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Truth, Justice, and the American Way: The Case *Against* the Client Perjury Rules

*Jay Sterling Silver**

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I. INTRODUCTION

In 1637, England's dreaded Court of Star Chamber pronounced the sentence: John Bastwick, a Puritan activist,¹ was to be pilloried twice with one ear cut off each time, imprisoned in perpetuity without "books, pen, ink, or paper," stripped of his university degrees, and fined £5,000.² Shortly before, he had been escorted up a twisting staircase in Westminster Palace and into a dark, cavernous room with stars painted on the ceiling³ to be tried on charges of criminal libel for having penned a political tract critical of the government.⁴ According to Star Chamber procedure, since Bastwick's counsel refused to vouch for the truthfulness of his client's version of the facts, Bastwick was precluded from placing his version of the truth before the tribunal and, instead, was deemed to have confessed.⁵

A century and a half later, the drafters of our Bill of Rights—haunted by the inquisitorial excesses of the Star Chamber and of Continental criminal proceedings—sought to ensure a

1. See Thomas G. Barnes, *Due Process and Slow Process in the Late Elizabethan-Early Stuart Star Chamber Part II*, 6 *Am. J. Legal Hist.* 315, 336 (1962).

2. Sir James F. Stephen, 1 *A History of the Criminal Law of England* 340-41 (MacMillan, 1883) (referring to the sentence as "monstrous"). According to legal historian Sir W. S. Holdsworth, in *Star Chamber trials*, "the manner in which the accused was either deprived of or hampered in his liberty of defence, and the systematic use of torture . . . [makes this] one of the most revolting episodes in the history of mankind." W. S. Holdsworth, 5 *A History of English Law* 196 (Little, Brown, 1924).

3. Most common-law historians believe that the Court derived its name from the stars painted against a blue background on the ceiling of the room in Westminster Palace in which the Court met. See, for example, John H. Baker, *An Introduction to English Legal History* 136 (Butterworths, 3d ed. 1990); Marshall M. Knappen, *Constitutional and Legal History of England* 317 (Rothman, 1987). Blackstone developed his own theory, speculating that prior to the banishment of Jews by Edward I, the chamber in which the Court eventually tried cases had been used to store the records of contracts and debts—known as *starrs* from the Hebrew word *shetar*, meaning "covenant"—to which a Jew was a party. William Blackstone, 4 *Commentaries* *266 n.a.

4. The Star Chamber established the offense of criminal libel, for which truth was no defense and which required no more than that the libelous message be published to the victim alone, as a means of repressing Puritan reformists, such as Bastwick, in early 17th century England. The offense, not then recognized by the common law, included defamatory speech as well as defamatory writings. See Stroud F. C. Milson, *Historical Foundations of the Common Law* 389 (Butterworths, 2d ed. 1981); Holdsworth, *A History of English Law* at 210-11 (cited in note 2); Charles Ogilvie, *The King's Government and the Common Law* 109, 156 (Basil Blackwell, 1958).

5. See notes 6-13 and accompanying text for background on the Court of Star Chamber and a more detailed description of this procedure.

balanced, adversarial encounter between criminal defendants and the state by providing defendants with the procedural protections of the Fifth and Sixth Amendments. Since the early 1900s, however, the legal profession has promulgated various codes of attorney conduct that, in addition to attempting to clarify the professional obligations of lawyers and seeking to minimize public pressure for the external regulation of the profession, have threatened these protections. Drafted by attorneys who are frequently insensitive to the dynamics of the adversarial process or hostile to procedural protections accorded criminal defendants, the rules of legal ethics contain provisions that fundamentally conflict with and undermine the adversarial pursuit of justice in our criminal proceedings.

One of the most compelling and egregious examples is the set of rules governing the duty of criminal defense counsel who believes that the accused will testify or has testified untruthfully and who, at the risk of criminal and professional sanctions, must not fail to withdraw from representation, denounce the client to the court, or both. These rules—the *client perjury* rules—closely resemble the odious Star Chamber requirement that defense attorneys vouch for the credibility of defendants who wish to present their account of the facts. The present rules of ethics thus create a hidden inquisition at the center of our adversarial criminal trials: a self-contained, summary inquiry, concealed from the view of the jury and the public, in which defense counsel must assume the role of inquisitor in assessing the veracity of the accused and the role of prosecutor in contending to the court that the client's account of the facts is untruthful.

In addition to undermining the basic structure of the adversarial system, the client perjury rules violate many of the individual rights accorded defendants under the Fourth, Fifth, and Sixth Amendments. Moreover, the rules are applied in a discriminatory manner based on race, class, and culture and impede the very search for truth they are touted to protect. Part I of this Article briefly sketches the ancient and modern history of the rules governing client perjury, their present scope, and the criticism they have generated. Part II presents the case against these rules, revealing the manner in which they violate principles of equal protection, subvert the constitutional guarantees designed to ensure a fair trial, upset the delicate balance of responsibilities within the constitutionally mandated structure of our criminal proceedings, and impair the discovery of truth in those proceedings. Part III critiques the potential responses of defense counsel to the seemingly perjurious

criminal defendant, ultimately prescribing a solution that promotes both truth and justice.

II. THE HISTORY, SCOPE, AND CRITICISM OF THE CLIENT PERJURY RULES

While the American rules and guidelines governing the duty of counsel who believes that the accused will testify falsely or that the accused has already done so have proliferated since the beginning of this century, they have clarified none of the confusion surrounding the issue. Indeed, over the history of the common law, counsel's duty was perhaps clearest in Star Chamber proceedings.

A. *The History of the Rules*

During the reign of the Stuart monarchy in the sixteenth and seventeenth centuries, England's infamous Court of Star Chamber pursued a political agenda through the unrestrained coercion of those it summoned.⁶ Star Chamber judges subjected citizens to searching examinations for evidence of unnamed crimes.⁷ A suspect's protestations of innocence or otherwise unsatisfactory response

6. See, for example, Baker, *An Introduction to English Legal History* at 137 (cited in note 3) (stating that "[t]he Star Chamber offered the government a convenient forum for prosecuting sedition and ecclesiastical offences, when juries might not co-operate"). Although much of the Star Chamber's jurisdiction was concurrent with that of the common-law courts, Maitland describes the manner in which the Star Chamber held English justice hostage by influencing the outcome of common-law jury trials:

[I]t was a tyrannical court . . . guilty of great infamies. . . . It was a court of politicians enforcing a policy, not a court of judges administering the law. It was cruel in its punishments, and often had recourse to torture. It punished jurors for what it considered perverse verdicts [in common-law courts]; thus it controlled all the justice of the kingdom. . . . [I]n the Star Chamber the jurors had to fear a terrible tribunal which would resent a verdict against the king.

Frederic W. Maitland, *The Constitutional History of England* 263 (Cambridge, 1908).

7. In a Star Chamber trial, "[t]here was no jury; the suspect was not allowed to cross-examine or, in some cases, even to see the witnesses against him. He might be tortured to extract evidence." Knappen, *Constitutional and Legal History of England* at 317 (cited in note 3). Holdsworth noted that "the court was quite as ready on a suitable occasion to imitate the continental practice, and strain every point against the accused, as it was ready to imitate the continental theory and practice of torture." Holdsworth, *5 A History of English Law* at 187 (cited in note 2). Moreover, Star Chamber defendants "were summoned peremptorily and given no hint of the substance of the charges against them." Albert K. R. Kiralfy, *The English Legal System* 183 (Sweet & Maxwell, 1954). In the act that eventually abolished the Court of Star Chamber, the House of Commons proclaimed that "the [Star Chamber] judges . . . have undertaken to punish where no law doth warrant." Act for the Regulating the Privy Council, and for Taking Away the Court Commonly Called the Star Chamber, 1640, 16 Car., ch. 10 (Eng.).

frequently resulted in torture or imprisonment,⁸ and conviction often entailed lengthy incarceration, exile, or mutilation.⁹

As noted, the client perjury rules presently in force in each American jurisdiction are comparable in effect to Star Chamber procedure. A Star Chamber defendant was provided with counsel who, prior to assisting in the suspect's defense, was required to sign, and thereby vouch for, the suspect's answer to the alleged offense.¹⁰ Although the appointment of counsel would appear to be a progressive reform, legal historians point out that "[t]he effect of this rule, and probably its object was, that no defence could be put before the Court which counsel would not take the responsibility of signing—a responsibility which, at that time, was extremely serious."¹¹ If counsel refused to sign, as in Bastwick's case, the suspect was deemed to have confessed and sentence was passed.¹² As English legal historian Sir James Stephen observed: "There is something specially repugnant to justice in using rules of practice in such a manner as to debar a prisoner from defending himself, especially when the professed object of the rules so used is to provide for his defence."¹³ To the extent that the present client perjury rules bar the defendant from presenting her version of the facts when counsel personally believes it is untruthful, the rules clearly resemble Star Chamber procedure.

8. Holdsworth, 5 *A History of English Law* at 184 (cited in note 2) (stating that "torture was freely used, to extort either a confession, or the disclosure of further information"). The court "capriciously" employed the rack—a medieval device upon which an accused was stretched until the inquisitor was satisfied that the subject had uttered the truth—to elicit confessions and evidence against accomplices despite self-serving denials by historical figures such as Coke, who had authorized its use when he was Attorney General. *Id.* at 184-87.

9. In a venomous criticism of the "leniency" of a sentence identical to that imposed on Bastwick handed down by the Court five years earlier following the conviction for criminal libel of another Puritan reformer, William Prynne, one Star Chamber justice referred to other common forms of mutilation employed by the Court: "I should be loth [that the convicted defendant] should escape with ears, for he may get a periwig which he now so much inveighs against, and so hide them, or force his conscience to make use of his unlovely love-locks on both sides; therefore I would have him branded in the forehead, slit in the nose, and his ears cropt too." Stephen, 1 *A History of the Criminal Law of England* at 341 (cited in note 2).

10. *Id.*; G. J. Hand and D. J. Bentley, eds., *The English Legal System* 106-07 (Butterworths, 6th ed. 1977).

11. Stephen, 1 *A History of the Criminal Law of England* at 341 (cited in note 2).

12. *Id.* See also Holdsworth, 5 *A History of English Law* at 187 n.9 (cited in note 2). The strength and endurance of the common-law privilege against self-incrimination (and its inclusion in the American Bill of Rights) is, in large measure, a reaction to the horrors of the Star Chamber. *Id.* at 187.

13. Stephen, 1 *A History of the Criminal Law of England* at 341-42 (cited in note 2). For a discussion of the origin, development, procedures, and demise of the Court of Star Chamber, see generally John H. Wigmore, 8 *Evidence in Trials at Common Law* § 2250 at 277-90 (Little, Brown, McNaughten rev. 1961); Holdsworth, 5 *A History of English Law* at 155-214 (cited in note 2); Maitland, *The Constitutional History of England* at 217-21, 261-64, 274-75, 311 (cited in note 6).

Sometime after Parliament abolished the Star Chamber in 1641,¹⁴ criminal defendants were barred from testifying at their own trials.¹⁵ This disability represented both a reaction against the coercive means by which Star Chamber justices obtained confessions and a legal presumption that defendants would lie.¹⁶ As the jury system and the art of cross-examination further evolved, however, confidence grew in the jury's ability to detect falsehoods and the privilege against self-incrimination eventually replaced the bar to a defendant's testimony. In 1864, Maine became the first state in the union to remove the disability¹⁷ and, a mere thirty years ago, Georgia was the last.¹⁸

B. *The Scope of the Present Rules*

The earliest American codification of the present client perjury rules appears in the Canons of Professional Ethics, the country's first comprehensive code of attorney conduct, adopted by the American Bar

14. Act for the Regulating the Privy Council, and for Taking Away the Court Commonly Called the Star Chamber, 1640, 16 Car., ch. 10 (Eng.). The Act also called for the release from prison of John Bastwick and other political prisoners tried by the Star Chamber, and for the justices who had sentenced Bastwick to provide him with restitution in the amount of his fine. *Id.*

15. John H. Wigmore, 2 *Evidence in Trials at Common Law* § 579 at 826 (Little, Brown, Chadbourn rev. 1979). For a discussion of the common-law history of the disability and the right to testify, see generally *id.* at § 575 (3) at 808-10, § 576, § 579; *Ferguson v. Georgia*, 365 U.S. 570, 573-82 (1961).

16. "[I]t is not in human nature to speak the truth under such a pressure as would be brought to bear on the prisoner [who was permitted to testify], and it is not a light thing to institute a system which would almost enforce perjury on every occasion." James F. Stephen, *A General View of the Criminal Law of England* 202 (MacMillan, 1863). See also Charles Maechling, Jr., *Borrowing from Europe's Civil Law Tradition*, 77 A.B.A. J. 59, 62 (Jan. 1991) (noting the assumption "that most people lie or conceal the truth when their vital interests are at stake").

17. Wigmore, 2 *Evidence in Trials at Common Law* at 826 (cited in note 15).

18. *Ferguson*, 365 U.S. 570 (striking down as unconstitutional a Georgia statute permitting criminal defendants to submit an unsworn statement in lieu of taking the witness stand in their own defense).

Wigmore noted that "[t]he competency of accused persons [to testify] . . . came later, in general, in the Southern States; and there it was sometimes accompanied by the proviso that the accused should testify, if at all, first in order of the witnesses on his own side." Wigmore, 2 *Evidence in Trials at Common Law* at 826-27 (cited in note 15). The Committee on Criminal Law and Procedure of the Georgia Bar Association transparently proclaimed that the denial of the right to testify was intended to advance the interests of criminal defendants: the right would "aid the prosecution and conviction of the defendant and would be of no material benefit to any defendant in a criminal case. Those who are on trial for their lives and liberty cannot possibly think and testify as clearly as a disinterested witness, and of course, it is agreed that a shrewd prosecutor could create, by expert cross examination, in the minds of the jury, an unfavorable impression of a defendant." The Georgia Bar Association Committee on Criminal Law and Procedure, 1952 Ga. Bar Ass'n Rep. 182. Remarkably, the Supreme Court did not officially recognize a criminal defendant's right to testify as a fundamental component of Fourteenth Amendment Due Process until 1987. See note 47.

Association (ABA) in 1908.¹⁹ Described as “glittering generalities . . . which lack a body to kick and a soul to condemn,”²⁰ the Canons were not formally adopted, and thus remained merely aspirational, in most jurisdictions.²¹ In a confusing set of pronouncements scattered throughout its text, the Canons prohibited lawyers from introducing a witness’s testimony if counsel believed it to be untruthful and required counsel who developed the belief after the testimony had been presented to “rectify” the situation, with conflicting instructions concerning how to do so.²²

19. John Dzienkowski, ed., *Selected Statutes, Rules and Standards on the Legal Profession* 331 (West, 1992). The drafters modeled the Canons after the 1887 Code of Ethics of the Alabama Bar Association. Rena A. Gorlin, ed., *Codes of Professional Responsibility* 333 (BNA, 2d ed. 1990).

In large part, the Canons were a xenophobic response to the growing entry of the offspring of recent European immigrants into the legal profession. The vague and contradictory nature of the Canons permitted them to be used in a restrictive manner by those who, like Henry S. Drinkler, legal ethicist and former chair of the ABA Committee on Professional Ethics and Grievances (now known as the Committee on Ethics and Professional Responsibility), decried the unsavory influence of “Russian Jew boys” who had come “up out of the gutter . . . [and] were merely following the methods their fathers had been using in selling shoe-strings and other merchandise.” Jerold S. Auerbach, *Unequal Justice* 127 (Oxford U., 1976).

20. James E. Starrs, *Professional Responsibility: Three Basic Propositions*, 5 Am. Crim. L. Q. 17, 20 (1966). One critic decried the Canons as “so vague, so ambiguous, and so contradictory that they are of little or no help in resolving these problems. . . . [A]lmost any position, on a given issue, can reasonably be defended with support from the canons.” Addison M. Bowman, *Standards of Conduct for Prosecution and Defense Personnel: An Attorney’s Viewpoint*, 5 Am. Crim. L. Q. 28, 28 (1966). Professor Anthony Amsterdam remarked that the Canons “are of as much use to the practicing attorney in the courtroom as a Valentine card would be to a heart surgeon in the operating room.” Monroe H. Freedman, *Lawyer’s Ethics in an Adversary System* vii (Bobbs-Merrill, 1975).

21. Dzienkowski, *Selected Statutes* at 331 (cited in note 19).

22. Eight Canons addressed the duty of an attorney who is suspicious of the veracity of a witness; two of these Canons focused specifically on counsel who discovered that statements were false only after a witness had testified. Canon 29 stated, “The counsel upon the trial of a cause in which perjury has been committed owe it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.” ABA Canons of Professional Ethics, Canon 29 (ABA, 1908). Whether conduct that is owed to the profession and the public is mandatory or discretionary, however, is unclear. Canon 41 paralleled Canon 29, with two key variations. Canon 41 introduced the attorney’s duty to remonstrate with a client suspected of perjury in an attempt to “rectify” the falsehoods. ABA Canons of Professional Ethics, Canon 41. Also, rather than urging disclosure to “the prosecuting authorities,” Canon 41 called for counsel “promptly” to convey the falsehoods to the “injured person or his counsel.” *Id.*

Six Canons addressed counsel’s duty in the face of anticipated client perjury. Canon 37, which covered “Confidences of a Client,” referred to the “announced intention of a client to commit a crime.” ABA Canons of Professional Ethics, Canon 37. Presuming that the drafters believed client perjury to be a crime, the Canon conferred upon counsel the discretion to disclose those client confidences “necessary to prevent the act.” *Id.* The Canons, however, left at least two points unclear. First, in the context of client perjury, a client’s “announced intention” might refer either to an admission to counsel that the client would testify untruthfully or merely to the client’s description to counsel of intended testimony that counsel independently believed to be untrue. Under either construction, however, the requirement that counsel’s belief be based on information provided by the accused, rather than by other sources, substantially constricted the duty to disclose. Second, Canon 37 did not specify to whom disclosure was to be made. Canons 16 and 44, however, seemed to direct counsel to withdraw in the face of would-be client perjury, but gave conflicting instructions on whether withdrawal was mandatory or discretionary. Canon 16

In 1969, the ABA drafted a revised and expanded version of the Canons—the Model Code of Professional Responsibility—which eventually was adopted, verbatim or with minor modifications, in every state.²³ In addition to facing any criminal charges arising from their conduct, attorneys accused of violating their jurisdiction's code of conduct risk disciplinary proceedings before a special board and professional sanctions such as suspension or disbarment. The Model Code, while still prohibiting counsel from introducing testimony she suspects is false,²⁴ expanded the protection accorded attorney-client communications. In addition to client confidences protected under the common-law attorney-client privilege,²⁵ the Model Code forbids counsel from revealing a client's "secrets," that is, information garnered from any source during the course of representation that, if disclosed, would embarrass or would be likely to adversely affect the

specified that counsel who was unable to "restrain . . . his clients from doing those things which the lawyer himself ought not to do . . . *should* terminate their relation," while Canon 44 provided that "[i]f the client insists upon an unjust or immoral course . . . the lawyer *may* be warranted in withdrawing." ABA Canons of Professional Ethics, Canons 16 & 44 (emphasis added).

Three additional Canons indirectly proscribed the intentional presentation of client perjury, but failed to specify *any* measures to be taken by counsel. Canon 15 provided that "[t]he office of attorney does not permit . . . violation of law or any manner of fraud or chicanery." ABA Canons of Professional Ethics, Canon 15. Canon 22 stated, "It is unprofessional and dishonorable to deal other than candidly with the facts . . . in the presentation of causes." ABA Canons of Professional Ethics, Canon 22. Finally, Canon 32 declared that counsel should not "render any service . . . involving disloyalty to the law . . . or deception or betrayal of the public." ABA Canons of Professional Ethics, Canon 32. Canons 33 through 47 were added between 1908 and 1964. See Dzienkowski, *Selected Statutes* at 331 (cited in note 19).

23. Initially, the title of the new code did not include the term "Model." For nearly a decade, the ABA contended that, whether or not the Code was granted formal recognition by the various states, it ought to have the force of law with respect to lawyers. Like a statute, the document even contained a particular date upon which it was to become effective. In 1978, however, under pressure from the Department of Justice and private groups charging that such an agreement on professional advertising and fees, among other items, amounted to an antitrust violation, the ABA reversed its position and changed the code's title to the *Model Code of Professional Responsibility*. See *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (applying the Sherman Act to the legal profession and holding that a minimum fee schedule maintained by a bar association constituted illegal price-fixing).

24. Model Code of Professional Responsibility DR 7-102(A)(4) (ABA, 1969) (stating, "In his representation of a client, a lawyer shall not . . . [k]nowingly use perjured testimony or false evidence.").

25. Summarizing the common-law privilege, Dean Wigmore states, "Where legal advice of any kind is sought from a professional legal adviser in his capacity as such, the communications relating to that purpose, made in confidence by the client, are at his instance permanently protected from disclosure by himself or by the legal adviser, except [if] the protection be waived." Wigmore, 8 *Evidence in Trials at Common Law* § 2292 at 554 (cited in note 13). "The purpose of the privilege," the Supreme Court has stated, "is to encourage clients to make full disclosure to their attorneys." *Fisher v. United States*, 425 U.S. 391, 403-404 (1976). For a discussion of the attorney-client privilege, see generally Wigmore, 8 *Evidence in Trials at Common Law* at ch. 82.

client.²⁶ Although the Code contains a muddled group of provisions applicable to client perjury,²⁷ it appears that counsel who knows or should know that the accused will testify untruthfully *must* attempt to withdraw from representation²⁸ and *may* disclose her client's intent,²⁹ while counsel who later "receives information clearly establishing" that the client testified falsely must urge the suspected perjurer to "rectify" the harm. If the client will not or cannot rectify the situation, then the attorney must reveal the situation to the court.³⁰

Just fourteen years later, in the wake of Watergate and the public backlash against lawyers,³¹ the ABA promulgated a third set of disciplinary standards, the Model Rules of Professional Conduct.³² Designed, according to a former president of the American Trial Lawyers Association, to counter "press and public criticism" and representing an "effort to improve the lawyer's image at the cost of

26. Model Code of Professional Responsibility DR 4-101(A). The Code permits disclosure of confidences and secrets if, *inter alia*, the client intends to commit a crime and revelation of the confidence or secret is necessary to prevent the offense. *Id.* at DR 4-101(C).

27. Over 20 Disciplinary Rules and Ethical Considerations scattered throughout the Code concern the duty of counsel who believes that the accused will lie or has lied on the witness stand, including Disciplinary Rules 2-110(A)(2), 2-110(B)(2), 2-110(C)(1)(b), 2-110(C)(1)(c), 4-101(A), 4-101(B), 4-101(C)(1), 4-101(C)(2), 4-101(C)(3), 7-101(B)(2), 7-102(A)(3), 7-102(B)(1), and Ethical Considerations 2-32, 4-1, 4-2, 4-4, 4-5, 7-5, 7-7, 7-26, 8-5, 9-2.

28. Model Code of Professional Responsibility DR 2-110(B)(2) (stating, "A lawyer representing a client before a tribunal . . . shall withdraw from employment . . . [if h]e knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule."). DR 7-102(A)(4), reprinted in note 24, provides one example of such a Disciplinary Rule. See also Model Code of Professional Responsibility EC 7-26 (stating, "A lawyer should . . . present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured.").

29. Model Code of Professional Responsibility DR 4-101(C)(2)&(3) (stating, "A lawyer may reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order . . . [and may reveal t]he intention of his client to commit a crime and the information necessary to prevent the crime."). DR 7-102(A)(4), reprinted in note 24, provides an example of such a permissive Disciplinary Rule. Unlike Canons 29 and 41 of the Canons of Professional Ethics and DR 7-102(B)(1) of the Model Code, DR 4-101 fails to specify to whom disclosure may be made.

30. Model Code of Professional Responsibility DR 7-102(B)(1) (1974) (stating, "A lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a . . . tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the . . . tribunal, except when the information is protected as a privileged communication.").

31. Andrew L. Kaufman, *Problems in Professional Responsibility* 17 (Little, Brown, 3d ed. 1989) (noting that "the involvement of so many lawyers in Watergate focused the attention of the public and the profession on lawyer's conduct"); Auerbach, *Unequal Justice* at 7 (cited in note 19) (asserting that "Watergate raised the most profound and tormenting question about the ethics and values of the legal profession").

32. The Model Code had been criticized for its inordinate focus on litigation, its extreme number of outdated or poorly formulated provisions, and the confusing format of Canons, Disciplinary Rules, and Ethical Considerations. For a summary of the controversy surrounding the formulation of the Model Rules and their adoption by the ABA House of Delegates, see generally Charles W. Wolfram, *Modern Legal Ethics* 60-63 (West, 1986).

violating his or her historic duty,"³³ the Model Rules have been adopted, with variations, in over three dozen states and the District of Columbia, and are under consideration in several others.³⁴ Despite requiring that, "[i]n a criminal case, the lawyer shall abide by the client's decision . . . whether the client will testify,"³⁵ the Rules contain a tangled set of provisions³⁶ directing counsel not to present the accused's testimony if counsel perceives it to be untruthful,³⁷ and specifying countermeasures to be taken by the defendant's lawyer in such instances³⁸ and in cases in which counsel later comes to believe that the defendant has testified falsely.³⁹ The rule dealing most directly with client perjury,⁴⁰ although internally inconsistent, directs

33. The remarks are those of a former president of the American Trial Lawyers Association. Theodore I. Koskoff, *The Two Faces of the Model Rules*, 19 *Trial* 26 (May, 1983). See also Monroe H. Freedman, *Understanding Lawyers' Ethics* 8-10, 60-64 (Matthew Bender, 1990).

34. A number of these codes retain various provisions of the Model Code of Professional Responsibility. See, for example, Dzienkowski, *Selected Statutes* at 133-217 (cited in note 19) (section on *Selected Significant State Modifications to the ABA Model Rules*).

35. Model Rules of Professional Conduct Rule 1.2(a) (ABA, 1983).

36. The Supreme Court of Florida observed in one case that "[defense counsel] was placed in a difficult situation when it became clear to him that the client intended to commit perjury. The rules provided little guidance as to how to proceed, and indeed placed [counsel] in the position where he would have to choose which rule to violate." *The Florida Bar v. Rubin*, 549 S.2d 1000, 1002 (Fla. 1989). The Florida Supreme Court publicly reprimanded counsel who, despite the trial court's denial of a motion to withdraw, effectively terminated his representation of an accused whose proposed testimony counsel believed was false.

37. These provisions prohibit counsel herself from making false statements of material fact to the court (as might occur if counsel used testimony she knew was false in opening or closing arguments or in support of a motion), Model Rules of Professional Conduct Rule 3.3(a)(1); from knowingly presenting false evidence, *id.* at Rule 3.3(a)(4); and from knowingly assisting a client in a crime or fraud, *id.* at Rule 1.2(d). In addition, the Rules grant counsel the discretion to refuse to present evidence that she "reasonably believes" to be false. *Id.* at Rule 3.3(c).

38. Provisions that seem to apply to a criminal defense lawyer who anticipates client perjury require counsel to disclose information "necessary to avoid assisting a criminal or fraudulent act [such as perjury] by the client," *id.* at Rule 3.3(a)(2); to warn the client of the "relevant limitations on the lawyer's conduct," *id.* at Rule 1.2(e); and to withdraw if that action will avert a violation of the Rules or the law, *id.* at Rule 1.16(a)(1). Other rules provide defense counsel with the discretion to seek withdrawal if the client uses the lawyer's services in furtherance of a crime or fraud (in apparent conflict with Rule 1.16(b)(1)), *id.* at Rule 1.16(b)(1), and to attempt to withdraw if the accused insists upon an "objective that the lawyer considers repugnant or imprudent," *id.* at Rule 1.16(b)(3).

39. These provisions require counsel to take "remedial measures" in the face of client perjury discovered subsequent to the client's testimony and grant counsel discretion in seeking to withdraw if the client has used the lawyer's services to perpetrate a crime or fraud. See *id.* at Rule 3.3(a)(4); Rule 1.16(b)(2).

40. *Id.* at Rule 3.3 & cmts. 7-12. The Rule is entitled "Candor Toward the Tribunal." The scope of protection provided to attorney-client communications under the Model Rules varies somewhat from that provided under the Model Code. Rather than superimposing the protection of "secrets" upon the attorney-client privilege, the Rules prohibit the nonconsensual disclosure of any "information relating to representation of a client." *Id.* at Rule 1.6(a). Counsel is granted the discretion, however, to reveal privileged communications in order to prevent a dangerous crime or to defend against a civil claim or criminal charge brought by or involving the client. *Id.* at Rule 1.6(b).

counsel who *knows* that the accused will lie to attempt to dissuade her from doing so and, if unsuccessful, to seek withdrawal.⁴¹ If the court denies the request, counsel must reveal "the client's perjury."⁴² These steps are discretionary if counsel merely "reasonably believes" that the client will testify falsely.⁴³ The attorney who later comes to know that the accused has testified untruthfully must follow the same course⁴⁴ but need not attempt to withdraw unless it would "remedy the situation."⁴⁵

The Supreme Court has addressed few of the constitutional issues raised by the client perjury rules. In a 1986 decision, *Nix v. Whiteside*, the Court held that a criminal defense attorney's threats to disclose his client's anticipated perjury to the trial judge, to withdraw

41. See *id.* at Rule 3.3 cmt. 7 (elaborating on the prohibition in Rule 3.3(a)(4) against "offer[ing] evidence that the lawyer knows to be false"). Comment 7 acknowledges the likelihood of denial of a motion to withdraw submitted too close to trial and seems to rule out withdrawal after the commencement of trial.

Based on widespread dissatisfaction among criminal trial lawyers with the perceived anti-client bias of the Model Rules of Professional Conduct, the American Trial Lawyers' Foundation promulgated its own model code, the American Lawyer's Code of Conduct. Theodore Koskoff, American Lawyer's Code Preface (Revised Draft 1982). Monroe Freedman was the original reporter and principal inspiration for the Lawyer's Code, which was written and revised at the same time that the Kutak Commission drafted the Model Rules. Irwin Birnbaum and Theodore Koskoff, American Lawyer's Code Chairmen's Introduction (Revised Draft 1982). The Lawyer's Code requires that a lawyer whose client intends to commit perjury seek withdrawal, but only if the client's confidences are not "directly or indirectly revealed as a result." American Lawyer's Code ch. 6, cmt. & Illustrative case 6(a) (Revised Draft 1982) (emphasis added). To date, no state has adopted the Lawyer's Code.

42. See Model Rule of Professional Conduct Rule 3.3 at cmts. 7-10. It is unclear whether revealing "the client's perjury" requires counsel to disclose exactly which of the client's statements will be untruthful and to explain the basis for this conclusion or whether counsel must merely convey that the accused seems intent upon testifying to some unspecified falsehood. While the commentary directs counsel to disclose *earlier* client perjury to the court, it does not specify whether *anticipated* client perjury should be revealed only to the court and not, for example, to the jury or to prosecuting authorities (as required under the Canons of Professional Ethics). *Id.* at cmts. 10 & 11. For examples of cases in which defense counsel disclosed to the prosecutor her belief that the defendant would commit perjury, see *State v. Salquerro*, 107 Misc.2d 155, 433 N.Y.S.2d 711, 712 (Sup. Ct., N.Y. County 1980); *Thornton v. United States*, 357 A.2d 429, 432 n.2 (D.C. App. 1976). See also note 22 (discussing Canon 29 of the ABA Canons of Professional Ethics).

43. Model Rules of Professional Conduct Rule 3.3(c) (ABA, 1983).

44. Model Rules of Professional Conduct Rule 3.3(a)(4) provides that "[i]f a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures." The corresponding commentary explains that "[i]f perjured testimony or false evidence has been offered, the advocate's proper course ordinarily is to remonstrate with the client confidentially. If that fails, the advocate should seek to withdraw if that will remedy the situation. If withdrawal will not remedy the situation or is impossible, the advocate should make disclosure to the court." *Id.* at cmt. 11.

