

Fall 2004

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Recommended Citation

Randolph Braccialarghe, *Why Were Perry Mason's Clients Always Innocent? The Criminal Lawyer's Moral Dilemma—The Criminal Defendant Who Tells His Lawyer He Is Guilty*, 39 Val. U. L. Rev. 65 (2004).

Available at: <https://scholar.valpo.edu/vulr/vol39/iss1/3>

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Essays

WHY WERE PERRY MASON'S CLIENTS ALWAYS INNOCENT? THE CRIMINAL LAWYER'S MORAL DILEMMA – THE CRIMINAL DEFENDANT WHO TELLS HIS LAWYER HE IS GUILTY

Randolph Braccialarghe*

I. INTRODUCTION

A. *The Criminal Defense Lawyer as Hero*

While it may seem that a majority of Americans are lawyers, many Americans probably have little direct contact with the law in their own personal lives.¹ Their exposure to and knowledge of the law is gained from popular culture: novels, television, and movies. If a person were to judge from these novels, television shows, and movies, he would assume that the law is mainly involved in the prosecution and defense of those accused of crimes and that most lawyers practice criminal law. For whatever reason, writers of fiction have either been unable or have chosen not to attempt to convey the excitement and reward that is experienced by lawyers who draft wills, represent landlords in tenant evictions, or represent banks in garnishment proceedings.²

Writing about criminal defense lawyers is an extension of the crime novel, a genre that has long been popular and is one of the chief inspirations of the incarnation of the criminal defense lawyer as

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¹ In 1960, there were approximately 286,000 licensed attorneys in the United States and by 2000 the number had increased to approximately 1,049,000. E-mail from Tracie Moxley, Market Research Dept., American Bar Association, to Alan Kelman, research assistant to the author (Oct. 11, 2001, 5:28:52 EST) (on file with author).

² A search of the Internet has revealed no novel about lawyers engaged in these fields of law nor do any movies or television shows in these areas of practice come to mind. Even John Grisham, who has branched out somewhat, has crime as the guiding force in all of his novels.

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detective.³ In Mark Twain's 1894 fictional *Pudd'nhead Wilson*, David Wilson successfully defended a wrongly accused defendant by using fingerprint evidence to solve a murder, thereby giving birth to the theme of the criminal defense lawyer as hero—the indispensable man who proves the innocence of his wrongly accused client.⁴ This theme lay dormant for thirty-nine years, until Erle Stanley Gardner picked it up in 1933 when he introduced Perry Mason in *The Case of the Velvet Claws*.⁵ This book was followed by a series of novels continuing the themes of the criminal defense lawyer as the savior of the innocent and the guarantor of justice in our judicial system.

Perry Mason, Gardner's fictional creation, gained wider exposure in the 1950's when he was portrayed on television by actor Raymond Burr.⁶ The series' weekly offerings consisted of Perry Mason successfully defending his client by proving not only that someone else committed the crime, but also by showing *who* the real criminal was *and* by getting him to confess. What could be better calculated to appeal to America's sense of justice—not only did an innocent person not get convicted, the real culprit was unmasked and brought to justice. Could anything be

³ See generally RAYMOND CHANDLER, LATER NOVELS AND OTHER WRITINGS (Frank McShane ed., Library of America 1995); DASHIELL HAMMETT, COMPLETE NOVELS (Steven Marcus ed., Library of America 1999).

⁴ MARK TWAIN, PUDD'NHEAD WILSON (Bantam Books 3d prtg. 1984) (1894).

⁵ ERLE STANLEY GARDNER, THE CASE OF THE VELVET CLAWS (Aeonian Press 1976) (1933).

⁶ While the highly popular weekly television series (1957-1966) ended in the mid-60s, Raymond Burr was to reprise the role in "made for T.V. movies" (1985-1993) until the actor's death in 1993. See William Grimes, *Raymond Burr, Actor, 76, Dies*, NY TIMES, September 14, 1993, at B9. *Perry Mason Returns* was the number one rated T.V. show for the week of November 25 through December 1, 1985, and was the most successful T.V. movie of the 1985-1986 season. See Stephen Farbers, *Burr and Griffith Back in Familiar TV Roles*, NY TIMES, April 12, 1986, at 50. The "made for T.V. movies" are as follows: 1985—*Perry Mason Returns*; 1986—*Perry Mason: The Case of the Notorious Nun* and *Perry Mason: The Case of the Shooting Star*; 1987—*Perry Mason: The Case of the Lost Love*, *Perry Mason: The Case of the Murdered Madam*, *Perry Mason: The Case of the Scandalous Scoundrel*, and *Perry Mason: The Case of the Sinister Spirit*; 1988—*Perry Mason: The Case of the Avenging Ace* and *Perry Mason: The Case of the Lady in the Lake*; 1989—*Perry Mason: The Case of the All-Star Assassin*, *Perry Mason: The Case of the Lethal Lesson*, and *Perry Mason: The Case of the Musical Murder*; 1990—*Perry Mason: The Case of the Desperate Deception*, *Perry Mason: The Case of the Poisoned Pen*, *Perry Mason: The Case of the Silenced Singer*, and *Perry Mason: The Case of the Defiant Daughter*; 1991—*Perry Mason: The Case of the Malignant Mobster*, *Perry Mason: The Case of the Ruthless Reporter*, *Perry Mason: The Case of the Glass Coffin*, and *Perry Mason: The Case of the Fatal Fashion*; 1992—*Perry Mason: The Case of the Fatal Framing*, *Grass Roots*, *Perry Mason: The Case of the Reckless Romeo*, and *Perry Mason: The Case of the Heartbroken Bride*; 1993—*Perry Mason: The Case of the Telltale Talk Show Host*, *Perry Mason: The Case of the Skin-Deep Scandal*, and *Perry Mason: The Case of the Killer Kiss*. The Museum of Broadcast Communications, *The Encyclopedia of Television* at <http://www.museum.tv/archives/etv/B/htmlB/burraymond/burraymond.htm> (last visited Oct. 24, 2004).

more salutary for the image of criminal defense lawyers? The feeling portrayed was that the only function of the prosecutor (and the police) was to arrest and prosecute someone, any man or woman would do, and an ever-vigilant criminal defense lawyer would avert a tragedy by bringing the real culprit to justice.⁷

A 1980s version of Perry Mason was attorney Ben Mattlock, portrayed by Andy Griffith, who found himself in the similarly challenging situation of being involved in a court system that invariably suspected, detained, arrested, and tried innocent people. As with Perry Mason, Ben Mattlock's job was to stop these weekly injustices and expose the real killer, again bringing a sense of closure to each of these criminal cases.

