

ARTICLES

WHEN THE LAWYER KNOWS THE CLIENT IS GUILTY: CLIENT CONFESSIONS IN LEGAL ETHICS, POPULAR CULTURE, AND LITERATURE

MICHAEL ASIMOW & RICHARD WEISBERG*

What should a criminal defense lawyer do when the lawyer is certain that the client is factually guilty (usually because the client has confessed to the lawyer), but the client nevertheless insists on a strong defense? This situation may be the defense lawyer's worst nightmare. The problem troubles legal ethicists as well as the general public and recurs in both literature and popular culture. Nevertheless, the ethical issues remain unresolved. This Article provides a framework for thinking about these ethical issues and brings both popular culture and literary sources to bear on the analysis.

Part I tells the story of two notorious cases, *Courvoisier* and *Westerfield*. In both cases, the lawyers' conduct in defending clients they knew were factually guilty touched off a firestorm of public criticism. Part II suggests a framework for analyzing ethical issues and for thinking about the lawyer's role in an adversary system: strong versus weak adversarialism. Part III traces the strong versus weak distinction through four dilemmas that are often confronted by criminal defense lawyers certain of their client's guilt. Part IV turns to the treatment of the ethical issue in popular culture. Pop culture suggests a clear and consistent model to guide the criminal defense lawyer whose client has confessed: betray the client. The pop culture solution, in other words, is no adversarialism at all—a reflection of the public's view that the justice system should pursue truth rather than adversarial combat. Part V turns to adversarialism in literature and observes that lawyers are usually depicted as either strong adversarialist rogues who win their cases or decent human beings who practice weak adversarialism and lose their cases. Literary sources also cast doubt on the ability of lawyers to decide whether their clients' confessions

* Michael Asimow is Professor of Law Emeritus, UCLA School of Law. Richard Weisberg is the 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, Carrie Menkel-Meadow, Tom Mesereau, Grant Nelson, Charles Rosenberg, William Simon, Jan Vetter, Eugene Volokh, Brad Wendel, Marlene Wagner, David Wintroub, and Steven Yeazell.

are truthful. Part VI sums up what we have learned about strong versus weak adversarialism in ethics, pop culture, and literature.

I. THE *COURVOISIER* AND *WESTERFIELD* CASES

The *Courvoisier* case of 1840 presented the criminal defense lawyer's nightmare in its clearest form. Our friend and colleague David Mellinkoff told the story of the *Courvoisier* case in his great book *The Conscience of a Lawyer*.¹ It is a spellbinding murder mystery as well as a crackling courtroom drama. An English nobleman, Lord William Russell, was murdered, his throat cut while he slept. Lord Russell's maid, Sarah Mancer, awoke to discover disorder in the house. She roused the cook, Mary Hannell, and the Swiss valet-butler, Benjamin Courvoisier. They soon discovered Lord Russell's dead body and summoned the police. The police discovered that a large amount of Lord Russell's property was missing and concluded that it was an inside job. The case generated intense public and media interest since the upper classes were terrified by the notion that a wealthy man could be murdered by a servant in his bed.

Suspicion soon fell on Courvoisier. 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 pantry to which the butler 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."² On the other hand, the police could not locate the murder weapon or the missing silver. No sign of blood appeared on any of Courvoisier's clothing. He stoutly maintained his innocence.

Charles Phillips, the leading criminal defense lawyer in England, represented Courvoisier at his trial in the Old Bailey. Phillips, then age fifty-three, was Irish and had a well-deserved reputation for emotionalism and flamboyance. He was opposed by John Adolphus who, according to contemporary practice, was selected and paid by the victim's family to prosecute the case.³ 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."⁴

In 1836, a mere four years before the *Courvoisier* trial, the Prisoners' Counsel Bill authorized lawyers for the first time to address the jury on behalf of defendants in English felony cases.⁵ Before 1836, the judge was

¹ DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* (West Publ'g Co. 1973).

² *Id.* at 22.

³ *See id.* at 41–47 for discussion about Phillips and Adolphus.

⁴ *Id.* at 44.

⁵ 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 (Oxford Univ. Press 2003); MELLINKOFF, *supra* note 1, at 47–63. Phillips was one of the leading opponents of the bill. MELLINKOFF, *supra* note 1, at 47–48.

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*.

On the first day of trial, 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, everything changed when the prosecution called a surprise witness. 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. 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 others in Leicester 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 an emotional three-hour closing argument, contending that the evidence against his client failed to satisfy 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 the murder. Mellinkoff quotes Phillips's lengthy address almost in full,⁶ but we provide a few snippets here:

⁶ MELLINKOFF, *supra* note 1, at 101–21.

“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 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 certainty 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.”⁷

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 his 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.”⁹ 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, even though 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.¹⁰ Not only laymen but many lawyers condemned him, although he had a few defenders. The consensus was that he had acted wrongly in aggressively defending Courvoisier, and his reputation never recovered.

The story of San Diego lawyer Steven Feldman and client David Westerfield is a sobering reminder that the *Courvoisier* problem is as

⁷ *Id.* at 116, 120–21 (alteration in original).

⁸ *Id.* at 126–40.

⁹ *Id.* at 140.

¹⁰ *Id.* at 141–49.

current as yesterday's headlines. 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 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.¹¹

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."¹²

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.¹³ 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 concerning the blowflies and maggots on the victim's body in order to fix the time of her death.¹⁴ 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.¹⁵ Conservative TV commentator Bill O'Reilly ran numerous segments about the case on Fox News¹⁶ and filed an ethics complaint with the San Diego and California State Bar Associations.¹⁷ Feldman and his family were shunned. According

¹¹ 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 attorneys, 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 (Foundation Press 4th ed. 2004); LISA G. LERMAN & PHILIP G. SCHRAG, ETHICAL PROBLEMS IN THE PRACTICE OF LAW 121-28 (Aspen Publishers 2005); TOM ALIBRANDI WITH FRANK H. ARMANI, PRIVILEGED INFORMATION (Dodd, Mead & Co. 1984).

¹² Alex Roth, *Defenders in Eye of Public Storm*, COPLEYS NEWS SERV., Sept. 18, 2002, quoted in Jeralyn Merritt, *On Westerfield's Lawyers' Conduct*, TALKLEFT, Sept. 19, 2002, available at <http://www.talkleft.com/story/2002/09/19/723/24550>.

¹³ *Id.*

¹⁴ See Harriet Ryan, *Frustrated Prosecutor Swats at Final Bug Expert*, COURT TV NEWS, Aug. 1, 2002, http://www.courtstv.com/trials/westerfield/080102_ctv.html.

¹⁵ Alex Roth, *Attorney Breaks His Silence on Defending Westerfield*, SAN DIEGO UNION TRIBUNE, Dec. 1, 2002, available at

http://www.signonsandiego.com/news/metro/danielle/20021201-9999_1m1feldman.html.

¹⁶ See Bill O'Reilly, *Talking Points*, FOX NEWS, Sept. 30, 2002,

<http://www.foxnews.com/story/0,2933,64435,00.html>.

¹⁷ Cathy Young, *A Lawyer's Obligation When Client Is Guilty*, REASON, Sept. 24, 2002, <http://www.reason.com/news/printer/31971.html>.

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.¹⁸

What should Phillips and Feldman have done when they awoke to the defense lawyer's worst nightmare: how 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.

II. STRONG VERSUS WEAK ADVERSARIALISM

Lawyers who are certain of their client's guilt confront inescapable ethical conflicts when the client insists on a vigorous defense. The lawyer's obligations to protect confidential client communications¹⁹ and to conduct a zealous defense²⁰ come into conflict with the lawyer's duty of candor toward the court²¹ and possibly the lawyer's own moral sensibility. How to reconcile these professional and moral obligations remains highly contested. The often-vague rules of legal ethics,²² the spotty judicial decisions on the subject, the opinion of the general public, 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.