45. Model Rules of Professional Conduct Rule 3.3(a)(4) at cmt. 11. The circumstances under which withdrawal would *remedy* earlier perjury seem somewhat dubious. The obligation to disclose covers perjury discovered by counsel until the "conclusion of the proceeding," although it is unclear whether, for this purpose, a proceeding is deemed to conclude after closing arguments, the verdict, the disposition of post-trial motions, sentencing, or the filing or final disposition of an appeal.

from the case, and to "impeach" the accused did not constitute ineffective assistance of counsel.⁴⁶ Although the Supreme Court did not formally recognize a constitutional right to testify until a year later in *Rock v. Arkansas*,⁴⁷ the Court observed in *Nix* that the defendant, who ultimately testified in a manner that his attorney believed was truthful, had not been deprived of the right to testify because that right does not encompass the right to testify falsely.⁴⁸

Writing for the majority in a unanimous decision, Chief Justice Burger in *Nix* cautioned that "a court must be careful not to narrow the wide range of conduct acceptable under the Sixth Amendment so restrictively as to constitutionalize particular standards of professional conduct. . . ."⁴⁹ Despite his own warning, Justice Burger seemed to do just that. The majority opinion outlined the conduct prescribed by the ABA model codes when defense counsel believes that the accused will testify perjurally,⁵⁰ concluding that the actions of

46. *Nix v. Whiteside*, 475 U.S. 157 (1986). In *Nix*, trial counsel believed that his client's intended testimony—that he feared for his own life when he fatally shot his victim—was untruthful. For a detailed discussion of the facts in *Nix*, see notes 207-12 and accompanying text. Utilizing the two-pronged *Strickland* test for evaluating claims of ineffective assistance of counsel, the Court held that neither the first prong, which requires the breach of a professional duty, nor the second, which requires prejudice, had been met. *Id.* at 175-76. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The *Nix* Court reasoned that defense counsel had acted consistently with the dictates of modern codes of ethics and, as a seeming consequence, with his professional duty under *Strickland*. *Nix*, 475 U.S. at 166-75. The Court then explained that defendant *Whiteside* was not prejudiced by counsel's threats since *Whiteside* had testified at trial and thus was deprived only of the opportunity to testify falsely; further, the Court believed that the false testimony, if proffered, likely would not have altered the outcome. *Id.* at 175-76. The *Nix* decision reversed the Eighth Circuit Court of Appeals's holding that counsel's threatened disclosure of communications protected under the attorney-client privilege did, in fact, represent ineffective assistance. See *Whiteside v. Scurr*, 750 F.2d 713 (8th Cir. 1984).

47. 483 U.S. 44, 51 (1987) (reversing Arkansas's per se prohibition against the hypnotically refreshed testimony of criminal defendants and holding that "[t]he right to testify on one's own behalf at a criminal trial . . . is one of the rights that 'are essential to due process of law in a fair adversary process'" (quoting, in part, *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975))).

48. *Nix*, 475 U.S. at 173 (stating that "it is elementary that [the right to testify] does not extend to testifying *falsely*") (emphasis in original). The Eighth Circuit had previously held, *inter alia*, that "[c]ounsel's actions also impermissibly compromised appellant's right to testify in his own defense by conditioning continued representation by counsel and confidentiality upon appellant's restricted testimony." *Whiteside v. Scurr*, 750 F.2d at 715. Moreover, in *Rock*, the Court reasoned that the right to testify was fundamental to due process, since "the most important witness for the defense in many criminal cases is the defendant himself" whose "veracity . . . can be tested adequately by cross-examination." *Rock*, 483 U.S. at 52. In fact, three years prior to the *Nix* decision, the Court had assured defendants that they have the "ultimate authority to make certain fundamental decisions regarding the case, [such] as to whether to . . . testify in [their] own behalf . . ." *Jones v. Barnes*, 463 U.S. 745, 751 (1983) (holding that appellate counsel was not ineffective in refusing to raise, for tactical reasons, each non-frivolous issue suggested by the client). See also Model Rules of Professional Conduct Rule 1.2(a) (ABA, 1983) (stating, in relevant part, "In a criminal case, the lawyer shall abide by the client's decision . . . whether to testify.").

49. *Nix*, 475 U.S. at 165.

50. *Id.* at 169-75.

defense counsel in *Nix* could be viewed, as required under the codes, either as remonstrance with the accused or as an appropriate threat to withdraw and disclose his client's alleged perjury. As an apparent result, the majority found that counsel had acted "well within" Sixth Amendment limits.⁵¹ In concurring opinions, four Justices challenged Justice Burger's apparent elevation of ABA model rules to constitutional status.⁵² Justice Brennan, for example, warned, "[L]et there be no mistake: the Court's essay regarding what constitutes the correct response to a criminal client's suggestion that he will perjure himself is pure discourse without force of law. . . . Lawyers, judges, bar associations, students, and others should understand that the problem has not now been 'decided.'"⁵³

C. Prior Criticism of the Rules

Ironically, one of the first American commentators to criticize the client perjury rules publicly was himself subjected to a judicial witch hunt. Addressing the Criminal Trial Institute of the District of Columbia Bar in the spring of 1966, Professor Monroe Freedman raised an objection to the client perjury rules, which, while the issue is now standard fare in the curriculum of every law school,⁵⁴ ignited a McCarthy-like vendetta against him. Reading a brief account of

51. *Id.* at 171 (stating, "Whether [defense counsel] Robinson's conduct is seen as a successful attempt to dissuade his client from committing the crime of perjury, or whether seen as a 'threat' to withdraw from representation and disclose the illegal scheme, Robinson's representation of [defendant] Whiteside falls well within accepted standards of professional conduct and the range of reasonable professional conduct acceptable under *Strickland*.").

52. Although the decision was unanimous, the nine Justices varied in their reasoning. Justices Rohnquist, O'Connor, White, and Powell joined the Chief Justice's opinion. Justices Brennan, Marshall, and Stevens joined in a concurrence written by Justice Blackmun, while Justices Brennan and Stevens also added their own concurring opinions. Each concurrence sharply criticized the majority's suggestion that defense counsel's response to anticipated perjury was not merely laudable but mandatory as well. Justice Blackmun, for example, agreed that the decision should not be construed to mandate disclosure: "The complex interaction of factors, which is likely to vary from case to case, makes inappropriate a blanket rule that defense attorneys must reveal, or threaten to reveal, a client's anticipated perjury to the court." *Id.* at 189. For a discussion of the Court's selective use of ethical codes in *Nix* and other cases, see Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 *Am. Crim. L. Rev.* 35, 98-102 (1991).

For rigorous critiques of the *Nix* decision, see, for example, Alfredo Garcia, *The Sixth Amendment in Modern American Jurisprudence: A Critical Perspective* 45-48 (Greenwood, 1992); Brent R. Appel, *The Limited Impact of Nix v. Whiteside on Attorney-Client Relations*, 136 *U. Pa. L. Rev.* 1913 (1988); Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 *U. Pa. L. Rev.* 1939 (1988).

53. *Nix*, 475 U.S. at 177 (Brennan, J., concurring in the judgment).

54. "Professor Freedman's forceful statement of his position . . . set in train a debate that has gripped professional and scholarly attention for the better part of three decades." Charles W. Wolfram, *The U.S. Law of Client Confidentiality: Framework for an International Perspective*, 15 *Fordham Int'l L. J.* 529, 538 (1991-92).

Freedman's remarks in the newspaper the next day, a group of federal judges led by former Chief Justice Warren Burger, then a member of the United States Court of Appeals of the District of Columbia, instigated disciplinary proceedings against the stunned professor for "express[ing] opinions" inconsistent with the legal profession's prevailing principles of ethical conduct.⁵⁵

Efforts to silence Freedman intensified daily. Through private correspondence with Freedman's dean, Burger's group sought to have the young professor expelled from teaching.⁵⁶ One of Burger's law clerks, posing as a "disinterested but incensed" member of the American Civil Liberties Union and writing on personal stationery, even sent a letter to the organization demanding that Freedman be removed as chair of its Washington, D.C. affiliate.⁵⁷ The national bar quickly closed ranks as leaders of the profession publicly assailed Freedman's character.⁵⁸

Freedman's offense: he had suggested that fostering a criminal defendant's trust and willingness to confide in counsel is so vital to constructing an adequate defense and receiving a fair trial that, on balance, a criminal defense attorney who believes the accused will testify untruthfully is duty-bound to present the accused's testimony as if counsel believed it to be truthful.⁵⁹

Supporters of the client perjury rules frame the issue as a clash between the discovery of truth in criminal proceedings on the one hand and, on the other, the need for confidentiality and trust within the attorney-client relationship in order to promote the candid

55. Freedman, *Lawyers' Ethics in an Adversary System* at viii (cited in note 20). At the same time that the disciplinary committee of the District of Columbia bar was anxious to commence proceedings against Freedman for having exercised his First Amendment rights, it ignored examples of blatant instability such as that of a lawyer who had been discovered several times defecating in the courthouse stairwells. See Jethro K. Lieberman, *Crisis at the Bar* 204 (Norton, 1978).

56. Freedman, *Lawyers' Ethics in an Adversary System* at viii (cited in note 20).

57. Letter from Monroe Freedman, Professor of Law, Hofstra University School of Law, to Jay Silver, Associate Professor of Law, St. Thomas University School of Law 1 (Dec. 5, 1993) (on file with the Author). Weeks later, upon learning that another Supreme Court clerk intended to reveal the author's identity to Freedman, Burger's clerk again wrote to the ACLU, noting that candor compelled him to mention that he was, in fact, a clerk for Burger. *Id.*

58. Standing his ground, Professor Freedman proceeded to publish his notorious critique of the client perjury rules. See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1965-66). Although, like most commentators, Professor Charles Wolfram opposes Freedman's position, he has described Freedman's devotion to his convictions in the face of high-level intimidation as "true lawyer heroism." Wolfram, 15 *Fordham Int'l L. J.* at 536 (cited in note 54).

59. Freedman, 64 Mich. L. Rev. at 1477-78. Since 1966, Freedman has retreated somewhat from this position. See, for example, Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. Pa. L. Rev. 1939, 1953 (1988).

disclosure of facts necessary for counsel to construct a meaningful defense and for the accused to receive a fair trial.⁶⁰ The principal disagreement is over which interest should prevail when counsel believes that the accused intends to testify falsely or has already done so.

The so-called client perjury *dilemma* is, however, a false dichotomy. The proponents of the client perjury rules have incorrectly framed the issue; in reality, the rules threaten *each* of these interests.

III. THE CASE AGAINST THE CLIENT PERJURY RULES

The client perjury rules undermine many of the accused's fundamental rights, including her Fifth and Sixth Amendment rights to a fair trial and her guarantee of equal protection. At the same time, the rules impede the discovery of truth in our criminal proceedings.

A. *Impeding the Discovery of Truth*

The principal justification for the client perjury rules is that preventing the accused from presenting falsehoods to the factfinder will help purify the search for truth.⁶¹ The handful of critics of the rules never challenged this point, which, admittedly, seems self-evident. Instead, they implied that the harm to the due process interests of the defendant exceeded any harm to the search for truth. However, a closer examination reveals that, *on balance*, the client perjury rules indirectly undermine the very truth-finding function of the trial process that they purportedly serve.

60. The drafters of the ABA Model Rules of Professional Conduct describe the client perjury issue as "a conflict . . . between the lawyer's duty to keep the client's revelations confidential and the duty of candor to the court." Model Rules of Professional Conduct Rule 3.3 cmt. 5 (ABA, 1983). Freedman frames the issue as a "trilemma" in which "the lawyer is required to know everything, to keep it in confidence, and to reveal it to the court." Freedman, *Lawyers' Ethics in an Adversary System* at 28 (cited in note 20).

61. See *Nix*, 475 U.S. at 171.

1. The Untruthful Defendant and the Advancement of the Search for Truth

Would that I could discover truth as easily as I can uncover falsehood.

—Cicero⁶²

Permitting counsel to call a criminal defendant whom she believes will testify untruthfully may, in the end, actually advance the adversarial search for truth. A defendant's confused, conflicting, fantastic, or incomplete testimony or suspicious demeanor frequently represents, in the minds of jurors, the clearest proof that the defendant's version of the case is untruthful. Even the Rehnquist Court recently observed that "[c]ross-examination, even in the face of a confident defendant, is an effective tool for revealing inconsistencies."⁶³ In fact, over 125 years ago, the Supreme Court noted that "[allowing defendants] to testify promotes 'the detection of guilt.'"⁶⁴ Despite the absence of cross-examination in inquisitorial proceedings, Professor Mirjan Damaska has observed that, within the civil law tradition, "[i]t is believed that precious information can be obtained even from false denials of guilt, detected inconsistencies, and other verbal or nonverbal expressions emanating from the defendant's person."⁶⁵ Accordingly, when the defendant is silenced by defense counsel's threat to impeach her testimony, as in *Nix v. Whiteside*,⁶⁶ the factfinder often is deprived of valuable information of a potentially inculpatory or exculpatory nature.

In his concurrence in *Nix*, Justice Blackmun disagreed: "The proposition that presenting false evidence could contribute to . . . the

62. Marcus Tullius Cicero, *De Natura Deorum* (Harvard U., Arthur Stanley Pease, ed., 1955).

63. *Rock v. Arkansas*, 483 U.S. 44, 61 (1987). As Louis Nizer asserts, "If an opponent permits his client to lie . . . [and] I am prepared and persistent, such a witness cannot survive." Louis Nizer, *My Life in Court* 327 (1961). See note 47 for a brief description of *Rock*.

64. *Ferguson v. Georgia*, 365 U.S. 570, 581 (1961) (quoting from Note, *Summary of Events*, 1 Am. L. Rev. 387, 396 (1867)). See also *Rosen v. United States*, 245 U.S. 467, 471 (1918) (abolishing the testimonial disability of persons convicted of forgery; holding that "truth is more likely to be arrived at by hearing the testimony of all persons of competent understanding who may seem to have knowledge of the facts involved in a case, leaving the credit and weight of such testimony to be determined by the jury or by the court").

65. Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure*, 121 U. Pa. L. Rev. 506, 528 (1973). As William James observed, "We never fully grasp the import of any true statement until we have a clear notion of what the opposite untrue statement would be." William James, *The Will to Believe and Other Essays in Popular Philosophy* 217 (Longmans, Green, 1896).

66. 475 U.S. 157, 185 (1986). See notes 46-53 and accompanying text.

reliability of a criminal trial is simply untenable."⁶⁷ Two paragraphs later, however, he unwittingly disproved his point. In explaining that defense counsel had provided effective assistance in part because his refusal to present apparent perjury was "entirely consistent with [murder defendant] Whiteside's best interest," Justice Blackmun illustrated that Whiteside's perjurious testimony may well have provided the jury with unique insight into the critical issue of intent: "If Whiteside had lied on the stand, . . . his testimony would have been contradicted by the testimony of other eyewitnesses and by the fact that no gun was ever found. In light of that impeachment, the jury might have concluded that Whiteside lied as well about his lack of premeditation. . . ."⁶⁸

2. Depriving the Factfinder of the Truths That Accompany Falsehoods

The true safeguard against perjury is not to refuse to permit any inquiry at all, for that will eliminate the true as well as the false, but the inquiry should be so conducted as to separate and distinguish the one from the other where both are present.

—Anonymous⁶⁹

A lie always needs a truth for a handle to it.

—Henry Ward Beecher⁷⁰

Perjurious testimony seldom consists of entirely fabricated information. More commonly, it is inextricably interwoven with material truth.⁷¹ For example, a murder defendant who falsely testifies that his victim provoked the shooting by threatening the defendant's life simultaneously conveys truthful information about having shot the victim. Similarly, an accused prostitute who falsely claims to have merely talked with a prospective customer places herself at the scene of the alleged crime. By suppressing falsehoods, therefore, truth inevitably is also suppressed.

Moreover, an innocent defendant will sometimes falsify a portion of her otherwise truthful testimony to enhance the chances of acquittal. A defendant charged with burglary, for example, might falsely claim to have had permission to enter a particular structure,

67. *Nix*, 475 U.S. at 185 (Blackmun, J., concurring in the judgment).

68. *Id.* at 187-88.

69. Reprinted in William J. Brennan, Jr., *The Criminal Prosecution: Sporting Event or Quest for Truth?*, 1963 Wash. U. L. Q. 279, 291.

70. Proverbs from Plymouth Pulpit (1887).

71. False alibis are a common exception.

yet truthfully assert that she had no intention to commit a crime inside. An innocent defendant might also include lies in her testimony to protect another person. In such situations, however, it would be virtually impossible for counsel to devise non-leading questions that elicit only truth. As a consequence, when the client perjury rules silence the accused, the factfinder is deprived not only of the opportunity to learn directly about the defendant's credibility and her version of the facts, but is also deprived of the truthful information that typically accompanies falsehoods and that, from time to time, would exculpate an innocent defendant.⁷²

B. Subverting the Rights of the Accused

In his ground-breaking article, Monroe Freedman described the adverse effect on client trust and counsel's resultant inability to adequately represent the accused as the principal negative effects of the client perjury rules.⁷³ In fact, the dynamics of the rules are more complex and the harm to the accused is broader than described by

72. Many of the proponents of the client perjury rules, which ultimately impede the search for truth in criminal trials, seem less devoted to the impartial discovery of truth than their rhetoric suggests. For example, although trial judges commonly increase the severity of the sentences of convicted defendants whose testimony they did not believe, judges and prosecutors typically tolerate the perjury of police and other government witnesses. See note 87 and accompanying text. See also Frank E. Schwelb, *Lying in Court*, 15 Litig. 3, 5 (1988-89) (stating, "[I]f a criminal defendant has been fairly warned that perjury will be costly, and he still lies under oath, this should be a factor in his punishment. As a trial judge, I would give additional time to defendants who had clearly perjured themselves by fabricating defenses . . .").

Another example is the charade of the guilty plea colloquy within the plea bargaining process, the process of informal, negotiated justice that has largely replaced the adversarial mode of adjudication mandated by the Constitution in criminal cases. To ensure against a claim that a defendant's plea was coerced, the trial court establishes on the record that the plea has been entered voluntarily. See *Boykin v. Alabama*, 395 U.S. 238 (1969) (requiring that a guilty plea be "intelligent" and "voluntary"). See also *McCarthy v. United States*, 394 U.S. 459 (1969). As confirmation, the judge asks the accused whether her plea is based on any promise or representation by another party. See, for example, *Blackledge v. Allison*, 431 U.S. 63 (1977); Paul Dow, *Discretionary Justice* 119 (Ballinger, 1981). Although each of those present—the defense counsel, prosecutor, defendant, and judge—helped forge or is aware of an agreement underlying the plea, the defendant must deny under oath the existence of any promises in order for the court to accept the plea. Lieberman, *Crisis at the Bar* at 29 (cited in note 55). Thus, when it serves the system's interest in crime control, administrative efficiency, or the concealment of the system's dependence on negotiated justice, the courts and the organized bar are quietly willing to tolerate perjury or to require defense counsel to coach her client to lie in open court and stand by in silence as the defendant does so. In reality, the rules help advance the legal profession's interest in rehabilitating the poor public image of lawyers and, as a consequence, in forestalling any outcry to limit the self-regulatory nature of the profession. The Preamble to the Model Rules of Professional Conduct even suggests that preserving internal regulation is, in itself, a reason to act ethically: "To the extent that lawyers meet the obligations of their professional calling, the occasion for government regulation is obviated." Model Rules of Professional Conduct Preamble (ABA, 1983).

73. Freedman, 64 Mich. L. Rev. at 1469 (cited in note 58).

Professor Freedman. In addition to undermining an array of Fifth and Sixth Amendment rights of criminal defendants and upsetting the fragile balance of responsibilities between defense counsel, prosecutor, judge, and jury in our adversarial system, the rules are enforced primarily against poor, disproportionately minority criminal defendants in violation of the fundamental principles of equal protection.

1. Denying Equal Protection: Race- and Class-Based Discrimination Against Defendants

Although the client perjury rules contained in the ethical codes of the various jurisdictions apply to civil litigation as well as criminal prosecutions, and although the irreconcilable testimony in many civil cases indicates that at least one party has testified untruthfully,⁷⁴ civil litigators rarely seem to enforce the rules against their clients. In criminal cases, the proclivity of prosecutors to tolerate police perjury is widely acknowledged.⁷⁵ Logic, experience, and a survey of state and

74. As Professor Freedman has noted, "the inclination to mislead one's lawyer is not restricted to the indigent or even to the criminal defendant." Freedman, *Lawyers' Ethics in an Adversary System* at 30 (cited in note 20). With respect to civil actions, Professor Geoffrey Hazard has noted that "it seems evident that if the stakes involved in a lawsuit are substantial, if the outcome depends on the truth, and if the parties are authorized to give evidence as to what the truth is, the parties will distort their submissions to the maximum extent possible." Geoffrey C. Hazard, *Ethics in the Practice of Law* 130 (Yale U., 1978).

75. According to the late Professor Irving Younger, who served as a federal prosecutor and state court judge, "[e]very lawyer who practices in the criminal courts knows that police perjury is commonplace. . . . And even if his lies are exposed in the courtroom, the policeman is as likely to be indicted for perjury by his co-worker, the prosecutor, as he is to be struck down by thunderbolts from an avenging heaven." Irving Younger, *The Perjury Routine*, 3 *Crim. L. Bull.* 551, 551 (1967). See also note 87 and accompanying text. A study of spurious homicide convictions in New York State concluded that "a substantial number of the wrongful convictions . . . resulted from prosecutorial misconduct [including] . . . the conscious use of perjured testimony." Marty I. Rosenbaum, *Inevitable Error: Wrongful New York State Homicide Convictions, 1965-1988*, 18 *N.Y.U. Rev. L. & Soc. Change* 807, 809 (1990-91) (emphasis added).

Professor Alan Dershowitz's list of 13 "Rules of the Justice Game" include:

Rule IV: Almost all police lie about whether they violated the Constitution in order to convict guilty defendants.

Rule V: All prosecutors, judges, and defense attorneys are aware of Rule IV.

Rule VI: Many prosecutors implicitly encourage police to lie about whether they violated the Constitution in order to convict guilty defendants.

Rule VII: All judges are aware of Rule VI.

Alan Dershowitz, *The Best Defense* xxi-xxii (Random House, 1982). The institutional tendency to tolerate police perjury likely stems from the prosecutor's interest in maintaining smooth working relations with police, who gather the government's evidence and are often its most important witnesses at trial, and from the prosecutor's own competitive drive to win and to advance professionally.

One judge who did address the problem of police perjury was the late Judge Skelly Wright of the District of Columbia Circuit Court of Appeals. In *Veney v. United States*, Judge Wright observed:

federal criminal cases over the past fifteen years⁷⁶ suggest that the same tendency to disregard the client perjury rules exists among privately retained criminal defense attorneys and that, in the vast majority of instances in which the veracity of a criminal defendant has been challenged by counsel pursuant to the rules, counsel has been a member of the public defender's staff or has been appointed by the court to represent an indigent defendant.

These tendencies suggest a race- and class-based double standard in the application of the client perjury rules. In civil litigation and white-collar criminal prosecutions, the parties and their privately retained counsel are highly likely to be white and middle-class.⁷⁷ They share, to some degree, a common culture and experience. While most public defenders and court-appointed criminal defense attorneys also fit this profile, their clients are poor and disproportionately members of racial minorities.⁷⁸ The random survey of cases decided over a fifteen-year period tends to confirm the racially discriminatory nature of the criminal defense bar's response to

For some time now I have been curious and concerned about evidence offered by the Government, appearing again and again in criminal case records, showing that the defendant, at the lineup or other confrontation with the complaining witness, had, while in the presence and custody of the police, "spontaneously and voluntarily" apologized for his misdeed. The word "apologize" would not ordinarily be expected to be in the vocabularies of most of the poorly educated defendants. And even if it were, it seemed more than passing strange, to me at least, that this phenomenon of contrition should assert itself so soon after the offensive act.

I began a search to solve the mystery. My efforts were first rewarded by my discovery of the case [holding that an accused's spontaneous apology was admissible despite a delay in arraignment]. . . .

Since our rule in [that case], and, particularly in the more recent past, "spontaneous" apologies by defendants have been offered by the Government and received in evidence in criminal cases with unusual frequency—usually supported by testimony that the apologies were not suggested or inspired by the police. . . .

In view of the above, it appears to me that the time is ripe for some soul searching in the prosecutor's office before it offers any more "spontaneous" apologies in evidence.

Veney v. United States, 344 F.2d 542, 542-43 (D.C. Cir. 1965) (Wright, J., concurring). See also note 87 and accompanying text.

76. See note 80 and accompanying text.

77. Corporate parties, in turn, tend to be owned and managed by middle-class whites.

78. See, for example, Barbara Babcock, *Defending the Guilty*, 32 *Cleve. St. L. Rev.* 175, 180 (1990). See generally Charles E. Silberman, *Criminal Violence, Criminal Justice* 159-67 (Random House, 1977). For example, although only about one-quarter of the nation's population is composed of persons of color, approximately two-thirds of those serving time in state or federal prisons are members of minorities, and the overwhelming proportion are black. National Minority Advisory Council on Criminal Justice, *The Inequality of Justice* 240 (U.S. Dep't of Justice, 1980) (counting African Americans, Asian Americans, Native Americans, and Hispanics as minorities). According to researchers' calculations, approximately one in four black males between the ages of 20 and 29 are in jail or prison or on probation or parole, while the ratio for Hispanic males in their twenties is one in ten, and that for white males of the same age is one in sixteen. See, for example, Marc Mauer, *Young Black Men and the Criminal Justice System: A Growing National Problem* 3 (The Sentencing Project, 1990).

anticipated client perjury: although less than one-third of all arrestees are black,⁷⁹ nearly two-thirds of the defendants in the surveyed cases whose lawyers believed that they would lie on the witness stand and disclosed this suspicion to the court, sought to withdraw, or employed the narrative form are black.⁸⁰

79. FBI Uniform Crime Reports, Table 38 (1990) (UCR). In 1990, 29.4% of all arrestees were African Americans, 68.8% were "white" (the UCR include Hispanics in this category), 1.1% were Native Americans or Native Alaskans, and 0.7% were Asian Americans. *Id.* These figures have remained fairly constant over the fifteen-year period, 1978-1993, covered by the survey.

80. The exact figure is 63.6%, or 14 out of 22 cases (in one of the remaining cases, as indicated below, the defendant was Hispanic). The survey included all state and federal cases over the past fifteen years (1978-1993) that, according to LEXIS (as of September 17, 1993), contain the neutral search term "client w/2 perj! & 'ineffective assistance' or falsehood or narrat! and date aft. 1977," and in which criminal defense counsel suspected that her client would testify untruthfully and, as a result, disclosed her suspicion to the court, submitted a motion to withdraw as counsel, or utilized the narrative form of defense. The objective of the survey was to discover the relationship between two sets of variables: defense counsel's willingness to invoke these countermeasures and the race of her client, and counsel's willingness to invoke these countermeasures and counsel's status as privately retained, court-appointed, or public defender. Counsel's willingness to disclose, seek withdrawal, or employ the narrative form was evident from the final written opinion in each case (through her new counsel, the appellant-defendant usually claimed that the trial attorney had violated the client's right to effective assistance of counsel). If the race of the defendant and the status of trial counsel as privately retained or court-appointed or as a public defender was not revealed in the opinion, these data were gathered from personal research, including telephone inquiries of trial and appellate defense attorneys and prosecutors, clerks of court, and prison record-keepers, among others. Specific information on each contact is on file with the Author, who owes special thanks to Brent Appel, appellate counsel for the State of Iowa in *Nix v. Whiteside*, for his insights and constructive criticism when interviewed.

The combination of search terms and factual criteria yielded a total of 22 cases, too small a sample to be extremely reliable and valid statistically, but suggestive nonetheless. The random sample of cases was well-balanced regionally, with six cases from Northeastern states (two from Pennsylvania and the District of Columbia and one from Delaware and West Virginia), five from the South (two from Georgia and one from Mississippi, Florida, and Texas), five from the Midwest (one from Illinois, Iowa, Minnesota, Ohio, and Arkansas), and six from the West (two from California and Arizona and one from Washington and Oklahoma). Twenty of the 22 trial attorneys (90.9%) were members of the local public defender's staff or were directly appointed by the court.

The sample cases and the data compiled about each are contained in the following list: *Commonwealth v. Jermyn*, 533 Pa. 194, 620 A.2d 1128 (1993) (privately retained trial counsel; non-minority defendant); *State v. Layton*, 432 S.E.2d 740 (W. Va. 1993) (trial counsel appointed by court; non-minority defendant); *Stephenson v. State*, 206 Ga. App. 273, 424 S.E.2d 816 (1992) (trial counsel appointed by court or public defender; minority defendant); *People v. Bartee*, 208 Ill. App.3d 105, 566 N.E.2d 855 (1991) (trial counsel appointed by court; minority defendant); *Raglin v. State*, 1991 Ark. LEXIS 100 (Ark.) (public defender as trial counsel; minority defendant); *United States v. Scott*, 909 F.2d 488 (11th Cir. 1990) (public defender as trial counsel; minority defendant); *Witherspoon v. United States*, 557 A.2d 587 (D.C. App. 1989) (trial counsel appointed by court or public defender; minority defendant); *The Florida Bar v. Rubin*, 549 S.2d 1000 (Fla. 1989) (bar disciplinary hearing against defense attorney for violating court order to represent criminal client he felt would lie on the stand; non-minority defendant); *Shockley v. State*, 565 A.2d 1373 (Del. 1989) (public defender as trial counsel; non-minority defendant); *United States v. Jackson*, 857 F.2d 436 (8th Cir. 1988) (trial counsel appointed by court; minority defendant; this case is a companion case to the opinion (with the same citation) better known as *United States v. Long*); *People v. Guzman*, 45 Cal. 3d 915, 755 P.2d 917 (1988) (public defender as trial counsel; minority defendant (Hispanic)); *Ferguson v. State*, 507 S.2d 94 (Miss. 1987) (trial counsel appointed by court; minority defendant); *Washington v. Fleck*, 49 Wash. App. 584, 744 P.2d 628

For a variety of reasons, the discriminatory application of the client perjury rules is hardly surprising. Unlike the public defenders and court-appointed criminal defense lawyers whose wages are paid by the state, by challenging a client's truthfulness, civil litigators in firms retained by the client, solo practitioners employed on a contingency-fee basis, in-house counsel, and criminal defense attorneys representing white-collar defendants would act against their economic interest.⁸¹ They would, in effect, bite the hand that feeds them, and, when word of their deed spread, could find themselves virtually unemployable.⁸²

Counsel's belief that her client is untruthful, and therefore subject to the countermeasures prescribed by the client perjury

(1987) (privately retained trial counsel; non-minority defendant); *Nix v. Whiteside*, 475 U.S. 157 (1986) (trial counsel appointed by court or public defender; minority defendant); *United States v. Roberts*, 20 M.J. 689 (C.M.R. 1985) (trial counsel was Army JAG Corps officer; minority defendant was stationed and court-martialed at Fort Sill in Oklahoma); *State v. Lee*, 142 Ariz. 210, 689 P.2d 153 (1984) (trial counsel appointed by court or public defender; minority defendant); *Commonwealth v. Wolfe*, 301 Pa. Super. 187, 447 A.2d 305 (1982) (trial counsel appointed by court or public defender; non-minority defendant); *Ohio v. Sims*, No. 43749, slip op., 1982 WL 5272 (Ohio App.) (minority defendant); *Maddox v. State*, 613 S.W.2d 275 (Tex. Ct. App. 1981) (trial counsel appointed by court or public defender; non-minority defendant); *Butler v. United States*, 414 A.2d 844 (D.C. App. 1980); *Coleman v. State*, 621 P.2d 869 (Alaska 1980) (public defender as trial counsel; minority defendant); *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978) (public defender as trial counsel; minority defendant).

81. As Professor Derrick Bell warns, attempts to distinguish between economic discrimination that disproportionately affects racial minorities and racial discrimination are futile: "Since race and socio-economic status interact in such a complex of ways, the claim that poverty but not race is the operative factor is, in effect, not to say much of any significance when it is recognized that those who are poor are so often non-white. . . . The impact of the racial variable cannot be isolated so easily from the wealth variable." Derrick Bell, *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 Cal. L. Rev. 165, 183-84 (1973).

82. One appellant-defendant whose public defender sought to withdraw at trial after concluding that the defendant would testify falsely argued on appeal that the client perjury rules discriminated against indigent defendants who, "unlike paying clients, are less able to dismiss an attorney who . . . [believes the client will testify falsely] and to procure an attorney who, because of his ignorance, may advocate his client's case with undiluted vigor." *Coleman v. State*, 621 P.2d 869, 882 (Alaska 1980).

provisions of each state's code, conforms to the common white, middle-class stereotype of blacks,⁸³ especially poor, young, male blacks, as untrustworthy and dishonest.⁸⁴

The criminal justice system itself has a long and shameful history of presuming that persons of color will testify falsely. Prior to the Civil War, "negro testimony laws" resembling the following Illinois statute were commonplace: "No black or mulatto person or Indian shall be permitted to give evidence in favor or against any white person whatsoever."⁸⁵ Today, when a judge instructs jurors at the close of trial, she often issues an explicit warning about the credibility of the accused.⁸⁶ The implication to jurors from these one-sided instructions is that the predominantly poor, minority defendants

83. The nature of the trial attorney's work may exacerbate the tendency to stereotype. The current literature on jury selection, for example, reflects this tendency. As one author advises in his 1989 treatise on the subject:

- "Blacks tend to be . . . prejudiced against executives."
- "Black females tend to convict."
- "Mexican Americans tend to be passive."
- "Orientals . . . tend to go along with the majority."
- "Athletic persons often lack compassion."