Lawyers and non-lawyers alike could feel warm and comfortable with these shows as they portrayed our profession in its best light, which was as defenders of the innocent, defenders who stopped the ethical but misguided state prosecutors from convicting, sentencing, and perhaps executing innocent people. To that noble end, many types of otherwise questionable behavior were countenanced, such as having secretary Della Street or investigator Paul Drake take a crucial witness down to Tijuana, or having an operative go undercover and pretend to be someone who he was not in order to get evidence that was needed to assist the defense lawyer.

B. Lawyers' Real Life Heroes

Noble as these shows presented the legal profession, they misrepresented what first the Canons of Professional Ethics, then the Code of Professional Responsibility, and now the Rules of Professional Conduct, require us to do with greater frequency—defend the guilty.⁸

⁷ Unlike the T.V. show makers, movie-makers have been willing to present a bleaker and perhaps more realistic picture of the justice system. Two good examples are Alfred Hitchcock's *THE WRONG MAN* (1956) and Sidney Lumet's *TWELVE ANGRY MEN* (United Artists 1957)—both starring Henry Fonda. Hollywood has not attempted a weekly television series based on such a depressing view of the criminal justice system. As neither movie was a hit at the box office, and *TWELVE ANGRY MEN* failed to make a profit, a television producer could not be faulted for doubting that such depressing realism would acquire and hold an audience large enough to attract advertisers. Carol J. Clover, *Movie Juries*, 48 *DEPAUL L. REV.* 389, 403 (1998).

⁸ The word "guilty" and the phrase "guilty client" are not used in this paper to imply that a finder of fact, jury or judge, has determined that the client is guilty. Rather, these terms are a shorthand to avoid the awkwardness that would come from continually describing the client as "one who has admitted to his attorney that he has done the acts of

Lawyers instinctively know this is the case, which explains *our* choice of heroes. Irving Younger's *Ten Commandments of Cross Examination* extolls the virtues of attorney Max Steurer, who successfully defended the owners of the Triangle Shirtwaist factory by use of brilliant cross examination.⁹ Criminal defense lawyers marvel at Richard "Racehorse" Haynes, whose brilliance succeeded in getting an acquittal for multimillionaire Fort Worth businessman T. Cullen Davis, who had been charged with attempting to murder his estranged wife and of murdering his stepdaughter and wife's boyfriend. Also celebrated is Haynes' representation of members of the Outlaws motorcycle gang who nailed a woman to a tree for not giving them ten dollars.¹⁰

The belief that the evidence proved beyond a reasonable doubt that O.J. Simpson killed his former wife is so common that late night talk show hosts can still tell jokes with that situation as the premise. This jesting only adds to the cachet of the defense lawyers who succeeded in obtaining O.J.'s acquittal.¹¹ And in Florida, criminal defense lawyers admired defense attorney Gerry Kogan's inspired cross examination of the coroner, which many thought was instrumental in the acquittal of the police officers accused of beating Arthur McDuffie to death.¹²

which he has been accused." Neither the term nor the phrase are intended to refer to a client whose mental state or acts are insufficient to fulfill all the elements of the crime of which he is accused, or for whom a justification defense, such as self-defense or incapacity, is available.

⁹ IRVING YOUNGER, *Triangle Shirt Waist Company Case*, in THE ART OF CROSS EXAMINATION 26-28 (ABA 1976).

¹⁰ Telephone Interview with Richard "Racehorse" Haynes (Oct. 22, 2004); see also EMILY COURIC, THE TRIAL LAWYERS 297-298 (1998); Lawyer Hall of Fame, *Richard "Racehorse" Haynes*, at <http://www.fansoffieger.com/haynes.htm> (last visited Nov. 4, 2004). Five members of "The Outlaws" motorcycle gang were accused of aggravated assault for nailing a woman's palms to a tree. Telephone Interview with Richard "Racehorse" Haynes (Oct. 22, 2004). What is not mentioned in criminal defense lawyer lore is that all five defendants pled guilty, one, a month before trial, and the other four during jury selection on July 25, 1968. The three most guilty were sentenced by Judge Cecil Rosier to state prison for terms of four years, two years, and one year, respectively. A fourth defendant was sentenced to eight months, and the least culpable, a juvenile who had agreed to testify for the State, was sentenced to two years probation. *State v. Owings*, 1968 FL Crim. Div. 67C-2301; see also *'Outlaws' End Trial With Plea*, FORT LAUDERDALE NEWS, July 25, 1968, at 1 & 14A; *Crucifixion Gang Gets Jail Terms In Girl's Assault*, THE MIAMI HERALD, BREVARD COUNTY EDITION, July 26, 1968, at 1 & 2A.

¹¹ See *People v. Simpson*, 1995 WL 704381 (Cal. Super. Trans. 1995).