This Article suggests a framework that may be helpful in thinking about the problem: strong versus 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

¹⁸ A similar contemporary story concerns the public outcry and criminal prosecution of Canadian lawyer Kenneth Murray for failing promptly to turn over to the prosecution incriminating videotapes concerning rapes and murders committed by his client Paul Bernardo. See Christopher D. Clemmer, *Obstructing the Bernardo Investigation: Kenneth Murray and the Defense Counsel's Conflicting Obligations to Clients and the Court*, 1 OSGOODE HALL REV. L. & POL'Y 137, 138-47 (2008).

¹⁹ See MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2008).

²⁰ 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." MODEL RULES OF PROF'L CONDUCT R. 1.3 cmt. 1. In earlier versions of the rules, however, the 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 PROF'L ETHICS Canon 15 (1908). See generally Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165 (2006) (defining and defending the obligation of zealous representation).

²¹ Like the obligation of zealous advocacy, see *supra* note 20, 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 to 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." MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 2.

²² 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).

defendant has the right to a competent and ethical defense on reasonable doubt grounds, but this axiom does not explain what constitutes a “competent and ethical defense” when the lawyer is certain of the client’s factual guilt.

The normative case for strong adversarialism (sometimes referred to as “neutral partisanship”) emphasizes the objective of zealous representation and protection of client confidences.²³ Strong adversarialists foreground the client’s interest above all other values. They take their credo from the often-quoted words of Lord Brougham in *Queen Caroline’s Case* in 1820:

[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 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.²⁴

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*.

In his dissenting opinion in *United States v. Wade*,²⁵ Justice White restates the strong adversarial credo:

[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 if he thinks the witness is telling the truth* [A]s part of our modified adversary system and as part of the duty imposed on

²³ In Trollope’s *Orley Farm*, defense lawyers Furnival, Chaffinbrass, and Aram are prototypical strong adversarialists. Although they are certain that Lady Mason is guilty of perjury and forgery, they furnish her with an all-out defense. Furnival has some reservations but Chaffinbrass and Aram have none. ANTHONY TROLLOPE, *ORLEY FARM* (Oxford Univ. Press 1985) (1861–62). For discussion of *Orley Farm*, see THOMAS L. SHAFFER, ON BEING A CHRISTIAN AND A LAWYER 45–56 & *passim* (Brigham Young Univ. Press 1981); David Luban, *A Midrash on Rabbi Shaffer and Rabbi Trollope*, 77 NOTRE DAME L. REV. 889 (2002). For another interesting literary treatment of strong adversarialism, see Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of “The Remains of the Day,”* 105 YALE L.J. 177, 184–90 (1995) (servant’s obligation to carry out master’s instructions regardless of morality).

²⁴ Monroe H. Freedman, *Henry Lord Brougham: Written by Himself*, 19 GEO. J. LEGAL ETHICS 1213, 1215 (2006) (quoting 2 THE TRIAL OF QUEEN CAROLINE 3 (1821)). 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); Fred C. Zacharias & Bruce A. Green, “Anything Rather than a Deliberate and Well-Considered Opinion”—*Henry Lord Brougham, Written by Himself*, 19 GEO. J. LEGAL ETHICS 1221 (2006).

²⁵ 388 U.S. 218 (1967).

the most honorable defense counsel, we countenance or require conduct which in many instances has *little, if any, relation to the search for truth.*²⁶

The strong approach also recognizes that in many situations a lawyer cannot be certain whether to take a client's confession at face value. Nor can the lawyer be certain whether the client's direct testimony will be perjured or whether the testimony of a particular witness is truthful. As a result, strong adversarialists argue, a prudential approach requires them to go all out in defense even when they feel sure the client is guilty.

The normative case for weak adversarialism, on the other hand, foregrounds values such as the truth-finding function of trials, the obligation of candor toward the tribunal, and the need to protect the reputation of truthful witnesses and 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, and more concerned with the pursuit of substantive justice—that is, reaching the correct result rather than just using the correct procedures.²⁷ The weak approach honors the individual lawyer's conscience by allowing the lawyer to do less than the lawyer's adversarial best when the lawyer is certain that the client is factually guilty of the crime.²⁸

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, 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 form²⁹ or that the lawyer will not engage in a crushing cross-examination of a witness whom the lawyer is certain will testify truthfully.³⁰ The client can then select another lawyer who will tread the strong adversarial path or a lawyer to

²⁶ *Id.* at 256–58 (emphasis added).

²⁷ See Trevor C.W. Farrow, *Sustainable Professionalism*, 46 OSGOODE HALL L.J. 51 (2008) (urging acceptance of a justice-centered rather than client-centered model of professionalism). There is a long tradition of weak adversarialism in criminal law. See RHODE & LUBAN, *supra* note 11, at 301–02 (quoting David Hoffman's 1836 treatise on legal ethics). See also MELLINKOFF, *supra* note 1, 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 have disclosed the location of the bodies of the children to their grieving parents in the *Belge* situation. See *supra* note 11. A weak adversarialist might have immediately turned over to the police the incriminating tapes in the *Bernardo* case so that the police would not strike a lenient plea bargain with a co-defendant. See Clemmer, *supra* note 18. A weak adversarialist might be willing to disclose a client confession to save an innocent third party from being imprisoned or executed for a crime he did not commit. See Colin Miller, *Ordeal by Innocence: Why There Should Be a Wrongful Incarceration/Execution Exception to Attorney-Client Confidentiality*, 102 NW. U. L. REV. COLLOQUY 391 (2008), available at <http://www.law.northwestern.edu/lawreview/collquy/2008/22/LRColl2008n22Miller.pdf>.

See also Adam Liptak, *When Law Prevents Righting a Wrong*, N.Y. TIMES, May 4, 2008. For other situations in which weak adversarialism might permit disclosure of client confidences, see Sharon Dolovich, *Ethical Lawyering and the Possibility of Integrity*, 70 FORDHAM L. REV. 1629, 1637 n.29 (2002).

²⁸ See William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 MICH. L. REV. 1767, 1772 (1993).

²⁹ See *infra* text at notes 59–64.

³⁰ See *infra* Part III.B.

whom the client has not confessed guilt. Granted, indigent clients would have little choice in the matter, since they cannot afford to retain a private lawyer and probably cannot switch public defenders. Even clients who are paying their lawyer may get this unwelcome news when it is too late to secure new representation. In such situations, clients may be forced to accept a plea bargain or may decide to represent themselves if they cannot accept the weak adversarial approach.

This Article strikes a compromise between the two positions.³¹ Defense counsel should have 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.³² The choice, in other words, should depend on the particular context.

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.³³ 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.³⁴ Thus the lawyer who wishes to

³¹ One of the authors of this Article (Weisberg) regards himself as a strong adversarialist, the other (Asimow) as a weak adversarialist. See Michael Asimow, *Popular Culture and the American Adversarial Ideology*, in 7 LAW AND POPULAR CULTURE 606, 609–21 (Michael Freeman ed., Oxford Univ. Press 2004). See also Michael Asimow, *Popular Culture and the Adversary System*, 40 LOY. L.A. L. REV. 653 (2007) [hereinafter Asimow, *Popular Culture and the Adversary System*].