Robert Wenke, *The Art of Selecting a Jury* 77-78, 80 (Charles C. Thomas, 2d ed. 1989). Trial attorneys even explain their stereotypical juror profiles through further stereotyping. Commenting on the conventional wisdom that "persons of Italian, Irish, Jewish, Latin American and Southern European extraction are more desirable as jurors [for a criminal defendant] than people of British, Scandinavian, or German extraction," F. Lee Bailey explains that "[t]he latter are presumably more law-abiding, conservative and strict, with more rigid standards of conduct." F. Lee Bailey and Henry Rothblatt, *Successful Techniques for Criminal Trials* 199 (Law. Co-op., 2d ed. 1985).

84. In his classic study of prejudice and stereotyping, *The Nature of Prejudice*, Gordon Allport cites a study in which "low character; immoral and dishonest" ranks as the fifth most common historical manner in which whites stereotype blacks. Gordon Allport, *The Nature of Prejudice* 197 (Addison-Wesley, 1979).

A member of the District of Columbia Court of Appeals, which is located in the major urban center with the highest proportion of black residents, recognized the existence of the stereotype as he speculated about the probable outcome of in camera hearings on defense attorneys' motions to withdraw at which the defendant would be permitted to challenge her lawyer's belief that she intended to lie on the witness stand: "My hunch is that, given . . . the likely credibility of most attorneys [compared to the credibility of their clients], the withdrawal motion will be decided primarily by reference to what the lawyer, not the client-defendant, has to say." *Witherspoon v. United States*, 557 A.2d 587, 593 (D.C. App. 1989) (Ferren, J., concurring).

85. Ill. Rev. Stat. § 16 (1845). Section 16 specified that "[e]very person who shall have one-fourth part or more of negro blood shall be deemed a mulatto; and every person who shall have one-half Indian blood shall be deemed an Indian." The genealogical formula for determining race varied slightly among states. For example, neighboring Indiana specified that no one "having one-eighth or more of negro blood, shall be permitted to testify as a witness in any cause in which any white person is a party in interest." Ind. Code § 1 (1853).

State courts acknowledged that, as a result of the ban, "the white man may now plunder the negro. . . . [H]e may abuse his person; he may take his life . . . and he must go acquitted, unless . . . [there] be some white man present." *Jordan v. Smith*, 14 Ohio (Griswold) 199, 202 (1846). Ultimately, the civil war amendments invalidated the testimonial restrictions on people of color.

86. Typically, the judge cautions the jury that "in weighing his testimony . . . you may consider the fact that the defendant has an interest in the outcome of this trial." Instruction 2.27, Criminal Jury Instructions, District of Columbia (3d ed. 1978).

appearing before them do not tell the truth, or at least that they are more likely to lie than are the prosecution witnesses about whom no warning is issued—including the police, who routinely perjure themselves.⁸⁷

Commentators have asserted that, under the client perjury rules, the only clients who are fearful of divulging information to counsel are those who intend to commit perjury, and the only information lost to counsel is the perjury itself. While this argument has superficial appeal, it overlooks the social reality of the attorney-client relationship. In addition to their alienation from the white, middle-class world of the criminal defense attorneys who represent them,⁸⁸ many defendants have been subjected previously to the criminal process, often having served time in a dehumanizing prison system, and each time having been represented by counsel. While some of their attorneys surely were hard-working, capable, and forthright, an appallingly large number likely were indifferent, unprepared, and incompetent.⁸⁹ Not surprisingly, these

87. Most observers seem to agree that government witnesses, such as police and their informants, armed with knowledge of the law and practiced in the art of testifying, regularly lie to gain convictions. See, for example, Paul Chevigny, *Police Power; Police Abuses in New York City* 141 (Pantheon, 1969) (observing that there is "no doubt that police lying is the most pervasive of all [police] abuses. In the [de facto] police canon of ethics, the lie is justified . . . as a vindication of police authority."); Melody Ridgley, *Creative Writing* 8 (1991) (unpublished manuscript on file with the Author) (finding, in a study of police practices by a former police officer, that over one-half of the police surveyed admitted having falsified information on arrest reports when necessary to substantiate the arrests); James S. Kunen, *How Can You Defend Those People?* 95 (Random House, 1983) (stating that "[o]nce apprised by the D.A. of the legal requirements for the admissibility of evidence, police are able to recall, with stunning consistency, that evidence seized by them was 'dropped' by the defendant, or was 'in plain view,' rather than found in the course of an illegal search"); Younger, 3 Crim. L. Bull. at 551-52 (cited in note 75) (observing that "policemen testify to their version of the circumstances of the search or of the interrogation, always reflecting perfect legality. . . . It then becomes apparent that policemen are committing perjury at least in some of [their cases], and perhaps in nearly all of them.").

88. As one writer notes, "[m]inority defendants criticize public defender attorneys because they are white, middle-class professionals who they feel have more in common culturally with the prosecutors (and judges) than they have with the majority of indigent defendants, who are minority, poor, and of a different social and economic class from that of the defense attorney." Coramae R. Mann, *Unequal Justice: A Question of Color* 180 (Indiana U., 1993) (citing National Minority Advisory Council on Criminal Justice, *The Inequality of Justice* at 213 (cited in note 78)). As one former public defender observed, "[Indigent criminal clients] do not know me from beans; they do not trust anyone who works in the court system; I am white and they are usually black; they are not paying me a dime and since when does that get you anything; even worse, they know that the people who are paying me are the same people, more or less, who pay the cops and the D.A.'s." Randy Bellows, *Notes of a Public Defender*, in Philip B. Heymann and Lance Liebman, *The Social Responsibilities of Lawyers* 88 (Foundation, 1988).

89. As one veteran criminal defender has observed, many criminal defense attorneys: simply do not care. They do not investigate. They do not file motions. They do not talk to their clients. They do not think through a defense, prepare an opening statement, subpoena witnesses, or do any of the other myriad tasks necessary to adequate representation. Sometimes on the day of trial, they cannot even recognize their clients.

defendants—whether guilty or not, and whether or not they intend to testify truthfully—distrust counsel, particularly court-appointed counsel.⁹⁰ In fact, in the eyes of many defendants, their attorney is the most despicable member of the cast of characters who have conspired to deprive them of their liberty; of all the figures in the courtroom, only defense counsel *pretends* to be on their side. By requiring counsel to denounce or abandon the seemingly perjurious defendant, the client perjury rules reinforce defendants' view of counsel as a mere appendage of the state and as a double-agent for the dominant culture.⁹¹ To these clients, the requests of counsel for

For a prosecutor, trying a case against one of these lawyers is like shooting fish in a barrel.

Bellows, *Notes of a Public Defender*, in Heymann and Liebman, *The Social Responsibilities of Lawyers* at 96.

90. See Bellows, *Notes of a Public Defender*, in Heymann and Liebman, *The Social Responsibilities of Lawyers* at 89 (cited in note 88); Jonathan Casper, *American Criminal Justice: The Defendant's Perspective* 105 (Prentice Hall, 1972) (describing a Connecticut study in which clients of privately retained counsel reported being satisfied with their attorney's performance five times more frequently than did clients of public defenders and court-appointed counsel).

91. As Professor Anthony Amsterdam observes:

It is not easy for a lawyer to convince a client to trust him or her when the client has never seen the lawyer before and particularly when the lawyer is of a different race or social background from the client's. As far as the client is concerned, the lawyer is "the law," along with the police and the judge; the client has no reason to believe that the lawyer is on *the client's* side. S/he will likely distrust the lawyer even more if the client is indigent and the lawyer is court-appointed, since, in common experience, things one gets for nothing are ordinarily worth nothing; and the only way to obtain services one can count on is to buy them.

Anthony G. Amsterdam, 1 *Trial Manual 5 for the Defense of Criminal Cases* 108 (ALI-ABA, 1988). See also Silberman, *Criminal Violence, Criminal Justice* at 414 (cited in note 78) (stating that "[t]he defendants with whom I spoke tended to see their [court-appointed] lawyers as representing the legal system to them, rather than representing them to the system. 'He's not my lawyer, he's the Legal Aid,' New York City defendants often respond when judges . . . go through the ritual of asking the defendant whether the individual standing alongside him is his attorney"); Casper, *American Criminal Justice: The Defendant's Perspective* at 36 (explaining that "[f]or the bulk of defendants—represented by Public Defenders—their attorney is at best [viewed as] a middleman and at worst an enemy agent. Not only is the process of criminal justice . . . an assembly line dedicated to turning over cases . . . , but the defendant's own attorney is thought often to be himself a production worker on the line. He is not 'their' representative, but in league with those who would determine the defendants' fates."); *id.* at 110 (quoting a convict who explains, "They got to be on the state's side in order that they can work for the state."). In a 1980 opinion, the Alaska Supreme Court reprinted a letter from a dissatisfied defendant to his public defender that read, in part, "If I were paying you out of my pocket for your services you would provide more [effective] actions as far as the case is concerned but, since your salary is paid by Stato taxpayers you can afford to be undependable which is a large part of injustice. I can understand now why such a large percentage of the men in Alaskan jails are there[:] they were represented by Public Defenders. . . . Poor services for poor people. . . ." *Coleman v. Alaska*, 621 P.2d 869, 881 (Alaska, 1980).

At least four other factors may contribute to the greater distrust of court-appointed attorneys, a term used here to encompass both public defenders and private counsel assigned on a case-by-case basis. First, defendants feel that, since court-appointed counsel is paid by the state and "gets his money either way [i.e., win or lose]," counsel has little incentive to fight vigorously in the defendant's interests. Casper, *American Criminal Justice: The Defendant's Perspective* at 110.

relevant facts seem no different than questions posed by police; they fear that their answers, even if truthful, might ultimately be used against them.⁹²

The client perjury rules pose a final danger to poor, minority defendants. To the extent that perception and communication are influenced by culture, language, and experience,⁹³ the vast chasm of

Second, "paying a lawyer . . . gives the defendant a sense of leverage over his attorney, a sense that he is in a position of some autonomy." *Id.* Third, while there is evidence that public defenders and privately retained counsel (but not necessarily court-appointed private counsel) obtain similar outcomes for their clients, public defenders appear to invest less effort in client relations. Finally, a perception exists among many defendants that public defenders are less capable attorneys than private counsel. When asked in court whether they are represented by counsel, defendants often respond, "No, I have a public defender." See *id.* at 101.

In reality, however, many public defender offices employ enthusiastic, capable young attorneys who, to the extent their oppressive caseloads and limited investigative resources permit, ably defend their clients. See, for example, Lisa J. McIntyre, *The Public Defender: The Practice of Law in the Shadows of Repute* (U. of Chicago, 1987). Indeed, a large portion of the private criminal defense bar has worked previously as public defenders.

92. "Whose side are you on, anyway?" is a familiar response to a public defender's request during a pre-trial interview that the defendant elaborate on her version of the facts in light of anticipated testimony by the police.

Although the system's interest in client trust has been subordinated to the largely unwarranted fears underlying the client perjury rules, courts and the organized bar continue to speak in reverent terms of the need for client trust. See, for example, *Fisher v. United States*, 425 U.S. 391, 404 (1976) (stating, "[I]f the client knows that damaging information could more readily be obtained from the attorney following disclosure than from himself in the absence of disclosure, the client would be reluctant to confide in his lawyer and it would be difficult to obtain fully informed legal advice."); Model Code of Professional Responsibility EC 4-1 (ABA, 1969) (stating, "Both the fiduciary relationship existing between lawyer and client and the proper functioning of the legal system require the preservation by the lawyer of [client] confidences and secrets . . . A client must feel free to discuss whatever he wishes with his lawyer and a lawyer must be equally free to obtain information beyond that volunteered by his client. A lawyer should be fully informed of all the facts of the matter he is handling in order for his client to obtain the full advantage of our legal system. It is for the lawyer in the exercise of his independent professional judgment to separate the relevant and important from the irrelevant and unimportant."); Model Rules of Professional Conduct Rule 1.6 cmts. 4 & 9 (ABA, 1983) (stating, "A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter. . . . [T]o the extent a lawyer is required or permitted to disclose a client's purposes, the client will be inhibited from revealing facts which would enable the lawyer to counsel against a wrongful course of action. The public is better protected if full and open communication by the client is encouraged than if it is inhibited."). See also *Baird v. Koerner*, 279 F.2d 623, 629-30 (9th Cir. 1960); *Ellis-Foster Co. v. Union Carbide and Carbon Corp.*, 159 F. Supp. 917, 919 (D.N.J. 1958). For a brief description of the attorney-client privilege and duty to maintain client "confidences" and "secrets," see notes 25-26 and accompanying text.

93. Professor Steven Winter explains,

"Truth" is a function of an understanding that is dependent on the experientially grounded, but imaginatively elaborated cognitive process. . . . [W]e experience central, verifiable truths that are a product of the relative stability of the ways in which our perceptual/conceptual systems "fit" our direct experience of the world at the "basic level." But there are many more non-central truths that are understood indirectly, and, therefore, display a high degree of relativity across cultures.

cultural, racial, and class-based differences and stereotypes across which white, middle-class defense attorneys view indigent, minority clients⁹⁴ may produce miscommunications between counsel and the accused or discordant views of the events surrounding an alleged crime that, in turn, lead counsel to speciously conclude that the defendant is lying.⁹⁵ An example from experience illustrates the barriers to mutual understanding in cross-cultural legal

Steven Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105, 1158-59 (1989). See also George Lakoff and Mark Johnson, *Metaphors We Live By* 231 (U. of Chicago, 1980).

94. As Professor Barbara Babcock succinctly states, "[t]he client is usually not of the [criminal defense] lawyer's social class, often not of the lawyer's race, and even the English-speaking defendant does not talk the same language." Babcock, 32 Cleve. St. L. Rev. at 181 (cited in note 78).

The Dove Counter Balance Test, a 30-question, knowledge-based test with a reverse cultural bias, illustrates some of the obstacles to cross-cultural communication. The following are typical questions from the test:

5. If you throw the dice and "7" is showing on top, what is facing down?
 - a) seven
 - b) snake eyes
 - c) boxcars
 - d) little Joes
 - e) eleven
23. And Jesus said, "Walk together, children, . . ."
 - a) "don't you get weary. There's a great camp meeting."
 - b) "for we shall overcome."
 - c) "for the family that walks together talks together."
 - d) "by your patience you will win your souls (Luke 21:9)."
 - e) "find the things that are above, not the things that are on Earth (Col. 3:3)."

Judy Katz, *White Awareness: Handbook for Anti-Racism Training* 126, 130 (U. of Oklahoma, 1978). The answer to question 5 is A and the answer to question 23 is C. Id. at 132. See generally Joey L. Dillard, *Black English: Its History and Usage in the United States* (Random House, 1972).

95. As a prominent black criminal defense attorney bluntly observed, "there is not a white man living who can understand a black client as a black man can." James D. Montgomery, *The Black Lawyer and the Human and Civil Rights Struggle*, 22 Harv. L.S. Bull. 21, 22 (Feb. 1971).

Black New York Supreme Court Justice Bruce Wright makes a similar point with respect to judges and criminal defendants:

Most of the judges of America are male, white, middle-class, aloof and conservative. Brought before them is a parade of dark-skinned defendants, all alien to the concept the judges have of the way life ought to be.

. . . Seldom do [judges] have any personal familiarity with the reality . . . [of] the lives of the poor. Such judges gaze upon the captives of the police across a vast expanse of social distance.

. . .
 What do they study in college or law school that might tend to qualify them to preside over . . . strangers to their kinds of neighborhoods, of aliens to their way of life, of . . . outsiders to their clubs, their churches, their folkways? What magic abolishes color in their eyes and gives them instant objectivity and a license to analyze human foibles entirely divorced from the historical truth of racism? How, indeed, does one annul one's heritage and that of one's forefathers?

Bruce Wright, *Black Robes, White Justice* 12-13 (Carol Publishing Group, 1979). With a twelve- (or nine- or six-) person jury, on the other hand, the chances are great that one or more of the jurors shares the cultural background of the defendant and can at least interpret to the balance of the jurors the culturally based differences between their perception and that of the accused.

representation. On occasion, defendants who have little chance of acquittal, face incarceration if convicted, and privately concede their guilt occasionally balk at a plea bargain calling for probation. Counsel will often assume that the defendant is simply denying his plight or has received poor advice from a jailhouse lawyer, and will usually redouble the effort to rescue the defendant from the disastrous consequences of her own misjudgment. To some defendants, however, forcing the court to provide an expensive, time-consuming jury trial seems to provide a rare sense of control over a system that otherwise brutally and completely dominates them. In such cases, the rejection of counsel's advice stems from counsel's own failure to understand the values and experience of the client, rather than, as counsel believes, from the accused's failure to understand or confront her predicament.⁹⁶

Even the Rehnquist Court could, in theory, hold that the client perjury rules violate current equal protection doctrine. In certain cases in which state actors have been granted broad discretionary powers, the Supreme Court has inferred the racially discriminatory intent necessary to violate the Fourteenth Amendment⁹⁷ from statistical evidence of a law's discriminatory impact.⁹⁸ In addition,

96. According to one recent study, communication between black defendants and their white, middle-class attorneys often "becomes difficult, problematic, and even hopeless," exacerbating the tendency of black defendants "not to trust a white lawyer." John Wildeman and Jorge Sanchez, *Struggle at the Bar: African Americans in the Profession of Law* 6 (1990) (unpublished manuscript).

97. The Fourteenth Amendment provides, in relevant part, "No State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. XIV, § 1. For a discussion of the strict scrutiny standard applicable to racial classifications, see generally Laurence Tribe, *American Constitutional Law* § 16-6 at 1451-54 (Foundation, 2d ed. 1988).

98. See, for example, *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *Washington v. Davis*, 426 U.S. 229, 239-45 (1976). See also Dorothy Roberts, *Punishing Drug Addicts Who Have Babies: Women of Color, Equality, and the Right of Privacy*, 104 Harv. L. Rev. 1419, 1452 (1991); Randall Kennedy, *McCleskey v. Kemp: Race, Capital Punishment, and the Supreme Court*, 101 Harv. L. Rev. 1388, 1425-27 (1988). Several cases have involved claims of racial discrimination in jury selection. See, for example, *Castaneda v. Partida*, 430 U.S. 482, 500-501 (1977) (finding racially discriminatory intent based on statistical evidence of the disproportionately low number of Mexican-Americans summoned for jury duty); *Turner v. Fouche*, 396 U.S. 346, 360-61 (1970). See generally Robert Nelson, Noto, *To Infer or Not to Infer a Discriminatory Purpose: Rethinking Equal Protection Doctrine*, 61 N.Y.U. L. Rev. 334, 351-62 (1986) (discussing the inference of discriminatory intent from evidence of discriminatory impact and arguing that the inference should be permitted in challenges to the death penalty). See also Roberts, 104 Harv. L. Rev. at 1452-56 (arguing that, in an equal protection challenge to criminal statutes punishing mothers of babies born addicted to crack cocaine, racially discriminatory intent should be inferable from evidence that a disproportionately high number of black mothers have been prosecuted under the statute).

A number of commentators favor an alternative approach to the requirement of racially discriminatory intent in equal protection cases. See, for example, Tribe, *American Constitutional Law* § 16-21 at 1514-21 (cited in note 97); Ruth Colker, *Anti-Subordination Above All: Sex, Race, and Equal Protection*, 61 N.Y.U. L. Rev. 1003, 1005-13 (1986). Professor Dorothy Roberts refers

criminal defense counsel who acts pursuant to the client perjury rules contained in state codes of attorney conduct should, as discussed in Part II.B.2.b, be deemed to have acted under color of state law.⁹⁹

2. Undermining the Fairness of Trial

The client perjury rules threaten a number of the Fifth and Sixth Amendment rights fundamental to a fair trial (and not considered in *Nix v. Whiteside*), and ultimately undermine the adversarial mode of adjudication mandated by the Constitution in our criminal proceedings.

a. Ineffective Representation: Defense Counsel's Duty and Inability to Impartially and Accurately Assess the Veracity of the Accused

Three factors combine to create a de facto duty on the part of counsel to assess the veracity of the accused's testimony: defense counsel's fear of professional sanctions¹⁰⁰ for failing to enforce the

to "two visions of equality": one vision is based on an "antidiscrimination principle" and the other on an "antisubordination principle." Roberts, 104 Harv. L. Rev. at 1451. As she explains:

[T]he function of the equal protection clause [under the antidiscrimination view] is to outlaw specific acts committed by individual government officials that discriminate against individual Black complainants because of their race. Thus, this approach judges the legitimacy of government action from the perpetrator's perspective.

...

Rather than requiring victims to prove distinct instances of discriminating behavior in the administrative process, the antisubordination approach considers the concrete effects of government policy on the substantive condition of the disadvantaged. This perspective . . . views social patterns and institutions that perpetuate the inferior status of Blacks as the primary threats to equality. . . . Under this conception of equality, the function of the equal protection clause is to dismantle racial hierarchy by eliminating state action or inaction that effectively preserves Black subordination.

Id. at 1451, 1453-54 (footnotes omitted). According to Professor Roberts, there are two principal problems with the antidiscrimination approach: the difficulty in identifying individuals who acted with discriminatory intent and, more importantly, the underlying presumption that racism consists merely of "disconnected acts by individuals who operate outside of the social fabric." Id. at 1454-55 (footnote omitted).

Others have argued that the antisubordination approach more closely reflects the intent of drafters of the Thirteenth and Fourteenth Amendments to eradicate, as the Supreme Court observed of the Thirteenth Amendment in the Civil Rights Cases, "all badges and incidents of slavery." *Civil Rights Cases*, 109 U.S. 3, 20 (1883). See Tribe, *American Constitutional Law* § 16-21 at 1516 (cited in note 97); Alan Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 Minn. L. Rev. 1049, 1067 (1978).

99. See note 190 and accompanying text.

100. See, for example, *Board of Overseers of the Bar v. Dineen*, 481 A.2d 499, 503-04 (Me. 1984) (concluding "that the ultimate sanction of disbarment is warranted. . . . In the case at bar, attorney Dineen deliberately elicited false testimony from his client on the witness stand."). See also ABA Standards for Imposing Lawyer Sanctions (ABA, 1986).

ethical ban on presenting testimony that counsel believes is false,¹⁰¹ the Supreme Court's dictum in *Nix* that violating the ban may also subject counsel to prosecution for suborning perjury,¹⁰² and counsel's reasonable concern that she could be subject to these sanctions even if it simply *appeared to others* that she had elicited client perjury.¹⁰³ However, in light of the model codes' remedies of withdrawal and disclosure, the difficulties encountered by criminal defense attorneys in impartially and accurately judging their clients' truthfulness threaten an accused's right to effective representation.¹⁰⁴ Moreover, since the client perjury rules effectively extend to counsel partial responsibility for factfinding, they also encroach upon the accused's right to an impartial jury.¹⁰⁵

The jury system—through which we entrust the search for truth and fairness to ordinary citizens who are duty-bound to presuppose the defendant's innocence and are untainted by unreliable or inflammatory evidence and unencumbered by conflicting interests—is the centrepiece of Anglo-American justice. Although the rules of evidence and criminal procedure seek to ensure the impartial and informed judgment of jurors as they evaluate the credibility of defense and prosecution witnesses, no restrictions apply to the information gathered by defense counsel in assessing the veracity of the accused's testimony. Counsel's assessment is further suspect because of her conflicting interests in avoiding criminal and professional sanctions while still providing zealous representation, the tendency of criminal defense attorneys to presume the guilt of their clients, counsel's often inordinate desire to please the court, exposure to a barrage of unreliable information during the investigation of the case, and the difficulty of accurately predicting a client's testimony at

101. Or, under the Model Code of Professional Responsibility, that counsel *should have known* was false. See note 28 and accompanying text.

102. *Nix v. Whiteside*, 475 U.S. 157, 173 (1986) (warning that "[a] lawyer who would . . . cooperate [with client perjury] would be at risk of prosecution for suborning perjury, and disciplinary proceedings, including suspension or disbarment"). While the Court's warning is sufficient to create the fear of liability for subornation (and the resultant hazards discussed in this subpart), the *Nix* majority inaccurately presumed that the offense of subornation typically would apply to counsel who knowingly called an untruthful defendant. See notes 130-33 and accompanying text (describing the nature of the Court's misconception about the offense).

For examples of successful prosecutions for suborning client perjury, see *People v. Schultheis*, 638 P.2d 8, 11 (Colo. 1981); *Herbert v. United States*, 340 A.2d 802, 804 (D.C. App. 1975).

103. In fact, as noted, the Model Code of Professional Responsibility prohibits counsel from presenting client perjury that counsel merely *should have known* was untruthful, even if she sincerely believed that it was truthful. See note 101.

104. U.S. Const., Amend. VI (providing, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

105. *Id.* (providing, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury. . .").

trial. As a result, defense counsel is considerably less likely than a jury to act impartially and to avoid prejudgments based on unreliable information.

i. Defense Counsel's Conflict of Interest

The professional judgment of a lawyer should be exercised . . . solely for the benefit of his client and free of compromising influences and loyalties.

—ABA Model Code of Professional Responsibility¹⁰⁶

The professional and criminal sanctions facing counsel who violates the client perjury rules may well deter more than simply the elicitation of *false* testimony. Defense counsel may consciously or unconsciously hesitate to call defendants whose truthful testimony appears, or could be made to appear, false. A skillful cross-examiner, for example, often can make a truthful defendant sound as if she were lying by exploiting normal defects in recall, anxiety about testifying, inarticulateness, or prior (false) inconsistent statements. The perjurious testimony of the state's witnesses, convincingly presented, can also create this illusion. Alternatively, counsel might be reluctant to call a defendant simply because the credibility of her story is uncertain, although on occasion, the truthfulness of a defendant's testimony emerges only after the trial has further unfolded.¹⁰⁷ At least one practitioners' journal has advised trial counsel who is unsure of the veracity of the accused to "err on the side of avoiding the

106. Model Code of Professional Responsibility EC 5-1 (ABA, 1969).

107. As Professor Lon Fuller warns:

What generally occurs in practice is that at some early point [in a trial] a familiar pattern will seem to emerge from the evidence; an accustomed label is waiting for the case and, without awaiting further proofs, this label is promptly assigned to it. It is a mistake to suppose that this premature cataloguing must necessarily result from impatience, prejudice or mental sloth. Often it proceeds from a very understandable desire to bring the hearing into some order and coherence, for without some tentative theory of the case there is no standard of relevance by which testimony may be measured. But what starts as preliminary diagnosis designed to direct the inquiry tends, quickly and imperceptibly, to become a fixed conclusion, as all that confirms the diagnosis makes a strong imprint on the mind, while all that runs counter to it is received with diverted attention.

An adversary presentation seems the only effective means for combating this natural human tendency to judge too swiftly in terms of the familiar that which is not yet fully known. The arguments of counsel hold the case, as it were, in suspension between two opposing interpretations of it. While the proper classification of the case is thus kept unresolved, there is time to explore all of its peculiarities and nuances.

Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1160 (1958) (co-chaired by Professor Lon Fuller).

appearance of ethical impropriety.”¹⁰⁸ Finally, to avoid the possibility of learning that a client’s proposed testimony is perjurious, counsel might hesitate to interview the defendant thoroughly or to investigate the case.¹⁰⁹

The success of the adversarial search for truth, however, requires that opposing counsel ferret out as many relevant facts as possible for consideration by the factfinder. The fear of personal liability can compromise the vigor with which defense counsel approaches this task, thus undermining the defense of the accused and increasing the possibility that innocent defendants will be convicted. The Supreme Court has recognized that an analogous fear would inhibit prosecutors from presenting all relevant evidence, enhancing the risk that a guilty defendant will go unpunished. In *Imbler v. Pachtman*,¹¹⁰ a unanimous Court extended absolute immunity to prosecutors from personal liability for damages under Section 1983 of the Civil Rights Act¹¹¹ for knowingly introducing perjurious testimony. Writing for the Court, Justice Powell stated:

Attaining the system’s goal of accurately determining guilt or innocence requires that both the prosecution and the defense have wide discretion in the conduct of the trial and the presentation of evidence. The veracity of witnesses in criminal cases frequently is subject to doubt before and after they testify. . . . If prosecutors were hampered in exercising their judgment as to the use of such witnesses by concern about resulting personal liability, the triers of fact in criminal cases often would be denied relevant evidence.¹¹²

108. Alan D. Chute, *Client Perjury: Practical Suggestions for Defense Counsel*, Army Law. 52, 53 (Mar. 1986).

109. While the client perjury proscription in the Model Code applies to counsel who “should have known” of her client’s falsehoods, the criminal codes and codes of ethics in most jurisdictions do not appear to subject a criminal defense attorney who remains willfully blind to the perjurious nature of her client’s testimony to criminal or professional sanctions. Model Code of Professional Responsibility EC 7-26 (ABA, 1969).

110. 424 U.S. 409 (1976).

111. 42 U.S.C. § 1983. The statute states, “Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.” *Id.*

112. *Imbler*, 424 U.S. at 426 (footnote omitted). In a concurring opinion, Justice White agreed: “[P]ermitting suits for knowing use of perjured testimony will be detrimental to the [truth-seeing] process—prosecutors may withhold questionable but valuable testimony from the court.” *Id.* at 447 (White, J., concurring).

Prosecutors who knowingly introduce false testimony remain, as do defense counsel, subject to professional discipline and to criminal sanctions for suborning perjury (and, in addition, to sanction for malicious prosecution). Nonetheless, the apparent discrepancy in imposing an ethical duty on the prosecutor to refrain from knowingly presenting false testimony while, at the same time, imposing no such duty on defense counsel can be justified on two grounds. First, the

To ensure that the trier of fact can consider the relevant evidence to which the accused might testify, and to level the playing field on which the prosecutor and defense attorney contest the charges,¹¹³ defense counsel likewise should be freed of the inhibiting effects of criminal and professional sanctions.

Defense counsel's conflict of interest between avoiding the sanctions warned of in *Nix* and fulfilling her duty of zealous advocacy is exacerbated by the various state codes' murky, overbroad definition of prohibited testimony and by the *Nix* Court's inaccurate conception of the offense of suborning perjury. In fact, the client *perjury* debate is poorly named. Counsel is prohibited at various points in both the ABA model codes and the Model Penal Code from knowingly presenting four types of testimony: that which is perjurious,¹¹⁴ fraudulent,¹¹⁵ false,¹¹⁶ or constitutes a criminal act.¹¹⁷ These four categories, however, encompass many entirely innocent and innocuous statements, and require counsel to make innumerable and instantaneous judgments about matters such as the defendant's degree of certainty about the accuracy of her own assertions that are inherently complex and indefinite. The uncertainty inherent in such a

prosecutor is charged with the unique duty to seek justice, not merely gain convictions. Second, as John Adams recognized, it is a universally accepted tenet of American jurisprudence that it is "more beneficial that many guilty persons should escape unpunished than one innocent person should suffer." 1 P. Smith, *John Adams* 124 (1962). In fact, in *Imbler*, the defendant had been convicted of murder and sentenced to death on the basis of the perjured testimony introduced by the state. *Imbler*, 424 U.S. at 426. See note 313 for a more elaborate comparison of the duties of defense counsel and prosecutor.

113. See generally Jay Sterling Silver, *Equality of Arms and the Adversarial Process: A New Constitutional Right*, 1990 Wis. L. Rev. 1007.

114. Model Rules of Professional Conduct Rule 3.3 cmt. (ABA, 1983). The approximate equivalent of perjury is proscribed in Rule 3.3(a)(4) and in Model Code of Professional Responsibility DR 7-102(A)(4) & EC 7-26 (ABA, 1969).

115. Model Rules of Professional Conduct Rule 1.2(d). Rule 3.3(a)(2) proscribes the presentation of a material, fraudulent act. See also Model Code of Professional Responsibility DR 7-102 (B)(1), EC 7-26, & EC 8-5. "Deceit" and "deceptive conduct," both of which are the equivalent of fraudulent testimony as defined in the Model Rules of Professional Conduct, are proscribed by Model Code of Professional Responsibility DR 1-102(A)(4) & EC 8-5, respectively.

116. Model Rules of Professional Conduct Rule 3.3(a)(4) & Rule 3.3 cmt.; Model Code of Professional Responsibility DR 7-102(A)(4) & EC 7-26.