¹² *State v. Diggs*, 1980 FL Crim. Div. 79-21601U. The verdict by the Tampa jury was so unpopular it was the catalyst for riots in Miami. Gerald Kogan continued to be respected and admired in his subsequent career as a jurist, retiring as Chief Justice of the Florida Supreme Court. See *Florida State Courts*, at <http://www.flcourts.org/pubinfo/justices/>

C. *Requirements of the Rules*

The lawyers who were responsible for those feats and others like them are admired by the rest of us because, through their sheer effort and imagination, they have won against what many of us first conceived to be insurmountable odds. The legal profession requires lawyers to represent our clients as best we can. For a criminal defense attorney, the best that he can do is to convince a jury to acquit his client, even if that client has committed the act of which he stands accused. This acquittal may not always be possible, as it is far from a surety, but if the client wants and directs the attorney to attempt to get an acquittal, the attorney must try to comply, even when the request comes from a criminal defendant client who admits to his attorney that he is guilty.¹³

In our profession, the client is responsible for the objectives of the representation,¹⁴ and it would be an unusual client whose first, if occasionally unrealistic, objective were something other than an acquittal. While lawyers have considerable control over the technicalities of the representation,¹⁵ the rules require us to work diligently¹⁶ and loyally¹⁷ to achieve our client's desired goal, if it can be accomplished ethically. What this situation means, in brief, is that a more precise description of the job and the goal of the criminal defense attorney is to get his client acquitted; and for those criminal defense attorneys whose clients have committed the acts of which they are

Former/kogan.html (last visited Oct. 24, 2004). One measure of the unpopularity of the verdict is that even today, twenty-four years later, one of the officers involved in the case who testified as a state witness is still having difficulty being admitted into the Florida Bar. See Laurie Cunningham, *Fla. Bar Raises Rehabilitation Questions*, THE LEGAL INTELLIGENCER, Oct. 13, 2004, at 4; Daniel Dodson, *First Champion of Indigent Defense award, speeches by judge, U.S. Deputy A.G. highlight Miami Mid-Winter Meeting*, THE CHAMPION, April 2002, at 6, 7 available at <http://www.nacdl.org/public.nsf/freeform/championmag?OpenDocument> (last visited Oct. 24, 2004).

¹³ While there is no Rule of Professional Conduct that requires a lawyer to take a case, once a lawyer has entered his appearance in a case, unless he is later permitted to withdraw, Rule 1.2 mandates that "a lawyer shall abide by a client's decisions concerning the objectives of representation." MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2003). This mandate is subject to the conditions in paragraphs (c) and (d), which require client consent in limiting the representation and proscribes objectives that are criminal, fraudulent, or which would cause the lawyer to violate the Rules. *Id.* R. 1.2(c)-(d). Rule 1.2 has no prohibition against an attorney's striving to achieve the acquittal of his guilty client, so long as the attorney does not manufacture or present false evidence or suborn perjury, which would violate Rule 1.2, as well as 3.1, 3.3, 3.4, 4.1, and 8.4. *Id.* R. 1.2, 3.1, 3.3, 3.4, 4.1, 8.4.

¹⁴ *Id.* R. 1.2.

¹⁵ *Id.*

¹⁶ *Id.* R. 1.3.

¹⁷ *Id.* R. 1.7.

accused, the criminal defense attorney's job is still to try to secure acquittals for the guilty clients.¹⁸

Hence, if popular culture were to more accurately portray to the public the criminal defense attorney's function, one would have to rewrite those Perry Mason (and Ben Mattlock) television episodes to have Perry's secretary, Della Street, or his investigator, Paul Drake, congratulate Perry on having successfully convinced a jury to acquit a guilty client. And then, at the celebratory dinner when Hamilton Burger comes over to Perry's table, Hamilton could say something to the effect of, "Celebrate all you want now Perry, but we will pick him up the next time he kills somebody, and he probably won't have enough money to hire you a second time." It is unlikely that a television series that routinely shows lawyers using their skills to allow guilty clients to go free would have much success with the public. Nor would these shows do much for lawyers' self-esteem or their reputations with the public.¹⁹ Such a depiction of lawyers would make it difficult to justify their special position in society and the special rules that permit lawyers to attempt to secure acquittals of clients who have admitted to their lawyers that they have committed the acts of which they are accused.

D. A Moral Dilemma – The Client Who Admits His Guilt

Under the Rules, when clients admit their guilt to their attorneys, those admissions are confidential.²⁰ By agreeing to the representation, the attorney assumes the duty of trying to get an acquittal, if so directed by the client. The attorney must assume this duty even of a client who says, "I have just killed seventeen women. I only selected pregnant women so I could torture them and kill two people at once. I did it. I liked it. I enjoyed it. And I want you to get me off."

¹⁸ It is not easy to determine the percentage of accused who have actually committed the acts they are accused of committing. While the prosecution drops some cases and others result in acquittal, most cases result in pleas and others result in guilty verdicts. Percentages vary among jurisdictions, and percentages vary between courts that try misdemeanors to those that try felonies. Some pleas are pleas of convenience, but those pleas cannot explain those defendants who, after pleading, admit their guilt in interviews with either pre-sentencing investigators or the judge at sentencing hearings.

¹⁹ A recent show that may come the closest to conveying a defense attorney defending the guilty is *The Practice* (ABC television 1997-2004), in which the defense lawyer protagonists may be morally troubled about representing a guilty person. However, even in victory, the winning defense counsel refuses to gloat.

²⁰ See MODEL RULES OF PROF'L CONDUCT R. 1.2(c)-(d).