³² This 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 H. SIMON, *THE PRACTICE OF JUSTICE* (Harvard Univ. Press 1998). See also William H. 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. See *THE PRACTICE OF JUSTICE*, *supra*, ch. 7. See also William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993) [hereinafter Simon, *Ethics of Criminal Defense*]; DEBORAH RHODE, *IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION* 66–80, 106–15 (Oxford Univ. Press 2000); Dolovich, *supra* note 27; 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); Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. CONTEMP. LEGAL ISSUES 165 (1996) (questioning civil-criminal distinction).

³³ See Bruce A. Green & Fred C. Zacharias, *Permissive Rules of Professional Conduct*, 91 MINN. L. REV. 265 (2006) [hereinafter Green & Zacharias, *Permissive Rules*]. These discretionary provisions allow lawyers wiggle room to act in good faith when they confront difficult and dangerous ethical and moral quandaries. Bruce A. Green, *Criminal Defense Lawyering at the Edge: A Look Back*, 36 HOFSTRA L. REV. 353, 391–92 (2007) [hereinafter Green, *A Look Back*].

³⁴ 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 reasonably believes necessary: (1) to prevent reasonably certain death or substantial bodily harm." MODEL RULES OF PROF'L CONDUCT R. 1.6(b) (emphasis added). 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." MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2). In contrast, New Jersey *requires* disclosure of the information itemized in Rule 1.6(b). N.J. RULES OF PROF'L CONDUCT R. 1.6(b), available at <http://www.judiciary.state.nj.us/rpc97.htm#1.6> (last visited February 7, 2009).

do the moral thing and protect an endangered third party may betray the client's confidence,³⁵ 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 in a civil case that the lawyer "reasonably believes is false."³⁶ In certain circumstances a lawyer for an organization "may" disclose confidential information detrimental to the organization's interests to outside authorities.³⁷ 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."³⁸

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.³⁹ 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, although that issue remains unresolved with respect to several of the tactical issues we discuss in Part III.

III. STRONG AND WEAK ADVERSARIALISM AT TRIAL

This Section considers four critical decision points that may arise in the representation at trial⁴⁰ of a client who insists on an all-out defense but whom the lawyer knows to be factually guilty. It focuses primarily on two of them:

- The client insists on taking the stand and committing perjury. The lawyer must decide whether to introduce this testimony and, if so, in what form, and whether to disclose the intended or completed perjury to the judge.
- The lawyer must cross-examine a witness whom the lawyer knows to be truthful. The question is how vigorous this cross-examination

³⁵ The lawyer may also fear tort liability to the third party if the lawyer fails to reveal the threat. *See Tarasoff v. Regents of Univ. of Cal.*, 551 P.2d 334 (Cal. 1976) (imposing tort liability on psychiatrist for failure to warn intended victim of threats made by patient).

³⁶ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3). *See also id.* R. 3.3 cmt. 9.

³⁷ *Id.* R. 1.13(c).

³⁸ *Id.* R. 2.1. Green and Zacharias give numerous other examples. *See Green & Zacharias, Permissive Rules*, *supra* note 33, at 270 n.22.

³⁹ Granted, there are few recorded instances in which a defense lawyer's choice of strong or weak adversarial tactics resulted in professional discipline. *But see* Clemmer, *supra* note 18, involving a criminal prosecution for obstruction of justice and a Bar disciplinary proceeding against a Canadian lawyer who failed to promptly deliver incriminating videotapes to the prosecution; Green, *A Look Back*, *supra* note 33, at 375–86. Green's article tells the fascinating tale of a 1917 disciplinary case against a New York criminal defense attorney who failed to correct testimony by his witness that he knew was perjured. Whether the attorney actually suborned the perjured testimony was disputed. Regardless of the likelihood that a particular tactical choice will lead to a disciplinary proceeding, this is something that lawyers worry about a lot.

⁴⁰ The strong versus weak adversarialism choice has relevance to trial decisions but little relevance to decision-making during plea bargaining. Over ninety percent of criminal cases are plea bargained. Even a weak adversarial lawyer should strive to strike the best possible plea bargain on behalf of a client whom the lawyer knows to be factually guilty.

should be. Should it be limited to questions that are directed to raising a reasonable doubt? Or should the lawyer go further, perhaps destroying the witness' reputation, creating a false defense, inflicting psychological damage on the witness, or assigning blame to a person whom the lawyer knows to be innocent?

In addition, the Article treats two additional dilemmas briefly:

- The lawyer must decide whether to introduce the direct testimony of a witness (often an expert witness) that the witness believes is correct but that the lawyer knows is wrong.
- The lawyer must decide what sort of closing argument is appropriate when the lawyer knows the client is factually guilty.

A. PERJURY

The problem of what the lawyer should do when a client insists on committing perjury in direct testimony seldom comes up in practice because criminal defense lawyers systematically avoid knowing for sure that their clients are factually guilty⁴¹ or because they have talked the defendant out of testifying.⁴² Nevertheless, the rules of legal ethics devote considerable attention to the problem, ethicists have written on it repeatedly, and the Supreme Court has rendered a major decision on the subject.⁴³ Still, 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 of withdrawal is most powerful when directed against poorer, less sophisticated, and relatively helpless clients, while it is less effective against more sophisticated and more affluent clients. Nevertheless, the

⁴¹ See KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* 103–23 (Yale Univ. Press 1985) (recounting strategies used by white collar criminal defense lawyers to avoid knowing too much). See also MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LEGAL ETHICS* 169 (LexisNexis 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 might say: “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.” 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 (Collins Publishers 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 him wish to ask the question. Nevertheless he did not ask it.” ORLEY FARM, *supra* note 23, at vol. II, pp. 9 & 253.

⁴² Nevertheless, a survey of D.C. lawyers suggests that the problem is more real than most criminal defense lawyers care to admit. When asked what they would do when the client indicates an intention to commit perjury, eighty-eight percent of those responding would question their client on the stand as they would any other witness. Only ten percent 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*, 25 *RES IPSA LOQUITUR* 60, 68 (1972).

⁴³ *Nix v. Whiteside*, 475 U.S. 157 (1986), discussed further in text accompanying notes 57–58, *infra*.

withdrawal solution is often impracticable if the client resists all remonstrance⁴⁴ and insists on giving perjured testimony.⁴⁵ A judge may refuse to allow withdrawal during the trial and public defenders will probably not be allowed to withdraw at any time.⁴⁶ A noisy withdrawal may betray client confidences.⁴⁷ 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.

1. *The Weak Adversarial Approach to Client Perjury*

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.⁴⁸ If the client insists on testifying over the lawyer's opposition,⁴⁹ the lawyer apparently should disclose the client's intention to the judge.⁵⁰ If perjury has already occurred, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal."⁵¹

⁴⁴ Under the Model Rules, "[i]f 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." MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 6.

⁴⁵ See Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 GEO. J. LEGAL ETHICS 521, 525-27 (1988); Jay Sterling Silver, *Truth, Justice and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 413-19 (1994).

⁴⁶ Comment 3 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." MODEL RULES OF PROF'L CONDUCT R. 1.16 cmt. 3.

⁴⁷ Comment 3 to ABA Model Rule 1.16 further 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." *Id.* R. 1.16 cmt. 3.

⁴⁸ 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." *Id.* R. 3.3(a). Rule 3.3(b) imposes a broad duty of disclosure to the tribunal in situations involving perjury and other misconduct: "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." *Id.* R. 3.3 (b).

⁴⁹ Normally whether or not to testify is for the client to decide, not the attorney. *Id.* R. 1.2(a); ABA STANDARDS FOR CRIMINAL JUSTICE 4-5.2(a)(iv) (1993).

⁵⁰ 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. MODEL RULES OF PROF'L CONDUCT R. 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.