117. Model Rules of Professional Conduct Rule 1.2(d). Rule 3.3(a)(2) proscribes the presentation of a material criminal act. See also Model Code of Professional Responsibility EC 7-5 & EC 8-5.

forced evaluation places counsel at personal risk and saps her zeal for introducing defense testimony.¹¹⁸

The Model Penal Code, for example, defines perjury as a material false statement made under oath or affirmation in an official proceeding by a witness who either believes that the statement is false or is uncertain of its truth.¹¹⁹ Thus, in addition to assessing the truthfulness and materiality¹²⁰ of a defendant's testimony, counsel

118. The knowledge required to impose liability for the presentation of each type of prohibited testimony is compiled in the following Table:

Beliefs Held by Counsel That Trigger the Rules Against Presenting Testimony of the Accused

	Perjury/ Model Penal Code	False Swearing/ Model Penal Code	Fraud	False Statements
Counsel Believes that Accused's Statement Is Material to Case	√			
Counsel Believes that Statement Is Factually Inaccurate	√	√		√
Counsel Believes that Accused Intends to Deceive			√	
Counsel Believes that Accused Is Either Aware that Statement Is False or Does Not Know It Is True	√			

119. Model Penal Code § 241.1(1) (ALI, 1962) (stating, in part, "A person is guilty of perjury, a felony of the third degree, if in any official proceeding he makes a false statement under oath or equivalent affirmation, or swears or affirms the truth of a statement previously made, when the statement is material and he does not believe it to be true."). See generally id. § 241.1 and commentary.

Under the common law and the Model Penal Code, the mens rea necessary for perjury is not the belief that one's statement is false, but rather the uncertainty that the statement is true. The offense was aimed at punishing those who violated the witness's oath to tell the truth to the best of their ability, not merely those who intentionally deceived the court. Rollin Perkins and Ronald Boyco, *Criminal Law* 510-13, 516-17 (Foundation, 3d ed. 1982). See also Model Penal Code § 241.1, Introductory Note (stating, "The prescribed culpability toward the falsity is that the actor not hold an affirmative belief in the truth of the statements made, i.e., it is sufficient if the actor believes the statement false or if he makes the statement without addressing in his mind its truth or falsity."); Charles Torcia, ed., 4 *Wharton's Criminal Law* § 617 at 342 (Law. Co-op., 14th ed. 1981) (noting that "[a] witness testifies falsely when he swears to a particular fact, without knowing at the time whether it is true or false"). The Model Penal Code does not require an affirmative intent to mislead the court. Model Penal Code § 241.1 cmt. 3.

120. Model Penal Code § 241.1(2) (defining falsification as material "if it could have affected the course or outcome of the proceeding"). See also Torcia, ed., 4 *Wharton's Criminal Law* § 619 at 347 (stating that "[t]he most common test of materiality is whether the false testimony can influence the determination of a fact in issue and hence influence the outcome of the proceeding"). But compare F.R.E. 401, Advisory Committee Note.

must draw an ultra-fine distinction about the defendant's state of mind with respect to each material falsehood by divining whether, on one hand, the accused either understands that the statement is inaccurate or is uncertain that it is true or, on the other hand, whether the defendant believes the statement is true, even if that belief is reckless or unreasonable.¹²¹ In jurisdictions that have codified the common-law offense of perjury,¹²² even if the statements of a witness who testified with indifference to the truth coincidentally turn out to be correct, the witness is deemed to have violated the oath to tell only what she believed to be true.¹²³ In these jurisdictions, counsel must attempt to discern whether the accused is guessing about or indifferent to the accuracy of each material assertion presented under oath, even if the statements appear to be true.

Under the Model Penal Code and a number of pre-existing statutes, the crime of *false swearing* is a lesser included offense in a charge of perjury, excluding the requirement of materiality.¹²⁴

121. A witness's reckless or unreasonable belief in the truth of her testimony does not satisfy the mental element required for the offense of perjury. Model Penal Code § 241.1 cmt. 3 (establishing that "the culpability standard to which the defendant will be held with respect to the truth or falsity of what was said [is] . . . a subjective standard requiring more than recklessness"); William Clark and William Marshall, *A Treatise on the Law of Crimes* § 14.03 at 1041-42 (Callaghan, 7th ed. 1967) (noting that "[a] witness who states what he believes to be true cannot be guilty of [perjury], however negligent or careless he may be in his belief").

122. Common-law perjury consists of a witness's material statement "made without sincere belief in its truthfulness" while under oath in a judicial proceeding. Perkins and Boyce, *Criminal Law* at 511 (cited in note 119). See generally *id.* at 510-26.

While perjury under the Model Penal Code can be committed in any official proceeding—for example, legislative or administrative—in which the witness has taken an oath or affirmation to tell the truth, perjury at common law could be committed only within a judicial proceeding. Torcia, ed., 4 *Wharton's Criminal Law* § 616 at 340 (cited in note 119); Model Penal Code § 241.1(1). For a brief history of the common-law crime of perjury, see generally Michael Gordon, *The Invention of a Common Law Crime: Perjury and the Elizabethan Courts*, 24 *Am. J. Leg. Hist.* 145 (1980).

123. Torcia, ed., 4 *Wharton's Criminal Law* § 604 at 327-28 (cited in note 119) (stating that "[a] person may be guilty of perjury when he swears to a particular fact, without knowing at the time whether it is true or false . . . even though the statement is in fact true"); Clark and Marshall, *A Treatise on the Law of Crimes* § 14.03 at 1041 (cited in note 121) (noting that "[o]ne . . . who does not know whether his testimony is true or false, may be guilty of perjury, though he may in fact speak the truth"); Thomas Coke, 3 *Co.Inst.* *166 (stating that "falsehood in knowledge or minde . . . may be punished though the words be true"). Thus, a "lucky" guess will not relieve a person of liability for perjury.

124. Model Penal Code § 241.2 cmt. 2 (explaining that "the element of materiality was regarded as appropriate for the felony of perjury. At the same time, however, there was no intent to immunize from criminality false but non-material statements given under oath in official proceedings. The formality of the proceeding and the defendant's willingness to lie in such a context are sufficient indicators of the evil at which the offense of perjury is aimed to justify criminal treatment even when the statement is not material. . . . This result is not uncommon under recent enactments and proposals.").

False swearing at common law could occur within any official proceeding in which the witness took an oath or affirmation to tell the truth. Perkins and Boyce, *Criminal Law* at 511 (cited in note 119). Under the common law, some jurisdictions required that the statement be material,

Therefore, despite the fact that immaterial inaccuracies are commonplace in most adjudications and, by definition, pose no risk of producing an unjust verdict, counsel must attempt to discern the thought process underlying each proposed assertion of her witness, however trivial or irrelevant the assertion.¹²⁵ In addition, counsel must search a client's thoughts for yet another type of intent. *Fraudulent testimony*, according to the Model Rules, requires an intent to "deceive."¹²⁶

Finally, the prohibition against knowingly presenting *false statements*, which contains no state-of-mind requirement on the part of the original speaker and no requirement that a false statement be material, is absurdly broad. As with the other types of proscribed testimony,¹²⁷ the prohibition against introducing false statements theoretically bars counsel from knowingly introducing a variety of innocent and innocuous statements, including euphemisms, generalizations, social niceties,¹²⁸ and jokes.¹²⁹

while others rejected the requirement. Torcia, ed., 4 *Wharton's Criminal Law* § 630 at 359 (cited in note 119).

125. As one trial veteran has noted, "[F]alse testimony . . . might have nothing to do with the fundamental issue of guilt versus innocence. For example, a client may continually maintain innocence, but may want to falsely explain away the significance of some evidence in the case." Chute, *Army Law*, at 53 (cited in note 108). As an illustration, an accused might lie about the name of a person with whom she had been drinking earlier in the evening of a crime, although that person would otherwise be a favorable witness, in order to avoid revealing that the accused was having an affair. See, for example, L.A. County Bar Ethics Opinion, Op. 305 (1968) (concerning a criminal case in which the defendant's counsel believed "the truth of the defendant's main assertion" that he was not the driver of a hit-and-run vehicle, but also felt that "the defendant had 'perjured' himself on other points" for "the purpose of protecting [a young family member]").

126. Model Rules of Professional Conduct Terminology (ABA, 1983) (defining "fraud" or "fraudulent" as "conduct having a purpose to deceive and not merely negligent misrepresentation or failure to apprise another of relevant information").

127. Surprisingly, none of the four types of prohibited testimony contain each of the three most important elements of a "lie" as defined by linguistic theorists: "belief of falsity," "intended deception," and "factual falsity." Linda Coleman and Paul Kay, *Prototype Semantics: The English Word Lie*, 57 *Language* 26, 43 (1981). In their linguistic study of the word "lie," Professors Coleman and Kay report that "[a] consistent pattern was found: falsity of belief is the most important element of the prototype of *lie*, intended deception is the next most important element, and factual falsity is the [third most important]." *Id.* (emphasis in original). Moreover, even statements that exhibit these elements often defy classification. For example, one intuitively understands that it is inappropriate to characterize history's best known illustration of judicial wisdom, Solomon's threat to divide the infant claimed by two women, as a "lie." 1 Kings 3:16-28.

128. "Take for example the many untruths which the conventional courtesies of Society prescribe. Some of these are so purely a matter of phraseology that they deceive no one. Others chiefly serve the purpose of courteous concealment, as when they enable us to refuse a request, or to decline an invitation or a visit without disclosing whether disinclination or inability is the cause." William E. H. Lecky, *The Map of Life: Conduct and Character* 85-86 (Longmans, Green, 1900).

129. Professor Steven Winter, in considering the nature of a "lie," has observed that "[a] lie is not simply a false statement. . . . Some false statements are exaggerations or jokes; others are

In placing defense counsel on notice that violating the client perjury rules could result in criminal liability for suborning perjury in addition to professional sanctions for violating the applicable code of ethics, the Supreme Court in *Nix* was laboring under a misconception about the offense of subornation. At common law, a suborner must have *induced* a witness to commit perjury.¹³⁰ Unless counsel helped fabricate the testimony or persuaded the witness to present it, an attorney who merely believes that the testimony is perjurious and who may well have urged the witness to testify truthfully cannot reasonably be characterized as having induced perjury. In fact, the Model Penal Code does not contain the offense of subornation. The commentary explains that accomplice liability, which requires the successful *solicitation* of another to commit an offense, produces the same result as the common-law crime of subornation.¹³¹ Solicitation, in turn, requires that counsel "commands, encourages or requests" a witness to commit perjury.¹³²

In the context of client perjury, proving the mental element of subornation is an enormously complicated task. The offense entails a greater variety of knowledge requirements than most other crimes: counsel must subjectively *and* reasonably believe that the accused's testimony is untrue, that the accused is aware of its untruthfulness, and that the testimony relates to the issue of guilt or innocence or might reasonably bear on the outcome of the trial.¹³³

Ultimately, counsel's de facto obligation under the client perjury rules to peer into the defendant's mind in order to avoid introducing any statement that the defendant does not subjectively believe to be true will cause counsel to become tentative in presenting the accused's side of the case, effectively chilling the right to testify and unduly limiting the pool of information available to the factfinder.

great literature (fiction). Moreover, we distinguish between a prototypical *lie*, on the one hand, and social lies, fibs, oversimplifications, tall tales, fantasies, and mistakes, on the other." Steven L. Winter, *Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law*, 137 U. Pa. L. Rev. 1105, 1151-52 (1989) (emphasis in original). For an expanded discussion of this point, see generally *id.* at 1150-56.

130. Perkins and Boyce, *Criminal Law* at 525 (cited in note 119); Torcia, ed., 4 *Wharton's Criminal Law* § 607 at 328-29 (cited in note 119); Clark and Marshall, *A Treatise on the Law of Crimes* § 14.03 at 1050 (cited in note 121).

131. Model Penal Code § 241.1 cmt. 11 (ALI, 1962). The commentary further explains that, under the Code, the unsuccessful solicitation of perjury would constitute solicitation. *Id.*

132. Model Penal Code § 502.1.

133. That is, the false statement is *material*.

ii. Defense Counsel's Desire to Please the Court

Once a criminal defense lawyer begins to worry excessively about his or her reputation for moderation . . . the temptation to sacrifice individual clients—particularly poor or despised ones—can become overwhelming.

—Professor Alan Dershowitz¹³⁴

Numerous incentives exist for a criminal defense attorney to curry favor with a trial judge before whom she regularly appears, thereby representing, in effect, an additional conflict of interest for counsel with respect to her duty to effectively assist the accused. The defense lawyer who rejects the role of counsel as *champion of the accused* in the classic tradition of Lord Brougham¹³⁵ and instead conveys to the court an image of a nonpartisan “team player”¹³⁶ may be accorded favorable treatment with respect to appearance dates, postponements, extensions of filing deadlines, and so forth. In addition, a public defender may benefit professionally from favorable comments by or the formal recommendation of a judge who is impressed with her *temperate* advocacy. Further, in jurisdictions in which trial judges appoint outside counsel when the public defender’s

134. Dershowitz, *The Best Defense* at 405 (cited in note 75).

135. In 1821, Lord Brougham voiced one of the most well-known formulations of the traditional model of adversarial counsel as he defended Queen Caroline in a dramatic divorce trial before the House of Lords that shook England and threatened to end the reign of King George IV. Peering directly into George’s eyes, Brougham declared:

[A]n advocate, by the sacred duty which he owes his client, knows in the discharge of that office but one person in the world—that client and none other. . . . Nay, separating even the duties of a patriot from those of an advocate, and casting them if need be to the wind, he must go on reckless of the consequences, if his fate it should unhappily be to involve his country in confusion for his client’s protection.

Lord Brougham, *Trial of Queen Caroline* 8 (1821), as recounted in Lord McMillan, *Law and Other Things* 195 (Cambridge U., 1937).

In modern times, former Supreme Court Justice Byron White offered another well-known formulation of the role of criminal defense counsel:

If [defense counsel] 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, just as he will attempt to destroy a witness who he thinks is lying.

United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, J., concurring in part and dissenting in part).

136. A trial judge’s efficiency is typically measured by, and her professional advancement often contingent on, her ability to rapidly dispose of the cases on her crowded docket. Accordingly, counsel can often gain a trial judge’s approval by minimizing her requests for jury trials.

office cannot represent a defendant (as opposed to jurisdictions in which a courthouse clerk performs the task), private defense attorneys desiring future appointments have an economic stake in remaining in favor with the judge.

Defense counsel may also have subtler reasons for restraining her efforts on behalf of the accused. She may adhere to the non-adversarial, "moral activist" model of lawyering.¹³⁷ She may identify more closely with the middle-class values and weltanschauung of the judge than with those of poor, minority defendants.¹³⁸ She may care more about her own image in the eyes of the judge and the prosecutor—her cultural peers—than in the eyes of the defendant.¹³⁹ Or she may adopt the utilitarian rationale that a cooperative relationship with the court and with the prosecutor's office will inure to the benefit of innumerable future clients of hers.¹⁴⁰ Because of the

137. This model envisions defense counsel primarily as an agent of society, entrusted with the duty to exert a moral influence on her client with respect to the goals and tactics of representation. Professor David Luban, one of the leading proponents of this model, speaks of counsel's obligation "to stoer [clients] in the direction of the public good." David Luban, *Lawyers and Justice: An Ethical Study* 160, 171 (Princeton U., 1988). In addition to undermining the adversarial process, the "moral activist" model is premised upon two myths: First, contrary to claims of the model's proponents, client-oriented advocates have not automatically abdicated moral responsibility for their acts. Partisan counsel's decision to work within the bounds of the adversarial process represents a commitment to the fundamental values underlying the system. Second, it is a myth that within our culturally diverse society, a high degree of consensus on current moral issues exists among lawyers and among members of society. In addition, the term "moral activism" implies the righteousness, intrusiveness, and intolerance of the religious missionary. As Professor Thomas Shaffer, another leading advocate of the moral activist role, remarks, "I, who am a Christian, would say that my hope for my client is that he respond to the redemption which God has accomplished for him. And if that is my hope, then it is my duty." Thomas Shaffer, *The Practice of Law as Moral Discourse*, 55 N.D. L. Rev. 231, 247-48 (1979).

138. "Minority defendants criticize public defender attorneys because they are white, middle-class professionals who they feel have more in common culturally with the prosecutors (and judges) than they have with the majority of indigent defendants, who are minority, poor, and of a different social and economic class from that of the defense attorney." Mann, *Unequal Justice* at 180 (cited in note 88) (citing National Minority Advisory Council on Criminal Justice, *The Inequality of Justice* 213 (U.S. Dep't of Justice, 1980)).

139. Commentators have advised criminal defense lawyers who disbelieve their client's pending or proffered testimony to disclose their suspicion to the court, since "[i]t may cost you a client but it will gain you respect in the eyes of the court and your peers." Joseph Cheshire, *General Ethical Considerations in Criminal Cases and the Perjurious Client in Particular*, 20 *Trial Briefs* 34, 35 (1988) (emphasis added); Patricia H. Marschall, *Who Should Decide the Appropriate Response to the Criminal Defendant Who Proposes or Commits Perjury: A Comparison of the North Carolina Rules of Professional Conduct and the American Bar Association's Model Rules of Professional Conduct*, 17 N.C. Cent. L. J. 157, 170 (1988) (quoting and endorsing the advice in Cheshire's article).

140. "[S]ince public defenders must deal with the same prosecutors and judges on a daily basis, they become 'coopted' or fight less in one case to get a better deal in another one." Mann, *Unequal Justice* at 176-77 (cited in note 88) (citing National Minority Advisory Council on Criminal Justice, *The Inequality of Justice* at 213 (cited in note 138)). As Professor Skolnick explains, "administrative requirements characterizing the American administration of criminal justice make for a relationship between prosecutor and defense attorney that strains toward cooperation; their relationship is based upon interests wider than those of the parties they

heavy caseload of the court and the prosecution, striking plea bargains rather than opting for jury trials may be the most effective means of securing a judge's approval;¹⁴¹ however, even the most trial-shy defense attorney¹⁴² may not always be able to persuade her client to agree to a plea bargain. In such cases, counsel's denunciation of her own client pursuant to the client perjury rules is consistent with her cooperative, team-player image.¹⁴³

iii. Defense Counsel's Presumption of the Defendant's Guilt

The Fifth and Sixth Amendment rights comprising the adversarial mode of adjudication represent, to a great extent, the embodiment of the Framers' concern that innocent defendants not be

represent." Jerome Skolnick, *Social Control in the Adversary System*, 11 J. Conflict Resol. 52, 53 (1967).

Each attorney who appears regularly on behalf of criminal defendants must decide whether to refrain from employing every potentially advantageous procedural device on behalf of a present client in order to maintain smooth working relations with the court and prosecutor for the sake of the attorney's many future clients. Even among proponents of zealous advocacy, no clear consensus exists. Judge Robert Keeton, for example, states that "[f]rom a long-range view, as distinguished from concern with the immediate case only . . . the interests of future clients . . . compel moderation of [the] extreme view [that the lawyer is] obliged to raise every legal claim or defense." Dershowitz, *The Best Defense* at 404-05 (cited in note 75). Responding to Keeton, however, Professor Alan Dershowitz points out that "in any particular case a given client may suffer grievously by the lawyer's refusal to play tough when toughness is demanded." *Id.* at 405 (emphasis in original).

141. "[T]he desire to please the judge with whom they work every day may influence public defenders to encourage guilty pleas instead of trials." Mann, *Unequal Justice: A Question of Color* at 177 (cited in note 88) (citing Skolnick, J. Conflict Resol. at 53).

142. Most urban court systems contain a handful of "pleaders," defense attorneys who, month after month, year after year, persuade each of a constant flow of defendants to plead guilty. In a repugnant symbiosis, pleaders who obtain a sufficiently high volume of appointments make a modest to impressive living with little effort, while courts that appoint pleaders move their dockets quickly. See generally Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 Yale L. J. 1179, 1181-1206 (1975).

143. In an egregious example from a District of Columbia case, defense counsel announced to the court:

This is an open and shut case, Your Honor where . . . there are one or two . . . police officers, for the government, and this defendant's word against theirs. . . . [T]he defendant is on parole for a crime of moral turpitude, and he doesn't have an alibi because he was arrested on the scene and, to be frank, Your Honor, because I expect he wants to testify in this case he is concerned that I do not want to put him on the stand, because he's told me before that he had the pistol, and today for the first time he tells me that's not true. I have explained to the defendant, Your Honor, that I cannot put him on the stand if I think he's committing perjury without tolling the Court.

Butler v. United States, 414 A.2d 844, 845 (D.C. App. 1980) (holding that "defense counsel who, prior to a hearing told the motions judge of his client's intention to commit perjury, and who permitted his client to go to a bench trial before the same judge" provided ineffective assistance). See also *Ferguson v. State*, 507 S.2d 94, 95 (Miss. 1987) (holding that counsel provided ineffective assistance by attacking his client's credibility in open court with statements such as, "I have been lied to by my client and I do not feel I can even sit here with him, and I regret it, but it is a fact, and I think the court ought to know it. . . . Your honor, he is lying, and I am getting tired of it.").

convicted. To minimize this risk, the responsibility for assessing the veracity of defendants and other witnesses should reside only in those who can take a fresh and impartial view of the evidence, and who remain alert to signs that a defendant, despite evidence to the contrary, is telling the truth.¹⁴⁴ However, jaded by their daily interaction with defendants, the overwhelming majority of whom have committed the acts with which they are charged,¹⁴⁵ criminal defense attorneys tend to presume, whether consciously or not, that their clients are guilty.¹⁴⁶ Empirical studies of metropolitan criminal court

144. For a classic illustration of this point, see Kunen, *How Can You Defend Those People?* (cited in note 87).

145. "Most defendants are guilty of something along the lines of the accusation." Babcock, 32 *Cleve. St. L. Rev.* at 180 (cited in note 78). "One of the awkward truths about being a public defender is that you are in the practice of representing people who are, indeed, guilty as charged." Bellows, *Notes of a Public Defender*, in Heymann and Liebman, *The Social Responsibilities of Lawyers* at 74 (cited in note 88). See also Jerome H. Skolnick, *Justice Without Trial: Law Enforcement in a Democratic Society* 241 (U. of California, 1966) (observing that "most defendants are guilty of some crime"). On his list of "Rules of the Justice Game," Professor Alan Dershowitz's first rule states that "[a]lmost all criminal defendants are, in fact, guilty." Dershowitz, *The Best Defense* at xxi (cited in note 75).

146. "Defense Lawyers . . . assume innocence claims by their clients are false unless proved." Robert E. Scott and William J. Stuntz, *A Reply: Imperfect Bargains, Imperfect Trials, and Innocent Defendants*, 101 *Yale L. J.* 2011, 2012 (1992).

The presumption of a client's guilt, which is logical from a purely statistical point of view, is not exclusively a trait of burned out and indifferent defense attorneys. The young public defender in the following anecdote, for example, was an able, energetic member of the highly regarded Public Defender Service of the District of Columbia:

I was the attorney for Billy Pepperidge. He had been on parole from a Maryland auto theft sentence when he was arrested in D.C. for stealing another car, and had been shipped back to Baltimore to await a parole revocation hearing.

. . . [He] was ushered into the jail's interview area and sat facing me through an iron screen.

. . . The evidence against him was overwhelming. The cops said he was driving a gray Scirocco in a "suspicious manner." . . . They looked on their "hot sheet," a printout of all the license numbers of cars reported stolen in the metropolitan area. The license was on the list. They radioed in to headquarters and asked whether the car was still unrecovered, a question quickly answered in the affirmative. They put their flashing lights on. The Scirocco sped off. High-speed chase. Crash. Three males got out and ran. The police caught only Billy. They found personal papers bearing his name in the car, which had been stolen seven days earlier.

I explained the elements of unauthorized use of a vehicle: even if Pepperidge did not steal the car (grand larceny), if he "knew or should have known" that the car was being used without the owner's permission, he was guilty of U.U.V.

Pepperidge had fled when the police approached — strong evidence that he knew the car was stolen.

"I was sitting in the back seat," he said. "I didn't know anything about the car."

"The best Perry Mason could get you is U.U.V.," I said, "so why not waltz in now and have U.U.V. *guaranteed, plus* the sentencing advantages of pleading?"

He looked me in the eye and said, "I'm not worried about the time." He said that he pled guilty once, and he wasn't going to make the same mistake again. . . .

"Yeah, you're not going to make the same mistake, you're going to make a different mistake," I said. "Last time you pled when you shouldn't have; this time you won't plead when you should. . . ."

He said he would not plead because he was not guilty. . . .

systems refer to defense attorneys' "publicly inarticulated and even disavowed . . . presumption of guilt against those who are funneled into the court."¹⁴⁷ The presumption of a client's guilt is often evident in counsel's first contact with the client.¹⁴⁸

Institutional factors such as the severe overload of cases and the need to legitimize our resultant reliance on plea bargaining exacerbate defense counsel's presumption of her client's guilt. As sociologist Jerome Skolnick points out, "[t]he negation of the presumption of innocence permeates the entire system of justice. . . . [A]ll involved in the system, the defense attorneys and judges, as well as the prosecutors and policemen, operate according to a working presumption of the guilt of persons accused of crime."¹⁴⁹

The air-conditioning was making me cold. I wanted to leave. "Okay," I said, "it's your ass. So, what happened?"

He said that he wanted to buy drugs, but not on the street. So he told the drug dealer he'd make the buy in the dealer's car. He got in the back seat. The dealer and another man, neither of whom he knew, were in the front. They drove around. A police car put its lights on. The driver sped off. He figured the driver was fleeing because he had drugs. When they crashed, he jumped out and ran.

It was a good story. *I thought it might be true. I should have listened to it before I urged him to plead.*

Kunen, *How Can You Defend Those People?* at 171-73 (cited in note 87) (emphasis added). Ultimately, Pepperidge was acquitted by a jury. *Id.*

147. Issac D. Balbus, *The Dialectics of Legal Repression* 17-18 (Russell Sage Foundation, 1973). Moreover, individuals appear to be inordinately "loyal" to their initial opinion about the guilt or innocence of another and often seem willing to reassess their belief only after exposure to overwhelming evidence to the contrary. As Professor Thomas Mauet explains:

Most people . . . are impulsive, use few basic premises to reach decisions, and then accept, reject, or distort other information to fit their already determined conclusions. People use their preexisting beliefs and attitudes about people and events to filter conflicting information, accepting consistent information and rejecting, distorting, or minimizing inconsistent information. People reach decisions quickly and resist changing their minds. Finally, people are unable to absorb most of the information they receive, since sensory overload occurs quickly[.]

Thomas A. Mauet, *Fundamentals of Trial Techniques* 25 (Little, Brown, 3d ed. 1992). These observations, of course, are not new: "So little trouble do men take in the search for truth," wrote Thucydides around 400 b.c., "so readily do they accept whatever comes first to hand." Thucydides, *The Peloponnesian War* 1.20 (tr. Benjamin Jowett, c. 400 b.c.).

148. According to the author of one study, "Why don't you start by telling me where this place was that you broke into?" typifies the first question posed to a number of clients in their initial interviews with counsel. David Sudnow, *Normal Crimes: Sociological Features of the Penal Code in a Public Defender Office*, in Richard Quinney, *Crime and Justice in Society* 324 (Little, Brown, 1969).

149. Skolnick, *Justice Without Trial* at 241 (cited in note 145). See also Balbus, *The Dialectics of Legal Repression* at 18 (cited in note 147) (observing that the presumption of guilt "is fundamental to the operations of the metropolitan criminal court, since it supplies the rationale for 'plea bargaining'"); Wright, *Black Robes, White Justice* at 11 (cited in note 95) (stating that "[t]he administrative structure of a large city's court system tempts the judges to dispose of the largest number of cases in the shortest period of time. Judges who accomplish this are said to be good 'calendar people,' and their rewards of preferment and promotion are examples to those who would otherwise pursue the vision of justice.").

An anecdote from the memoirs of a former public defender illustrates the pervasiveness of the presumption of guilt within the court system, the tendency of the court to rely on stereotypes, and the pressure applied to counsel to concede her client's guilt.

"I had my first live client . . .

Judy Hoffman was a gum-cracking little eighteen-year-old in platform shoes, . . . a slinky jersey, and pink sunglasses . . . She would not have been mistaken for a Campfire Girl, but she was well within community standards of dress for criminal court. She was charged with "loitering for purposes of prostitution."

I deepened my voice a little and very professionally invited Ms. Hoffman to follow me to the . . . "interview room," a derelict alcove in the Legal Aid office . . .

I was explaining lawyer-client confidentiality and the importance of full disclosure, when Ms. Hoffman, needing no encouragement, launched into her story. She was angry.

It seems that on the night in question, after dinner at her cousin Marlene's house, Judy and her boyfriend had driven from their native Brooklyn to the Library disco at Fifty-eighth Street and Sixth Avenue in Manhattan. Before going off to look for a parking space, her boyfriend dropped her opposite the Library; she intended to buy cigarettes and call her sister. She had completed the first errand and was standing at a pay phone, digging through her pocketbook for a dime in order to accomplish the second, when a man in a three-piece suit asked her if she knew a woman named Mary. She said no, and was about to drop a dime into the phone, when a man in a green windbreaker came up behind her and told her she was under arrest.

"What do you mean?" she said. "Are you serious?"

He was serious, and told her to hand over her pocketbook. He put her into a car and sat down beside her. "You're a whore," he said.

"Don't call me that!"

His investigation of the pocketbook led to the discovery of four dollars and change, and an address book. He looked through the book. "There's nothing here," he said. "You got another address book?" He handed the purse to another plainclothesman as they drove to the 18th Precinct, "Here, maybe you can find something." At the station, she was booked, fingerprinted, and locked in a cell to await the arrival of a relative.

It was hard for me to believe that the police . . . would arrest a young woman for *no reason at all*, but Ms. Hoffman's *indignation*, coupled with her lack of any prior arrests, persuaded me. Prostitutes are arrested, and fined, and released to be arrested and fined again, and again. Prostitutes without arrest records exist, but not for long — sort of like falling stars. Ms. Hoffman and I agreed that complete vindication was the only acceptable disposition of her case.

We made our way back down the piss-stained stairs to the courtroom, where we waited, and waited, and waited for the clerk to call our case.

The court reminded me of a package express terminal. Each defendant was a package. The prosecutor and defense counsel were shipping clerks, who argued perfunctorily over where the package should be shipped, then accepted the determination of the black-robed dispatcher. Papers were stamped and tossed in a wire basket. The package was removed. The next package was brought in.

Finally, after three and a half . . . hours . . . our case was called. Drawing shallow breaths, sweat trickling down my ribs, I strode forward, lifted and replaced the maroon felt rope dividing what now seemed like the pews from what now seemed like the altar, and approached the judge, a thin-lipped, bull-necked tough guy who looked like he smoked Camels at both ends.

"Let's get rid of this," the judge said. "Plead her guilty, and I'll let her go with a fine."

"She's not guilty, Your Honor."

The judge did not appear to hear me. The D.A. rolled his eyes.

"All right," the judge said. "I'll take a disorderly conduct."

"No, she won't plead to anything," I insisted.

"C'mon," the judge said. "She has to plead to something — a dis con, no fine, she can walk out of here right now."

Things seemed to be going against me. Then I was seized by inspiration. "But Your Honor," I whispered intently, my eyes blazing into his, "*she's not a prostitute.*"

While defense counsel's presumption does not necessarily preclude zealous advocacy, requiring a biased individual to assess the veracity of an accused's proposed testimony increases the risk that innocent, truthful defendants will be convicted.¹⁵⁰ Instead, this determination should rest exclusively with those most likely to be impartial, that is, the jurors selected through voir dire based, among other qualities, on their lack of preconceptions about the defendant's guilt or innocence. For the young, black, male defendant already viewed by counsel through a prism of cultural differences¹⁵¹ and stereotyped as dangerous and prone to criminal behavior,¹⁵² counsel's presumption of his guilt is likely to be even stronger.

"She's not?"

"No, Your Honor, she's not."

"Oh well, in that case she can go. Case dismissed."

Kunen, *How Can You Defend Those People* at 3-5 (cited in note 87)

Author John Hershey describes the presumption of guilt that pervades our criminal proceedings and exacts a heavy toll on its victims:

The Sixth Circuit courtroom . . . is a great dingy box of passions. . . . What faces one sees there!—ravaged, jaunty, dazed, disenchanted, raging, resigned. A man in his forties (found intoxicated) clutching in his arms a stuffed tiger nearly as tall as he, his constant companion and only comfort; . . . three weedlike red-eyed minors in blue jeans, accused of armed robbery; a woman booked as a whore, with a pokey-soiled wig and a hacking cough, badly in need of night's more merciful light; an empty-faced teenager, held for possession, with his mother, who is played out to the very end of her kitchen string, on hand to stand up with him. . . . A hundred cases a morning. Breaking and entering, assault, gambling, pimping, prostitution, found drunk, armed robbery, non-support, welfare fraud, disturbing the peace.