The way lawyers successfully defend and attempt to get acquittals for guilty clients is to suppress evidence or confessions where possible, and ultimately, to convince juries of the opposite of what the lawyers know to be true based on the client's admission. Toward that end, a lawyer will attempt to convey to the jury the false impression that he believes his client is innocent, as that will assist in persuading the jury to acquit. This duplicity is not prohibited by the Rules so long as the lawyer avoids actually stating his "belief" about his client's innocence.²¹

Consequences of this type of defense include the following: a greater chance that guilty people will be acquitted and that innocent people will get convicted; truth and justice not being served and becoming casualties of these practices; our streets and neighborhoods being less safe; and lawyers being in a weaker position to challenge threats to our liberties. Just like the boy who cried "wolf," by raising the defense of those who are guilty, lawyers are less likely to be believed when they raise their voices to defend someone who is not guilty. This Essay will argue for a change in the practice of defending the guilty, a change which can be accomplished by modifying one Rule: Rule 3.1.²²

E. Model Rule of Professional Conduct 3.1

Rule 3.1 currently prohibits an attorney from raising non-meritorious defenses or contentions, or controverting a fact that he knows is true and that was raised by the opposing party.²³ However, the second sentence of this two-sentence rule excludes criminal cases insofar as a criminal defense attorney does not violate the Rule if he defends so "as to require that every element of the case be established."²⁴ This section would have no meaning for a lawyer defending an innocent man, as that would not be frivolous. Its only application is to a criminal defense lawyer who knows his client is guilty, but "nevertheless . . . defend[s] the

²¹ *Id.* R. 3.4(e).

²² *Id.* R. 3.1. This Rule states:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Id.

²³ *Id.*

²⁴ *Id.*

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proceeding.”²⁵ Amending Rule 3.1 by dropping the second sentence would broaden the Rule’s application to criminal defense, thereby prohibiting a lawyer from defending a guilty client, other than pleading him guilty and arguing mitigation.²⁶ It would also prohibit an attorney from raising a defense that the attorney knows, based on his client’s admissions, to be inconsistent with the facts of the case.²⁷

II. THE CURRENT SYSTEM

A. *Interviewing Clients – Two Approaches*

Currently, when a client retains a criminal defense attorney, that attorney can plan the defense by using one of two stratagems: (1) He can ask the accused what happened, or (2) he can determine what the state is able to prove, and then tell *that* information to the defendant and explain the state of the law to the defendant, all before asking the defendant for an explanation.²⁸ Both approaches have advantages and disadvantages. If the attorney chooses to ask his client for the facts, he would be better able to anticipate the state’s case and be more successful in knowing when and how deeply to probe the state’s witnesses’ testimony because the defendant would have provided the information that would give the defense attorney an independent basis to judge how well and how much the witness could have seen, i.e., how vulnerable to attack that witness’s testimony will be. The disadvantage of this approach is that if the client admits to having committed the act, absent a version of diminished capacity or self defense, the client’s attorney will not be able to put the client on the stand to tell a different story, as that would be perjury and is proscribed by the Rules.²⁹

On the other hand, if the lawyer does not ask for the client’s version of the facts, but requests that the client delay relating his version of the facts until the client understands *all* the facts the state has, as well as how the law relates to those facts, his client may be tempted to make up a

²⁵ *Id.*

²⁶ See *supra* notes 22-25 and accompanying text.

²⁷ This Essay will not argue for the abolition of self-defense or incapacity, defenses that would remain legitimate and not frivolous or deceptive.

²⁸ In the movie, *Anatomy of a Murder*, before asking his client Ben Gazzara to explain what occurred, the attorney, played by Jimmy Stewart, explains what the legal defenses to murder are in Michigan and how those defenses relate to proof that the police have accumulated. ANATOMY OF A MURDER (Columbia Pictures 1959); ROBERT TRAVER, ANATOMY OF A MURDER (St. Martin’s Press 1983) (1958).

²⁹ See MODEL RULES OF PROF’L CONDUCT R. 1.2(d), 3.1, 3.3, 3.4, 8.4; FLA. BAR REG. R. 4-1.6(b)(1) (West 2003).

story that is not totally consistent with what occurred. While this permits the defense lawyer to put his client on the stand, it means that the defense lawyer is relying on the client's ability to synthesize and to fend off cross examination under circumstances where the client may have exaggerated somewhat. The jury may see this exaggeration as lying, even though it may turn out to be essentially the truth, so that this exaggeration could lead to a skeptical jury convicting the client. Another drawback is that the client, who is not free to tell his lawyer what really occurred, will not be able to assist his attorney as readily in determining how lightly the lawyer can safely tread during his examination of the state's witnesses.

Both approaches are permitted by our practice and our Rules, as in neither case is the lawyer actively introducing false evidence or untruth into the system. To the extent that he suspects that his client's story does not wash or will not stand up under cross examination, the lawyer will strongly attempt to discourage his client from taking the stand and from telling a story that, however much the client says is true, the lawyer believes the jury will not find persuasive. This discouragement to testify is in part because the lawyer does not find the story persuasive, and he suspects that his client is not telling him the complete truth. While a lawyer can select variations of the two stratagems in deciding which approach he wants to take with his client, there appears to be a certain advantage to permitting a client to speak freely with his attorney to the point of even admitting that he has committed the act he is accused of committing.³⁰ The attorney-client confidence and Rules 3.1 and 1.6 permit this complete candor and prohibit the lawyer from divulging what his client has told him.³¹

The rationale behind the attorney-client privilege is that it permits free interchange between the client and the attorney so that the attorney can give the client the best possible advice based on the most complete information. The privilege recognizes that in its absence, a client would be less likely to tell the attorney all of the facts, and that the attorney's advice and assistance to the client would suffer accordingly.

³⁰ On several occasions, when speaking at continuing legal education seminars attended by criminal defense lawyers, I have asked the lawyers present for a show of hands of those who have succeeded in getting jury acquittals in the last year or so. I then asked those individuals how they had gotten those acquittals. The vast majority have said that they found it more successful to have their clients tell them everything, even if that meant that the client could not later take the stand. Client candor increases the attorney's ability to meet and overcome the state's evidence.

³¹ MODEL RULES OF PROF'L CONDUCT R. 3.1, 1.6.