⁵¹ MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3), 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.* R. 3.3 cmt. 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 then to determine what should be done—making a statement about the matter to the trier of fact, ordering a mistrial or perhaps nothing." *Id.* 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,

But what is the judge supposed to do with this information, assuming the client insists that the testimony 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.⁵² This mini-trial pits the lawyer against the client and destroys the relationship between them, perhaps necessitating the lawyer's withdrawal mid-trial.⁵³ 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.⁵⁴ If the judge finds that the testimony will be perjured, the judge presumably would refuse to let the defendant testify, creating a serious issue on appeal of denial of the right of a criminal defendant to testify.⁵⁵ 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.⁵⁶ However, it is supported by the Supreme Court's decision in *Nix v. Whiteside*.⁵⁷ 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

thereby subverting the truth-finding process which the adversary system is designed to implement." *Id.* R. 3.3 cmt. 11. The rule was different under the prior ABA Model Code of Professional Responsibility. See MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B)(1) and ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 341 (1975), which states that the rules requiring confidentiality of client communication trump the obligation to disclose completed perjury to the judge. See also ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 87-353; ABA STANDING COMM. ON ETHICS & 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.

⁵² See Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 MINN. L. REV. 121, 151-62; Lefstein, *supra* note 45, at 534-41; Silver, *supra* note 45, at 396-400.

⁵³ Comment 15 to ABA Model Rule 3.3 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." MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 15.

⁵⁴ "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness." MODEL RULES OF PROF'L CONDUCT R. 3.7(a).

⁵⁵ 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 (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). See also Rieger, *supra* note 52, at 128-43.

⁵⁶ According to Dershowitz, lawyers "blow the whistle" on clients more frequently when they are working pro bono or on court appointment, less frequently when they are being paid by the client. Alan Dershowitz, *Legal Ethics and the Constitution*, 34 HOFSTRA L. REV. 747, 753-54 (2006). Dershowitz bases this disturbing statement on anecdotal evidence. Monroe Freedman agrees with this critique. Monroe H. Freedman, *Getting Honest about Client Perjury*, 21 GEO. J. LEGAL ETHICS 133 (2008).

⁵⁷ 475 U.S. 157 (1986).

jurors or to commit or procure perjury. No system of justice worthy of the name can tolerate a lesser standard.”⁵⁸

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).⁵⁹ 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 1980.⁶⁰ Comments to the Model Rules disapprove of it,⁶¹ as does *Nix v. Whiteside*.⁶² 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,⁶³ the jury may well catch on that the lawyer thinks the testimony is perjured.

The narrative approach is obviously suboptimal,⁶⁴ but may be the best way to implement a weak adversarial approach to the client perjury problem. It 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

⁵⁸ *Id.* at 174. 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. See also *People v. DePallo*, 754 N.E.2d 751 (N.Y. 2001), in which the New York court approved counsel’s disclosure of completed perjury to the judge after both sides had rested; the client was not present during this disclosure.

⁵⁹ See *People v. Guzman*, 248 Cal. Rptr. 467, 482–85 (Cal. 1988) (approving the narrative approach and distinguishing *Nix*); *Johnson*, 72 Cal. Rptr. 2d 805 (narrative approach is best accommodation of competing interests). In Kentucky and Massachusetts, counsel should disclose the likelihood of perjured testimony to the court and the testimony should then be presented in narrative form, but counsel should not withdraw from the courtroom. *Brown v. Commonwealth*, 226 S.W.3d 74 (Ky. 2007); *Commonwealth v. Mitchell*, 781 N.E.2d 1237 (Mass. 2003). New York also approves this approach. *People v. Andrades*, 828 N.E.2d 599 (N.Y. 2005) (narrative presentation of testimony at confession-suppression hearing); *DePallo*, 754 N.E.2d 751 (narrative testimony to which counsel did not refer in closing argument). 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).

⁶⁰ See FREEDMAN & SMITH, *supra* note 41 at 166–69; Lefstein, *supra* note 45, at 523 n.12; Lowery v. Cardwell, 575 F.2d 727, 730 n.3 (9th Cir. 1978); *Guzman*, 248 Cal. Rptr. at 484 n.8.

⁶¹ The comments to the ABA Model Rules disapprove of the narrative approach but defer to contrary 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 desires, 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 RULES OF PROF’L CONDUCT R. 3.3 cmt. 7.

⁶² *Nix*, 475 U.S. at 170 n.6. Lefstein criticizes the *Nix* Court’s negative treatment of the narrative approach. Lefstein, *supra* note 45, at 541–50. Professor Peter Henning casts a grudging vote in favor of narrativity. See Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J. L. ETHICS & PUB. POL’Y 209, 266 (2006).

⁶³ *The Practice: Dog Bite* (ABC television broadcast Oct. 4, 1997). Eugene Young defended a one-legged mugger who insisted on giving false testimony. Young insisted the testimony be given in narrative form.

⁶⁴ There are grave risks even to guilty defendants in permitting them to ramble unguided by counsel, particularly in the penalty phase of the trial.

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 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.

2. *The Strong Adversarial Approach to Client Perjury*

Under the *strong adversarial* approach, if remonstrance fails, counsel should introduce the testimony known to be perjured in the normal question-and-answer format. Monroe Freedman is the leading advocate of this approach.⁶⁵ Freedman argues that his approach will facilitate lawyer-client communication, because it allows the lawyer say to the client: "Tell me the whole truth; I won't use the information to your disadvantage no matter what happens at trial." He argues that the resulting candor will enhance communication between lawyer and client in *all* cases, including those in which a guilty client knows enough not to confess to the lawyer.⁶⁶ The present system, of course, strongly motivates lawyers to avoid finding out the truth and encourages smart clients to lie to their lawyers.⁶⁷ 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, under the existing system that discourages the client from admitting factual guilt, the lawyer is left in the dark about what really happened and may overlook legitimate defenses.⁶⁸

⁶⁵ Monroe Freedman favors a strong adversarial approach to all of the ethical dilemmas discussed in this Article. His 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 41 at 159–95; 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 45. 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. SHAFER, *supra* note 23, at 93–104. See also JAMES S. KUNEN, "HOW CAN YOU DEFEND THOSE PEOPLE?": THE MAKING OF A CRIMINAL LAWYER 188–89 (Random House, Inc. 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). 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 OF THE CENTURY 556 (Tony Hillerman ed., Houghton Mifflin Co. 2000); ROBERT TRAVER, ANATOMY OF A MURDER 35, 44–49 (St. Martin's Press 1958). But see *The Three Hardest Questions*, *supra*, at 1478–82; FREEDMAN & SMITH, *supra* note 41, at 211–14 (approving lawyer's conduct in *Anatomy of a Murder*); KUNEN, *supra*, at 244, 256 (lawyer's admission that he suggested a fictitious defense to the defendant and that he erred in doing so).

⁶⁶ FREEDMAN & SMITH, *supra* note 41, at 161–64, 169; *The Three Hardest Questions*, *supra* note 65, at 1470–74. 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 it.

⁶⁷ See *supra* note 41.

⁶⁸ Simon challenges Freedman on this point, arguing that clients almost always manage to communicate essential information to the lawyer without confessing guilt. Simon, *Ethics of Criminal Defense*, *supra* note 32, at 1719–21. Gillers also challenges Freedman's policy arguments. Stephen Gillers, *Monroe*

3. Discretion to Choose Between Weak and Strong Approaches

This Article contends that defense lawyers 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.⁶⁹ Others prefer a weak adversarial solution (either the ABA Model Rules 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.⁷⁰ 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 (e.g., 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.⁷¹ However, the ABA's non-binding Standards for Criminal Justice take a *strong adversarial* position: "Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination."⁷² Thus

Freedman's Solution to the Criminal Defense Lawyer's Trilemma Is Wrong as a Matter of Policy and Constitutional Law, 34 HOFSTRA L. REV. 821, 826-31 (2006).