. . . [W]hat happens to *all* human beings, judges included, in the . . . [criminal court's] atmosphere of pragmatism, of getting the job done in the crudest but quickest way; with, in the end, its cynicism, its assumption that riffraff are probably guilty . . . ("I can get you a suspended sentence if you'll cop the plea"), and so of copping out, playing the game, fitting in with the system's requirement that the job of the courts be done, above all, with dispatch. The noble ideal, "innocent until proved guilty," gives way to a corrupt and crime-feeding one, "let off easy if copped as guilty."

Excerpts of a letter from author John Hershey to members of The Forum (Aug. 11, 1972), in Malcolm Feeley, *The Process Is the Punishment: Handling Cases in a Lower Criminal Court* 8-9 (Russell Sage Foundation, 1992).

150. Our law, literature, and popular culture abound with examples of the conviction of innocent persons. See, for example, Hugo A. Bedau and Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 *Stan. L. Rev.* 21 (1987) (compiling a list of 350 cases of persons who, since 1900, have been convicted for "potentially capital" offenses but eventually were exonerated); Resenbaum, 18 *N.Y.U. Rev. L. & Soc. Change* 807 (cited in note 75); James McCloskey, *Convicting the Innocent*, 8 *Crim. Just. Ethics* 2 (1989); Louis Nizer, *Catspaw: The Famous Trial Attorney's Heroic Defense of a Man Unjustly Accused* (1992); Jerome Frank and Barbara Frank, *Not Guilty* (Gollancz, 1957); Edwin M. Borchard, *Convicting the Innocent: Sixty-Five Actual Errors of Criminal Justice* (Garden City, 1932). Of course, the number of cases in which an innocent person is known to have been convicted represents only a small portion of all such instances. Younger, 3 *Crim. L. Bull.* at 551-52 (cited in note 75).

151. See Part II.B.1.

152. Studies have suggested the prevalence of this stereotype as well. In one study, subjects were shown a picture of a white man holding a razor during an apparent argument with a black man. Numerous white respondents later recalled that the razor had been held by the black man.

iv. Defense Counsel's Exposure to Unreliable and Inflammatory Information

Criminal defense attorneys' tendency to presume guilt is exacerbated by their exposure during the interviewing and investigatory stages to information that, under the codes of evidence of each jurisdiction, would be inadmissible at trial. The rules of evidence, derived from a combination of common law, statutes, and constitutional law,¹⁵³ are designed primarily to advance the search for truth by filtering out unreliable or inflammatory information before it reaches the factfinder.¹⁵⁴ The rule against hearsay provides one example. Excluding assertions of declarants who are not subject to cross-examination at the time of the assertion¹⁵⁵ ensures that testimony submitted to the jury can be rigorously tested for reliability. The rules of evidence prohibiting the introduction of inflammatory statements,¹⁵⁶ speculation,¹⁵⁷ and other forms of misleading, unreliable, or inordinately prejudicial evidence¹⁵⁸ also serve the search for truth.

During the investigation of a case, defense counsel is almost always exposed to a barrage of such information. To learn as much as

R. L. McNeely and Carl Pope, *Race, Crime, and Criminal Justice* (Sage Publications, 1981). Studies also have found that "judicial attitudes appear to mirror the stereotype of minorities as typically violent, dangerous, or threatening." Mann, *Unequal Justice* at 188 (cited in note 88) (citing Margaret Farnsworth and Patrick Horan, *Separate Justice: An Analysis of Race Differences in Court Processes*, 9 Soc. Sci. Res. 381, 381-99 (1980), and Marjorie Zatz, *Race, Ethnicity, and Determining Sentencing: A New Dimension to an Old Controversy*, 22 *Criminology* 147, 147-71 (1984)).

153. See, for example, Charles T. McCormick, 2 *McCormick on Evidence* 547 (West, 1992) (commenting on the origin of the Federal Rules of Evidence).

154. The Model Code, for example, speaks of bringing about "just and informed decisions" through "the inclusion of relevant evidence . . . and the exclusion of all other considerations." Model Code of Professional Responsibility EC 7-24 (ABA, 1969) (emphasis added).

The rules of evidence promote other interests in addition to truth. See, for example, notes 219-21 and accompanying text (discussing the exclusionary rule, which seeks to deter police misconduct by preventing the introduction of unlawfully obtained, but often entirely reliable, evidence).

155. See, for example, F.R.E. 801(c). To constitute hearsay, of course, assertions must be offered to prove the truth of the matter asserted. *Id.*

156. See, for example, F.R.E. 403 (stating, in relevant part, that "evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice").

157. See, for example, F.R.E. 602 (stating that "[a] witness may not testify to a matter unless evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter").

158. See, for example, F.R.E. 403 (establishing that relevant evidence "may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by consideration of undue delay, waste of time, or needless presentation of cumulative evidence"); F.R.E. 901(a) (stating that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims").

possible about the alleged criminal episode, counsel not only inquires into the factual basis of the charges and the identity, knowledge, and probable testimony of the potential witnesses for each side, but also investigates such facts as the character and background of the defendant, including information about her reputation in the community, history of bad acts, and record of adult convictions, in order to counter any effort by the state to impeach the defendant's credibility at trial.¹⁵⁹ This information is gathered from a variety of sources,¹⁶⁰ including the client herself, the prosecutor, the victim, police, co-defendants, eye-witnesses, character and other witnesses, members of the defendant's family, probation and parole officers, medical personnel, psychiatrists, and an endless array of experts in various fields.¹⁶¹ In addition to facts about the defendant's participation in the alleged crime, this information may concern past crimes with which the defendant was not charged or is presently under investigation, or the defendant's past bad acts, violent or dishonest character, outlandish lifestyle, unpopular beliefs, offensive comments, failed polygraph tests, and so on. In addition, the prosecutor provides information, whether accurate or not,¹⁶² during discussions about the terms of a possible plea bargain and throughout the formal discovery process. Often, the prosecutor or police speak to counsel "off the record" about a case—that is, on an informal or confidential basis.

Frequently, it is difficult for counsel to gauge the validity of this information with any degree of precision. First, much of the information obtained by counsel is inexact and incomplete. For example, in her initial discussions with defense counsel, the prosecutor must attempt the delicate task of describing the evidence against the defendant (in the present case and any others in which the accused has been charged or is a suspect) with sufficient specificity to induce a plea bargain yet, at the same time, must avoid furnishing

159. Although many defendants ultimately choose not to testify, competent counsel must always conduct such an investigation in order to measure the impeachability of the defendant so that counsel may competently advise her on the desirability of testifying.

160. See, for example, *State v. Fleck*, 49 Wash. App. 584, 744 P.2d 628, 629 (1987), in which defense counsel who "received information from a jailhouse informer" that led him to suspect that his client would perjure himself on the witness stand "then confronted the defendant, who again denied involvement [in the crime with which he was charged] but agreed to a polygraph examination to dispel [defense counsel's] doubts." *Id.*

161. For example, fingerprint, ballistics, polygraph, handwriting, chemical, breathalyzer, and fiber analysts, to name just a few.

162. Kunen notes that prosecutors may encourage a defendant to plead to all the original charges "by claiming to have all sorts of evidence — 'positive' identifications, for instance — that [do not] exist." Kunen, *How Can You Defend Those People?* at 170 (cited in note 87).

defense counsel a windfall in premature discovery. As a result, the prosecutor is often intentionally vague with regard to factual detail and the identity of her sources.

Second, the sources themselves—including police, informants, accomplices, bystanders, and a variety of other witnesses—are of uneven reliability. For example, when the prosecutor informs defense counsel that a client charged with possessing an illicit drug is a known drug dealer, counsel frequently does not know whether the source of the information is the defendant's upstanding next-door neighbor or an informant with a record of perjury or a grudge against the defendant.¹⁶³ Similarly, when police mention that a defendant charged with theft of an automobile is about to be charged with ten additional auto thefts, the police may have constructed strong cases out of careful detective work or, on the other hand, may be indiscriminately clearing unsolved cases from their records or attempting to pressure the defendant into a plea agreement. Inaccurate but prejudicial information may even be relayed through the accused herself. As one commentator describes, "It's common police interrogation technique to lie to the suspect, telling him that he's been identified, his fingerprints have been found, his partner's confessed, and so forth."¹⁶⁴ Finally, the information itself is commonly the product of third- or fourth-hand hearsay, especially information supplied to counsel by the prosecutor or police.¹⁶⁵

Particularly in light of defense counsel's tendency to presume guilt, the aggregation of hearsay, inflammatory remarks, conjecture, and otherwise unreliable information assimilated by criminal trial attorneys in the investigative stage casts doubt on their ability to

163. Prosecutors themselves are often the source of inaccurate, inculpatory information. Referring to "jail and prison snitches; addict informers, 'sting' operators and other spies and provocateurs retained on what amount to contingent-fee contracts which reward entrapment successfully covered up or supplemented by perjury; and accomplice testimony bought by promises of leniency often subtly phrased and executed," Professor Anthony Amsterdam has commented that, although "[n]o sophisticated and intelligent prosecutor I know would spank a puppy with newspaper in reliance on the testimony of any of these characters corroborated by a puddle on the livingroom rug," prosecutors routinely engage in "the indiscriminating use of various sorts of highly unreliable evidence." Stephen Gillers, *The Prosecution and Defense Functions: Do They Promote Justice?*, 42 *Rec.* 626, 638-39 (1987).

164. Kunen, *How Can You Defend Those People?* at 206 (cited in note 87). For additional descriptions of the frequency and nature of police perjury, see Younger, 3 *Crim. L. Bull.* at 551 (cited in note 75); note 87 and accompanying text.

165. Bellows, *Notes of a Public Defender*, in Heymann and Liebman, *The Social Responsibilities of Lawyers* at 90 (cited in note 88) (noting that defense counsel investigating a case "cannot rely on what the police or prosecutors tell [him]. They see things through their own tinted glasses.").

assess the veracity of their clients fairly and accurately.¹⁶⁶ Indeed, if a jury was exposed to even a small amount of the unreliable and inflammatory evidence routinely encountered by counsel during the investigative stage, the court might well declare a mistrial.

If, for example, one were to learn of a foreign system in which there were no formal evidentiary restrictions, one would lament the fate of those on trial there. Defendants would necessarily be judged on the basis of rumor and supposition, dramatically increasing the risk that innocent defendants will be convicted. Defendants and the public at large might lose confidence in the fairness of the criminal justice system, breeding social unrest and contempt for the rule of law. The citizenry would be subject to a police force that operated with little regard for privacy or due process. To a degree, however, we face the same dangers in our own system when defense counsel is required to assess the veracity of the accused: the criminal defense attorney, acting as factfinder with respect to whether or not the accused will commit perjury on the witness stand, utilizes tainted information in the absence of sound, uniform evidentiary restrictions.

Over thirty years ago, a special commission appointed by the ABA recognized the principle that the accused's "chance to have his day in court loses much of its meaning if his case is handicapped from the outset by the very kind of prejudgment our rules of evidence and procedure are intended to prevent."¹⁶⁷ The Eighth Circuit Court of

166. As one writer has noted, "It seems to me that were trials exposed to information utterly unfiltered by rules of [evidence], the truth they would reveal would frequently be different from the truth presently ascertained. If I had to hazard a guess I would assert that the quality of our justice would suffer grievously were trials exposed to such unrestricted information." Simon H. Rifkind, *The Lawyer's Role and Responsibility in Modern Society*, 30 *Rec.* 534, 545 (1975). But compare Charles W. Wolfram, *Client Perjury*, 50 *S. Cal. L. Rev.* 809, 842 (1977) (asserting, without further explanation, that "[w]ith respect to the sources to which the attorney must look, there seems to be little point in requiring the attorney to take account only of perjury-suggesting data that would itself be admissible as evidence in a trial").

167. Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 *A.B.A. J.* 1159, 1216 (1958) (sponsored by the ABA and the Association of American Law Schools). The commentary to the Model Rules of Professional Conduct implies that the rule prohibiting counsel from expressing her personal opinion to the factfinder about the defendant's "credibility . . . or guilt or innocence" rests, in part, on the rationale that these opinions are based on information not filtered through the rules of evidence. Model Code of Professional Responsibility DR 7-106(C)(4) & EC 7-24 (ABA, 1969). In addition, the drafters note that if defense counsel were permitted to mention her belief about the accused's truthfulness or innocence, then in cases in which counsel failed to do so, the trier of fact could reasonably infer that counsel believed the defendant was untruthful or guilty. *Id.* at EC 7-24. However, if counsel's personal belief that the accused has lied is conveyed to the factfinder via the narrative approach or is relayed by the court, then in all other cases the factfinder might reasonably infer that counsel believes the defendant has testified truthfully. As a result, the present ethical rules against knowingly presenting client perjury and the corresponding countermeasures produce the very danger feared elsewhere in the codes of ethics—that is, that the factfinder will be influenced by opinions formed from unreliable and inadmissible information.

Appeals understood this proposition when it observed in a case in which counsel disclosed to the trial judge his suspicions that the accused would lie on the witness stand: "A lawyer who judges a client's truthfulness does so without the many safeguards inherent in our adversary system. . . . He may consider *too much* evidence, including much that is untrustworthy."¹⁶⁸

Ironically, the more conscientiously a defense attorney investigates a case, the greater her exposure to unreliable evidence that is likely to influence counsel's belief about a client's guilt or innocence and, in turn, about the credibility of the client's proposed testimony. Accordingly, by requiring counsel to judge the veracity of the defendant's proposed testimony, the client perjury rules create a paradox: counsel's diligent fulfillment of the duty to investigate¹⁶⁹ will, from time to time, actually increase the risk that an innocent client will be convicted.¹⁷⁰

168. *United States v. Long*, 857 F.2d 436, 445 (8th Cir. 1988) (emphasis added).

169. Model Rules of Professional Conduct Rule 1.1 cmt. 5 (ABA, 1983) (stating that "[c]ompetent handling of a particular matter includes inquiry into and analysis of the factual . . . elements of the problem").

170. In relating the case of a former client who was innocent of the robbery with which he had been charged, one writer reveals a clear example of this phenomenon:

. . . I didn't believe [Wyatt Clayton's story] because he had flunked a lie detector test, which I had him take in the first place only at the insistence of the lawyer on his prior purse-snatch case.

...
I hired a private polygraph examiner.

...
He went through the questions three times. . . .

"Examinee's responses to the relevant questions regarding his knowing who was involved in the Marilyn Tracy robbery were indicative of deception," the examiner reported. "These test charts indicated further that he became so tense during the examination that normal reactions were diminished. This tenseness increased so rapidly during each test chart that instrument rebalancing procedures were required two or more times. In the opinion of the examiner, this is an indication of 'overall' deception to the remaining relevant questions. This testing precluded this examiner from clearing Wyatt Clayton of any involvement in the Marilyn Tracy robbery."

I knew that Wyatt, even if innocent, had every reason to be nervous, being questioned alone in a closed room by a middle-aged white ex-FBI agent, who put two rubber tubes around his chest, . . . wrapped a blood-pressure cuff around his wrist, and hooked everything up to something electronic in a metal box. I knew that nervousness was supposed to be compensated for by "instrument rebalancing" and not throw off the test. I knew that the tests were far from perfect, and were inadmissible in evidence for good reason. *What I did not know was that, having read a report of failure, I would be unable to disregard it.*

After the test, *I presumed Wyatt guilty.*

Kunen, *How Can You Defend Those People?* at 82-84 (cited in note 87). Wyatt Clayton (a fictitious name to protect the defendant's privacy) was fortunate. After tirelessly collecting evidence indicating that the defendant had been framed, the prosecution eventually dismissed the case. *Id.* at 84-88.

v. The Perils of Predicting the Defendant's Testimony

Since counsel must be aware of the content and falsity of the defendant's *upcoming* testimony prior to employing the countermeasures prescribed in the model codes, mere knowledge of the defendant's *present* intent is insufficient. Instead, counsel must accurately predict the actual testimony of the defendant at a particular point in the future. However, as the Supreme Court seemed to recognize when it observed that the "veracity of witnesses in criminal cases frequently is subject to doubt *before and after* they testify,"¹⁷¹ foretelling the defendant's future testimony is, for a variety of reasons unexplored by the Court, a nearly impossible task.

First, counsel may mistakenly presume that a new, more exculpatory recollection by the accused is untruthful. Instead, as several courts have acknowledged, the latter recollection may simply represent the later recall of additional details.¹⁷²

Second, the defendant's actual testimony is likely to be influenced by events that intervene between counsel's conclusion that the defendant will lie and the moment the defendant takes the witness stand. Among others, these events could include the content and strength of the prosecutor's opening argument, the testimony and credibility of government witnesses and of those defense witnesses preceding the defendant, the prosecutor's tenacity on cross-examination, and the composition of the jury and its apparent reaction to the case.¹⁷³ If counsel postpones her prediction of the accused's actual testimony until immediately prior to the time the defendant is to be called to the stand, counsel would virtually ensure that the court would deny a request to withdraw made pursuant to her duty under the model codes. Also, by doing so, counsel would nearly always lack the opportunity to conduct the thorough

171. *Imbler v. Pachtman*, 424 U.S. 409, 426 (1976) (emphasis added). For a brief discussion of *Imbler*, see note 112 and accompanying text.

172. See, for example, *Commonwealth v. Alderman*, 292 Pa. Super. 263, 437 A.2d 36, 39 (1981) (noting that "a defendant may say one thing to his lawyer and later contradict it, when for one reason or another—new information, for example—his memory has been refreshed and he concludes that his first account was mistaken. Every change in a defendant's story should not be viewed by counsel as a fabrication."). See also *United States v. Long*, 857 F.2d 436, 445 (8th Cir. 1988) (recognizing that "[n]ot only may a client overlook and later recall certain details, but she may also change intended testimony in an effort to be more truthful").

173. See, for example, *Long*, 857 F.2d at 445 (recognizing that "even a statement of an intention to lie on the stand does not necessarily mean the client will indeed lie once on the stand. Once a client hears the testimony of other witnesses, takes an oath, faces a judge and jury, and contemplates the prospect of cross-examination by opposing counsel, she may well change her mind and decide to testify truthfully.").

questioning and deliberation that a sound assessment of the defendant's veracity demands. Alternatively, as additional evidence emerges during trial, counsel may discover that the testimony of the accused is, in fact, truthful. As Justice Hugo Black observed, "[a]ny lawyer who has actually tried a case knows that, regardless of the amount of pretrial preparation, a case looks far different when it is actually being tried than when it is only being thought about."¹⁷⁴ In an analogous situation, the drafters of the Model Rules recognize that an accused might alter her course. Explaining the exception to the rule requiring attorney-client confidentiality that permits counsel to disclose a client's intent to take the life of another or to cause serious bodily injury, the commentary states that "[i]t is very difficult for a lawyer to 'know' when such a . . . purpose will actually be carried out, for the client may have a change of mind."¹⁷⁵

Third, as discussed, the vast cultural gulf separating most criminal defense attorneys and their clients can impede mutual understanding.¹⁷⁶ Fourth, a defendant's pre-existing distrust of assigned counsel or the desire to shield a friend or relative¹⁷⁷ can inhibit the accused from providing the detail necessary to convince counsel of the truthfulness of the accused's proposed testimony. Fifth, the defendant—*anxious, fearful, often confused by conflicting advice from counsel, family, and jailhouse lawyers, and sometimes high or in withdrawal or psychologically unstable*—may not express herself clearly or may be misunderstood with respect to her intended testimony.

Sixth, although the client may *express* an intent to testify about events that counsel perceives to be untrue or that the client even concedes are untrue, the client may not actually *intend* to lie once on the stand. In light of many criminal defendants' distrust of and contempt for the court, for the attorney assigned to them by the state, and for the system itself, the bold assertion to counsel that the accused will lie at trial can reflect a cathartic or self-affirming defiance, an assertion of control over one's life in one of the few remaining ways. The defendant may not, however, actually intend to testify falsely. Public defenders and court-appointed counsel often experience this phenomenon in another way. The criminal defendant who is provocative and antagonistic in private exchanges with counsel

174. *Williams v. Florida*, 399 U.S. 78, 109 (1970) (Black, J., concurring in part and dissenting in part) (holding that six-person juries in state criminal trials are not per se unconstitutional).

175. Model Rules of Professional Conduct Rule 1.6 cmt. 12 (ABA, 1983).

176. See Part II.B.1.

177. "[S]ometimes a defendant may risk conviction rather than reveal exculpatory evidence to his lawyer. He may, for example, wish to shield someone." *Alderman*, 437 A.2d at 39.

often has a sufficient sense of gamesmanship to appear contrite and submissive before the court.

Finally, the degree to which defense counsel must be certain of both the content and the untruthfulness of the defendant's testimony prior to taking the countermeasures required by the model codes is woefully unclear. One might expect that, prior to delaying justice by withdrawing or severely prejudicing the client's case through direct or indirect disclosure to the court or indirect disclosure to the jury,¹⁷⁸ the codes of ethics would require that counsel be convinced to a high degree of certainty, for example, "beyond a reasonable doubt."¹⁷⁹ Nonetheless, although the drafters of the Model Rules included the "reasonable doubt" standard in a preliminary draft,¹⁸⁰ that standard was ultimately discarded in favor of a confused web of attenuated standards.¹⁸¹

178. See Part IV.A.

179. "[I]t can be expected that courts . . . will permit attorneys to give clients the benefit of *reasonable doubts*." Wolfram, 50 S. Cal. L. Rev. at 842 (cited in note 166) (emphasis added).

180. "A lawyer shall not . . . offer evidence that the lawyer is convinced *beyond a reasonable doubt* is false." Discussion Draft Rule of the Model Rules of Professional Conduct Rule 3.1 (1980) (emphasis added).

181. Rule 3.3 of the final draft of the Model Rules discusses the lawyer's duty of "Candor to the Tribunal" and provides that an attorney may refrain from offering evidence that she "reasonably believes" to be untrue. Model Rules of Professional Conduct Rule 3.3(b) (ABA, 1983). According to the drafters' tautological definition, "[r]easonably believes" . . . denotes that the lawyer believes the matter in question and that the circumstances are such that the belief is reasonable." *Id.* at Terminology. The commentary to the Rule, however, explains that counsel may refuse to offer evidence that she merely "*believes* is untrustworthy." *Id.* at Rule 3.3 cmt. 14 (emphasis added). The drafters explain, again tautologically, that "[b]elieves" denotes that the person involved actually supposed the fact to be true." *Id.* at Terminology. These standards conflict: the former is both objective and subjective, requiring that counsel personally believe an objectively reasonable fact, while the latter is merely subjective. Moreover, the Rules do not specify the degree of certainty with which counsel must *reasonably believe* that intended testimony is *untrue* or must *actually believe* that it is *untrustworthy*.

Courts that have decided the degree to which counsel must be certain that her client will be or has been untruthful before invoking counter-measures have adopted a variety of standards, most of which are more demanding than those of the Model Rules. See, for example, *People v. Bartee*, 208 Ill. App. 3d 105, 566 N.E.2d 855, 856-57 (1991) (noting that the Illinois court "has never adopted the 'firm actual basis' test proposed in [*United States v.*] *Long* . . . The [Illinois Supreme] Court clearly adopted a less stringent test of a 'good-faith determination' by defense counsel."); *Long*, 857 F.2d at 445-46 (stating that "it is absolutely essential that a lawyer have a *firm factual basis* before adopting a belief of impending [client] perjury") (emphasis added); *Sanborn v. State*, 474 S.2d 309, 313 n.2 (Fla. Dist. Ct. Ap. 1985) (observing that there must be "*compelling support* for [counsel's] conclusion" that her client will commit or has committed perjury) (emphasis added); *U.S. ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977) (noting that counsel's conclusion that her client's version of the facts is perjurious must have a "firm factual basis"); *People v. Schultheis*, 638 P.2d 8, 11 (Colo. 1981) (stating that "[a] mere inconsistency in the client's story is insufficient in and of itself to support the conclusion that a witness will offer false testimony"). But see, for example, *Shockley v. State*, 565 A.2d 1373, 1379 (Del. 1989) (concluding that "an attorney should have knowledge 'beyond a reasonable doubt' before he can determine . . . that his client has committed or is going to commit perjury"). Compare *United States v. Del Carpio-Cotrino*, 733 F. Supp. 95, 99 (S. D. Fla. 1990) (noting that

b. Violating the Privilege Against Self-Incrimination: Inducing Disclosure of Perjurious Intent Through False Assurances of Confidentiality

[U]sing the defendant's invited trust to the disadvantage of the client without prior warning is a flagrant betrayal on which we should not base our system.

—Professors Philip Heymann & Lance Liebman¹⁸²

One of the first rituals performed by criminal defense attorneys in the course of representation is to advise the client of counsel's need to know "all of the facts," no matter how inculpatory or embarrassing, in order to represent the client effectively.¹⁸³ In an attempt to foster candor on the part of distrustful defendants, the attorney then explains counsel's sacred obligation under the law and under the code of ethics to maintain the confidentiality of their communications.¹⁸⁴

actual knowledge is required to trigger counsel's duty to disclose); *Commonwealth v. Wolfe*, 301 Pa. Super. 187, 447 A.2d 305, 310 n.7 (1982) (asserting that "the lawyer [must] know *for sure* that actual perjury is involved") (emphasis added).

Rule 3.3 also fosters confusion over whether the proscription against presenting ostensible client perjury is mandatory or discretionary. Counsel who "knows" that proposed testimony is false *must* not present such evidence. The drafters explain, with unabashed circularity, that the term "know" denotes actual knowledge." *Id.* In a subsequent comment, however, the drafters state that "[a] lawyer should . . . present any admissible evidence his client desires to have presented unless he knows, or from facts within his knowledge should know, that such testimony or evidence is false, fraudulent, or perjured." Again, the standards conflict; in this case the Rule contains an exclusively subjective standard while the comments describe a standard that is both objective and subjective, and the drafters fail to specify the necessary degree of counsel's certainty. Finally, Rule 3.4, which covers "Fairness to Opposing Party and Counsel" and provides that "[a] lawyer shall not . . . assist a witness to testify falsely," fails to specify any standard at all. *Id.* at Rule 3.3(a)(4). The Model Code also establishes a confusing set of standards for measuring the certainty of counsel's knowledge.

182. Heymann and Liebman, *The Social Responsibility of Lawyers* at 104 (cited in note 88).

183. "The lawyer shall impress upon the client that the lawyer cannot adequately serve that client without knowing everything that might be relevant to the client's problem, and that the client should not withhold information that the client might think is embarrassing or harmful to the client's interests." American Lawyer's Code of Conduct Rule 1.1 (1982).

184. "A lawyer owes an obligation to advise the client of the attorney-client privilege." Model Code of Professional Responsibility EC 4-4 (ABA, 1969). See also American Lawyer's Code of Conduct, Rule 1.1 (stating that "[t]he lawyer shall explain to the client the lawyer's obligation of confidentiality").

Most defense attorneys advise their clients to the effect that "I need to know everything that happened, just the way it happened, to be able to defend you. I will keep everything you tell me confidential and, even if I wanted to tell someone, the law would not permit me." In his highly regarded criminal trial manual, Professor Anthony Amsterdam suggests a similar, but lengthier and more emphatic, explanation:

[E]verything you tell me is strictly private, just between you and me. Nothing you tell me goes to the police or to the District Attorney or to the judge or to anybody else. Nobody can make me tell them what you said to me, and I won't. Maybe you've heard about . . . the attorney-client privilege. The law says that when a person is talking to [his] [her] lawyer, whatever [he] [she] tells the lawyer is confidential and secret between the two of

At the same time, a defense attorney's belief that a client intends to testify untruthfully is often partially or entirely based on information disclosed by the defendant. For example, the defendant may have provided counsel with conflicting versions of the facts or with an account that seems inherently unlikely or is inconsistent with other evidence.¹⁸⁵ If, pursuant to the client perjury rules, counsel discloses directly to the court or indirectly to the jury the belief that the client intends to lie or has lied, then counsel has, in effect, induced the client to incriminate herself through false assurances of the inviolability of their communications. Indeed, the rational client has little choice in deciding whether or not to discuss the case with counsel; silence would ensure counsel's inability to present an adequate defense. Justifiably, the defendant feels lied to by counsel and betrayed by the system,¹⁸⁶ an experience that intensifies criminal defendants' distrust of defense attorneys and breeds contempt for the system and disregard for the law.¹⁸⁷ Moreover, this betrayal violates another cornerstone of our adversarial system: the defendant's Fifth

them. This is because the . . . lawyer is supposed to help [his] [her] client and never do anything — or tell anybody — that might hurt the client in any way. . . . As your lawyer, I am completely for you. And I couldn't be completely for you if I were required to tell anybody else the things that you say to me in *privato*. So you can trust me and tell me anything you want without worrying that I will ever pass it along to anyone else because I won't. I can't be questioned or forced to talk about what you tell me, even by a court, and I am not allowed to tell it to anyone else without your permission . . . ; so everything we talk about stays just between us. Okay?

Anthony G. Amsterdam, 1 *Trial Manual 5 for the Defense of Criminal Cases* 109-10 (ALI, 1988).

The Model Rules explain that "[t]he principle of confidentiality is given effect in two related bodies of law: the attorney-client privilege . . . in the law of evidence and the rule of confidentiality established in professional ethics." See note 25 for a brief description of the attorney-client privilege and its exceptions; see text accompanying notes 25-26 for an explanation of the broader protection of attorney-client communications provided by the Model Code and the Model Rules.

185. At other times, counsel's belief is founded on information provided entirely by sources other than the defendant. For example, physical evidence or interviews with witnesses may convince the attorney that a client's would-be testimony is false. Most often, however, counsel's belief is based on a combination of information gathered from the client and various other sources.

186. "[E]lemental fairness requires that the client be put on notice that the lawyer would be required or permitted to betray confidences." Monroe H. Freedman, *Lawyer-Client Confidences: The Model Rules' Radical Assault on Tradition*, 68 A.B.A. J. 428, 431 (1982). It would be fatuous to attempt to defend the attorney's conduct by distinguishing between disclosing the belief that the accused will lie and disclosing the actual information conveyed by the client that formed the basis of the belief. The latter is an incriminating characterization of the former, and its disclosure violates the expectation instilled in the accused by counsel's promise of non-disclosure of damaging information.

187. As the Preamble of the ABA Model Code of Professional Responsibility proclaims, "[w]ithout [justice], . . . respect for law is destroyed." Model Code of Professional Responsibility Preamble (ABA, 1969). Indeed, there is an Alice-in-Wonderland quality about a system in which a suspect is warned by police that anything she says may be used against her and is then induced by her own counsel's misleading promise of confidentiality into disclosing incriminating information ultimately used against her at trial.

Amendment privilege against self-incrimination.¹⁸⁸ Although the defendant who refuses to describe to the factfinder her involvement in an alleged crime is not, as in the days of the Star Chamber, deemed to have confessed or subjected to the persuasive powers of the rack, she is effectively misled and maneuvered into providing information to counsel that, should counsel disbelieve it, will result in an incriminating disclosure to the factfinder.

Although defense counsel's efforts in representing the accused in an adversarial proceeding normally do not constitute state action, they would seem to when counsel acts pursuant to her duty under the client perjury rules contained in the various state codes of legal ethics.¹⁸⁹ As the de facto inquisitor of the accused and as one whose denunciation of the seemingly mendacious defendant is required by the codes, counsel acts under "color of state law" on behalf of the state's, rather than the defendant's, interests.

Commentators have suggested that criminal defense attorneys could avoid misleading clients by including in their description of the attorney-client privilege a *Miranda*-like warning to the effect that

188. The privilege is designed to prevent coerced confessions. *Miranda v. Arizona*, 384 U.S. 436 (1966). The test for coercion—whether the accused's statements were voluntary under the "totality of the circumstances," see *Fikes v. Alabama*, 352 U.S. 191 (1957)—indicates that a defendant's statements may indeed be "coerced" by counsel's promises of confidentiality.

189. In *Polk County v. Dodson*, a § 1983 claim against appellate counsel for ineffective assistance, the Supreme Court held that although a public defender has a contractual relationship with the state, she "does not act under color of state law when performing a lawyer's *traditional functions* as counsel to a defendant in a criminal proceeding." 454 U.S. 312, 325 (1981) (emphasis added). The Court defined the partisan nature of a criminal defense attorney's *traditional functions*: "In our system a defense lawyer characteristically opposes the designated representatives of the State . . . advancing 'the undivided interests of his client.'" *Id.* at 318-19 (footnote omitted). Nevertheless, three factors indicate that defense lawyers—whether employees of the public defender's office, court-appointed, or privately retained—should be considered state actors when requesting withdrawal or disclosing client perjury pursuant to the client perjury rules contained in the state codes of attorney conduct. First, in doing so, counsel is not acting in the "undivided interests of [the] client." Second, counsel is mandated by the state's code of attorney conduct and, according to the Supreme Court in *Nix*, by state laws prohibiting subornation of perjury, to act in this manner. Finally, in holding recently that criminal defense lawyers may not discriminate on the basis of race in exercising peremptory challenges, the Court concluded that although defense counsel had struck prospective jurors in a manner that presumably would benefit his client, counsel had acted as an agent of the state merely because a jury is a "government agency." *Georgia v. McCollum*, 112 S. Ct. 2348, 2354-57 (1992). Especially in the wake of *McCollum*, the Court would now be hard pressed to explain the absence of state action on the part of counsel who discloses client perjury. See also *Tower v. Glover*, 467 U.S. 914, 923 (1984) (holding that, for the purposes of a § 1983 action against trial counsel for conspiring with the trial judge to deprive the accused of his federal rights, a public defender acts under color of state law).