B. *Defending the Guilty*

Theoretically, encouraging a client to fully and honestly confide in his attorney promotes justice and benefits all parties. Permitting a client to speak openly with his attorney results in a properly informed attorney. This attorney is better equipped to either secure an acquittal for his client or plead mitigating circumstances. Hypothetically, the free interchange of information between a lawyer and his attorney will prevent innocent defendants from being convicted. The current Rule 3.1 does not draw a distinction between allowing an attorney to defend a client whose guilt or innocence is uncertain, and permitting an attorney to defend a client who he knows is guilty. The distinction is neither moot nor irrelevant—it is not clear that society benefits when an attorney is allowed to defend a guilty client.

The rationale for defending a guilty client goes back at least as far as Canon 5,³² which urged the lawyer not to let his personal opinion as to the guilt of the accused determine whether the lawyer should undertake the defense. While the Canon does not actually address the situation where the accused tells his attorney that he is guilty, the Canon states that “[t]he lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.”³³

Without examining the premise, Canon 5 merely accepts as fact that the defense of guilty people was somehow related to the defense of the innocent who had been wrongly accused. Canon 5 does not specify how the innocent—but wrongly accused—man would benefit by having lawyers try to prove that the guilty accused was innocent.³⁴

C. *Acquitting the Guilty*

It is not a stretch to argue that justice is not done when a guilty person is acquitted. Just results are the desired ends of our criminal laws and rules, evidence rules, and rules of procedure and ethics. Our adversary system is based on the assumption that justice comes from

³² CANONS OF PROF'L ETHICS Canon 5 (1908).

³³ *Id.*

³⁴ The premise of Canon 5 totally neglects the harm that comes to those wrongfully accused of having the judge, the prosecutor, the jury, and even defense lawyers themselves assume that all accused are guilty. This premise can create an assumption that the lawyer's efforts on their clients' behalf is part of a cynical game and is unrelated to the truth of the matter.

bringing the facts to light and that facts are more likely to be brought to light if both sides work against each other so that one lawyer will bring out those facts that another lawyer would rather hide, and vice versa. We recognize that justice is desirable, and that either the absence of facts or introduction of false facts or untruths could lead to unjust results. Hence, lawyers are prohibited from actively introducing false evidence or perjurious testimony.

Permitting (indeed requiring) a criminal defense attorney to attempt to secure an acquittal for his guilty client forces the state to prove its case, and by extension all cases, to such a high standard that the chance of convicting an innocent person is minimized. We recognize that the price we pay for limiting the conviction of the innocent is an increased likelihood that some guilty defendants will be acquitted.

But our logic is fallacious. In reality, by permitting criminal defense attorneys to go forward with defenses that they know are unmeritorious—a permitted exception to Rule 3.1—our current system, in addition to increasing the chances of a guilty person being acquitted, also increases the chances that an innocent person will be convicted.

D. Convicting the Innocent

Given that the criminal defense lawyer's job is to attempt to get his clients acquitted, if possible, and not to judge which of his clients are innocent and which are guilty, the criminal defense attorney is less likely to concern himself with the innocence or guilt of the accused and more likely to leave that up to the judge and jury. Consequently, the criminal defense attorney looks at his cases from the perspective of how strong the evidence is against a client and the likelihood of securing an acquittal. Accordingly, a criminal defense attorney's focus is not on justice, not on securing acquittals for his innocent clients, but on securing acquittals for his clients, innocent or guilty. The practical result is that a criminal defense attorney who sees that the state's case is weak will spend his efforts attempting to get an acquittal in that case, and, where the state has more evidence in another case with a greater chance of getting a conviction, the defense attorney, maximizing his own utility if not that of his client, would be more likely to urge that client to plead guilty.

In each case, the decision will be made based on the strength of the state's evidence and not on any attempt by the defense attorney to determine whether his client is innocent or guilty. The defense attorney

has conceded, and the system appears to accept, that it is not the criminal defense attorney's job to determine his client's innocence or guilt. The result is that a defense attorney will spend more of his time representing and attempting to get acquittals for criminal defendants who are guilty where the evidence against them is not as strong, and he will spend less of his time attempting to get acquittals for criminal defendants who are innocent where the state has a stronger case.³⁵

To break it down further, consider the criminal defense attorney who has four individuals who have been charged with crimes. All four have told their attorney that they are not guilty. Everything else being equal, which cases will the criminal defense attorney more likely be prepared to try? The decision will be made based on the strength of the state's cases without any independent attempt by the attorney to determine who is innocent and who is guilty. He may believe that all are innocent or that all are guilty, but it will be immaterial to him. His decision will be influenced by the amount of evidence the state has. We, like the criminal defense attorney, do not know whether any or all of those four individuals are innocent or guilty. However, the ones who are guilty and who have tried to fool the lawyer, and so have given him an incomplete or inaccurate version of the facts, run the risk that their lawyer will not be as prepared at trial to counter the evidence against them as the lawyers of clients who have given their lawyers a complete version of the facts. Consequently, those who are not being truthful with their attorneys stand a greater chance of conviction.

E. Modifying Rule 3.1 – More Convictions of Guilty Defendants

If the rule were that a guilty man's lawyer could not pretend or try to persuade the court and the jury that the defendant was innocent of the acts he had admitted to his attorney,³⁶ people who are actually guilty would have to choose between lying to their attorney, thereby increasing their chances of conviction, or telling the truth to their attorney and having their attorney plead them guilty (and argue mitigation or the existence of an affirmative defense). Under this system, everything else being equal, the expectation would be more convictions of guilty individuals due to either pleas or convictions.

³⁵ Remember, the criminal defense attorney has conceded that it is not his job to determine the question of his clients' guilt.

³⁶ This situation would be the case under a modified, one-sentence Rule 3.1.

F. Favoring the Accused Who Is Candid and Guilty – the Current Rule 3.1

Under the current system, if an attorney has four clients, and two of them say they did not commit the crime and two say they did, if the two who denied having committed the crime are not telling the truth, they stand in the same situation as the previous four clients in that their attorney will not be as prepared to meet the state's evidence. If they are telling the truth, the facts that they provide to their attorney will be a far more accurate road map to permit him to apply the state's evidence and thereby increase their chances of acquittal.