⁶⁹ See Friedman, *supra* note 42.

⁷⁰ See Farrow, *supra* note 27 (urging a model of professionalism that allows lawyers to make moral choices including preferring interest of third parties over those of client); Green & Zacharias, *Permissive Rules*, *supra* note 33 (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*, 34 HOFSTRA L. REV. 987 (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. "[I]t 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." *Id.* at 992. "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." *Id.* at 1016.

⁷¹ The Restatement of the Law Governing Lawyers appears to take a weak adversarial position on this issue. See RESTATEMENT OF THE LAW GOVERNING LAWYERS §106 cmt. c (2007) ("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 civil and criminal cases.

⁷² ABA STANDARDS FOR CRIMINAL JUSTICE 4-7.6(b) (1993) (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 42, at 71. Friedman's survey indicated that ninety-six percent 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.

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's reputation or casts blame for committing the crime on the witness.⁷³

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.⁷⁴ 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 can mislead the jury and impede the truth-finding process. If anything, the cross-examination of a truthful witness seems worse because of the risk that it can damage the witness's 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.⁷⁵

In the legal ethics literature, John Mitchell,⁷⁶ Abbe Smith,⁷⁷ and Monroe Freedman⁷⁸ 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 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,⁷⁹ William Simon,⁸⁰ David Luban,⁸¹ Deborah Rhode,⁸² and Murray Schwartz,⁸³ favor the weak

⁷³ 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 23, at vol. II, pp. 312–18, 373–83.

⁷⁴ See MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 44–46 (The Bobbs-Merrill Co., Inc. 1975) [hereinafter FREEDMAN, *LAWYERS' ETHICS*] (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).

⁷⁵ 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).

⁷⁶ 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. LEGAL ETHICS 339 (1987) [hereinafter Mitchell, *Reasonable Doubts*]; John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980).

⁷⁷ See Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 948–57 (2000) (defense lawyers should not hold back from using homophobic or racist defenses, no matter how damaging to witnesses and regardless of moral concerns).

⁷⁸ *The Three Hardest Questions*, *supra* note 65, at 1474–75.

⁷⁹ Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987).

⁸⁰ Simon, *Ethics of Criminal Defense*, *supra* note 32 (arguing that criminal defense lawyers should not engage in any form of deception).

adversarial position.⁸⁴ 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 (e.g., 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, 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,⁸⁵ neither of which promotes any valid societal interest.⁸⁶

Once again, this Article 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-strike laws) or

⁸¹ Luban's position in favor of weak adversarialism in cross-examining truthful witnesses 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).

⁸² RHODE, *supra* note 32, at 100-03.

⁸³ Schwartz, *supra* note 74, at 1145 (defense lawyers should be permitted to cross-examine only for the purpose of undermining the certainty of the truthful witness's testimony).

⁸⁴ Even David Mellinkoff (generally an unabashed strong adversarialist) had reservations about Phillips's cross-examination of Ptolaine 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." MELLINKOFF, *supra* note 1, at 218.

⁸⁵ 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 *supra* note 73.

⁸⁶ 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.*" CAN. CODE OF PROF'L CONDUCT ch. IX cmt. 11 (emphasis added). See ALLAN C. HUTCHINSON, LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY 152-57 (Publ'ns for Prof'ls 1999); GAVIN MACKENZIE, LAWYERS AND ETHICS §7.4 (Carswell Legal Publ'ns 2005).

possibly in a death penalty case.⁸⁷ It allows lawyers like Luban to conduct a strongly adversarial defense in most criminal cases but less than that in a rape case.⁸⁸

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.⁸⁹ However, sometimes that line is fairly clear. Thus 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 Feldman should have had discretion not to expose the lifestyle of Danielle's parents. Such cross-examination gravely harms the witness with no compensating benefit to the truth-finding process of the criminal justice system.

C. INTRODUCING DIRECT TESTIMONY THAT THE WITNESS THINKS IS
CORRECT BUT 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.⁹⁰ 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.⁹¹ A weak adversarialist believes that it is improper to construct a false defense, whether or not through testimony that the witness thinks is truthful.⁹² Like introducing perjured testimony or cross-examining

⁸⁷ Simon argues for ad hoc strong adversarialism in cases involving disproportionate punishment or the death penalty. Simon, *Ethics of Criminal Defense*, *supra* note 32, at 1722–28. See also Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 178–79 (1983). 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.

⁸⁸ See *supra* note 81.

⁸⁹ Mitchell, *Reasonable Doubts*, *supra* note 76, at 343–46, 351–59.

⁹⁰ See *supra* text accompanying note 14.

⁹¹ A well-known example of truthful direct testimony arises in a 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.

⁹² See Henning, *supra* note 62, at 275–77 (disagreeing with the Michigan ethics opinion described in the previous note); Schwartz, *supra* note 74, at 1146–47.

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

The prevailing view on closing argument is based on *strong adversarialism*. A criminal defense attorney should deliver the most convincing closing argument possible,⁹³ arguing all "reasonable inferences from the evidence in the record."⁹⁴ However, the lawyer should not state a personal belief in the client's innocence (so-called "vouching"), even though this anti-vouching principle may be honored more in the breach than in the observance.⁹⁵ Phillips's emotional closing in *Courvoisier*⁹⁶ took the strong adversarial approach.⁹⁷ 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, this Article suggests that defense lawyers should have discretion to choose either approach.⁹⁸

IV. 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 has committed some form of misconduct 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

⁹³ See Rosemary Nidiry, Note, *Restraining Adversarial Excess in Closing Argument*, 96 COLUM. L. REV. 1299 (1996). Nidiry's 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.

⁹⁴ ABA STANDARDS FOR CRIMINAL JUSTICE 4-7.7(a). James Kunen recounts such a case from his own experience. KUNEN, *supra* note 65, 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 argued 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 was based on false factual assumptions.

⁹⁵ ABA STANDARDS FOR CRIMINAL JUSTICE 4-7.7(b) ("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.").

⁹⁶ See *supra* quoted text accompanying note 7.

⁹⁷ 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 23, at vol. II, pp. 323-30.

⁹⁸ If counsel chooses the weak approach, the client should be warned in time to get another attorney. See *supra* Part II. However, 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.

from the danger that a wrongdoer might be acquitted. In civil cases, the defense lawyer's duty is to make sure the client does not escape either the dishonor resulting from its evil conduct or the obligation to pay handsomely for its wrongs.

Sometimes the good lawyer who wishes to betray the client can do it by tipping off the police to a critical witness who can demolish an alibi, by not making a motion to exclude evidence that is legally excludible, 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 as getting the client arrested and convicted for some other crime or by arranging for the client's death or, at a minimum, dishonor. In civil cases, the defense lawyer should pull off some stratagem to make sure the plaintiff wins and the defendant does not escape responsibility for its misdeeds.

Betrayal of evil clients 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."⁹⁹ 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.¹⁰⁰

The theme that a good lawyer betrays the bad client appears in novels, such as *The Lincoln Lawyer*,¹⁰¹ and in quite a few movies¹⁰² and episodes of television shows about law and lawyers including *Eli Stone*, *L.A. Law*, *The Practice*, *Law & Order*, *Boston Legal*, *Shark*, and *Close to Home*.¹⁰³ We select four illustrations drawn from the movies.