For an alternative theory explaining that criminal defense lawyers are state actors when enforcing the client perjury rules against their clients, see Thomas S. Donovan, Note, *Legal Ethics, Client Perjury and the Privilege Against Self-Incrimination*, 13 *Hastings Const. L. Q.* 545, 558-62 (1986).

counsel must disclose a defendant's intention to testify untruthfully.¹⁹⁰ This suggestion, however, poses two problems. First, by warning an accused that counsel might later feel compelled to disclose their discussions to the court and thus enhance the accused's chances of conviction, counsel will normally engender in the accused a distrust of counsel and a reluctance to convey any seemingly inculpatory information necessary for counsel to wage a meaningful defense.¹⁹¹ Even the drafters of the Model Rules conceded in a Discussion Draft that such a warning "may lead the client to withhold . . . relevant facts, thereby making the lawyer's representation . . . less effective."¹⁹²

Second, even with the addition of a Miranda-like warning, the ethical rules obliging counsel to disclose client perjury to the factfinder chill the exercise of the privilege against self-incrimination. Since, for reasons discussed previously, counsel might inaccurately conclude that the defendant intends to testify falsely or that she has already done so, the client's only means of ensuring the exercise of the privilege is to refuse to convey any facts to counsel, thus forgoing a meaningful defense.¹⁹³

190. See, for example, Charles J. Ogletree, *The Future of Defense Advocacy*, 136 U. Pa. L. Rev. 1903 (1988); Lee A. Pizzimenti, *The Lawyer's Duty to Warn Clients About Limits on Confidentiality*, 39 Cath. U. L. Rev. 441, 457-63 (1990).

191. See Freedman, *Understanding Lawyers' Ethics* at 122 (cited in note 33) (noting that "the harm that would be done to the lawyer-client relationship by a *Miranda* warning far outweighs the marginal value of fairness to the exceptional client to whom the warning would be relevant"). Also, as criminal defense lawyers understand, "once your client has soured on you, resurrecting the relationship is difficult and, often, impossible." Bellows, *Notes of a Public Defender*, in Heymann and Liebman, *The Social Responsibilities of Lawyers* at 81 (cited in note 88).

192. Discussion Draft Rule of the Model Rules of Professional Conduct Rule 1.4 cmt. (1980). The Model Rules provide that "[w]hen a lawyer knows that a client expects assistance not permitted by the Rules of Professional Conduct or other law, the lawyer shall consult with the client regarding the relevant limitations on the lawyer's conduct." Model Code of Professional Responsibility Rule 1.2(e) (ABA, 1983). This language does not, however, constitute the *Miranda*-like warning that some proponents urge since it would be given only to those defendants counsel believes will testify or have testified falsely and only after the accused has already confided in counsel. Experience suggests that a *Miranda*-like warning is rarely issued.

193. The client perjury rules also violate another aspect of the Fifth Amendment: the presumption of innocence inherent in Fifth Amendment due process. *Carter v. Kentucky*, 450 U.S. 288, 306-7 (1981) (Powell, J., concurring) (stating that "the defendant is presumed to be innocent and . . . this presumption can be overridden only by evidence beyond a reasonable doubt"); *Corbitt v. New Jersey*, 439 U.S. 212, 229 n.3 (1978) (Stevens, J., dissenting) (noting that "the accused . . . [is] shielded by the presumption of his innocence"). Under the model codes, as noted earlier, counsel may not express to the jury her personal opinion about the defendant's credibility or ultimate guilt or innocence. Model Rules of Professional Conduct Rule 3.4(e) (ABA, 1983) (stating that "[a] lawyer shall not . . . in trial . . . state a personal opinion as to the justness of a cause, the credibility of a witness, . . . or the guilt or innocence of an accused"); Model Code of Professional Responsibility DR 7-106(C)(4) (ABA, 1969) (containing language virtually identical to that of the Model Rules). See also ABA Canons of Professional Ethics Canon 15 (1908). The drafters feared that if such remarks were permitted, their absence would create the inference that the defendant was guilty. Model Code of Professional Responsibility EC 7-24 (ABA, 1969) (explaining that "were

c. *Denying Confrontation Clause Rights and the Right to Counsel: The Inadequacy of In Camera Hearings*

The various rights of the Sixth Amendment Confrontation¹⁹⁴ and Compulsory Process¹⁹⁵ Clauses—the right to hear one's accusers,¹⁹⁶ to testify,¹⁹⁷ to compel the presence of witnesses,¹⁹⁸ to present witnesses and evidence,¹⁹⁹ and to cross-examine adverse witnesses²⁰⁰—guarantee an accused the opportunity to present her case to the jury and to impeach and rebut adverse evidence. In turn, these rights are given meaning through the defendant's right to effective assistance of counsel. Nonetheless, after counsel assesses the veracity of the defendant's testimony and, by seeking to withdraw in mid-trial or by employing the narrative approach,²⁰¹ telegraphs to the jury her opinion that the defendant will be or has been untruthful,²⁰² the model codes of ethics suggest no means by which the accused might effectively challenge counsel's devastating allegation. The accused is thus denied the right to impeach and rebut adverse evidence. The commentary to the Model Rules offers only the

the rule [DR-106(C)(4)] otherwise, the silence of a lawyer on a given occasion could be construed unfavorably to his client"). This inference would, in turn, contravene the presumption of innocence underlying the prosecution's constitutional burden of proving each element of an alleged offense. *In Re Winship*, 397 U.S. 358, 364 (1970) (holding that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged"). See also F.R.Cr.P. 29.

The client perjury rules, however, produce the very results feared by the drafters. By invoking the countermasures required in the event of client perjury, counsel's personal belief that the defendant will testify untruthfully or has done so would be communicated directly or indirectly to the factfinder. The factfinder would then, according to the logic of the drafters, infer the defendant's guilt, vitiating the prosecution's Fifth Amendment burden of proof. Moreover, applying the drafters' logic to the cases in which counsel made no such communication, jurors would draw the same inference the drafters feared: that counsel personally believed the defendant had been truthful.

194. U.S. Const., Amend. VI (stating, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him.>").

195. *Id.* (stating, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . . .").

196. *Pointer v. Texas*, 380 U.S. 400 (1965).

197. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (quoting *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975), in which the Court held that "the right to testify on one's own behalf at a criminal trial . . . is one of the rights that 'are essential to due process of law in a fair adversary process'").

198. *Washington v. Texas*, 388 U.S. 14 (1967).

199. *Taylor v. Illinois*, 485 U.S. 400 (1988); *Washington*, 388 U.S. 14.

200. *United States v. Owens*, 484 U.S. 554, 557 (1988); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895).

201. See Part IV.B for a discussion of this alternative method of handling anticipated client perjury. With the "narrative" approach, defense counsel calls the accused to the stand; the accused then testifies in a narrative fashion without counsel's guidance. Counsel also refrains from weaving the defendant's suspected falsehoods into opening or closing arguments.

202. See notes 302-03 for an explanation of the manner in which narrative testimony telegraphs to the judge and jury counsel's belief that the defendant's testimony is false.

nebulous assurance that the accused "may controvert the lawyer's version of their communication when the lawyer *discloses* the [client perjury] situation *to the court*."²⁰³

Even if the accused was afforded a full-blown evidentiary hearing on a pretrial or an interlocutory basis with all rights accorded under the Confrontation Clause and with the "reasonable doubt" standard of proof, the defendant—"lacking skill in the science of law"²⁰⁴—would be denied the right to counsel in this "trial-like confrontation."²⁰⁵ At least one court has appreciated this danger: "To provide such an opportunity may present a delicate problem for the trial judge, who must take care before questioning a defendant whose counsel is at least momentarily on the other side of the issue and may be unable to advise the defendant in a meaningful way."²⁰⁶

The hearing afforded the defendant in *Nix v. Whiteside* underscores this point.²⁰⁷ According to trial counsel Gary Robinson, murder defendant Emanuel Charles Whiteside originally stated to counsel that he believed his victim possessed a gun, but conceded that he never actually observed the weapon.²⁰⁸ Counsel claimed that, shortly before the trial in Iowa state court, Whiteside decided to embellish his self-defense theory by testifying that he saw "something metallic" in the victim's hand.²⁰⁹ Warned by counsel that he would disclose Whiteside's suspected perjury, withdraw, and testify against him, Whiteside relented and testified without referring to a metallic object.²¹⁰ At a post-trial hearing in which Whiteside disputed

203. Model Rules of Professional Conduct Rule 3.3 cmt. 11 (ABA, 1983) (emphasis added).

204. *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932) (stating, "The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel. Even the intelligent and educated layman has small and sometimes no skill in the science of law.").

205. See *United States v. Ash*, 413 U.S. 300 (1973) (defining the scope of the right to counsel to include "trial-like confrontations"). The claim of ineffective assistance in *Nix* did not address this issue; rather, it involved the adequacy of counsel's representation in light of his refusal to call the accused to the stand and his threats to impeach the accused.

206. *Witherspoon v. United States*, 557 A.2d 587, 592 n.4 (D.C. App. 1989). In a partial concurrence and partial dissent, Judge Ferren suggested that, at such a hearing, "if the client-defendant does wish to speak, the hearing judge may wish to assure the defendant access to independent counsel to evaluate and monitor that decision." While Judge Ferren is rightfully concerned that a hearing could trample the defendant's privilege against self-incrimination, when one considers a defendant's many other fundamental adversarial rights and the legal expertise and advocacy skills necessary to protect those rights at the hearing, it is clear that the defendant would have been deprived of the effective assistance of counsel, as well.

207. The hearings to which the commentary to the Model Rules refers (see note 203) or that several commentators have proposed (see note 217) are interlocutory. Whiteside's hearing was held pursuant to his post-trial motion for a new trial and according to the Iowa rules governing recanted testimony. See *Nix v. Whiteside*, 475 U.S. 157, 162, 179 (1986).

208. *Id.* at 160-61.

209. *Id.* at 161, 179.

210. *Id.* at 179-80.

Robinson's assertion that his intended testimony was untruthful, the trial judge concluded that it was.²¹¹ Chief Justice Burger derided Whiteside's version as "cryptic."²¹²

Based on the small amount of testimony reprinted in *Nix* from that hearing, however, it seems that if counsel had been appointed for Whiteside, a more convincing case could have been made that Whiteside may never have intended to commit perjury. For example, Whiteside's trial counsel testified at the hearing that his client's claim to have seen "something metallic" was a lie "because [Whiteside] had never at any time indicated that there was a gun."²¹³ However, as a lawyer could have argued on Whiteside's behalf, Whiteside simply may have recalled observing something metallic after a long search of his memory for details, and he may not have been claiming that the metallic object was a gun. After all, trial counsel conceded at the hearing that his client "made reference to seeing something 'metallic' . . . *I don't think he ever did say a gun.*"²¹⁴ In fact, in his separate concurrence in *Nix*, Justice Stevens warned that

[a] lawyer's certainty that a change in his client's recollection is a harbinger of intended perjury—as well as judicial review of such apparent certainty—should be tempered by the realization that, after reflection, the most honest witness may recall (or sincerely believe he recalls) details that he previously overlooked.²¹⁵

The metallic object may, in reality, have been a ring, which, in a dark room where the defendant believed a gun was present and in which the defendant was forced to act on the spur of the moment, may have reasonably influenced the defendant to act in the manner he did. More important than the truth about the metallic object, however, is the fact that trial counsel may not have considered these explanations and that Whiteside may have presented a more cogent argument at the hearing had he been afforded the assistance of counsel.

While several courts have implicitly or explicitly rejected the notion that the defendant is entitled to a hearing when counsel

211. *Id.* at 162-63, 179-80, 182. See notes 213-15 and accompanying text for a discussion of the sufficiency of Whiteside's hearing and reasons to believe that Whiteside's intended testimony may have been true.

212. *Nix*, 475 U.S. at 161 n.2. The trial judge asked Whiteside, "[A]s you went over the questions, did the two of you come into conflict with regard to whether or not there was a weapon?" Whiteside responded, "I couldn't—I couldn't say a conflict. But I got the impression at one time that maybe if I didn't go along with—with what was happening, that it was no gun being involved, maybe that he will pull out of my trial." *Id.*

213. *Id.* at 179.

214. *Id.* (Blackmun, J., concurring) (quoting the Appeal to Petition for Certiorari) (emphasis added).

215. *Id.* at 190-91 (Stevens, J., concurring).

refuses to conduct the defense as if she believed the defendant was being truthful,²¹⁶ other courts and commentators have described their own proposals for a hearing at which the accused may challenge counsel's grounds for concluding that her client is lying.²¹⁷ However, in addition to the destruction of client trust resulting from a pretrial or interlocutory hearing in which the defendant must defend herself against her own lawyer's accusations, a hearing would impose a burden on the defendant and the court system equal to the constitutional burdens it relieved: to rebut effectively defense counsel's assertion to the court that the defendant's testimony is untruthful, the defendant may need to construct, through her own testimony and that of others, the very same case by which she proposes to convince the jury of the credibility of her version of the facts. The accused would thus be forced to try her case twice, once in the hearing before the trial judge and once again to the jury at trial. In addition, when the hearing precedes the defendant's testimony, the

216. See, for example, *People v. Barte*, 566 N.E.2d 855, 857 (Ill. App. 2d 1991) (stating that the state supreme court's "holding in no way refers to defendant's choice of remedy, a hearing to determine the basis for counsel's belief. Defendant would require an evidentiary hearing before counsel could move to withdraw or have a defendant testify in narrative form. Defendant cites no case, other than [*United States v.*] *Long*, that would require such action. We decline to adopt the holding in *Long*").

217. See, for example, *United States v. Long*, 857 F.2d 436, 444-45 (8th Cir. 1988) (holding that when defense counsel discloses to the trial court her belief that the defendant will testify untruthfully, the defendant is entitled to an evidentiary hearing in a post-conviction habeas corpus proceeding to determine whether counsel had a "firm factual basis" for disclosure). In several different factual contexts, the District of Columbia Court of Appeals has spoken of a duty to conduct a hearing: *Witherspoon v. United States*, 557 A.2d 587, 591 (D.C. App. 1989) (warning, in a case in which defense counsel informed the trial judge that the defendant's alibi witnesses would testify untruthfully and requested to withdraw from representation, that the trial judge should have been "alert . . . to the possibility of a conflict [of interest on the part of defense counsel] and to [the judge's] attendant duty to conduct an inquiry to determine whether an actual conflict existed") (emphasis added); *Butler v. United States*, 414 A.2d 844 (D.C. App. 1980) (Ferren, J., concurring in part and dissenting in part) (recommending that, following a pretrial hearing (at which the prosecutor remained present) on the effectiveness of defense counsel who believed her client would commit perjury and thus proposed to limit her efforts on the client's behalf, the case be transferred to a new trial judge and testimony at the hearing should be inadmissible at trial); *Thornton v. United States*, 357 A.2d 429, 432 (D.C. App. 1976) (holding that "[t]he resolution of a motion [to withdraw by defense counsel who believes the accused will testify perjurally] affecting such a basic constitutional right [as the right to counsel], without any examination of the reasons therefor, is prima facie improper. When a question of the continued effective assistance of counsel is voiced, the court then has a duty to inquire into [its] basis."). See also William H. Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 Denver L. J. 75, 88-89 (1981) (suggesting that a panel of lawyers give defense counsel advice on whether to withdraw); Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*, 70 Minn. L. Rev. 121 (1985) (proposing that a judge, other than the one trying the case, hold an informal, in camera, interlocutory hearing attended only by defense counsel and the accused, at which the judge should review the accuracy of counsel's belief that her client will testify untruthfully).

defendant would be forced to choose between responding to counsel's accusation and exercising her privilege against self-incrimination with respect to a potential perjury prosecution.

d. Circumventing the Exclusionary Rule: Disclosure of Unlawfully Obtained Evidence to Counsel

The Government cannot violate the Fourth Amendment . . . and use the fruits of such unlawful conduct to secure a conviction. . . . Nor can the Government make *indirect* use of such evidence. . . . [C]onvictions obtained by [these] means . . . are invalidated, because they encourage the kind of society that is obnoxious to free men.

—Walder v. United States²¹⁸

Although truth is undoubtedly an essential element of justice, the discovery of truth at the cost of fairness or human dignity is not a goal of the adversarial system. The privilege against self-incrimination, for example, is a testament to this point. Another example is the exclusionary rule, a principal but beleaguered facet of Fourth Amendment jurisprudence²¹⁹ designed to deter police misconduct by preventing the introduction of unlawfully obtained, but often highly reliable, evidence.²²⁰ Even the Rehnquist Court concedes

218. 347 U.S. 62, 64-65 (1954) (emphasis added).

219. The Fourth Amendment guarantees, in relevant part, "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures. . . ." U.S. Const. Amend. IV.

Even the right to counsel, in part, frustrates the search for truth. On one hand, defense counsel's obligation to seek and present all evidence favorable to the defendant is consistent with the truth-seeking function of the adversarial process. On the other hand, fulfilling many of her other responsibilities results in the suppression of truth. These responsibilities include the duty to advise a client of his or her rights (such as the right not to testify) and to advocate zealously on the client's behalf (for example, by attempting to suppress unlawfully seized evidence). As Chief Justice Burger articulated in *Williams v. Florida*, "[a] criminal trial is in part a search for truth. But it is also a system designed to protect 'freedom' by insuring that no one is criminally punished unless the State has first succeeded in the admittedly difficult task of convincing a jury that the defendant is guilty." *Williams v. Florida*, 399 U.S. 78, 113 (1970).

220. In *Stone v. Powell*, the Supreme Court optimistically suggested that compliance with the rules of gathering evidence is the product of a long-term "educative effect" in which police internalize the stated values of the system, and not merely the product of the fear of forfeiting convictions. *Stone v. Powell*, 428 U.S. 465, 493 (1976). Unfortunately, the late Professor Irving Younger's assessment may be more accurate: "Policemen see themselves as fighting a two-front war—against criminals in the street and against 'liberal' rules of law in court. All's fair in this war . . . to subvert 'liberal' rules of law that might free those who 'ought' to be jailed." Younger, 3 *Crim. L. Bull.* at 551 (cited in note 75).

Justice Brandeis, among others, believed that the exclusionary rule also plays an important role in promoting the appearance of justice essential to an orderly society. In his dissent in *Olmstead v. United States*, he stated, "If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto himself; it invites anarchy." *Olmstead v. United States*, 277 U.S. 438, 485 (1928) (Brandeis, J., dissenting) (holding that

that in principle, “[t]he occasional suppression of illegally obtained yet probative evidence has long been considered a necessary cost of preserving overriding constitutional values.”²²¹ From time to time, however, the client perjury rules frustrate the policy behind the exclusionary rule.

Upon learning of unlawfully gathered evidence that is both reliable²²² and central to the charges, defense counsel will often conclude, and accurately so, that the accused is guilty and that her proposed exculpatory testimony is untrue. If, pursuant to the codes of ethics of the various jurisdictions, counsel takes countermeasures that directly or indirectly alert the factfinder to the defendant’s apparent dishonesty,²²³ then suppressed evidence, which the prosecutor is forbidden to use in obtaining a conviction, nonetheless would be used to achieve that very end. The state is thus permitted to accomplish indirectly that which the exclusionary rule directly prohibits, diminishing the incentive for police to gather evidence lawfully²²⁴ and, ultimately, violating the Fourth Amendment.²²⁵

evidence obtained through a wiretap by federal agents acting without a search warrant and without having trespassed on the defendant’s property is admissible under the Fourth Amendment).

221. *James v. Illinois*, 493 U.S. 307, 311 (1990) (holding that the impeachment exception to the exclusionary rule permitting the prosecution to rebut a defendant’s testimony with previously suppressed evidence does not extend to other defense witnesses).

222. Physical evidence seized without a warrant (or pursuant to a defective warrant) is often an example of such evidence. Unlawfully obtained confessions, on the other hand, vary widely in reliability.

223. That is, in a non-jury trial, disclosure to the court of an “ethical problem”; in a jury trial, requiring the defendant to narrate her testimony on direct examination and failing to refer to that testimony during closing argument. See Part IV.A (discussing the measures required under the model codes when counsel believes the accused will testify or has testified perjurally).

224. A long-standing exception to the exclusionary rule permits the state to impeach the defendant’s credibility with excluded evidence if the defendant directly contradicts some aspect of that evidence on direct examination. *Walder v. United States*, 347 U.S. 62, 65 (1954). The exception is designed to prevent the defendant from taking undue advantage of the exclusionary rule by claiming, for example, that the unlawfully seized evidence did not exist or could not be linked to her. Just as the exclusionary rule cannot be used as a “shield for perjury” at trial, one can also argue that the rule should not shield the would-be perjurer from exposure by defense counsel.

The defendant’s conduct in each situation, however, is distinguishable. Before the state may make use of excluded evidence on cross-examination, the defendant must directly contradict some aspect of that evidence. If, for example, a murder defendant whose bloody clothes were seized unlawfully claimed on direct examination that the clothes were unstained, the prosecutor could introduce the once-excluded clothes to impeach the defendant’s credibility. However, if the defendant’s testimony did not relate to the clothes—for example, if she claimed never to have possessed the murder weapon—then the excluded evidence would remain inadmissible. On the other hand, when defense counsel uses excluded evidence in concluding that a client intends to lie and, pursuant to the present rules of ethics, directly or indirectly impeaches the client, the defendant does not necessarily intend to contradict excluded evidence on direct examination. As in the example above, her perjury might relate to the murder weapon rather than the excluded clothes. Since the defendant in such a situation would not be using the exclusionary rule as a

e. The Need for Client Trust in Plea Bargaining

The traditional but incorrect presumption that the client perjury rules pit the value of truth against the values of client trust and effective representation overlooks the fact that the client perjury rules tend to weaken client trust in *all criminal cases*, not merely in those which result in trial. Indeed, the need for client trust and candor in a case resolved through the plea bargaining process is at least as great as in a case that is brought to trial. Unless armed with the relevant facts, defense counsel is no better able to negotiate a favorable plea bargain or an outright dismissal than she is to obtain a favorable verdict and sentence at trial. In reality, the criminal defendant who remains suspicious of counsel will often doubt that even the most advantageous plea offer is actually in her penal interest.²²⁶ Moreover, the vast majority of charges are disposed of through plea bargaining, while, according to many estimates, only about five percent of cases are ultimately tried.²²⁷ With these facts in

shield for her perjury, the rationale behind the exception is generally inapplicable to the client perjury problem.

225. The Supreme Court has given conflicting indications about whether the Fourth Amendment requires the exclusionary rule or whether the rule is merely a deterrent fashioned by the Court to promote compliance with the Amendment. While the Court stated in *Mapp v. Ohio*, 367 U.S. 643 (1961), that the rule is "part and parcel" of the Fourth Amendment, 13 years later in *United States v. Calandra*, 414 U.S. 338 (1974), the Court referred to the rule as "a judicially created remedy." *Id.* at 348.

226. "The possibility that your client may need to plead guilty makes the need for quickly establishing trust of overarching importance. Plea offers come and go like meteors. If your client does not trust you until a plea has expired, you have failed. You have quite simply screwed your client." Bellows, *Notes of a Public Defender*, in Heymann and Liebman, *The Social Responsibilities of Lawyers* at 89 (cited in note 88).

227. Donald Newman, *Reshape the Deal*, 9 Trial 11 (May-June 1973); ABA Project on Standards for Criminal Justice, *Pleas of Guilty* 1-2 (1968). More important, as the author of a study involving the criminal courts in Detroit points out:

[J]ury trials represented only 5 percent of the total number of felony dispositions but consumed almost 40 percent of the total number of judge-days for that year. Had the number of jury trials tripled, they would have consumed *all* of the judge-days for that year, yet left undisposed 85 percent of the felony cases confronting the court! And this situation is by no means unique to Detroit: all major metropolitan courts are structurally incapable of disposing of the major proportion of their volume by means of an adversary trial. In fact, if the adversary expectations entailed in an ideal-typical formal-rational administration of justice controlled the actual operations of these courts, the administration of justice in the urban centers of the United States would grind to a sudden and dramatic halt.

Balbus, *The Dialectics of Legal Repression* at 16-17 (cited in note 147). See also Albert W. Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 54 (1976) (quoting a Manhattan prosecutor admitting that "[o]ur office keeps eight courtrooms extremely busy trying five per cent of the cases. If even ten per cent of the cases ended in a trial, the system would break down,"). Sources estimate that approximately 90% of all criminal cases scheduled for trial are ultimately resolved through plea bargaining. See, for example, Henry J. Abraham, *The Judicial Process: An Introductory Analysis of the Courts of the United States* 135 (Oxford U., 1993).

mind, even if the abolition of the client perjury rules resulted in a net loss of truth in the small proportion of cases that advance to trial, the distrust of counsel generated by the rules in each criminal case—whether tried, plea bargained, or dismissed—almost certainly exacts a greater toll on justice.

The fact that the disclosure of perceived client falsehoods is not an issue in a plea bargain does nothing to alleviate client distrust. During the early stages of representation when the accused is called on to relate the relevant facts to defense counsel, she is rarely certain that a bargain will or should be struck and that the case may not be tried. The accused is thus concerned, even during plea bargaining, that information she relays to her attorney might eventually be used against her at trial should the plea bargaining fail.

C. *Undermining the Adversarial Process*

In addition to the foregoing violations of the Fifth and Sixth Amendment rights accorded criminal defendants, the client perjury rules undermine the very structure of the adversarial system mandated by the Constitution. First, by shifting the delicate balance of responsibilities among defense counsel, prosecutor, judge, and jury, the client perjury rules upset the fragile equilibrium of the adversarial process prescribed by the Constitution and resurrect the duplicitous role of defense counsel in Star Chamber proceedings. Second, by effectively requiring counsel to assess the defendant's veracity and by denying the accused a meaningful opportunity to challenge the accuracy of counsel's allegation that the accused will testify or has testified untruthfully, the client perjury rules implant within the trial process a hidden inquisition.

1. Upsetting the Balance of Power Within the Constitutionally Mandated Adversarial Process

Keenly aware of the specter of the Star Chamber and the historical abuses of Continental inquisitorial proceedings,²²⁸ the drafters of the Bill of Rights provided to criminal defendants the procedural protections of the Fifth and Sixth Amendments.²²⁹ These

228. See generally Adhemer Esmein, *History of Continental Criminal Procedure* (Little, Brown, 1913, reprinted 1968).

229. *Wardius v. Oregon*, 412 U.S. 470, 479 (1973) (Douglas, J., concurring) (stating that "[t]he Fifth Amendment [was] written with the inquisitorial practices of the Star Chamber firmly in mind").

guarantees represent the constituent elements of the adversarial process,²³⁰ the mode of adjudication that the drafters knew firsthand,²³¹ and are meaningful only within the context of the process itself.²³² By vesting primary responsibility in opposing parties for developing evidence and testing credibility, the Sixth Amendment rights to effective assistance of counsel,²³³ to testify on one's own

230. The Court has cited various combinations of the Fifth, Sixth, and Fourteenth Amendment rights as the basis of our adversarial system. See *Strickland v. Washington*, 466 U.S. 668, 685 (1984) (remarking that "a fair trial is one in which evidence subject to adversarial testing is presented to an impartial tribunal . . ."); *Nix v. Williams*, 467 U.S. 431, 453 (1984) (adopting the "inevitable discovery" exception to the exclusionary rule in a case involving an involuntary confession and stating that "[t]he Sixth Amendment guarantees that the conviction of the accused will be the product of an adversarial process"); *Garner v. United States*, 424 U.S. 648, 655 (1976) (construing the limits of the privilege against self-incrimination and concluding that "the fundamental purpose of the Fifth Amendment [is] the preservation of an adversary system of criminal justice"); *Herring v. New York*, 422 U.S. 853, 857 (1975) (considering the constitutionality of a New York statute permitting a judge to order counsel to forgo closing arguments in a non-jury trial and asserting that "the adversary factfinding process . . . has been constitutionalized in the Sixth and Fourteenth Amendments"); *Faretta v. California*, 422 U.S. 806, 818 (1975) (establishing the right of criminal defendants to pro se representation and stating that "[t]he Sixth Amendment . . . rights are basic to our adversary system of criminal justice. . . . The rights . . . guarantee that a criminal charge may be unanswered . . . through the calling and interrogation of favorable witnesses, the cross-examination of adverse witnesses, and the orderly introduction of evidence. In short, the [Sixth] Amendment constitutionalizes the right in an adversary criminal trial to make a defense as we know it"). See also Hazard, *Ethics in the Practice of Law* at 122 (cited in note 74) (noting that "the Supreme Court has substantially equated adversarial trial with due process"); Wolfram, *Modern Legal Ethics* at 564 (cited in note 32) (recognizing that "the adversary system . . . [is] presently part of the Supreme Court's definition of due process that is assured to litigants by the Fifth and Fourteenth Amendments"); Leonard S. Rubenstein, *Procedural Due Process and the Limits of the Adversary System*, 11 Harv. C.R.-C.L. L. Rev. 48 (1976) (noting that "it is common to equate the adversarial system with the idea of due process itself"); John E. Nowak, Ronald D. Rotunda, and J. Nelson Young, *Constitutional Law* § 11.6 at 366 (West, 3d ed. 1986).

231. See *Ex Parte Grossman*, 267 U.S. 87, 108-09 (1925) (stating, "The language of the Constitution cannot be interpreted safely except by reference to the common law and to British institutions as they were when the instrument was framed and adopted."); *Mattox v. United States*, 156 U.S. 237, 243 (1895) (stating that the Court is "bound to interpret the Constitution in light of the law as it existed at the time [the Constitution] was adopted").

232. "The legal system that gives context and meaning to basic American rights is the adversary system." American Lawyer's Code of Conduct Preamble (1982).

In the late 18th century, when the Constitution and Bill of Rights were ratified, a number of the principal Sixth Amendment rights of the accused were foreign to the inquisitorial systems of Continental Europe. In a purely inquisitorial trial, the judge conducts the questioning of witnesses and otherwise develops the evidence (see note 249 and accompanying text) thereby reducing the significance to the defendant of protections such as the right to present evidence and the right to counsel.

233. U.S. Const., Amend. VI (providing, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."); *Powell v. Alabama*, 391 U.S. 45 (1968) (holding that the right to effective counsel is a fundamental element of Fourteenth Amendment due process); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring the states to provide counsel to indigent criminal defendants). For the general standards by which counsel's effectiveness is measured, see generally *United States v. Chronic*, 466 U.S. 648 (1984); *Strickland v. Washington*, 466 U.S. 668 (1984).

behalf,²³⁴ to compel the testimony of others,²³⁵ and to confront one's accusers²³⁶—including the derivative right of cross-examination²³⁷—define the adversarial system of criminal justice.²³⁸ The Sixth Amendment right to trial by jury²³⁹ entrusts factfinding to a defendant's peers, and the Fifth Amendment privilege against self-incrimination²⁴⁰ further limits the coercive powers of the state. Reflecting the Framers' belief in the intrinsic link between justice and the adversarial process, the Supreme Court has repeatedly acknowledged that "the Constitution recognizes an adversary system as the proper method of determining guilt."²⁴¹

234. *Rock v. Arkansas*, 483 U.S. 44, 51 (1987) (noting that "[t]he right to testify on one's own behalf at a criminal trial has sources in several provisions of the Constitution").

235. U.S. Const., Amend. VI (providing, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor. . ."). See *Washington v. Texas*, 388 U.S. 14 (1967) (applying the defendant's right to compulsory process to state court prosecutions through the due process clause of the Fourteenth Amendment).

236. U.S. Const., Amend. VI (providing, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him. . ."). See *Pointer v. Texas*, 380 U.S. 400 (1965) (incorporating the right to confront witnesses into Fourteenth Amendment due process).

237. "It cannot seriously be doubted at this late date that the right of cross-examination is included in the right of an accused in a criminal case to confront the witnesses against him." *Pointer*, 380 U.S. at 404.

