welcome this change, just as they welcomed their option under recently revised ethical rules to notify the police if the client threatens harm to a potential witness.[110] There is still another benefit to the weak adversarial options: to the extent lawyers avail themselves of it, public scandals damaging to the lawyer and to the professional generally, such as occurred in *Courvoisier* and *Westerfield*, might be prevented.

C. Introducing direct testimony that the witness thinks is correct but which the lawyer knows would establish a false defense.

The defense of a client that the lawyer knows is guilty may include the presentation of direct testimony from a witness (often an expert witness) that the witness thinks is truthful and correct. The lawyer, however, knows that the testimony, if accepted, would establish a false defense. During Feldman's defense of Westerfield, for example, he presented the testimony of three entomologists concerning the time of the victim's death.[111] The witnesses thought their testimony was correct, but Feldman knew better.

The arguments concerning the propriety of presenting such evidence parallel those relating to the presentation of perjured direct testimony and cross-examination of truthful witnesses. A strong adversarialist sees no problem in presenting evidence that the witness believes is truthful, since the client should not be penalized because of his confidential confession of guilt to the lawyer.[112] A weak adversarialist believes that it is improper to construct a false defense, whether or not through testimony that the witness thinks is truthful.[113] Like introducing perjured testimony or cross-examining a truthful witness in a way that damages the witness or creates a false defense, introducing truthful direct testimony to establish a false defense may result in acquittal of the guilty, a bad result that outweighs the incursion on the confidentiality of the client's communication.

D. Closing argument

---

[109] We acknowledge that questions of professional discipline rarely or ever arise in practice from the sorts of defense lawyer decisions discussed in this article. Nevertheless, lawyers worry a lot about discipline issues.

[110] *See* text at notes 45-50 *supra*.

[111] *See* text at note 12, *supra*.

[112] A well-known example of truthful direct testimony is arises in a well-known Michigan ethics opinion. A defendant has admitted to his lawyer that he committed armed robbery. The victim testifies that the crime occurred at midnight, but the victim is mixed up about the time (possibly because the defendant hit him in the head). In fact the robbery occurred at 2 AM. Truthful witnesses will place the defendant in a poker game at midnight. Should defense counsel have the option not to call these witnesses, since their truthful testimony will establish an alibi that the lawyer knows to be false? The Ethics Committee determined that the lawyer should introduce the testimony. Mich. Bar Ass'n Ethics Op. CI-1164 (1987). However, we do not endorse the proposition that a criminal defense lawyer who is a strong adversarialist can introduce testimony of a witness (other than the client) that the lawyer knows is perjured (even though the strong adversarial option allows the lawyer to introduce perjured testimony from the client).

[113] See Henning, *supra* note 76, at 275-77, disagreeing with the Michigan ethics opinion described in note 111; Schwartz, *supra* note 91 at 1146-47.

The prevailing view about closing argument is based on strong adversarialism. A criminal defense attorney should deliver the most convincing closing argument possible,[114] arguing all "reasonable inferences from the evidence in the record."[115] However, the lawyer should not state a personal belief in the client's innocence (so-called "vouching"), although this anti-vouching principle may be honored more in the breach than in the observance.[116] Phillips' emotional closing in *Courvoisier*[117] took the strong adversarial approach.[118] A weak adversarialist may decide to do less than the lawyer's best in closing argument, arguing reasonable doubt, perhaps, but not constructing arguments based on the evidence that would tend to establish a defense the lawyer knows is false. For the reasons already stated, we favor giving defense lawyers discretion to choose either approach, after having warned the client that this is their intention.[119]

V. Defending the guilty in popular culture

A. The no-adversarialism model

Popular culture rejects *both* strong and weak adversarialism. The issue of what good lawyers should do when they are certain that the client is guilty has arisen repeatedly in film as well as on television and in popular novels. The answer is clear. A good lawyer should *betray* the client. The defense lawyer's duty is to protect the public from the danger that a vicious criminal might be acquitted.

Sometimes the good lawyer who wishes to betray the client can do it by tipping the police off to a critical witness who can demolish an alibi, or by not making a motion to exclude evidence that is legally excludible, or by not introducing exculpatory evidence, or by failing to effectively cross-examine a prosecution witness. If the guilty person has already been acquitted, the good lawyer should arrange another suitable punishment such

---

[114] See Note, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299 (1996). The Note advocates restraining adversarial excesses in closing argument. It acknowledges that, under present practice, both criminal defense lawyers and prosecutors commonly engage in a variety of improper tactics in closing argument.