⁹⁹ William Simon, *Moral Pluck*, 101 COLUM. L. REV. 421, 447 (2001) [hereinafter *Moral Pluck*]. 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 UCLAL. REV. 1305 (2001).

¹⁰⁰ 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 99, at 442-43.

¹⁰¹ MICHAEL CONNELLY, *THE LINCOLN LAWYER* (Little, Brown & Co. 2005).

¹⁰² In addition to the films discussed in the text, films that involve bad-client betrayals include *The Advocate's Devil* (1997), *Guilty as Sin* (1993), *Class Action* (1991), the remake of *Cape Fear* (1991), *The Music Box* (1989), and *Criminal Law* (1988). Of course, not all defense lawyers in pop culture betray their guilty or evil clients. The notorious Billy Flynn in *Chicago* (2002) and in 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 *Counselor at Law* (1933), lawyer George Simon finds himself in hot water with the Bar because he introduced alibi evidence that he knew was false. He did it to prevent the conviction and excessive punishment of a client who had numerous prior convictions.

¹⁰³ In the premiere episode of *Eli Stone*, a big-firm defense lawyer switches sides in a product liability case to represent the virtuous plaintiff at trial, thus opposing lawyers from his own firm. Needless to say, nobody sought the client's consent. *Eli Stone* (ABC television broadcast Jan. 31, 2008). In an episode of *L.A. Law* involving a tort action 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 by threatening disclosure to the EPA. *Moral Pluck*, *supra* note 99, 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's confidence to save the

In *Michael Clayton* (2007), big-firm defense lawyer Arthur Edens (Tom Wilkinson) goes off his medication and prepares to betray his client, U-North, after learning that the client failed to disclose a critical and damaging memo to the plaintiffs. Edens has been working for years to defend U-North in a huge class action. The undisclosed memo makes clear the client knew that its weed killer was also a person-killer, but it chose to go ahead and market the product anyway. After the client kills Edens to prevent him from publishing the critical memo and also attempts to kill law firm “fixer” Michael Clayton (George Clooney), Clayton finishes off the client by entrapping its general counsel (Tilda Swinton in an Oscar-winning performance) in a police sting. The actions taken by Edens and Clayton are classic examples of the no-adversarialism model in pop culture.

In *The Devil’s Advocate* (1997), cocky lawyer Kevin Lomax (Keanu Reeves) wins every case. This isn’t just good luck; he happens to be the Devil’s son and so possesses supernatural powers. Early in the film, Lomax successfully defends Gettys, a high school teacher, against charges of sexually abusing a student named Barbara. Lomax destroys Barbara’s credibility on cross examination, even though he is certain that she is 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 Street 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 is doing the right thing. The news media is amazed at actually finding an honest lawyer.

In *From the Hip* (1987),¹⁰⁴ lawyer Stormy Weathers (Judd Nelson) is defending Douglas Benoit (John 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 would be a failure as a 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

life of an opposing party. *The Practice* (ABC television broadcast Nov. 18, 2001). In the *L.A. 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. *Moral Pluck*, *supra* note 99, at 431; MICHAEL ASIMOW & SHANNON MADER, LAW AND POPULAR CULTURE: A COURSE BOOK 107–08 (Peter Lang Publ’g, Inc. 2004). In one of the final episodes of *Shark*, Sebastian Stark sells out a client by deliberately opening the door to damaging cross-examination. He also exposes the client’s attempts at jury tampering. This chicanery gets the client convicted and also gets Stark reinstated to practice law in California. *Shark* (CBS television broadcast Mar. 7, 2008). On *Boston Legal*, Shore and Crane get a witness to blow the whistle on their client, a drug company, for rigging a clinical trial. *Boston Legal: A Greater Good* (ABC television broadcast Dec. 12, 2004). On *Close to Home*, an episode inspired by the *Westerfield* case morphs into a lawyer betrayal story—exactly the opposite of what actually occurred. *Close to Home* (CBS television broadcast Jan. 13, 2006). In another episode, a defense lawyer wins his case but then tips off the prosecution to an earlier murder the defendant committed. *Close to Home* (CBS television broadcast Nov. 24, 2006).

¹⁰⁴ *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*.

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 (Al Pacino) 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 guilty of the rape but has arranged for alibi witnesses to furnish perjured testimony 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.¹⁰⁵

B. POPULAR CULTURE AS AN ALTERNATIVE UNIVERSE

Most people think of popular culture as disposable trash, to be quickly consumed and as quickly forgotten—and, of course, much of it is. Nevertheless, those who work in the field of popular culture studies believe it is important to take pop culture seriously.

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 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 this way, these lawyer-betrayal films and television shows suggest that people expect good lawyers to look out for the public interest ahead of their clients. Most people do not understand or agree with the lawyer's view that justice is a procedural concept consisting of adversarial combat and due process. Instead, they believe that justice involves a search for the truth.¹⁰⁶ A good lawyer should always work to find the truth and achieve substantive justice for all concerned, even when the lawyer must sacrifice the interest of an evil client to do so. Of course, most lawyers reject the idea that their job is to assist in revealing the truth about past events, but lawyers should understand that the public doesn't see it that way.

Second, pop culture serves as a powerful teacher, instructing millions of consumers about what lawyers do and how legal institutions function.¹⁰⁷

¹⁰⁵ In both *The 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 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL PROCEDURE ch. 14 (LexisNexis 4th ed. 2005). Thus the lawyers' actions in these films must be considered deeds of conscience rather than effective tactics to insure conviction of guilty clients.

¹⁰⁶ See Asimow, *Popular Culture and the Adversary System*, *supra* note 31, at 676–79 (explaining the public's approval of the adversary system as a mistaken belief that it is designed to ferret out the truth).

¹⁰⁷ For discussion of cognitive psychological approaches to media effects, see *id.* at 668–73 (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) (discussing impact of "bad lawyer" movies on public opinion of lawyers). Others deal with media effect through the use of reception theory whereby viewers make their own meanings out of the raw materials furnished by the creators of media products. See,

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 are fictitious. Thus film and television have consistently taught the public that good lawyers should betray client confidences and sell out their own clients in the interest of justice.

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. For example, pop culture, as well as literature, forces both lawyers and the public to rethink the meaning of justice and the gulf between law and morality. 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.”¹⁰⁸

Thus the various pop cultural products about defense lawyers who know their civil or criminal clients are factually guilty force lawyers as well as consumers to contemplate a set of philosophically difficult dilemmas. What is the nature of justice—is it substantive or procedural? To whom is the defense lawyer primarily responsible—to the client or to the public? How does the good lawyer behave in the face of such terrible dilemmas? These pop cultural products suggest an alternative to strong and weak adversarialism: no adversarialism at all.¹⁰⁹ This is indeed an alternative universe, one that few have seriously contemplated and that few lawyers would care to inhabit.¹¹⁰ Presumably a lawyer in the no-adversarial

e.g., LAWRENCE GROSSBERG, ELLEN WARTELLA, D. CHARLES WHITNEY, & J. MACGREGOR WISE, *MEDIAMAKING: MASS MEDIA IN A POPULAR CULTURE* 253–274 (Sage Publ’ns, Inc. 2d ed. 2006). 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.

¹⁰⁸ Austin Sarat, Lawrence Douglas, & Martha Merrill Umphrey, *On Film and Law: Broadening the Focus*, in *LAW ON THE SCREEN* 1, 2 (Sarat, Douglas & Umphrey eds., Stanford Univ. Press 2005). The authors refer to these “might-have-beens” as “sideshadows” on the law. *Id.* *See also* Orit Kamir, *Cinematic Judgment and Jurisprudence: A Woman’s Memory, Recovery, and Justice in a Post-Traumatic Society (A Study of Polanski’s Death and the Maiden)*, in *LAW ON THE SCREEN*, *supra*, at 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.