238. LaFave and Israel, *Criminal Procedure* § 1.6(a) at 25 (cited in note 230) (explaining that "[t]he structuring of an adversary system underlies many of the guarantees of the Bill of Rights, such as the Sixth Amendment rights of the defendant to the assistance of counsel, to confront opposing witnesses, and to compulsory process for obtaining witnesses in his favor").

Counsel's responsibility in an adversarial system for gathering and presenting evidence is the principal distinction between the adversarial and inquisitorial modes of adjudication. Mirjan R. Damaska, *The Faces of Justice and State Authority* 3 (Yale U., 1986) (describing the adversarial system as "an engagement of two adversaries before a relatively passive decision-maker whose principal duty is to reach a verdict. The [inquisitorial] mode is structured as an official inquiry. Under the first system, two adversaries take charge of most procedural action; under the second, officials perform most activities."); Abraham S. Goldstein, *Reflections on Two Models: Inquisitorial Themes in American Criminal Procedure*, 26 Stan. L. Rev. 1009, 1016-17 (1974) (noting that, in adversarial proceedings, "[c]ounsel for the state and accused play an aggressive role in presenting and examining witnesses and in shaping legal issues. . . . The judge is a relatively neutral participant who assures that rules of evidence are satisfied and that the jury is properly instructed on the law."); Hazard, *Ethics in the Practice of Law* at 120 (cited in note 74); LaFave and Israel, *Criminal Procedure* § 1.6(a) at 23; Wolfram, *Modern Legal Ethics* at 564 (cited in note 32).

239. U.S. Const., Amend. VI (providing, in relevant part, "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury. . ."). See *Duncan v. Louisiana*, 391 U.S. 145 (1968) (incorporating the right to a jury trial into Fourteenth Amendment due process).

240. U.S. Const., Amend. V (providing, in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."). See *Malloy v. Hogan*, 378 U.S. 1 (1964) (holding that the privilege against self-incrimination is a fundamental component of Fourteenth Amendment due process).

241. *Singer v. United States*, 380 U.S. 24, 36 (1965) (holding that a criminal defendant has no constitutional right to a non-jury trial: "We have elected to employ an adversary system of criminal justice in which the parties contest all issues. . ."); *United States v. Nixon*, 418 U.S. 683,

In at least two respects, the client perjury rules alter the nature and upset the balance of responsibilities and powers allocated among the prosecutor, defense attorney, judge, and jury in adversarial criminal proceedings. First, a crucial duty of the prosecutor is the duty to test the credibility of defense witnesses. Similarly, a primary part of the jury's responsibility (or the judge's responsibility in a non-jury trial) as impartial factfinder is to evaluate the veracity of witnesses.²⁴² However, as noted, the client perjury rules effectively oblige *defense counsel* to assess the veracity of the defendant, often the most important witness in the proceeding.

Second, the client perjury rules require counsel who believes the accused will testify untruthfully to seek withdrawal, to disclose this perception to the court, or both.²⁴³ By assuming important duties of the prosecutor and the factfinder, and by withdrawing or disclosing counsel's belief, defense counsel virtually abandons the role of partisan advocate.²⁴⁴ As Justice Blackmun warned in his concurring opinion in *Nix*, "[A]ttorneys who adopt 'the role of the judge or jury to determine the facts,' . . . pose a danger of depriving their clients of . . . zealous and loyal advocacy. . . ." ²⁴⁵ Indeed, in denouncing her client to the court upon concluding that the accused's version of the facts is untrue, defense counsel functions as an arm of the state in a manner similar to that of suspect's counsel in the Star Chamber.²⁴⁶ Perhaps

709 (1974). The Court even stated that "the Fifth Amendment outlaws" an "inquisitorial system of criminal justice." *Griffin v. State of California*, 380 U.S. 609, 614 (1965).

"The adversary system," as Professor Laurence Tribe has observed, "has deep roots in America's political and cultural heritage." Tribe, *American Constitutional Law* § 10-19 at 764 (cited in note 97). See also Hazard, *Ethics in the Practice of Law* at 120-21, 123 (cited in note 74) (noting that "[t]he adversary system has deep roots in the Anglo-American legal tradition. . . . [It] is not only a theory of adjudication but a constituent of our history of political theory. . . . [T]he adversary system stands with freedom of speech and the right of assembly as a pillar of our constitutional system."); Wolfram, *Modern Legal Ethics* at 565 (cited in note 32) (observing that "[t]he adversary system in the United States is culture-bound").

242. *Washington v. Texas*, 388 U.S. 14, 20 (1967) (observing that "the Framers of the Constitution felt it necessary specifically to provide that defendants in criminal cases should be provided the means of obtaining witnesses so that their own evidence, as well as the prosecution's, might be *evaluated by the jury*") (emphasis added).

243. See Part IV.A.

244. Because of the prosecution's ability to persecute or harass citizens, and because of the severity of criminal sanctions, prosecutors are assigned the duty to seek justice, a duty that exists in perpetual tension with their role as partisan advocates. As a consequence, the prosecutor's role properly requires that she assess the veracity of government witnesses.

245. *Nix v. Whiteside*, 475 U.S. 157, 189 (1986) (Blackmun, J., concurring in the judgment) (citation omitted).

246. Thomas Erskine, the great English advocato, observed:

I will for ever, at all hazards, assert the dignity, independence, and integrity of the English Bar; without which, impartial justice, the most valuable part of the English constitution, can have no existence. . . . If the advocato refuses to defend, from what he may think of . . . the defense, he assumes the charter of the Judge; nay, he assumes it before the hour of judgment; and in proportion to his rank and reputation puts the heavy

the most significant difference is that, in the Court of Star Chamber, counsel's obligation to denounce a client whose version of the facts she does not believe is an openly acknowledged trial procedure while, in our adversarial criminal trials, counsel poses as champion of the accused.

2. The Hidden Inquisition

"I'll be judge and I'll be jury," said cunning old Fury; 'I'll try the whole cause and condemn you to death."

—Lewis Carroll²⁴⁷

The manner in which the client perjury rules upset the fragile balance of responsibilities within the adversarial process creates, in effect, an unregulated, summary inquisition within the larger adversarial trial. This inquisition, hidden from public view, occurs in two stages. The first is defense counsel's own assessment of the credibility of the accused, as necessitated by criminal and professional sanctions that can be levied against counsel should she simply *appear* to have knowingly elicited client perjury. In making the assessment, counsel must resolve various questions of fact from the evidence she has gathered during her investigation of the case.²⁴⁸ Unlike adversarial trials, in which opposing counsel share responsibility for developing evidence and a jury of the defendant's peers decides questions of fact and credibility, in inquisitorial proceedings these responsibilities reside in a single entity—the state tribunal.²⁴⁹ Accordingly, the process by which defense counsel must assess the veracity of the defendant resembles an inquisition: counsel, by developing evidence and discerning the defendant's credibility,

influence of, perhaps, a mistaken opinion into the scale against the accused, in whose favour the benevolent principle of English law makes all presumptions.

2 *The Speeches of the Hon. Thomas Erskine, When at the Bar: On Subjects Connected with the Liberty of the Press, Against Constructive Treasons, and On Miscellaneous Subjects* 90-91 (S. Gosnell, collected by James Ridgway 1813).

247. Lewis Carroll, *Alice's Adventures in Wonderland* 25 (Clarendon Press, 1865).

248. For an analysis of the problems associated with counsel's reliance on such information, see Part II.B.2.a.iv.

249. Damaska, *The Faces of Justice* at 3 (cited in note 238); John Henry Merryman, *The Civil Law Tradition* 127 (Stanford U., 1985) (describing the judge in an inquisitorial system as "an active inquisitor who is free to seek evidence and to control the nature and objectives of the inquiry"); Hazard, *Ethics in the Practice of Law* at 120 (cited in note 74) (explaining that "in countries of the civil law tradition such as France and Germany . . . the judge determines the law and finds the facts by his own active investigation and inquiries at trial").

assumes the role of the inquisitorial tribunal,²⁵⁰ while the diminished role of the jury reflects an elitist and inquisitorial distrust of jurors' ability to sort fact from fiction.²⁵¹

The second stage of the hidden inquisition occurs when counsel conveys to the factfinder, either directly by disclosure to the court or indirectly by seeking to withdraw,²⁵² the incriminating assertion that her client intends to be or has been untruthful. In oppressive, pre-modern Continental inquisitions, defendants were virtually unable to mount an effective defense. They were accorded, for example, no right to counsel, no right to confront their accusers or to present evidence on their own behalf, and no privilege against self-incrimination.²⁵³

250. "[I]n an inquisitorial system, . . . virtually all relevant sources of information are available to the judge, including evidence involuntarily obtained from the defendant." Joshua Dressler, *Understanding Criminal Procedure* § 7 at 22 (1991).

251. American courts historically have demonstrated a distrust of the jury system. See, for example, *Benson v. United States*, 146 U.S. 325, 336 (1892) (conceding that courts do not trust the ability of jurors to distinguish fact from fabrication). The roots of this distrust extend back to the early development of the jury system. From mid-16th century England until the middle of the next century, for example, "[common-law t]rial judges dissatisfied with acquittals would either fine the jurors instantly, or bind them over to appear in Star Chamber . . . [where] they were accounted very tyrannical." John Hamilton Baker, *The Legal Profession and the Common Law: Historical Essays* 269-70 (1986).

252. See Part IV.A for further discussion of this point.

253. See generally Adhemar Esmein, *History of Continental Criminal Procedure* (Little, Brown, John Simpson trans., 1913). Over the past 200 years, a number of the features of adversarial criminal justice—including the right to counsel and, to a more limited extent, the right to a jury trial—have been incorporated into the inquisitorial criminal proceedings of most civil-law countries. Few civil-law countries, however, extend to criminal defendants a privilege against testifying. Damaska, 121 U. Pa. L. Rev. at 526-28 (cited in note 65). Although a civil-law court may question a witness closely whose testimony it doubts, witnesses are not routinely subjected to intensive cross-examination, as in our adversarial system. Merryman, *The Civil Law Tradition* at 129-30 (cited in note 249). See also 5 John H. Wigmore, *Evidence in Trials at Common Law* § 1367 at 32 n.2, 33 (Little, Brown, James H. Chadbourn rev. 1974) (noting that "[i]n Continental practice, . . . cross-examination is so casual or so feeble as to be a negligible quantity. . . . [I]n some of the great Continental trials, . . . the failures of justice could hardly have occurred under the practice of effective cross-examination."); G. E. P. Brouwer, *Inquisitorial and Adversary Procedures—A Comparative Analysis*, 55 Austl. L.J. 207, 220 (1981) (explaining that "[t]he concept of 'cross-examination' as formalised at common law is not known to French law as such").

In most modern civil-law systems, there are three stages in a criminal prosecution: investigation, examination, and trial. Of these, the examination phase most closely resembles the presentation of the case-in-chief in an American trial. Although the initial and most extensive questioning of witnesses is performed, in a non-partisan manner, by the examining judge, the prosecutor and defense counsel typically may submit questions to be asked of witnesses, request that particular witnesses be called to testify, and seek the introduction of physical evidence. See generally Merryman, *The Civil Law Tradition* at 124-32.

The relative effectiveness of adversarial and inquisitorial truth-finding is, of course, a subject of endless debate. See, for example, Judith Resnick, *The Declining Faith in the Adversary System*, 13 Litig. 3, 4 (1986); Martin Golding, *On the Adversary System and Justice* in Richard Bronaugh, ed., *Philosophical Law* 98, 106 (1978) (arguing that "an adversarial trial promotes decisions that are well grounded on both the law and the facts because each side will, with partisan zeal, bring to the court's attention all the material favorable to that side, and therefore, no relevant consideration will escape its notice"); Rubenstein, 11 Harv. C.R.-C.L. L. Rev. 48 (cited

Similarly, when defense counsel in our adversarial criminal proceedings communicates her incriminating belief in the defendant's untruthfulness pursuant to the client perjury rules, the defendant is given little opportunity to rebut counsel's allegation.²⁵⁴ As discussed above, a defendant who maintains that her version of the facts is truthful is denied most of the Confrontation Clause rights that would permit her to prove her contention.²⁵⁵ Induced by assurances of confidentiality to reveal her version to counsel, the defendant is also effectively denied the privilege against self-incrimination.²⁵⁶ Even if the accused did possess these rights, since defense counsel functions as the defendant's accuser during the hidden inquisition, the defendant is denied the assistance of counsel necessary to exercise such rights meaningfully.²⁵⁷ Ultimately, by destabilizing the delicate balance of adversarial responsibilities between the defense counsel, prosecutor, judge, and jury, and by creating a hidden inquisition within our criminal proceedings, the client perjury rules represent a wholesale repudiation of the adversarial mode of adjudication prescribed by the Constitution.

in note 230); Rudolf B. Schlesinger, *Comparative Criminal Procedure: A Plea for Utilizing Foreign Experience*, 26 Buff. L. Rev. 361 (1977); Rescoe Pound, *The Causes of Popular Dissatisfaction with the Administration of Justice*, 29 Rep. A.B.A. 395, reprinted in 40 Am. L. Rev. 729 (1906); *Polk County v. Dodson*, 454 U.S. 312, 318 (1981); *Herring v. New York*, 422 U.S. 853, 862 (1975). One scholar compared adversarial and inquisitorial truth-finding by observing that, if he were innocent, he would prefer to be tried in a modern, modified inquisitorial system, but if he were guilty, he would prefer an adversarial proceeding. See Merryman, *The Civil Law Tradition* at 132. However, since the American process is mandated by the Constitution, this issue need not be resolved in addressing the aptness of the client perjury rules in American criminal proceedings.

For an authoritative comparison of the adversarial system of justice with various modern inquisitorial models that have evolved in civil-law countries, see generally Damaska, *The Faces of Justice* (cited in note 238); John H. Langbein, *The Criminal Trial Before the Lawyers*, 45 U. Chi. L. Rev. 263 (1978); John H. Langbein, *Comparative Criminal Procedure: Germany* (West, 1977); Mirjan R. Damaska, *Structures of Authority and Comparative Criminal Procedure*, 84 Yale L. J. 480 (1975); Damaska, 121 U. Pa. L. Rev. 506 (cited in note 32).

254. See Part II.B.2.c for further discussion of this point.

255. See id. for further discussion of this point.

256. See Part II.B.2.b for further discussion of this point.

257. See notes 204-15 and accompanying text for further discussion of this point.

3. The Failure to Recognize That Legal Ethics Must Conform to the Constitutionally Mandated Process and Must Be Process-Specific

Lawyers are professionals, and share with other professionals modes of conduct that clash with normal rules of everyday morality.

—Professor Charles Frankel²⁵⁸

The client perjury rules and their resultant denaturing of the adversarial mode of adjudication reflect, in part, the failure of leaders of the bench and bar, drafters of the codes of attorney conduct, and legal scholars to recognize two imperatives of legal ethics: that rules of legal ethics must not undermine the adversarial process prescribed by the Constitution,²⁵⁹ and that professional ethics are necessarily process-specific. Some leaders have even openly dismissed the need for the standards of professional conduct to conform to the adversarial process. In a flagrant example, the late Robert Kutak, Chair of the Commission that drafted the Model Rules of Professional Conduct and the driving force behind the Rules, unabashedly declared, “[A]s useful as the [adversarial system] may have been in an earlier day, it simply is neither accurate nor functional as an organizing principle around which to order our thinking about professional responsibility.”²⁶⁰

258. Charles Frankel, *The Code of Professional Responsibility*, 43 U. Chi. L. Rev. 874, 883 (1976) (book review).

259. “[T]he professional responsibilities of the lawyer . . . must be determined, in major part, by the same civil libertarian values that are embodied in the Constitution.” Freedman, *Understanding Lawyers’ Ethics* at 13-14 (cited in note 33). See also Monroe H. Freedman, *Professionalism in the American Adversary System*, 41 Emory L. J. 467, 470 (1992).

260. Robert Kutak, *Pacific Business News* at 18 (ABA Bonus Edition, July 31, 1980).

The American Trial Lawyers Association (ALTA), in the preface to the alternative American Lawyer’s Code of Conduct, described the drafters of the Model Rules as “a commission made up of lawyers who work for institutional clients, in institutional firms, licensed to write prospectuses for giant corporations, or to haggle with federal agencies over regulations and operating rights.” The American Lawyer’s Code of Conduct Preface (ATLA, Revised Draft 1992). As the Preface to ATLA’s American Lawyer’s Code of Conduct states, “The Kutak Rules . . . embody a core conviction about the lawyer’s role that is fundamentally at odds with the American constitutional system.” Theodore Koskoff, *The American Lawyer’s Code of Conduct Preface* (ATLA, 1982).

The model codes of ethics, few of the drafters of which have had substantial experience representing criminal defendants, reflect a similar hostility toward or limited understanding of the rights comprising the adversarial process and the mandatory nature of that process. In a classic example, the commentary to the Model Rules expresses concern that, because counsel might be obligated to withdraw if a dispute arises at trial over the veracity of the defendant’s impending testimony, an “unscrupulous defendant” might cause a succession of mistrials in an attempt to evade prosecution. Model Rules of Professional Conduct Rule 3.3 cmt. 11 (ABA, 1983). Astonishingly, despite the blatant inequity and unconstitutionality of an attempt to revoke an accused’s fundamental right to counsel, the drafters suggest that “a second such [attempt] could be construed as a deliberate abuse of the right to counsel and as such a waiver of the right to further representation.” *Id.*

Even some writers have supported the suggestion made in the comment. See, for example, Carol T. Rieger, *Client Perjury: A Proposed Resolution of the Constitutional and Ethical Issues*,

Although, in the broadest sense, professional ethics represent the application of general moral principles to situations occurring in professional practice,²⁶¹ not all general moral principles are applicable

70 Minn. L. Rev. 121, 147 (1985). The right to counsel, of course, cannot be forfeited or involuntarily "waived." See *Faretta v. California*, 422 U.S. 806 (1975); *Johnson v. Zerbst*, 304 U.S. 458 (1938). The Supreme Court has held that "the record must show . . . that an accused was offered counsel but intelligently and understandingly rejected the offer. Anything less is not waiver." *Carnley v. Cochran*, 369 U.S. 506, 516 (1962). As the Ninth Circuit Court of Appeals has warned, "[i]f in truth the defendant has committed perjury . . . she does not by that falsehood forfeit her right to fair trial." *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978).

261. To an extent, professional ethics assume the troubling notion of a universally accepted morality, as evident in current efforts to redefine the lawyer's role as that of "moral activist."

Feminist scholars have identified an alternative to the rights-based legal ethics of the traditional partisan lawyer and to the moral tyranny of the moral activist lawyer. Professor Carole Gilligan's research, which suggests a relational, care-based morality more common to women than to men, has inspired studies identifying an alternative, de facto set of legal ethics concerned more with responsibility and connectedness than with the application of abstract principles of justice within a combative process. See generally Carole Gilligan, *In a Different Voice: Psychological Theory and Women's Development* (Harvard U., 1982); Rand Jack and Dana C. Jack, *Moral Vision and Professional Decisions: The Changing Values of Women and Men Lawyers* (Cambridge U., 1989). As one commentator explains,

The rights orientation hypothesized that the individual is a "moral" agent who "stands . . . against a ground of social relationships, judging the conflicting claims of self and others against a standard of equality," while the care perspective is "grounded in the assumption that self and other are interdependent . . . the self is by definition connected to others." The consequences of the rights paradigm lead to a framework in which decisions are made through a logical hierarchy of duties. The care paradigm might lead to balancing caring for oneself with caring for others, and managing conflict without hurting continuing relationships. For those who use a contextual analysis, moral problems arise from conflicting responsibilities rather than from competing rights. Their resolution requires a way of thinking that is contextual and narrative, not formal and abstract.

Naomi Cahn, *A Preliminary Feminist Critique of Legal Ethics* 4 *Georgetown J. Legal Ethics* 23, 45-46 (1990) (footnote omitted). See generally Beverly Horsburgh, *Redefining the Family: Recognizing the Altruistic Caretaker and the Importance of Relational Needs*, 25 *U. Mich. J. L. Ref.* 423, 425 n.4, 426 n.5 (1992).

An example illustrates the difference. One study asked a group of lawyers how they would respond if, while representing a parent in a custody hearing, they learned that their client posed a serious threat of severe physical harm to the children, they knew that the opposing lawyer would not obtain this information unless they violated the attorney-client privilege, and they believed that the opposing party was a fit parent. Jack and Jack, *Moral Vision and Professional Decisions* at 78. Over three-quarters of the male respondents indicated that they would not disclose the risk posed by their client and based their response on their formal role as a partisan advocate and on their duty to maintain client confidences. *Id.* at 190 (figure 4). The rights-oriented group of male attorneys typically responded, "it's not a moral issue for me. . . . I've got a client privilege to protect. . . . I have a legal and ethical responsibility to a client, and that's the position I take." *Id.* at 82. Half of the females, on the other hand, responded that they would reveal the information, justifying disclosure as the only means of preventing serious harm to the children. *Id.* at 190 (figure 4). In a representative response, one of the care-oriented female attorneys stated that, "I don't want to participate in increasing the hazard to a child; . . . [I]t's not money we're talking about here. We're talking about people, and you can't undo . . . something like that for a child." *Id.* at 82.

Even if it could be shown that care-based legal ethics promote a more humane legal system, a rights-based code of conduct is necessary at the present moment in time: an ethical system that fails to conform to our adversarial, rights-based trial procedure undermines the adjudicatory system mandated by the Constitution.

to every professional situation.²⁶² Just as a baseball pitcher who strikes a batter out with a deceptive curve ball cannot be said to have acted in a dishonest or unprincipled manner,²⁶³ process-specific ethics are routinely accepted in all facets of life.

The very existence of professional codes demonstrates the inadequacy, in many professional situations, of applying simpler codes, such as the Ten Commandments or the Golden Rule. For example, consistent with the Ninth Commandment prohibition against "bearing false witness," the American Medical Association's Principles of Ethics recognize the need for "[a] physician to deal honestly with patients," and even to "expose those physicians . . . who engage in . . . deception."²⁶⁴ Nonetheless, a provision within the Principles of Ethics requiring the informed consent of patients permits doctors to mislead clients with respect to their medical condition or the risk of treatment if disclosure poses "a serious psychological threat of detriment to the patient."²⁶⁵ Ultimately, the failure of leaders of the profession to recognize that professional ethics must be process-specific, and that rules of ethics governing conduct within a mandatory process should not subvert the process, has played a critical role in the promulgation of and widespread support for the client perjury rules.

262. Many scholars have underscored the need for process-specific standards of attorney conduct: "[Legal ethics] often present problems of conflict and accommodation with the ethical rules applicable to individuals and to families, and to those of citizenship generally." Eugene V. Rostow, *The Ideal in Law* 144 (U. of Chicago, 1978); "specialized professions, like the law, . . . have distinctive functions and therefore distinctive ethical norms." Frankel, 43 U. Chi. L. Rev. at 883 (cited in note 258). One scholar has noted that "[u]nions are, like businesses, primarily organizations of self-interest. . . . A profession, in contrast, is organized to help members serve others—according to a certain ideal expressed in its code of ethics. . . . Understanding a code of (professional) ethics as a convention between professionals . . . [w]hat conscience would tell us to do absent a certain convention is not necessarily what conscience would tell us given that convention." Michael Davis, *Thinking Like an Engineer: The Place of a Code of Ethics in the Practice of a Profession*, 20 Phil. & Pub. Aff. 150, 154-55 (1991). See also Charles P. Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3, 16 (1951) (asserting that "[w]e are not dealing with the morals which govern a man acting for himself, but with the ethics of advocacy").

263. Despite the popular tendency to eschew the combat metaphor and to seek less contentious means of resolving civil disputes, the adversarial criminal process formed by the Fifth, Sixth, and Fourteenth Amendments is, for better or worse, a highly regulated form of conflict.

264. American Medical Association, Principles of Ethics Preamble (AMA, 1989).

265. *Id.* at 8.08. Further, with respect to clinical testing, the Principles provide: "[T]o the extent that disclosure of information concerning the nature of the drug or experimental procedure or risks would be expected to materially affect the health of the patient and would be detrimental to his best interest, such information may be withheld from the patient." *Id.* at 2.07 (3)(B)(i).

IV. ALTERNATIVE RESPONSES TO THE PERJURIOUS CRIMINAL CLIENT

Having revealed the cost of the client perjury rules to truth, justice, and the American way of adjudicating criminal charges, the appropriate response to the criminal defendant whose testimony counsel believes will be or was untruthful must be identified. At least four options exist. First, counsel could attempt to follow the prescription in the codes of ethics in force in most jurisdictions requiring that, following an unsuccessful attempt to *remonstrate* with the accused, she seek to withdraw from representation, disclose her belief to the court, or both. Second, as authorized in a number of jurisdictions, counsel may call the defendant to the stand and allow her to narrate her version of the facts, but refrain from eliciting or referring to any testimony counsel believes is false. Third, as a number of commentators and practitioners have suggested and as the Model Rules permit in certain instances, the decision about whether or not to intervene when counsel perceives that her client's testimony is untruthful could be committed to counsel's own conscience. Finally, although few have openly espoused the option, counsel could conduct the defense in the very same manner as if she believed her client was truthful.

A. *Withdrawal, Disclosure, and Remonstratation*

No more devastating breach of th[e] duty [of client loyalty] can be imagined than for a lawyer to denounce his client before the trier of fact as untruthful.

—Ferguson v. State²⁶⁶

Requiring counsel to seek withdrawal when the accused seems intent upon lying on the witness stand entails the obvious risk of generating an endless cycle of withdrawals and new appointments, at least until one of the procession of newly appointed attorneys decides to violate the code and present the defendant's testimony. Alternatively, if the accused becomes reticent with her new attorney in order to conceal her perjurious intent,²⁶⁷ the accompanying flow of relevant and truthful information necessary for counsel to construct a

266. 507 S.2d 94, 97 (Miss. 1987).

267. "If the client is sufficiently sophisticated, he or she will ensure that the new counsel does not become aware that he or she will commit perjury." Chute, *Army Law*, at 55 (cited in note 108).

defense would diminish, as discussed earlier.²⁶⁸ In addition, without an accurate version of the alleged events or an awareness of the client's mendacious intent, the new attorney would be unable to dissuade the would-be perjurer from her course by explaining how the untruthful testimony might be easily detected.²⁶⁹

As a consequence, the only ostensible benefit achieved in exchange for depriving a criminal defendant of the attorney most familiar with her case derives from the perceived need for moral redemption of defense attorneys who have internalized the hollow morality of the client perjury rules. As one such attorney advises, "At least the new attorney would not be aware that he or she is assisting, even passively, the client in presenting false testimony."²⁷⁰ The drafters of the Model Rules seem, in the absence of any other apparent purpose, to have employed similar reasoning in prescribing withdrawal as a potential means of rectifying client perjury of which counsel becomes aware after the fact.²⁷¹

The Model Rules instruct counsel who petitions for withdrawal to refrain from stating to the court that the defendant intends to testify falsely, asserting instead that "*professional considerations* require termination."²⁷² The result, however, is invariably unsatisfactory. If the trial judge does not accurately read between the lines, then she has no means of determining whether the grounds for the request are frivolous or compelling. From the perspective of the bench, the "professional consideration" could be as fundamental as counsel's prior representation of the victim, as petty as the attorney's annoyance with a minor personality trait of the defendant, or as self-

268. See Part II.A for an explanation of the manner in which the client perjury rules interrupt the flow of even truthful information from the defendant to counsel.

269. See Freedman, 136 U. Pa. L. Rev. at 1953 (cited in note 52); Monroe H. Freedman, 64 Mich. L. Rev. at 1476 (cited in note 58). The appropriate limits of remonstrating with one's client are discussed in notes 289-92 and accompanying text.

270. Chute, *Army Law*, at 55 (cited in note 108). The Model Rules express a similar concern that counsel not become the "*knowing* instrument of perjury." Model Rules of Professional Conduct Rule 3.3 cmt. 9 (ABA, 1983) (emphasis added).

271. See Model Rules of Professional Conduct Rule 3.3 cmt. 11. Four years after the American Bar Association adopted the Model Rules, however, the ABA Committee on Ethics and Professional Responsibility conceded that "withdrawal can rarely serve as a remedy [after] the client's perjury." ABA Comm. on Ethics and Professional Responsibility Formal Op. 353 (1987).

272. Model Rules of Professional Conduct Rule 1.16 cmt. (stating that "[t]he court may wish an explanation for the withdrawal. . . . The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.") (emphasis added). See also Standards for Criminal Justice, Standard 4-7.7 (ABA, 1980) (stating that "[i]f, in advance of trial, the defendant insists that he or she will take the stand to testify perjurally, the lawyer may withdraw from the case, if that is feasible, seeking leave of the court if necessary, but the court should not be advised of the lawyer's reason for seeking to do so").

serving as the desire to evade non-lucrative court appointments.²⁷³ If, on the other hand, the court correctly surmises the reason, as it almost certainly will,²⁷⁴ then the prohibition against disclosing the specific nature of the problem becomes a transparent charade.²⁷⁵ As the Eighth Circuit Court of Appeals has observed, defense counsel “inform[s] the court, and perhaps incidentally his adversary and the jury, of his client’s possible perjury . . . when the lawyer makes a motion for withdrawal (usually for unstated reasons).”²⁷⁶

In the instances in which defense counsel is required or permitted to disclose her belief in the defendant’s untruthfulness, the commentary to the Model Rules explains that the trial judge might respond to such revelations by “making a statement about the matter

273. The ABA Model Rules and Model Code require that a lawyer “not seek to avoid” a court appointment without a compelling reason. Model Rules of Professional Conduct Rule 6.2; Model Code of Professional Responsibility EC 2-29 (ABA, 1969).

274. See Murray L. Schwartz, *Lawyers and the Legal Profession* 93 (Bobbs-Merrill, 2d ed. 1985) (referring to “the near automatic presumption of client perjury that arises whenever counsel tries to withdraw from representation without disclosing a reason”).

275. When played out further, the charade produces circumlocutory exchanges such as the following sidebar between a defense counsel who requested withdrawal without giving specific reasons, the prosecutor, and the trial judge:

COURT: Well, if we assume that the reason you’re thinking about, and the reason I’m thinking about, is the reason, that reason could very well present itself to another attorney.

DEFENSE COUNSEL: Okay. My feeling is, as I expressed to the court earlier but not on the record, is that I — that I think it is possible that another lawyer may not have the same conflict or dilemma that I have, and in part the problem that [the prosecutor] and I are having is a product of a — a large part of it is based upon discussions that we had during the pretrial stages of this case, and a lot of—well, perhaps some people that I talked to, or evidence that I discovered at that point that aren’t—that is not necessary for somebody else to go through if they were picking up the case at this stage, but something that I can’t set aside and in large part that is why, you know, I have a problem that I am not confident another lawyer coming in would have.

COURT: Someone else may have a different view of this, but I interpret what you just said to me as saying—as meaning this: if another lawyer does not do what you did, he may not learn what you have learned, so as to put him in the position of knowing that, what your client wants to do is wrong, and I’m not going to aid or abet that. He doesn’t have a constitutional right to get another lawyer and hope that he doesn’t discover the truth. If that’s what we’re talking about.

United States v. Scott, 909 F.2d 488, 492, n.3, 4 (11th Cir. 1990).

276. *United States v. Long*, 857 F.2d 436, 447 (8th Cir. 1988). See also *The Florida Bar v. Rubin*, 549 S.2d 1000, 1001 (Fla. 1989) (recognizing that “[t]hrough he gave vague reasons for withdrawal, [defense counsel’s] message to the court was that his client was planning to testify untruthfully”); *Maddox v. State*, 613 S.W.2d 275, 283 n.15 (Tex. Ct. App. 1981) (noting that “[e]ven a motion to withdraw for no stated reason may reveal to the court the attorney’s belief that his client’s testimony is false”). Over a century ago, Dean Sharswood warned that “[t]o come before the court with a revelation of facts, damning to his client’s case, as a ground for retiring from it, would be a plain breach of the confidence reposed in him.” George Sharswood, *Legal Ethics* 85 (T. & J.W. Johnson & Co., 5th ed. 1884).

to the trier of fact, ordering a mistrial or perhaps nothing."²⁷⁷ Each of these options, however, is unfeasible.