[115] ABA Standard 4-7.7(a), *supra* note 62. James Kunen recounts such a case from his own experience. Kunen, *supra* note 79 at 117. Slightly simplified, Kunen's hypothetical goes like this: Kunen's client Norman was arrested while loading stolen property onto the back seat of a borrowed car. The issue is whether Norman knew the property was stolen. Norman told Kunen that he had only the ignition key, not the trunk key, to the borrowed car, but this information never came up at the trial. In his closing, Kunen argues that if Norman knew the property was stolen, he would never have loaded it into the back seat of the car, but instead would have placed it in the trunk. However, Kunen knew that Norman did not have the trunk key. Thus, Kunen's closing was consistent with the evidence in the record, but the lawyer knew (from a confidential client communication) that the closing argument is based on false factual assumptions.

[116] ABA Standard 4-7.7(b), *supra* note 62, provides: "Defense counsel should not express a personal belief or opinion in his or her client's innocence or personal belief or opinion in the truth or falsity of any testimony or evidence."

[117] See text at note 7, *supra*.

[118] Similarly, Mr. Furnival's emotional closing argument in Lady Mason's case in Trollope's Orley Farm persuades the jury to acquit a client that he is certain is guilty. *Orley Farm*, *supra* note 16 at Vol. II, p. 323-30

[119] See text at note 53, *supra*. This warning may come too late in the trial for the defendant to do anything about it other than to insist on giving the closing argument him or herself.

as getting the client arrested and convicted for some other crime or by arranging for the client's death or at minimum dishonor.

Betrayal of the guilty client in popular culture is an example of what William Simon refers to as "moral pluck." He points to numerous popular culture examples of lawyers who cut ethical corners in order to do what they perceive as the right thing, "a combination of transgression and resourcefulness in the service of virtue."[120] He argues that the centrality of "moral pluck" themes in pop culture evidences the public's acceptance of situational legal ethics in unusual and compelling situations in opposition to the black-letter commands of conventional legal ethics.[121]

The theme that a good lawyer betrays the bad client appears in novels, such as *The Lincoln Lawyer*,[122] and in quite a few movies and episodes of television shows including *L.A. Law*, *The Practice*, *Law & Order* and *Close to Home*. We've identified about a dozen films and television shows that make the point,[123] but choose four of them as illustrations here.

In *Devil's Advocate* (1997), cocky lawyer Kevin Lomax (Keanu Reeves) wins every case—that's because he is the Devil's son so has supernatural power. Early in the

---

[120] William Simon, *Moral Pluck*, 101 COLUM. L. REV. 421, 447 (2001). For a broad survey of legal ethics in popular culture, see Carrie Menkel-Meadow, *Can They Do That? Legal Ethics in Popular Culture: Of Characters and Acts*, 48 UCLA L. REV. 1305 (2001).

[121] Simon states: "Moral Pluck [as articulated in popular culture] insists that ethics is not simply a matter of duties to society, but rather of character and personal integrity. While philosophers have argued for this perspective abstractly, popular culture teaches it by urging us to identify imaginatively with an attractive figure and then confronting us with the damage to the character's commitments and self-conception that deference to authority sometimes would require." *Moral Pluck*, *supra* note 119 at 442-43.

[122] MICHAEL CONNOLLY, THE LINCOLN LAWYER (2005).

[123] In addition to the films discussed in text, we point to *Guilty as Sin* (1993), *Criminal Law* (1988), *Class Action* (1991), *The Music Box* (1989), and the remake of *Cape Fear* (1991). The same theme has appeared on television in episodes on *Law & Order*, *The Practice*, *Close to Home*, *and LA Law*. In *Class Action* (1991), a member of the defense team in a civil case betrays her client when one of her associates destroys critical documents to avoid turning them over to the plaintiff, thus punishing the crime of spoliation of evidence through betrayal of a colleague. In an episode of *LA Law* involving a tort suit against a water company that poisoned the plaintiffs, the defense lawyer settles the case, then forces her client to clean up the contaminated ground water under threat of disclosing it to the EPA. *Moral Pluck*, *supra* note 119 at 431-35. On *The Practice*, Berluti sells out a guilty client to the DA in order to win the DA's acquiescence in reopening another case involving an innocent client. *Id.* at 446, n.66. In another episode, Berluti betrays a client confidence to save the life of an opposing party. Episode of Nov. 18., 2001. In the *LA Law* pilot, a lawyer tips off the police that his client is carrying a gun in violation of probation in order to force the client to plead guilty in a rape case and testify against a fellow rapist. *Id.* at 431; MICHAEL ASIMOW & SHANNON MADER, LAW AND POPULAR CULTURE: A COURSE BOOK 107-08 (2004). In *Indictment: The McMartin Trial* (1995), a conscientious prosecutor betrays the prosecution team by disclosing information to the media that indicates his belief that defendants in the case are innocent and that prosecutors are violating their ethical duties by pursuing a meritless case.