¹⁰⁹ 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 23, at vol. I, p. 179. Thus Graham refuses to discredit a truthful witness in the criminal trial of Lady Mason. *Id.* at vol. II, pp. 288–89. The strong adversarial lawyers on Lady Mason’s defense team regard Graham with undisguised contempt.

¹¹⁰ *But see* Sara Rimer, *Lawyer Sabotaged Case of a Client on Death Row*, N.Y. TIMES, Nov. 24, 2000, at A37. 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 decided that Tucker should be executed.

universe would do whatever it takes to assure appropriate punishment of a client who the lawyer is certain is factually guilty. For example, such a lawyer would not seek to discredit the prosecution's case by establishing a reasonable doubt defense. In any system of justice worthy of the name—adversarial or inquisitorial—there can be no normative justification for lawyer betrayal. Such action breaches the lawyer's fiduciary duty of loyalty to the client and should never be tolerated.

V. LITERARY PERSPECTIVES ON ADVERSARIALISM

Great literature offers numerous intriguing perspectives on the dilemmas raised by representation of guilty or evil clients. It questions whether a lawyer can hope to know if a client is truthful and also casts doubt on whether weak adversarialists can serve their client effectively.

A. CAN LAWYERS RELY ON A CLIENT CONFESSION?

Discussions of the guilty-client dilemma must first confront a threshold question of epistemology: can a lawyer ever really “know” with sufficient certainty that the client is guilty? Defense lawyers often suspect their clients are factually guilty, but they systematically avoid “knowing for sure.”¹¹¹ Even if the client has confessed to his 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 cautioned lawyers not to accept a client confession at face value.¹¹²

From Victor Hugo¹¹³ to Albert Camus¹¹⁴ and William Faulkner,¹¹⁵ literature has closely observed the way lawyers discover “truth,” particularly in the charged arena of criminal investigations. Literary lawyers and judges consistently do a poor job of determining whether the accused actually committed the crime.¹¹⁶ False confessions, as well as

¹¹¹ See *supra* text accompanying note 41.

¹¹² See RHODE & LUBAN, *supra* note 11, 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 Simon, *Ethics of Criminal Defense*, *supra* note 32, at 1706; Lefstein, *supra* note 45, at 527–33; Subin, *supra* note 79, at 141–43. Monroe Freedman contends that lawyers are often quite certain that a client is factually guilty. FREEDMAN, *LAWYERS' ETHICS*, *supra* note 74, at 51–59. Others argue that the lawyer should never conclude that the client is factually guilty of the crime, regardless of the client's confession. See, e.g., Silver, *supra* note 45, at 379–91.

¹¹³ See VICTOR HUGO, *LE DERNIER JOUR D'UN CONDAMNÉ* [The Last Day of a Condemned Man] (1829); *LES MISÉRABLES* (1861); *HISTOIRE D'UN CRIME* [The History of a Crime] (1877).

¹¹⁴ See ALBERT CAMUS, *L'ÉTRANGER* [The Stranger] (1942); *LA CHÛTE* [The Fall] (1956).

¹¹⁵ See WILLIAM FAULKNER, *INTRUDER IN THE DUST* (1948); *LIGHT IN AUGUST* (1932); *SANCTUARY* (1931).

¹¹⁶ For analyses of Camus's representation of legal epistemology, see RICHARD H. WEISBERG, *THE FAILURE OF THE WORD: THE PROTAGONIST AS LAWYER IN MODERN FICTION* 5 (Yale Univ. Press 1984). See also W. WOLFGANG HOLDHEIM, *DER JUSTIZIRRTUM ALS LITERARISCHE PROBLEMATIK* [Judicial Error as a Literary Thematic] *passim* (de Gruyter 1969). For analyses of Faulkner in this regard, see JAY WATSON, *FORENSIC FICTIONS: THE LAWYER FIGURE IN FAULKNER* (Univ. of Ga. Press 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 Lawyer in a Comparative Setting*, 4 *MISS. C. L. REV.* 193 (1984).

incorrectly evaluated motives and poorly understood personalities, all play a role in literary trials that reach the wrong result.

In Dostoevski's *Crime and Punishment*,¹¹⁷ 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, 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.

In Dostoevski's final masterpiece, *The Brothers Karamazov*,¹¹⁸ Dmitri Karamazov is accused of the brutal killing of his own father. This time, the character's guilt or innocence is not transparent. For the prosecutor, every piece of evidence—and indeed Dmitri's own statements, which fall just short of a confession—points to his guilt. For the reader who has come to know him fully, these faults would make him at worst “a scoundrel,” but not a thief and certainly not a murderer. The law, however, sees things 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 seals Dmitri's guilt.

Fetyukovich, the brilliant defense lawyer, seems eminently up to the task of debunking an apparently airtight—but ultimately false—prosecutorial portrait. As Fetyukovich puts it in his closing argument to the jury, “[T]here is an overwhelming chain of evidence against the prisoner, but not one fact will stand criticism, if examined separately.”¹¹⁹

Fetyukovitch discerns 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 Dmitri,¹²⁰ a piece of artistry that serves only an adversarial and not a truth function. Unfortunately for Dmitri, Fetyukovich makes a strategic blunder in his closing argument. After an extended demolition of the prosecutor's powerful circumstantial case, Fetyukovich seems to betray his own uncertainty by arguing in the alternative that if Dmitri killed his father, he did so accidentally or in a fit of insane impulse. Nevertheless, he contends that the jury should acquit the client because of mitigating circumstances. This tactic fails miserably; the prosecutor ridicules it and the jury convicts Dmitri after only an hour's deliberation. In all likelihood, however, the force of the case against Dmitri was so great that nothing Fetyukovich could have said would have made any difference.

¹¹⁷ FYODOR DOSTOEVSKI, *CRIME AND PUNISHMENT* (George Gibian ed., W.W. Norton & Co., Inc. 3d ed. 1989).

¹¹⁸ FYODOR DOSTOEVSKI, *THE BROTHERS KARAMAZOV* (Constance Garnett trans., Manuel Komroff ed., New Am. Library, Inc. 1957).

¹¹⁹ *Id.* at 657.

¹²⁰ “[O]f all the mass of facts heaped up by the prosecution against the prisoner, there is not a single one that is certain and irrefutable.” *Id.* at 671. Ippolit Kirillovich, the prosecutor, responds to this assertion in his closing argument. *Id.* at 678.

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 a ghastly judicial error. 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.¹²¹

Still, there are times when defense attorneys know beyond any doubt that their clients are factually guilty. At that point, they confront the same nightmare scenario faced by Charles Phillips and Steven Feldman.¹²²

B. STRONG VERSUS WEAK ADVERSARIALISM IN LITERATURE

Most mainstream fictional narratives about lawyers distinguish the “decent human being” from the effective lawyer, reflecting the broad Dickensian satire present in our literary tradition through the ages.¹²³ The introduction to Mellinkoff's *The Conscience of a Lawyer*¹²⁴ reminds us of stories told for a millenium that lampoon the character and greediness of lawyers. An anonymous 14th century story, “The Vision of Piers the Ploughman,” says, “[Y]ou could sooner measure the mist on the Malvern Hills than get a sound out of them without first producing some cash!”¹²⁵

In literature, decent human beings are generally weak or inept adversarialists. They lose their cases (like Atticus Finch¹²⁶ or Faulkner's Horace Benbow¹²⁷) or never manage to get any clients at all (Pudd'nhead Wilson¹²⁸). Some lose their lives in the pursuit of justice (*A Man for All Seasons*;¹²⁹ Malamud's Bibikov in *The Fixer*¹³⁰). Only strongly adversarial scoundrels do well in the practice of law, at least according to fiction's one thousand year account.