The first measure would seem to entail the court informing the jury that the defendant had lied or, at a minimum, that the defendant's testimony should be closely scrutinized for its credibility. In addition to destroying client trust, actual disclosure can be expected to result in a conviction²⁷⁸ and is, in the words of one court, "so egregious that it disables the fact finder from impartially judging the merits of [the accused's] defense."²⁷⁹ Merely admonishing the jury that it should closely scrutinize the defendant's testimony is problematic, as well. If the trial judge's timing and demeanor suggest that the defendant is untruthful, then the court has effectively conveyed the same message imparted by overt disclosure. If, on the other hand, the jury reads nothing into the warning, the court has accomplished little more than having issued the standard jury instruction on assessing the defendant's testimony at an earlier point in the trial.²⁸⁰

The court's second option, declaring a mistrial, simply postpones a resolution of the problem. As with the remedy of withdrawal, the accused might be subjected to an endless series of aborted trials. Moreover, in the period between trials, memories fade, witnesses become unavailable, and many defendants, some of whom will be acquitted or placed on probation, languish in jail awaiting trial. The court's final option—doing "nothing" following counsel's disclosure of her client's alleged untruthful intent—fosters client distrust without producing any ostensible benefit.²⁸¹

277. Model Rules of Professional Conduct Rule 3.3 cmt. 11 (ABA, 1983). The trial judge's conduct, of course, is not mandated by the rules of attorney conduct in force in the various jurisdictions. The codes of judicial conduct, however, do not address the subject. See, for example, Model Code of Judicial Conduct (ABA, 1990); Model Code of Judicial Conduct (ABA, 1972).

278. The drafters of the Model Rules concede that defense counsel's disclosure or withdrawal in the face of anticipated client perjury "increase[s] the likelihood of the client's being convicted as well as opening the possibility of a prosecution for perjury." Model Rules of Professional Conduct Rule 3.3 cmt. 8.

279. *United States v. Roberts*, 20 M.J. 689, 691 (C.M.R. 1985). See also *Lowery v. Cardwell*, 575 F.2d 727, 730 (9th Cir. 1978) (stating that "if . . . counsel informs the fact finder of his belief [that the testimony of the accused is untruthful,] he has, by that action, disabled the fact finder from judging the merits of the defendant's defense. . . . The consequences of such action on the part of counsel, in our judgment, are such as to deprive the defendant of a fair trial.>").

280. See note 86 for an example of such an instruction. In a non-jury trial, of course, the factfinder is always tainted by disclosure. See, for example, *Ferguson v. State*, 507 S.2d 94 (Miss. 1987); *United States v. Roberts*, 20 M.J. 689 (C.M.R. 1985); *Butler v. United States*, 414 A.2d 844 (D.C. 1980); *Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978).

281. The alternative responses of several courts to defense counsel's disclosure of anticipated client perjury underscore the absence of viable options available to the trial judge. In *United States v. Scott*, for example, upon learning that defense counsel suspected her client would testify perjurally, the trial judge gave the accused a choice: he could continue to be represented by

Three additional problems plague disclosure. First, under the Model Penal Code and in many jurisdictions under the common law, a witness's voluntary retraction of a false statement prior to its discovery by the court constitutes a defense to perjury.²⁸² As such, counsel's disclosure to the court of a client's perjurious testimony terminates the client's ability to avoid the possibility of a future charge of perjury and increases the risk that, upon conviction in the matter at hand, the trial judge will enhance the sentence based on the belief that the client lied on the witness stand.²⁸³

Second, the code of ethics in each jurisdiction prohibits counsel from expressing to the factfinder her personal opinion about the defendant's "credibility . . . [or] guilt or innocence."²⁸⁴ The commentary to the Model Rules suggests that, in part, the prohibition rests on the rationale that such opinions are based on information not filtered through the rules of evidence. The drafters provided another reason: if defense counsel were permitted to mention her belief in the accused's truthfulness or innocence, then in cases in which counsel failed to do so, the trier of fact could reasonably infer that counsel believed the defendant was untruthful or guilty. However, if counsel's personal belief that the accused has lied is conveyed to the factfinder via the narrative approach or is relayed through the court, then in all other cases the factfinder might reasonably infer that the absence of disclosure or client narration reflects counsel's belief that the

counsel if he agreed not to testify, or he could testify but would have to represent himself pro se. While the Eleventh Circuit Court of Appeals found the trial judge "impermissibly forced [the defendant] to choose between two constitutionally protected rights," ultimately the court could do little more than shift the burden to defense attorneys to reconcile the contradictory web of ethical rules and constitutional rights at stake in the client perjury situation. The court offered the following vacuous advice to the criminal defense bar:

The decision regarding exposure of the problems that client and counsel are experiencing lies with counsel and is governed by the rules of professional conduct adopted by the state bar. . . . If . . . the problem involves the perjurious nature of defendant's testimony, counsel must be extremely careful to protect the defendant's rights while simultaneously complying with the ethical standards imposed upon lawyers practicing in the state.

United States v. Scott, 909 F.2d 488, 493, 493 n.8 (11th Cir. 1990).

282. Model Penal Code § 241.1(4) (Proposed Official Draft 1962), stating: "Retraction. No person shall be guilty of an offense under this Section if he retracted the falsification in the course of the proceeding in which it was made before it became manifest that the falsification *was or would be exposed* and before the falsification substantially affected the proceeding." *Id.* (emphasis added). The split of authority under the common law as to whether retraction constitutes a defense is discussed in Perkins and Boyce, *Criminal Law* at 521-22 (cited in note 119), and Torcia, ed., 4 *Wharton's Criminal Law* § 627 (cited in note 119).

283. See note 290 and accompanying text.

284. See Model Code of Professional Responsibility DR 7-106(C)(4) (ABA, 1969). The duty to disclose also belies the notion expressed in the commentary to the Model Rules that "an advocate does not vouch for the evidence submitted in a cause." Model Rules of Professional Conduct Rule 3.3 cmt. 1 (ABA, 1983).

defendant has testified truthfully. Accordingly, the present ethical rules against knowingly presenting client perjury and the required countermeasures produce the very danger feared elsewhere in the codes of ethics, that is, that the factfinder will be influenced by opinions formed from unreliable and inadmissible information.²⁸⁵

Finally, one popular but specious argument holds that non-disclosure of client perjury is analogous to concealing criminal means of gaining acquittal, such as a client's tampering with jurors.²⁸⁶ A critical difference exists. By disclosing seemingly perjurious statements, counsel breeds reluctance on the part of clients to confide information about the charge against which counsel must construct a defense, thus jeopardizing the effectiveness of counsel's representation. Even truthful clients become reticent with counsel, as previously discussed.²⁸⁷ In contrast, counsel's revelation that a client tampered with the jury would inhibit only the flow of information from client to counsel about acts committed *after and independent of* those against which counsel must presently defend the client.²⁸⁸

With respect to *remonstrating* with the accused, Chief Justice Burger accurately noted in *Nix* that "[i]t is universally agreed that . . . the attorney's first duty when confronted with a proposal for perjurious testimony is to attempt to dissuade the client."²⁸⁹ Counsel

285. See also Part II.B.2.a.iv.

286. See, for example, *Nix v. Whiteside*, 475 U.S. 157, 168-69 (1986). In *Nix*, the Supreme Court stated:

The crime of perjury in this setting is indistinguishable in substance from the crime of threatening or tampering with a witness or a juror. A defendant who informed his counsel that he was arranging to bribe or threaten witnesses or members of the jury would have no "right" to insist on counsel's assistance or silence. Counsel would not be limited to advising against that conduct. An attorney's duty of confidentiality, which totally covers the client's admission of guilt, does not extend to a client's announced plans to engage in future criminal conduct. . . . In short, the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, is essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury.

Id. at 174. See also Wolfram, 50 S. Cal. L. Rev. at 833 (cited in note 166); John T. Noonan, Jr., *The Purposes of Advocacy and the Limits of Confidentiality*, 64 Mich. L. Rev. 1485, 1488 (1966); Jeffrey L. Dunetz, *Surprise Client Perjury: Some Questions and Proposed Solutions to an Old Problem*, 29 N.Y. L. Sch. L. Rev. 407, 426-27 (1984).

287. See notes 88-92 and accompanying text.

288. Indeed, by virtue of the ethical prohibition against representing a client in a matter in which counsel knows in advance that she is likely to be called as a material witness, counsel would usually be precluded from representing the present client on such tampering charges.

289. *Nix v. Whiteside*, 475 U.S. 157, 169 (1986). See also Model Rules of Professional Conduct 3.3 cmt. 9; Kenneth Reichstein, *The Criminal Law Practitioner's Dilemma: What Should the Lawyer Do When His Client Intends to Testify Falsely?*, 61 J. Crim. L., Criminology, & Pol. Sci. 1, 4 (1970) (noting that "[a]ll [commentators] agree that the attorney should attempt to dissuade his client from perjuring himself"). Even Monroe Freedman calls for counsel to remonstrate with the criminal client who seems intent upon testifying untruthfully. See Freedman, *Understanding Lawyers' Ethics* at 120 (cited in note 33) (counseling that "[i]f the lawyer learns that the client is

will normally be obliged in her capacity as legal advisor and as trial strategist to warn the client of the perils of testifying untruthfully. As legal advisor, counsel should inform the defendant that, if convicted and if the trial judge believes the defendant had testified perjuriously, the judge might increase the severity of the sentence.²⁹⁰ The defendant should also be forewarned that she could be charged with perjury. In the role of trial strategist, counsel should caution the client that perjury, particularly when committed by the person against whom the state has marshalled its massive investigatory resources and of whom the trier of fact is already leery, is often easy to expose.

Remonstrance motivated principally by counsel's moral disapproval is, however, inappropriate, carrying with it all of the perils of the nonpartisan "moral activist" model of lawyering.²⁹¹ Moreover, counsel's expression of moral indignation over the defendant's anticipated conduct may reaffirm the defendant's suspicion that, beneath her professed willingness to "rumble" with the prosecution,²⁹² counsel is an arm of the state whose purpose is to cast the appearance of justice over a predetermined outcome.

B. *The Narrative Method*

A traditional alternative to withdrawal and disclosure permits counsel to disassociate herself from the false testimony of the accused while ostensibly avoiding the futility of withdrawal and the harshness of disclosure. With the *narrative* method, counsel who believes that her client will perjure herself calls the defendant to the witness stand and, without guiding her testimony in the normal fashion, permits the defendant to narrate her version of the alleged crime on direct examination.²⁹³ In opening and closing arguments, counsel refrains

contemplating perjury, she should make continuing, good faith efforts to dissuade the client from that course").

290. Although the practice is a form of summary punishment for perjury, it has been held to be constitutional. See *United States v. Grayson*, 438 U.S. 41 (1978).

291. See note 137 and accompanying text (discussing the moral-activist model).

292. The primary measurement of the sincerity and effectiveness of defense counsel is her willingness, in jailhouse jargon, to "rumble" with the prosecutor—that is, to conduct the defense energetically.

293. Lawyers can guide witnesses through direct examination without necessarily violating the prohibition against leading questions during direct examination. Through the skillful use of non-leading questions, a competent trial attorney can elicit an effective portrait of the facts on direct. Further, leading questions are, to an extent, permitted by the rules of evidence in establishing objective, biographical information, and often are tolerated by opposing counsel to avoid appearing dilatory in the eyes of the jury. See also *Standards for Criminal Justice*, Standard 4-7.7 (cited in note 272). Ultimately, as Lord Landale noted, "[a]ll interrogatories must,

from referring to the suspected falsehoods of the defendant but does not seek to withdraw from representation or expressly disclose her suspicions to the court.

Assailed by the Supreme Court in *Nix*,²⁹⁴ by the Model Rules,²⁹⁵ by several state and federal courts,²⁹⁶ and by state codes of conduct,²⁹⁷ the "narrative" method nonetheless is authorized by the courts²⁹⁸ or the code in some jurisdictions,²⁹⁹ and is utilized to some extent in

to some extent, make a suggestion to the witness. It would be perfectly nugatory to ask a witness, if he knew anything about something." *Lincoln v. Wright*, 49 Eng. Rep. 302, 304 (1841).

294. *Nix v. Whiteside*, 475 U.S. 157, 170-71 (1986). Although former Chief Justice Burger criticized the narrative approach as "passively tolerat[ing]" client perjury and as inconsistent with "a search for truth," *id.* at 171, he had written earlier that, if defense counsel who believed that the accused would testify perjurally was not permitted by the trial court to withdraw, counsel "should confine himself to asking the witness to identify himself and to make a statement." Warren E. Burger, *Standards of Conduct: A Judge's Viewpoint for Prosecution and Defense Personnel*, 5 Am. Crim. L.Q. 11, 13 (1966).

295. Model Rules of Professional Conduct Rule 3.3 cmt. 9 (ABA, 1983) (stating, "[T]o permit the accused to testify by a narrative without guidance through the lawyer's questioning . . . compromises both contending principles; it exempts the lawyer from the duty to disclose false evidence but subjects the client to an implicit disclosure of information imparted to counsel."). See also ABA Comm. on Ethics and Professional Responsibility Formal Op. 353 (1987) (stating that "the lawyer can no longer rely on the narrative approach to insulate the lawyer from a charge of assisting the client's perjury").

296. See, for example, *United States v. Curtis*, 742 F.2d 1070 (7th Cir. 1984); *McKissick v. United States*, 379 F.2d 754 (5th Cir. 1967), *aff'd* after remand, 398 F.2d 342 (5th Cir. 1968).

297. See, for example, Fla. Rules of Professional Conduct Rule 4-3.3(a)(4) (1987) (stating, "A lawyer may not offer testimony that the lawyer knows to be false in the form of a narrative unless so ordered by the tribunal.>").

298. See, for example, *Commonwealth v. Jermyn*, 620 A.2d 1128, 1130-31 (Pa. 1993); *State v. Layton*, 432 S.E.2d 740, 754-55 (W. Va. 1993); *People v. Bartee*, 208 Ill. App. 105, 566 N.E.2d 855, 857 (1991); *Shockley v. State*, 565 A.2d 1373, 1377 (Del. 1989); *People v. Guzman*, 45 Cal. 3d 915, 755 P.2d 917 (1988). In the decade prior to *Nix*, a number of state and federal courts had begun to permit or even require use of the narrative model. See, for example, *United States v. Roberts*, 20 M.J. 689, 693 (C.M.R. 1985); *State v. Fosnight*, 235 Kan. 52, 679 P.2d 174, 180 (1984); *State v. Covington*, 279 S.C. 274, 305 S.E.2d 578, 580 (1983); *United States v. Radford*, 14 M.J. 322 (C.M.A. 1982); *Maddox v. State*, 613 S.W.2d 275, 284 (Tex. Ct. App. 1981); *United States v. Campbell*, 616 F.2d 1151, 1152 (9th Cir. 1980); *Coleman v. State*, 621 P.2d 869, 881 (Alaska, 1980); *People v. Salquerro*, 107 Misc.2d 155, 158-59, 433 N.Y.S.2d 711, 714 (N.Y. Sup. Ct. 1980); *Lowery v. Cardwell*, 575 F.2d 727, 730-31 (9th Cir. 1978); *People v. Lowery*, 52 Ill. App. 3d 44, 366 N.E.2d 155, 157 (Ill. 1977); *State v. Lowery*, 111 Ariz. 26, 523 P.2d 54, 56-57 (1974).

299. The District of Columbia Rules of Professional Conduct provide:

[I]f the lawyer is unable to dissuade the client [from testifying untruthfully] or to withdraw without seriously harming the client, the lawyer may put the client on the stand to testify in a narrative fashion, but the lawyer shall not examine the client in such a manner as to elicit testimony which the lawyer knows to be false, and shall not argue the probative value of the client's testimony in closing argument.

D.C. Rules of Professional Conduct Rule 3.3(b) (1990). Standard 4-7.7 of the ABA Standards Relating to the Administration of Criminal Justice, drafted prior to the Model Rules and never formally adopted by the ABA, instructs counsel to employ the narrative approach and describes the measure in great detail:

Before the [perjurious] defendant takes the stand . . . , the lawyer should make a record of the fact that the defendant is taking the stand against the advice of counsel in some appropriate manner without revealing the fact to the court. The lawyer may identify the witness as the defendant and may ask appropriate questions of the defendant when it is believed that the defendant's answers will not be perjurious. As to matters for which it is

practice.³⁰⁰ This method, however, is generally understood to telegraph to the factfinder counsel's belief in the defendant's guilt³⁰¹ and, in the words of one commentator, represents an "incoherent attempt to have it both ways on client perjury."³⁰² In fact, the narrative approach represents an attempt to compromise based on the universal but invalid view of the client perjury issue as a clash between the interests of truth and crime-control on one hand and the integrity of the adversarial process on the other.

If, in fact, the factfinder understands counsel's belief, then the narrative model—designed to avert the spectacle of counsel

believed the defendant will offer perjurious testimony, the lawyer should seek to avoid direct examination of the defendant in the conventional manner; instead, the lawyer should ask the defendant if he or she wishes to make any additional statement concerning the case to the trier or triers of the facts. A lawyer may not later argue the defendant's known false version of facts to the jury as worthy of belief, and may not recite or rely upon the false testimony in his or her closing argument.

Standards for Criminal Justice Standard 4-7.7(c).

300. See, for example, *Jermyn*, 620 A.2d at 1130-31; *Raglin v. State*, 1991 Ark. LEXIS 100, *7-8 (Ark. 1991); *Shockley*, 565 A.2d at 1375-76; *Guzman*, 755 P.2d at 932; *State v. Fosnight*, 679 P.2d 174, 177 (Kan. 1984); *United States v. Radford*, 14 M.J. 322, 323 (C.M.A. 1982); *People v. Lowery*, 366 N.E.2d 155, 156 (Ill. 1977); *Thornton v. United States*, 357 A.2d 429 (D.C. App. 1976); *State v. Henderson*, 205 Kan. 231, 468 P.2d 136 (1970).

301. The drafters of the Model Rules, for example, concede that the narrative approach "subjects the client to an implicit disclosure of information imparted to counsel." Model Rules of Professional Conduct Rule 3.3 cmt. 9 (ABA, 1983). See also *Nix v. Whiteside*, 475 U.S. 157, 170 n.6 (1986) (recognizing that the narrative approach is "thought to be a signal at least to the presiding judge that the attorney considered the testimony to be false"); Rieger, 70 Minn. L. Rev. at 152 n.170 (cited in note 217) (noting that "when counsel steps asking specific questions and suggests the defendant give whatever additional testimony he desires, the lawyer raises a red flag for the judge, the prosecutor, and probably many jurors, pointing out the specific testimony that he believes is untrue"); *United States v. Long*, 857 F.2d 436, 446 n.7 (8th Cir. 1988) (recognizing that "[w]hen a lawyer is confronted during trial with the prospect of client perjury, allowing the defendant to testify in narrative form . . . has been criticized because it would indicate to the judge and sophisticated jurors that the lawyer does not believe his client"); *Maddox v. State*, 613 S.W.2d 275, 285 (Tex. Ct. App. 1981) (stating that "[t]he failure of the attorneys to argue to the jury was as though the attorney had told the jury that his client had uttered a falsehood"); *State v. Lee*, 142 Ariz. 210, 689 P.2d 153, 162 n.4 (1984) (noting that "a knowledgeable judge or juror, alert to the ethical problems faced by attorneys and the manner in which they traditionally are met, might infer that [the defendants'] testimonies were perjurious from trial counsel's failure to refer to them").

Former Chief Justice Burger, the author of the majority opinion in *Nix*, is one of the few authorities who has shut his eyes to the problem, asserting in a law review article that "there is no basis for saying that [the narrative method] tells the jury the witness is lying. A judge may infer that such is the case but lay jurors will not." Burger, 5 Am. Crim. L.Q. at 13 (cited in note 294). The California Supreme Court seems to have gone a step further in suggesting that juries simply infer that the accused has chosen a refreshing and spontaneous format for testifying: "[U]se of the narrative form [is not] . . . inconsistent with the jury surmising that defendant desired to testify unhampered by the traditional question and answer format." *People v. Guzman*, 755 P.2d 917, 935 (Cal. 1988).

302. Wolfram, *Modern Legal Ethics* at 662 (cited in note 32). Several commentators still support the narrative approach. See, for example, Norman Lefstein, *Client Perjury in Criminal Cases: Still in Search of an Answer*, 1 Georgetown J. Legal Ethics 521 (1988).

impeaching her own client through direct disclosure in a supposedly adversarial proceeding and, thus, to prevent the total rupture of client trust—would indirectly produce the very effect it was intended to prevent. In addition, although a client's false assertions may constitute only a small portion of her total narrative, the taint conveyed to the factfinder applies equally to the accused's entire testimony.³⁰³ Finally, by telegraphing her own belief in the inaccuracy of the accused, the defendant's lawyer arguably violates the ethical prohibitions against counsel serving as a witness³⁰⁴ and against expressing a personal opinion about the client's "credibility . . . or . . . guilt or innocence"³⁰⁵ and also contravenes the evidentiary restrictions on opinion evidence and on testimony presented without oath or affirmation or the laying of a proper foundation.

C. *Permitting Counsel to Follow the Dictates of Her Own Conscience*

Although counsel may not *knowingly* present perjury under the various codes of legal ethics, according to the Model Rules, "[a] lawyer *may* refuse to offer evidence that the lawyer reasonably believes is false."³⁰⁶ In failing to provide guidelines for the exercise of the discretion accorded counsel,³⁰⁷ the drafters have, in effect, committed to counsel's conscience the decision whether to refuse to elicit the testimony of the defendant whom counsel reasonably believes is lying. Thus, between two defendants with defenses of equal merit, one might be convicted while the other is acquitted solely because the first defendant's counsel has personal qualms about eliciting testimony³⁰⁸ that, under the client perjury rules presently in force in the various

303. See notes 69-72 and accompanying text.

304. Model Rules of Professional Conduct Rule 3.7 (ABA, 1983).

305. Model Rules of Professional Conduct Rule 3.4(e) (stating, "A lawyer shall not . . . state a personal opinion as to . . . the credibility of a witness . . . or the guilt or innocence of an accused."); Model Code of Professional Responsibility DR 7-106(C)(4) (ABA, 1969) (stating, "In appearing in his professional capacity before a tribunal, a lawyer shall not . . . [a]ssert his personal opinion . . . as to the credibility of a witness . . . or as to the guilt or innocence of an accused."). According to the Model Code, one reason for the rule is that, if such remarks were permitted, the factfinder could reasonably draw the opposite inference from their absence. Model Code of Professional Responsibility EC 7-24.

306. Model Rules of Professional Conduct Rule 3.3(c) (emphasis added). See generally Part II.B.

307. The commentary to the Rules explains only that submitting such evidence "may reflect adversely on the lawyer's ability to discriminate in the quality of evidence and thus impair the lawyer's effectiveness as an advocate." Model Rules of Professional Conduct Rule 3.3 cmt. 14.

308. As Charles Curtis observed over 40 years ago in his provocative discussion of occasions on which the criminal defense attorney's duty of candor to the court should be subordinated to her duty of loyalty to the accused, "for every lawyer whose conscience may be pricked, there is another whose virtue is tickled." Curtis, 4 *Stan. L. Rev.* at 16 (cited in note 262).

jurisdictions, she would have been permitted to present.³⁰⁹ Moreover, in the absence of guidelines for the exercise of this discretion, counsel's reasons for refusing to elicit the testimony of such a defendant could be arbitrary, capricious, and essentially unreviewable.

D. The Appropriate Response: Conducting the Defense as if Counsel Believed the Accused

In light of the pitfalls of withdrawal and disclosure, the narrative approach, and deferring to counsel's conscience, the solution for handling suspected client perjury is self-evident: if the seemingly untruthful criminal defendant chooses to testify, defense counsel should call her to the stand and conduct the defense as if counsel believed the testimony was truthful. Similarly, counsel who, at a later point in the proceeding, comes to believe that the defendant has testified falsely should continue to defend her as if counsel believed her testimony was true.³¹⁰

Although the client perjury issue has traditionally been viewed as a clash between the interests of the defendant and, in effect, those of the community, this solution promotes the interests of both. It preserves the integrity of the adversarial criminal proceedings required by the Constitution, thus protecting the person on trial by ensuring that she may present her version of the facts and by reducing the chance that an innocent defendant will be convicted. At the same time, however, the solution protects society's interest in convicting lawbreakers by advancing, on balance, the adversarial search for truth. Further, this resolution obviates the need to attempt to effect radical change in the behavior of the vast majority of criminal defense lawyers who ignore the client perjury rules in practice.³¹¹ As

309. Of course, the outcome of two cases of equal merit can vary for a number of other reasons, including differences in the ability of counsel, the composition of the jury, and the evidentiary rulings of the court. However, inconsistent results in like cases violate our sense of fairness and do not constitute a sound argument for permitting still more inconsistent outcomes.

310. In the face of defense counsel's disclosure of his belief that his client will lie on the stand and counsel's resultant request to withdraw, at least one trial court has ordered counsel to conduct the defense in the normal, zealous manner—that is, “to put [the defendant] on the stand, to question him on direct examination . . . [and] to argue the defendant's version of the facts.” *Coleman v. State*, 621 P.2d 869, 882 (Alaska 1980). In concluding on appeal that counsel's request for withdrawal did not constitute ineffective assistance per se, the Alaska Supreme Court explained, “We think [the trial court's] directive clearly indicated that, unless defense counsel had affirmatively initiated or furthered the use of perjury, he was to treat [defendant's testimony] as any other testimony.” *Id.* As to whether the state supreme court actually endorsed the trial judge's order, however, the high court's opinion hedged: “[W]e are not ruling that this course was necessarily the correct one from all perspectives.” *Id.*

311. An anonymous survey of the District of Columbia bar revealed that 90% of those surveyed would call the perjurious criminal defendant to the witness stand and conduct the

the drafters of the Model Rules concede, presenting the testimony of the seemingly perjurious defendant represents "a coherent solution"³¹² to the client perjury issue.³¹³

defense as if the client had testified truthfully. Friedman, *Professional Responsibility in D.C.: A Survey*, 1972 Res Ipsa Loquitur 60.

312. Model Rules of Professional Conduct Rule 3.3 cmt. 9 (ABA, 1983).

313. Criminal defense attorneys also may, of course, disbelieve the impending testimony of other prospective defense witnesses, and prosecutors may be deeply suspicious of the evidence proffered by government witnesses. Although a rigorous analysis of the appropriate duty of counsel with respect to a witness other than a criminal defendant is beyond the scope of this inquiry, several observations are worthy of note.

Monroe Freedman has suggested an intelligent general principle for determining whether to permit criminal defense counsel to call, in addition to the untruthful defendant, other defense witnesses whom counsel believes will testify falsely. Freedman divides these witnesses into two categories: those, such as family members, whose relationships are sufficiently close to the accused that they would be expected to lie on the accused's behalf and those whose relationships are more remote. Freedman, *Understanding Lawyers' Ethics* at 123-24 (cited in note 33) (explaining that "a spouse or parent would be acting under the same human compulsion as the defendant, and I would present their testimony if I could not succeed in dissuading them. . . . On the other hand, I would not call a causal acquaintance of the defendant to give a perjurious alibi.") (footnote omitted). Freedman notes that juries, alert to the probable biases of those in the former group, presumably would apply the same intense scrutiny to their testimony as is normally applied to the testimony of the accused.

Many of the difficulties encountered by defense counsel in accurately and impartially evaluating the veracity of the accused, such as the exposure to unreliable information, also impair a prosecutor's ability to assess the credibility of prospective government witnesses. Moreover, to ensure the *equality of arms* upon which adversarial justice depends, the procedural rights and restrictions applicable to the defense and prosecution at trial should, whenever possible, exist in symmetrical balance. Silver, 1990 Wis. L. Rev. at 1037-39 (cited in note 113). The Supreme Court has held, nonetheless, that a prosecutor may not introduce testimony or other evidence that she believes to be false. See, for example, *United States v. Agurs*, 427 U.S. 97, 103 (1976) (holding that "a conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury") (footnote omitted). According to the Court, the Fifth Amendment guarantee of due process imposes upon the prosecutor a unique duty to seek justice rather than courtroom victory and compels the government to forgo use of evidence that, contrary to the Framers' belief that "many guilty persons should escape unpunished [rather] than one innocent person should suffer," Smith, 1 *John Adams* at 124 (cited in note 112), would tend to result in the conviction of innocent defendants. See note 150. See also *Berger v. United States*, 295 U.S. 78, 88 (1935); Model Rules of Professional Conduct Rule 3.1 (ABA, 1983) (stating, "A prosecutor has the responsibility of a minister of justice and not simply that of an advocate."); Model Code of Professional Responsibility EC 7-13 (ABA, 1969) (stating, "The responsibility of a public prosecutor . . . is to seek justice, not merely to convict."); Joint Conference on Professional Responsibility, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1218 (1958) (stating, "The freedom elsewhere wisely granted to partisan advocacy must be severely curtailed if the prosecutor's duties are to be properly discharged."). The widespread occurrence of police perjury and the institutional tolerance of it intensify the need to ban prosecutors from knowingly calling untruthful witnesses. See note 87 and accompanying text.

Many of the barriers to a criminal defense attorney's accurate assessment of the truthfulness of a defendant's testimony also exist with respect to the civil litigator's evaluation of the veracity of her client's or other witnesses' testimony. Additionally, in civil proceedings, the consistency and plausibility of the witness's testimony, her demeanor, and the extent of damage to her story on cross-examination reveal much about the ultimate truth in the case. Nonetheless, critical differences exist between counsel's efforts to thwart the testimony of an accused in a criminal proceeding and counsel's attempt to do so with respect to a party or other witness in a civil action. The most important difference is that only criminal defendants are afforded the full protection of

V. CONCLUSION

Among the widely divergent views of the role of the criminal defense attorney—from the heirs of Lord Brougham's view of counsel as champion of the accused to the proponents of the moral activist role of counsel to the supporters of a minimalist model in which counsel seeks only to prevent the violation of the accused's fundamental rights—the client perjury issue has been erroneously viewed as an ethical "dilemma," a clash between the quest for truth in our criminal proceedings on one hand and the interests of client trust and confidentiality on the other. In reality, however, no dilemma exists. Since the client perjury rules diminish the flow of even truthful information from client to counsel and deprive the factfinder of the truths that frequently accompany a defendant's falsehoods and the falsehoods that inadvertently reveal truth, the rules impede the discovery of truth to a greater extent than they promote it. Disproportionately invoked by the largely white, middle-class American criminal trial bar against indigent, minority criminal defendants, the client perjury rules engender racial, cultural, and class-based discrimination, miscommunication, and distrust, and violate basic principles of equal protection.

The client perjury rules conceal at the center of our criminal trials a summary inquisition into the truthfulness of the accused's testimony and obligate defense counsel to denounce, as did John Bastwick's lawyer in the iniquitous Court of Star Chamber, the client whose version of the facts counsel does not believe. The rules upset the fragile balance of responsibilities among the judge, jury, prosecutor, and defense counsel, transforming the accused's attorney into an arm of the state, revealing the failure of the leaders of the bench and bar to recognize the need for legal ethics to conform to the adversarial process, reflecting an elitist distrust of the jury system and of the adversarial process itself, and violating numerous provisions of the Fifth, Sixth, and Fourteenth Amendments. Finally, the rules require that defense counsel assess the veracity of the accused, a task that counsel is ill-suited to perform in an impartial and accurate manner. From the perspective of the state, the sense of unfair treatment that the rules help breed among its underclass jeopardizes the system's long-term interests in legitimacy and social order. Ultimately, the only response to the perjurious criminal

the Fourth, Fifth, and Sixth Amendments against unjust verdicts, protections that form the foundation of much of the case against the client perjury rules.

defendant that promotes truth and fairness and preserves the adjudicatory process mandated by the Constitution is for counsel to conduct the defense in the same manner as if she believed that the client was telling the truth.

Although the client perjury issue does not pit the discovery of truth against client trust, it *does* represent a conflict among other fundamental values. While the rules seek to serve the state's interest in crime control and, by rehabilitating the lawyer's public image, the profession's economic interest in self-regulation, they do so at an inordinate cost to the fairness, equality, and human dignity traditionally ranked supreme in the hierarchy of American moral and constitutional principles, to the integrity of the adversarial pursuit of justice mandated by the Bill of Rights, and, ultimately, to the constitutional rule of law. Indeed, many of the strongest proponents of the client perjury rules, including a number of state and federal judges sworn to uphold the Constitution, openly favor the abolition of the adversarial system. As former Chief Justice Warren Burger, the author of the Supreme Court's opinion in *Nix* and the leader of the effort to disbar the first outspoken critic of the client perjury rules,³¹⁴ has urged, "trials by the adversarial contest must in time go the way of the ancient trial by battle and blood."³¹⁵

Time will tell whether the Constitution and our common-law heritage are strong enough to withstand this frontal attack on the adversarial process. In reaffirmation of the values served by this fundamentally fair American way of determining the truth, the set of rules that transforms defense counsel from the champion of the accused into the accused's inquisitor should be recognized as diametrically opposed to our constitutional system of justice.

314. See notes 54-58 and accompanying text.

315. Speech, American Bar Association, Las Vegas, Feb. 12, 1984, reprinted in David S. Schrager and Elizabeth Frost, *The Quotable Lawyer* 7 (New England, 1986).