Of course, not all criminal defense lawyers in pop culture betray their guilty clients. The notorious Billy Flynn in *Chicago* (2002) and its predecessor *Roxie Hart* (1942) pulls out all the stops (including introduction of perjured testimony) to win acquittal of obviously guilty clients. In the great film *Counsellor at Law* (1933), lawyer George Simon is in hot water with the Bar because he introduced alibi evidence that he knew was false in order to prevent a conviction that he believed would trigger excessive punishment of his client.

film, Lomax successfully defends Gettys, a high school teacher, against charges of sexually abusing a student named Barbara. Lomax destroys Barbara on cross examination, even though he is certain that she's telling the truth and that Gettys is guilty. (The basis for this belief is not that Gettys confessed but that he became aroused at seeing the victim on the stand). Later Lomax goes to work for John Milton (Al Pacino), managing partner of a Wall St. firm—who in fact is Satan. After various supernatural shenanigans, Lomax finds himself again trying the Gettys case. This time Lomax withdraws in the middle of trial in order not to cross-examine Barbara. It is clear that he is selling out his client. He tells his wife that he thinks he's doing the right thing. The news media is amazed—we've actually found an honest lawyer!

In *From the Hip* (1987)[124] lawyer Stormy Weathers (Judd Nelson) is defending Douglas Benoit (William Hurt) in a murder case. Convinced from Benoit's psychotic ravings that he is guilty, and fearing that he may well be acquitted, Weathers goads Benoit into testifying by telling him he wouldn't be a good witness. Then he taunts Benoit on direct examination, accusing him of being an impotent coward who was beaten up by the victim. Enraged, Benoit leaps out of the witness box and attacks Weathers with a hammer, barely missing him with a vicious swing. Having glimpsed the real Benoit, the jury convicts him of first degree murder.

. . . *And Justice for All* (1979) is the true classic of this subgenre. Conscientious defense lawyer Arthur Kirkland (Pacino again) is forced to defend his worst enemy, Judge Henry Fleming (John Forsythe), in a rape case. Although Kirkland at first believes Fleming's denials, Fleming confesses that he is in fact guilty but has arranged for perjured testimony by alibi witnesses that is certain to get him off. Kirkland's opening statement creates a sensation: He informs the jury that the rape victim isn't lying at all. "The prosecution is not going to get that man today because I'm going to get him. My client, the honorable Henry T. Fleming, should go right to fucking jail, the son of a bitch is guilty." The courtroom explodes and Kirkland is left to contemplate the rest of his (probably quite brief) career as a practicing lawyer.[125]

In an episode of the prosecutor TV show *Close to Home,*[126] the writers took the Westerfield case as their story model—and morphed it into a defense lawyer betrayal story. This version of the story, of course, is exactly the opposite of the way Steven Feldman handled the real case.

B. Popular culture as an alternative universe

---

[124] *From the Hip* was written by David E. Kelley who later became the creator, producer and writer of very popular law-related television shows including *Ally McBeal, The Practice, and Boston Legal.*

[125] In both *Devil's Advocate* and *And Justice for All,* the lawyers' betrayals will not inevitably cause the guilty client to avoid acquittal. The lawyer's misconduct will cause the judge to declare a mistrial and the cases will be retried. The mistrial will not trigger double jeopardy protection because of the "manifest needs" of justice. See 2 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE ch. 14 (4th ed. 2006). Thus the lawyers' actions in these films must be considered deeds of conscience rather than effective tactics to insure conviction of guilty clients.

[126] January 13, 2006.