As to the remaining two who tell their attorney that they are guilty of the crime, how do they fare compared to the two guilty individuals who have denied their guilt to their attorney? Under our current system, the two who are truthful to their attorney will help him be better prepared to meet and defeat the state's evidence and, everything else being equal, stand a much better chance of an acquittal than the two who are also guilty but lied to their attorney. Under this circumstance, the Rule 3.1 exemption for the criminal defense results in a greater chance of acquittal of guilty individuals. To some extent, this situation turns the criminal defense function into a "game." Thus, the time criminal defense attorneys spend in attempting to get acquittals for individuals who have confessed their guilt is time that is not spent representing defendants who are not guilty and have been wrongly accused.³⁷

III. AMEND RULE 3.1 – STOP DEFENDING THE GUILTY CLIENT

Efforts by lawyers to secure the acquittal of the guilty do not benefit the law abiding members of society, victims, or even the falsely or mistakenly accused; the main beneficiaries are guilty defendants and, to some extent, the pocket books of criminal defense lawyers themselves. Under the proposed Rule 3.1, a guilty person would still have the benefit of the attorney-client privilege and to the assistance of his attorney in looking for a legal defense or arguing for mitigation, but he would not have a right to the active complicity by the attorney in assisting the guilty person in perpetrating a fraud on the tribunal, to wit, that the guilty person is not guilty.³⁸ To some extent, the proposed Rule 3.1

³⁷ Of course, it would be impossible to give a quantitative measure to break the time down.

³⁸ See *supra* note 22 for the text of current Rule 3.1. The proposal would omit the final sentence of Rule 3.1, which currently states that "[a] lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may

would mean that in cases where a defendant admitted his guilt to his lawyer, the state would not have to prove its case. But why should the state have to prove what the guilty person and his attorney know is true? How does society benefit from this system? Aren't the state's resources better spent on fewer cases and attempting to prove the guilt or innocence of defendants who have not admitted their guilt to their lawyers?³⁹ Such a change can be accomplished by amending Rule 3.1 and removing the second sentence, which exempts criminal defense attorneys from the general prohibition against unmeritorious claims and contentions. By deleting the second sentence of Rule 3.1, which permits the criminal defense attorney to "so defend the proceeding as to require every element of the crime to be established" (even when he is defending someone who is guilty), the criminal defense attorney would be in the same situation as the civil defense attorney.⁴⁰ In a civil law suit, it is a violation of Rule 3.1 to defend by denying the other side's truthful allegations.⁴¹

A. *Make the Client's Innocence the Focus of Defense*

Changing this rule would also change the focus of the criminal defense attorney from that of evaluating and pleading cases based on the amount and weight of the state's proof, to concentrating on cases in which the client says that he is not guilty. The criminal defense attorney will now be confronted with three different situations: (1) The criminal defendant who says he is guilty, (2) the criminal defendant who says he is not guilty but has to lie to his attorney because he is guilty, and (3) the

nevertheless so defend the proceeding as to require that every element of the case be established." MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003).

³⁹ As Rule 3.8 reminds us, the prosecutor's job is to seek justice and to look for all of the evidence, and the less time he spends on frivolous cases—cases where a guilty defendant and that guilty defendant's lawyer are trying to prove a lie, that the guilty client is not guilty—the more time the prosecutor will have to spend on other cases. See MODEL RULES OF PROF'L CONDUCT R. 3.8. Also, there is a corrupt stain of cynicism that runs through our system where everyone knows that the defense attorney's job is not to defend the innocent, but rather to secure the acquittal of the guilty. Defense of the guilty leads to a prosecutor's cynicism, which makes it harder for him to believe the accused in those cases where someone has been wrongly accused because the prosecutor and the defense lawyer are not attempting to determine who is guilty and who is not guilty. Rather, they are engaged in the game of determining who can be *proven* guilty, regardless of whether the person is innocent or guilty.

⁴⁰ *Id.* R. 3.1.

⁴¹ Failing to admit those allegations of the complaint that the defense lawyer knows are true also violates Rules 1.2(d), 3.2, 3.3, 3.4, 8.4, 4.1, and possibly Rule 4.4. *Id.* R. 1.2(d), 3.2, 3.3, 3.4, 8.4, 4.1, 4.4. Failure to admit true statements also violates several Rules of Civil Procedure. FED. R. CIV. P. 8, 11(b), 26(g)(1).

criminal defendant who says he is not guilty and truthfully relates the facts as he knows them to be. Currently, the focus of the criminal defense attorney is on determining in which of his cases he has a greater probability of winning, which means that he will spend some time on the first of these three examples, thus taking time and effort away from the last two examples. Under the proposed version of Rule 3.1, the criminal defense attorney will focus his energies differently.

B. Elicit More Guilty Pleas Earlier

In the first example, the criminal defense attorney will be unable to plead his client not guilty and will instead concentrate on preparing the best arguments for mitigation at sentencing. The criminal defense attorney will devote his time toward proving innocence in examples two and three, where he believes his clients are not guilty. As the criminal defense attorney will not know which clients fall into category two and which clients fall into category three, he will prepare both sets of cases, with this difference: His preparation for the clients in category two will be less efficient, as they have lied to him, and the criminal defense attorney is more likely to be surprised at trial by facts that the clients in category two did not tell him. Also in his preparation of his defense, the criminal defense attorney will, in many cases, slowly discover which clients fall into category two. At some time during the preparation of those cases, as the facts prove to be other than what the category two clients told the attorney, it is likely that the attorney will confront his clients and some number of those clients will confess their guilt, thereby moving their cases from category two to category one. The result will, therefore, be different than what we currently get. Under our current system, the discovery in the middle of preparation that the client has not told his attorney the truth and that the client is really guilty does not impose any ethical duty on the attorney to plead the client guilty, but rather permits the attorney to continue developing evidence in the hope of getting an acquittal by fooling the judge and jury and persuading them of a fraud.⁴²