¹²¹ 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 *Zacarias Moussaoui*, WIKIPEDIA, http://en.wikipedia.org/wiki/Zacarias_Moussaoui (last visited Feb. 15, 2009). Similarly, John Mark Karr's highly publicized confession to murdering JonBenet Ramsay turned out to be entirely bogus. See *John Mark Karr*, WIKIPEDIA, http://en.wikipedia.org/wiki/John_Mark_Karr (last visited Feb. 3, 2009). See also O. JOHN ROGGE, *WHY MEN CONFESS* (Thomas Nelson & Sons 1959). In a series of episodes in the second season of the television drama *Murder One*, lawyer Jimmie Wyler disbelieves client Sharon Rooney's confession to him that she killed the governor (with whom she had been having an affair). In fact, Rooney's confession was false and Wyler correctly mounted a strong defense that included Rooney's truthful testimony denying her guilt. When she confessed to Wyler, Rooney was deeply depressed and felt guilty about all of her actions including her infidelity and securing an abortion of the governor's child, but she was not guilty of the murder.

¹²² See *supra* Part I.

¹²³ See RICHARD WEISBERG, *POETHICS: AND OTHER STRATEGIES OF LAW AND LITERATURE* (Columbia Univ. Press 1992).

¹²⁴ See MELLINKOFF, *supra* note 1, at 1–15.

¹²⁵ *Id.* at 11.

¹²⁶ See HARPER LEE, *TO KILL A MOCKINGBIRD* (J. B. Lippincott Co. 1960).

¹²⁷ Benbow's weakest professional moments occur in WILLIAM FAULKNER, *SANCTUARY* (1931).

¹²⁸ See MARK TWAIN, *PUDD'NHEAD WILSON* (Sidney E. Berger ed., W.W. Norton & Co., Inc. 2d ed. 2005) (1894).

¹²⁹ See ROBERT BOLT, *A MAN FOR ALL SEASONS* (1966).

¹³⁰ See BERNARD MALAMUD, *THE FIXER* (Farrar, Straus & Giroux 2004) (1966).

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 literature, 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.¹³¹

Stories about the law—unlike either the lawyers within those stories¹³² or the events real lawyers need to sort out—are always truth-revealing.¹³³ The problem 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, in other words, is not with the “system;” it is with the people who manage it. The adversarial system can produce truthful outcomes while protecting the individual's rights against the government. Literature shows that breakdowns occur because of corruption or weakness within the lawyer.

Thus Fetyukovitch missed the point about Dmitri Karamazov and confused the jury with his nihilistic closing argument.¹³⁴ In *To Kill a Mockingbird*, Atticus Finch overlooked numerous tactical moves that might conceivably have saved the life of Tom Robinson.¹³⁵ Horace Benbow lacked the forensic and rhetorical skills to prevail in Faulkner's *Sanctuary*. In *Intruder in the Dust*, Faulkner's favorite lawyer, Gavin Stevens, possessed the skills but not the humanity. Put these two fictional lawyers together, with Benbow's humane sensitivity linked to Stevens' skills, and you would have an ideal strong adversarialist.

Literature 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. However, there are glimpses of strong adversarialists capable of working towards just outcomes that reflect the truth. Within the same period that brought forth Dickens's rogues' gallery of lawyers, Anthony Trollope offered us some epistemologically sound lawyers in *Orley Farm*,¹³⁶ and Honoré de Balzac suggested a minority view from his *Comédie Humaine* in his character of the skillful truth-teller, Derville.¹³⁷

¹³¹ See THE FAILURE OF THE WORD, *supra* note 116, at 6–7, 63–64, 133–39.

¹³² See *id.* at pt. II (The Failure of the Christian Narrative Vision: Dostoevski's Legal Novels).

¹³³ For an 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 THE COMPARATIVE PERSPECTIVE ON LITERATURE: APPROACHES TO THEORY AND PRACTICE 224, 224–32 (Clayton Koelb & Susan Noakes eds., Cornell Univ. Press 1988).

¹³⁴ See *supra* text accompanying notes 118–120.

¹³⁵ See ASIMOW & MADER, *supra* note 103, at 43–44 (listing various tactical moves that Finch should have attempted).

¹³⁶ See *supra* note 23. Mr. Chaffanbras, the unashamed strong adversarialist in *Orley Farm*, delivers a not-guilty verdict for an innocent man in another Trollope novel. See ANTHONY TROLLOPE, PHINEAS REDUX (Oxford Univ. Press 1973) (1874).

¹³⁷ Derville appears throughout Balzac's novels and has been discussed favorably by American legal scholars in recent years. See, e.g., Daniel J. Kornstein, *He Knew More: Balzac and the Law*, 21 PACE L. REV 1, 35 (2000); Richard Weisberg, *Droit et Littérature aux États-Unis et en France. Une Première Approche*, in IMAGINER LA LOI: LE DROIT DANS LA LITTÉRATURE 19 (Antoine Garapon & Denis Salas

Sometimes, the successful pursuit of justice is performed by the hard work of women, and not all of them are actually lawyers, although they play a legal role in the stories. Pallas Athena in *The Oresteia* creates the jury system and achieves a just result for Orestes.¹³⁸ In *The Merchant of Venice*, Shakespeare's Portia must appear as a man to resolve the 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.¹³⁹ 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."¹⁴⁰ Most of the mainstream professionals, however, remain starkly dichotomized as either good people *or* successful lawyers.

VI. CONCLUSION

Legal ethicists have spilled a great deal of ink struggling with the problem of what a defense lawyer should do when the client has confessed guilt but insists on an all-out defense. Many ethicists, led by Monroe Freedman, take the strong adversarial position: you should defend such clients zealously as if you did not know they were guilty. Other ethicists take the 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.

This Article straddles 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 *Courvoisier* and *Westerfield*, lawyers engaged in strong adversarial 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 at all. Under the no-adversarial model, a lawyer should betray a guilty client in order to protect the public and prevent a guilty person from going free. By contemplating this rather disturbing alternative universe, lawyers may have occasion to rethink the way in which they have struck a balance between client

eds., Editions Michalon 2007). 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 ANDRÉ DAMIEN, *LES AVOCATS DU TEMPS PASSÉ* 360 (1973).

¹³⁸ See AESCHYLUS, *ORESTEIA* (David Grene & Richard Lattimore eds., Richard Lattimore trans., Univ. of Chi. Press 1953). See also Paul Gewirtz, *Aeschylus' Law*, 101 HARV. L. REV. 1043 (1988).

¹³⁹ WEISBERG, *POETHICS*, *supra* note 123, at 94. See also Carrie Menkel-Meadow, *Portia Redux: Another Look at Gender, Feminism, and Legal Ethics*, 2 VA. J. SOC. POL'Y & L. 75 (1994).

¹⁴⁰ Susan Glaspell, *A Jury of Her Peers*, in *THE BEST AMERICAN MYSTERY STORIES OF THE CENTURY*, *supra* note 65, at 85.

partisanship and public interest. In literature, most strong adversarialists are rascals, but they deliver for their clients; weak adversarialists, like nice guys, usually finish last. Literature teaches us that nice guys sometimes need to employ strong adversarial tactics to match up with their opponents.

Notwithstanding the messages from popular culture and from literature, we believe that the good lawyer must grapple seriously with the ethical dilemmas arising out of the representation of clients they know to be guilty and should be empowered but not required to engage in weak adversarialism when they confront this nightmare scenario.