We often think of popular culture as disposable trash, to be quickly consumed and as quickly forgotten—and, of course, a lot of it is trash. Nevertheless, those who work in the field of popular culture studies believe it is important to study pop culture for several distinct reasons. First, popular culture serves as a mirror of what people actually believe (or at least what the makers of pop culture believe that they believe). Of course, the mirror is highly distorted, given the biases of filmmakers and their need to entertain people and turn a profit. Still, pop culture products often furnish tantalizing clues about public attitudes and beliefs. Looked at in that way, the guilty-client films and television shows suggest that people expect good lawyers to look out for the public interest ahead of their own clients.

Second, pop culture serves as a powerful teacher, instructing millions of consumers about what lawyers do and how legal institutions function.[127] For many people, film and television is virtually their only source of information on these subjects and they often fail to take into account that the stories in media are purely fictitious. Thus film and television has been steadily teaching the public that good lawyers should betray client confidences and sell out their own clients.

Third, popular culture reveals alternative visions of common situations and relationships, including those presented in legal practice, thus surfacing new issues and revealing new perspectives on old ones. As Austin Sarat and his collaborators argue: "The moving image attunes us to the 'might-have-beens' that have shaped our worlds and the 'might-bes' against which those worlds can be judged and toward which they might be pointed. In so doing, film contributes to both greater analytic clarity and political sensitivity in our treatments of law. It opens up largely unexplored areas of inquiry as we chart the movement from law on the books to law in action to law in the image."[128]

Thus the films dealing with the dilemmas of criminal lawyers who know their clients are guilty suggest an alternative to strong and weak adversarialism: no

---

[127] For discussion of cognitive psychological approaches to media effects, see Asimow, *Loyola, supra* note 43 at (discussing impact of media products that valorize the adversary system); Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533, 553-61 (2000) (hereinafter *Asimow, Nova*) (discussing impact of "bad lawyer" movies on public opinion of lawyers). Others deal with media effect through the use of reception theory whereby viewers decode for themselves messages previously encoded by filmmakers. *See, e.g.*, LAWRENCE GROSSBERG, ELLEN WARTELLA, & D. CHARLES WHITNEY, MEDIAMAKING: MASS MEDIA IN A POPULAR CULTURE 235-57 (1998). Still others consider media effects through the prism of "implicit bias" research. See generally Jerry Kang, *Trojan Horses of Race*, 118 HARV. L. REV. 1489, 1497-1535 (2005). An extensive discussion of media effects is beyond the scope of this article.

[128] Austin Sarat, Lawrence Douglas, & Martha Merrill Umphrey, *On Film and Law: Broadening the Focus*, in LAW ON THE SCREEN 1-2 (Sarat, Douglas & Umphrey, ed., 2005). The authors refer to these "might have beens" as "side shadows" on the law. Similarly, see Orit Kamir, *Cinematic Judgment and Jurisprudence: A Woman's Memory, Recovery, and Justice in a Post-Traumatic Society*, *id.* 27, 27-30. According to Kamir, law and film form parallel universes. "Detailed comparison of such parallel structures may expand our understanding of both discourses, as well as the operation of social discourses and institutions at large. Most significant and intriguing of the parallel functions are the many subtle ways each field offers its readers or viewers a seductive invitation to take on a sociocultural persona and become part of an imagined (judging) community, sharing the worldview constituted by the law or the film." *Id.* at 28.

adversarialism at all.[129] This is indeed an alternative universe, one that few have seriously contemplated and that few lawyers would care to inhabit.[130] Presumably the no-adversary lawyer would do whatever is necessary to assure conviction of the certainly-guilty client and might not even challenge whether the prosecution has proved its case beyond a reasonable doubt. In any system of justice—adversarial or inquisitorial—there is no normative justification for a system that in which a lawyer who has a fiduciary duty of loyalty to the client sells out that client in order to protect the public. Still, even though the alternative universe occupied by the no-adversarialism stories is normatively unattractive, the message may at least cause lawyers to reconsider the tenets of strong adversarialism in criminal practice that most of them take for granted.

VI. Adversarialism in literature

A. The public image of the lawyer

David Mellinkoff's *The Language of the Law* and *The Conscience of a Lawyer* contain rather humorous chapters bemoaning the terrible professional image of lawyers. The "Introduction" to *The Conscience of a Lawyer* reminds us of stories told for a millenium whose point is that lawyers seek only lucre for the services of their golden tongues. They speak for anybody any way any time if there's a paycheck involved and they are always strongly adversarial.