C. Free up More of a Defense Attorney's Time to Devote to His Innocent Clients

Those who would gain by the proposed Rule 3.1 include the following: the innocent client, because his criminal defense attorney

⁴² The only current ethical restraint on an attorney is that he cannot permit his client to take the stand and lie.

would spend more time on his case and would now be concerned with innocence or guilt; the prosecutor, because he would spend less time preparing to prove cases against those who are admittedly guilty;⁴³ the criminal defense attorney who, instead of being part of a game, would reenter the search for justice and truth by making his clients' innocence or guilt his focus rather than which cases offer the better chance of getting an acquittal regardless of the innocence or guilt of his clients; the system of justice itself, because just results would more likely be achieved where the focus of everyone in the system is on whether an accused is really innocent or guilty, versus the current focus on whether there is sufficient proof to prove someone guilty; and finally society in general, because fewer innocent and more guilty people would be convicted.

The big loser under this system would be the criminal defendant of category two who, although guilty, insists on lying to his attorney and denying his guilt. This client runs the risk that during the trial preparation, his lawyer would discover that he was guilty and would convince him to plead guilty. Alternatively, if his lawyer did not discover that the client was guilty, the lawyer would be ill-prepared at trial due to the faulty information that the client had given the lawyer. The extremely big loser would be the criminal defendant of category one, in that he no longer would be entitled to his criminal defense attorney's assistance in perpetrating a fraud on the court and on the public.

The change in Rule 3.1 would also be consistent with the general tone of the Rules of Professional Conduct, which urge ethical conduct and behavior and truthfulness by attorneys. The exception for criminal defense attorneys in Rule 3.1 is one rule that "defines truthfulness downward," to paraphrase Daniel Patrick Moynihan.⁴⁴

D. Align Rule 3.1 with the Philosophical Spirit of the Other Rules

Rule 1.2(d) prohibits a lawyer from assisting a client in conduct that the lawyer knows or reasonably should know is criminal or fraudulent.⁴⁵

⁴³ The prosecutor's focus would also change. Because he would have more time to devote to fewer cases, he could investigate each one better, and he would know that in each case he prepared, the defense was maintaining the *innocence* of the accused, not playing the game of "what can you prove?"

⁴⁴ Daniel Patrick Moynihan, *Defining Deviancy Downwards: How We've Become Accustomed to Alarming Levels of Crime and Destructive Behavior*, THE AMERICAN SCHOLAR, Winter 1993, at 17.

⁴⁵ MODEL RULES OF PROF'L CONDUCT R. 1.2(d).

What is more fraudulent than trying to persuade a judge and jury of the innocence of a criminal defendant who has admitted to his attorney that he is guilty?

Rule 2.1 advises us that in counseling a client that we are not just lawyers, but also advisors, and we may refer not only to the law but also to other considerations (such as moral, economic, social, and political) that may be relevant to a client's situation.⁴⁶ Our society encourages the rehabilitation of those who have gone astray. The first step on the road to rehabilitation must be taken by the wrongdoer; he must admit his guilt.

Rule 3.2 requires us to expedite litigation.⁴⁷ Raising the false allegation that our guilty client is not guilty is inconsistent with expediting litigation.

Rule 3.3 mandates candor to the tribunal and prohibits a lawyer from knowingly making a false statement of material fact to a tribunal and requires us to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a fraudulent act by a client.⁴⁸ What fact is more material in a criminal prosecution than the guilt of the defendant?

Rule 3.4 talks about fairness to the opposing party and counsel.⁴⁹ Currently criminal defense attorneys have to "dance around" this rule when they know their clients are guilty. While not violating the letter of the law, they violate its spirit every time they try to persuade a jury that a guilty man is not guilty.

The spirit of Rule 4.1, truthfulness in statements to others,⁵⁰ is violated every time a lawyer stands up and argues for the innocence of someone he knows to be guilty.

Rule 4.4, respect for the rights of third persons,⁵¹ comes into question every time a criminal defense attorney cross examines a witness he knows is telling the truth or burdens the third person merely by requiring the victim or witness to come into court to testify, all of which would not be necessary if his client was simply to admit to the truth.

⁴⁶ *Id.* R. 2.1.

⁴⁷ *Id.* R. 3.2.

⁴⁸ *Id.* R. 3.3.

⁴⁹ *Id.* R. 3.4.

⁵⁰ *Id.* R. 4.1.

⁵¹ *Id.* R. 4.4.

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The spirit of Rule 8.4 is destroyed by the current exception for criminal defense attorneys in Rule 3.1. Rule 8.4(c) prohibits attorneys from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation,⁵² all of which are implicated when an attorney attempts to persuade a jury that his guilty client is not guilty.

Amending Rule 3.1 would bring Rule 3.1 and a criminal defense lawyer's behavior into compliance and consistence with all of these other rules. Moreover, there is no valid reason either in reality or in the rules why this change should not be made. The rule that a lawyer cannot assist his client in committing a crime or fraud has already been established, for example, by Rules 1.2, 1.6 and 3.3.⁵³

IV. HOW REALISTIC IS IT THAT CRIMINAL DEFENSE LAWYERS COULD PRACTICE UNDER SUCH A RULE?

Given what a radical departure such a small change in one rule would have for the way American defense lawyers practice, it is a fair question to ask whether it would be realistic to expect criminal defense lawyers to practice under a limitation that would prohibit them from defending self-admitted guilty clients. While in answering that question attorneys could look to the bars of virtually every other country in the world. However, the most appropriate system to look to is the legal system from which the American legal system evolved: the English system.