With typical thoroughness, Mellinkoff takes us through centuries of Anglo-European literature on this point, beginning with the anonymous 14th century story "Vision of Piers the Ploughman." Even then, a narrator could generalize ferociously about lawyers, saying "you could sooner measure the mist on Malvern Hills than get a sound out of them without first producing some cash!"[131] This understandable—if somewhat unattractive—professional desire to get paid was already paired with the zeal to make the true false and the false true. A contemporaneous French story by Guillaume de Deguileville sees lawyers making

> Right of Wrong, and wrong of right;
> Turn the matter upside down,
> And prove it out with good reason.[132]

---

[129] Felix Graham, one of the lawyers in Trollope's *Orley Farm*, is the leading literary champion of no adversarialism. He declares: "Let every lawyer go into court with a mind resolved to make conspicuous to the light of day that which seems to him to be the truth. A lawyer who does not do that—who does the reverse of that, has in my mind undertaken work which is unfit for a gentleman and impossible for an honest man. *Orley Farm*, *supra* note 16, Vol. I, p. 179. Thus Graham refuses to discredit a truthful witness in the criminal trial of Lady Mason. Vol. II, 288-89. The strong adversarial lawyers on Lady Mason's defense team regard Graham with the undisguised contempt.

[130] *But see* Sara Rimer, *Lawyer Sabotaged Case of a Client on Death Row*, NEW YORK TIMES (Nov. 24, 2000). Rimer's story concerns North Carolina lawyer David Smith who deliberately missed a deadline to file an appeal to the death sentence of his client Russell Tucker. After meeting with his client, Smith had decided that Tucker should be executed.

[131] *Conscience*, *supra* note 2, at 11.

[132] *Id. at* 11, quoting GUILLAUME DE DEGUILEVILLE, THE PILGRIMAGE OF THE LIFE OF MAN (1330) (John Lydgate, translator, 1426).

Yet both *The Conscience of a Lawyer* and *The Language of the Law* were written during the Civil Rights movement and before the Watergate scandal. These books appeared at a time when the public image of American lawyers was at an all-time high![133] We think that this context helps explain a certain aspirational tone in Mellinkoff, linked both to his strong adversarial approach and his awareness of the ethical relativism associated with lawyers by writers throughout the centuries.

Shortly after Mellinkoff's two main books were written, the public's opinion of the trustworthiness and ethics of American lawyers fell off a cliff.[134] Today, the public's trust in lawyers remains beneath that of nearly all professions and occupations, far below the trust accorded to other "helping" professions with which lawyers would like to be compared. Instead, lawyers rank close to politicians and labor leaders and just ahead of car dealers and telemarketers.[135] Among the major reasons for this decline are probably exaggerated lawyer advertising on television and elsewhere,[136] the perceived litigation explosion, the public's continuing distrust of criminal defense lawyers and—on the civil side—efforts by political and corporate elites to demonize plaintiffs' lawyers.[137]

Popular culture now reflects the distaste for lawyers in mainstream America. Prior to 1980, about 2/3 of the portrayals of lawyers in the movies were positive. Since 1980, about 2/3 of the portrayals are negative, meaning the character was either a bad human being or a bad professional.[138] Post-1980 television contains many positive representations of lawyers and judges, but increasingly TV lawyers are either wierdos or sleezeballs.[139] The current breed of television lawyers bears no resemblance at all to the

---

[133] BARBARA A. CURRAN, THE LEGAL NEEDS OF THE PUBLIC: THE FINAL REPORT OF A NATIONAL SURVEY 232, 255 (1977) (giving survey data from 1973-74 and stating that only 13% of respondents strongly agreed with the statement that "most lawyers would engage in unethical or illegal activities to help a client).

[134] See MARC GALANTER, LOWERING THE BAR: LAWYER JOKES AND LEGAL CULTURE 3-15 (2005); *Asimow, Nova, supra* note 126, at 536-49.

[135] A recent Harris poll states that the percentage of respondents who think lawyers have "very great prestige" fell from 36% in 1977 to 18% today. While the prestige of most professions has fallen during this period, the 18 point decline in lawyer prestige is the largest of any of them. HARRIS POLL #69 (Sept. 8, 2005). According to the Gallup Poll, 18% of respondents give lawyers a very high/high rating for honesty and ethics; 35% give lawyers a low/very low rating. The only professions trailing lawyers in the honesty and ethics department are congressmen, labor union leaders, business executives, advertising practitioners, car salesmen, and telemarketers. GALLUP POLL (Dec. 5, 2005).

[136] *Asimow Nova, supra* note 126, at 547-48 (observing that the fall in public esteem for lawyers coincided with the sharp increase in lawyer advertising and citing focus group evidence that advertising contributes to derision of lawyers).

[137] *Id.* at 543-49; Galanter, *supra* note 132 at 13.

[138] *Asimow, Nova, supra* note 126 at 561-82.

[139] Thus *L.A. Law* and *The Practice* contained both positive and negative representations of lawyers. Series such as *Law & Order* present prosecutors favorably but defense lawyers negatively. *Boston Legal, Justice, Shark* (and similar but now-cancelled series like *The Lyon's Den, The First Years,* and *The Girls' Club)* paint lawyers and law firms in satiric but deeply negative tones. The very popular *Ally McBeal* presented lawyers as eccentric and unhappy weirdos. Lawyers are subject to ridicule on *The Simpsons* or *Harvey Birdman, Attorney at Law.*

noble heroes of yesteryear portrayed in series like *Perry Mason*, *Matlock*, or *The Defenders*.[140]

B. Lawyers in literature: The case for an honest adversarialist

We have seen that American popular culture occasionally brings forth not only admirable but even heroic lawyers. On the other hand, there are cycles in popular thought, and the current one disfavors the profession. During such periods, Americans seem to ask the underlying question of this Article: is law synonymous with deception? Something deep in the American pysche loves the heroic lawyer standing up for his client against all odds but detests the same lawyer using the same skills as soon as it comes out that the client is guilty!

Although we will argue that great literature also allows for the heroic understanding of law, at first blush lit shares with popular culture *only* the darker view of law, the one emphasized by Mellinkoff as *The Conscience of a Lawyer* begins.[141] While pre-1980 film and television lionized lawyers, most American novels of that period heaped scorn on them,[142] reflecting the broad Dickensian satire present in our literary tradition through the ages.[143] Most mainstream fictional narratives about lawyers distinguish the good human being from the good lawyer. Good human beings who are weak adversarialists lose their cases (Atticus Finch;[144] Faulkner's Horace Benbow[145]); or never manage to get any clients at all (Pudd'nhead Wilson[146]); or, worse still, lose their lives in the pursuit of legal ethics (*A Man for All Seasons*;[147] Malamud's Bibikov in *The Fixer*[148]). Only sons-of-bitches, who are generally also strong adversarialists, do well in the practice of law, at least according to fiction's 1000 year-account—right through the period of "humane" lawyers in film and TV.

Our readers can find the darker view of lawyers in lit discussed elsewhere by one of us, with Dickens' infamous creations as the model.[149] We believe that in general strong literary adversarialism implies distortion of truth, protection of clients' interest with clever language, and concealment of relevant information. The interesting thing about lit, however, is that most legal stories that end with the victory of falsehood carry within them the key for the reader to unlock the actual truth that one lawyer or another might have and should have propounded.[150]

---

[140] See ROBERT M. JARVIS & PAUL R. JOSEPH, PRIME TIME LAW (1998); Asimow, *Loyola*, *supra* note 126 at ; Steven D. Stark, *Perry Mason meets Sonny Crockett: The History of Lawyers and the Police As Television Heroes*, 42 UNIV. OF MIAMI L. REV. 229 (1987).

[141] See text at notes 129-30, *supra*.

[142] Weisberg, *Poethics*, *supra* note 77 at 73.

[143] *Ibid.* Part II.

[144] HARPER LEE, TO KILL A MOCKINGBIRD (1960).

[145] Benbow's weakest professional moments occur in WILLIAM FAULKNER, SANCTUARY (1952).

[146] MARK TWAIN [SAMUEL CLEMENS], PUDD'NHEAD WILSON (1894).

[147] ROBERT BOLT, A MAN FOR ALL SEASONS (1966).

[148] BERNARD MALAMUD, THE FIXER (1966).

[149] See POETHICS, *supra* note 78, Part II.

[150] See THE FAILURE OF THE WORD, *supra* note 23 at 6-7, 63-64, ch. 8.

The privileged position of lit regarding epistemology is precisely this: stories about the law—unlike either the lawyers within those stories[151] or the events real lawyers need to sort out—are always truth-revealing.[152] The problem, for lit, is neither the absence of truth-availability nor the basic dishonesty of lawyers; instead, most significant law-stories reveal a weakness of perception in the individual lawyer charged with either prosecuting or defending the accused individual. The fault according to lit, in other words, is not with the "system;" it is with certain kinds of people who at certain times come to manage it.[153] The adversarial system is quite competent to lead to truthful outcomes while it at the same time protects the individual's rights against the government. Lit shows that breakdowns occur because of a corruption or weakness within the lawyer, a demonstration lit is particularly empowered to make.

Consider some stories treated in detail here or otherwise referenced by us in these pages. Fetyukovitch should have defeated the resentful prosecutor but, as we have seen,[154] misses the point about Dmitri Karamazov and only confuses the jury with his nihilistic closing argument. In *To Kill a Mockingbird,* Atticus Finch overlooked numerous tactical moves that might have saved the life of Tom Robinson, although it is doubtful that anything he could have done would have made any difference to the outcome.[155] Horace Benbow lacks the forensic and rhetorical skills to prevail in Faulkner's *Sanctuary*;[156] meanwhile Faulkner's favorite lawyer, Gavin Stevens, possesses the forensic skills but not the humanity, as we see most (in)famously in *Intruder in the Dust.* Put these two fictional lawyers together, with Benbow's humane sensitivity linked to Stevens' skills, and you'd have an ideal strong adversarialist. Great writers do not so much detest lawyers as admire the profession's potential for the linkage of the writer's own verbal ability with the pursuit of justice.

Lit strongly supports the adversarial process, but finds scoundrels defending the corrupt and the guilty while their humane colleagues are insufficiently good at their trade to protect the innocent. The answer for great story-tellers lies in the Ciceronian unity of civic virtue and rhetorical skill. This mix may seem unusual to us in 2006, where as recent pop culture shows, Americans have lost their faith in civic virtue and have come to

---

[151] See *id.* Part II.

[152] For an extended analysis of the "tripartite structure" of legal novels, through which a certain truth is revealed and privileged above the distortions brought on by lawyers, see Richard Weisberg, *Law In and As Literature: Self-Generated Meaning in the "Procedural Novel,"* in Koelb and Noakes, eds., THE COMPARATIVE PERSPECTIVE ON LITERATURE 224-32 (1987).

[153] In a similar vein and on a similar theme, Anthony d'Amato has characterized as follows Socrates' view of the trial that brings about his own conviction and capital punishment: "Socrates' view of the immorality of the charges against him [corrupting Athenian youth by teaching them to ask questions] must be contrasted with his view of the procedures employed by the Athenian justice system. . . . He may have been falsely accused, and the 280 jurors who voted to convict him may have been acting wrongly; nevertheless, the Athenian legal system was the backbone of the Athenian state and it had to be respected." Anthony D'Amato, *Obligation to Obey the Law: A Study of the Death of Socrates*" 49 SO. CAL. L. REV. 1079, 1085 (1976).

[154] See text at notes 26-31, *supra.*

[155] *See* Asimow & Mader, *supra* note 122 at 43-44 (listing various tactical moves that Finch should have attempted).

[156] See *supra* note 145.

associate rhetorical skill with deception. Lit shares this skepticism, as we demonstrated in section II, but it also opens the door to at least the possibility of achieving truthful outcomes through law.

Indeed, there are glimpses of strong adversarialists capable of working towards just outcomes that reflect the truth. Within the same period that brought forth Dickens' rogues' gallery of SOB lawyers, Anthony Trollope was giving us some epistemologically sound lawyers in *Orley Farm*[157] and Honore de Balzac was offering as a minority view from his *Comedie Humaine* the empathetic and—at the same time—the immensely skillful truth-teller, Derville.[158] In addition, writers have shown that the intelligent pursuit of just outcomes can actually produce within the available legal system—or sometimes by just giving it a bit of a boost—a truthful outcome.

Sometimes, the successful pursuit of justice is performed by the hard work of women, and not all of these are actually lawyers although they play a legal role in the story. Pallas Athena in "The Oresteia" creates the jury system and achieves a just result for Orestes.[159] In *The Merchant of Venice*, Shakespeare's Portia must appear as a man to resolve the comic crisis caused by Shylock and Antonio's pound of flesh bond. Remarkably she saves the day for the latter without totally destroying the dignity of the Jew or his strongly ethical system.[160] Susan Glaspell represents the out-of-court strong adversarialism of two women who ethically arrange for the exoneration of an abused neighbor in "A Jury of Her Peers."[161] Most of the mainstream professionals, however, remain starkly dichotomized as either good people *or* successful lawyers.

The key to a positive and strong adversarialism as represented in lit involves Mellinkoff's highest professional value: the ability of lawyers to do their adversarial best in a hard case through the use of their rhetorical abilities, but not necessarily to use those abilities to the fullest in the cause of a certainly guilty client. These skills, according to lit, should never be used to betray a client. It is always the responsibility of the prosecution to prove the case against even a scoundrel or a murderer.

VII. Conclusion

---

[157] See *supra* note 39. Similarly, Mr. Chaffenbras, the unashamed strong adversarialist, delivers a not-guilty verdict for an innocent man in another Trollope novel. ANTHONY TROLLOPE, PHINEAS REDUX (Oxford Univ. Press 1975).

[158] Derville, like Faulkner's lawyers discussed *supra* at notes 22, 145, 156-57, appears throughout Balzac's novels and has been discussed favorably by American lawyers in recent years. See, e.g., Daniel J. Kornstein, *He Knew More: Balzac and the Law*, 21 PACE L. REV 1 (2000) at 35; Richard Weisberg, *Introduction to Conference on Law and Literature at the French High Court*, October 13, 2006 (publication pending, ms. available with author). So Ciceronian was the unity of rhetoric and ethics in Derville that he is cited by legal historians in France as a model (albeit fictional) of the early 19th century Paris bar. See ANDRE DAMIEN, LES AVOCATS DU TEMPS PASSE 361 (1973).

[159] See D. Grene and R. Lattimore, eds., AESCHYLUS I: ORESTEIA (U. of Chicago, 1983); *see also* Paul Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043 (1988).

[160] *Poethics*, *supra* note 77 at 94. See also Carrie Mankel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994).

[161] Susan Glaspell, *A Jury of Her Peers*, in Hillerman ed., *supra* note 81 at 85.

Legal ethicists have spilled a great deal of ink struggling with a problem that apparently arises seldom in criminal law practice: What should the defense lawyer do when the lawyer is certain that the client is factually guilty but the client insists that the lawyer provide an all-out defense? Many ethicists, led by Monroe Freedman, take what we have described as a strong adversarial position: you should defend the client zealously as if you did not know the client is guilty. Other ethicists take what we call a weak adversarial position: you must take account of your knowledge that the client is guilty when you make tactical trial decisions. The Model Rules and the Standards for Criminal Justice are sometimes strong, sometimes weak.

We have straddled the two views by calling for ethical discretion that allows lawyers to act in accordance with their views of justice. Under that approach, you may do less than your best in defending a client you know to be guilty or you may conduct an all-out defense (even introducing the client's perjured direct testimony). In the *Courvoisier* case, so brilliantly evoked in Mellinkoff's *The Co[illegible]nce of a Lawyer*, and in the recent *Westerfield case*, lawyers engaged in strong adve[illegible]ial tactics and turned themselves into public enemies. We believe a criminal defense lawyer should not be faulted for employing strong adversarial tactics, but we also believe that lawyers should be able to follow the dictates of conscience and (after warning the client) do less than their adversarial best.

This article intervenes in the ongoing ethical debate by contributing perspectives gleaned from popular culture and from literature. Pop culture teaches us about a third alternative: no adversarialism. A lawyer should betray a guilty client. This disturbing alternative universe of legal ethics should cause lawyers to rethink their always problematic personal balancing between client partisanship and public interest. In literature, most strong adversarialists are SOBs, but they deliver for their clients; weak adversarialists, like nice guys, usually finish last. Lit teaches us that the nice guys sometimes need to employ strong adversarial tactics to match up with their opponents.

Notwithstanding the messages from pop culture and from literature, we join David Mellinkoff in believing that the good lawyer must infuse a deep sense of legal ethics into the language the lawyer uses in criminal defense practice, and that lawyers should be empowered (but not required) to engage in weak adversarialism when they confront the nightmare scenario: the client they know is guilty.