Criminal defense attorneys in England operate under a constraint that is different from that of their American counterparts, but not so strict as this paper proposes. *The Code of Conduct for the Bar of England and Wales*, which governs practicing barristers, specifically addresses the problem of what to do when defending a person accused of a crime. In the event that the client confesses his guilt to the barrister, "[s]uch a confession . . . imposes very strict limitations on the conduct of the defence."⁵⁴ The Code also instructs the barrister as follows:

⁵² *Id.* R. 8.4(c).

⁵³ *Id.* R. 1.2, 1.6, 3.3.

⁵⁴ THE CODE OF CONDUCT FOR THE BAR OF ENGLAND AND WALES, N: Written Standards for the Conduct of Professional Work, R. 12.3 (2000) ("Such a confession, however, imposes very strict limitations on the conduct of the defense. A barrister must not assert as true that which he knows to be false. He must not connive at, much less attempt to substantiate, a fraud.").

While, therefore, it would be right to take any objection to the competency of the Court, to the form of the indictment, to the admissibility of the evidence, or to the sufficiency of the evidence admitted, it would be wrong to suggest that some other person had committed the offense charged, or to call any evidence, which he must know to be false having regard to the confession.⁵⁵

So in England, it appears that even when an accused has made full confession to his lawyer, while the first option is to plead the client guilty, it is still permissible to make the prosecution prove its case, but under very strict limitations for the defense, limitations which would appear to almost always result in the prosecution winning. The prosecution still has the burden of proving its case and a barrister may still represent the client who pleads not guilty, provided that he does not in any way advance a defense. The defense would be permitted to cross examine the prosecution's witnesses so as to cast doubt on their memory or their ability to have seen, heard, or form an opinion, while not actually challenging their story.

The proposed Rule 3.1 would be more strict than the *Annex 13* in that it would prohibit American lawyers, in those jurisdictions that adopt the change, from entering a not guilty plea for their guilty clients. On the other hand, motions attacking the competence of the Court or the form of the indictment would still be available under a revised Rule 3.1, as they would not require any unmeritorious pleading by the criminal defense lawyer.⁵⁶

A fictional illustration of a British barrister confronted with a guilty client is found in John Mortimer's short story, *The Alternative Society*.⁵⁷ Mortimer's fictional British barrister, Horace Rumpole, is hired by the Legal Aid Society to defend a young girl who is accused of selling drugs

⁵⁵ *Id.* R. 12.4 (2000).

⁵⁶ A less drastic modification to the amendment of Rule 3.1 advocated in this Essay could follow the British version and permit the lawyer to argue that the evidence produced against his client was insufficient, or to attack its admissibility on evidentiary grounds. This modification would not compromise the principal suggested—the necessity of avoiding unmeritorious claims. Such a rule would almost always result in guilty verdicts. Criminal defense attorneys and their clients might find such a rule unpalatable—they might find themselves limited to a “punching bag” defense where they are the punching bag and they can only object to unsportsmanlike conduct by the prosecutor when he “hits below the belt.”

⁵⁷ JOHN MORTIMER, *The Alternative Society*, in RUMPOLE OF THE BAILEY 48-78 (Penguin Books 1984) (1978).

to an undercover police officer. Rumpole raises the affirmative defense of entrapment and is making considerable headway due to his client's previously clean record and Rumpole's brilliant cross examination of the police officer who made the arrest. The judge appears ready to dismiss the case due to improper police conduct. At this moment, Rumpole's client discloses to Rumpole that the case was not one of entrapment. The client had intended to sell the drugs in order to raise money to assist the client's brother who was in prison in Turkey.

Once Rumpole hears this admission, Rumpole informs the client that he cannot go forward and he must either withdraw or plead his client guilty.⁵⁸ Again, revising Rule 3.1 as this Essay suggests would not prevent the American lawyer from raising meritorious defenses such as self-defense or incapacity any more than the Code of Conduct prevents British barristers.

V. CONFIDENTIALITY IS NOT AFFECTED

The attorney-client privilege and the confidentiality that is imposed by Rule 1.6 would not be affected by an amendment to Rule 3.1, which would prohibit the defense of guilty clients. As with the current practice, a client's disclosure to his attorney that he was guilty would be confidential and would be information the attorney would not be permitted to disclose. The amendment to Rule 3.1 would merely impose upon the attorney a further obligation of not working to advance the acquittal of someone who confessed his guilt. This amendment would force upon the guilty client the dilemma of either lying to his lawyer and saying that he was innocent when he was really guilty, or telling the truth to his lawyer, which would require his lawyer to plead him guilty (assuming that no justification defense such as self-defense or entrapment was available).

The duty not to defend a criminal who has admitted his guilt to his lawyer is fully consistent with the current obligations that are imposed on the lawyer or permitted to the lawyer regarding the attorney-client privilege and Rule 1.6. For example, a client's intention to commit a crime must be disclosed in some states and may be disclosed in others.⁵⁹

⁵⁸ Unlike the British barrister, the American criminal defense attorney is permitted under the Rules of Professional Conduct to raise the defense of entrapment and challenge a truthful witness's actual story, whereas under the proposed change, he would not be permitted to do so as that would violate the modified version of Rule 3.1.

⁵⁹ Florida requires disclosure ("shall reveal") of a client's intention to commit a crime, whereas other states permit the disclosure ("may reveal"). Compare FLA. BAR REG. R. 4-1.6

Rule 1.6 also gives way to Rule 3.3 regarding a client's fraud upon a tribunal. Rule 1.6 is far from sacred: It permits an attorney to disclose client confidences to defend against a civil suit, a criminal case, a bar grievance, or to collect a fee.⁶⁰ Rule 1.6 would in no way change with the adoption of the proposed Rule 3.1.

VI. CONCLUSION

Rule of Professional Conduct 3.1 should be amended to remove its second sentence, which creates an exception for criminal defense attorneys and permits them to raise unmeritorious contentions benefiting their guilty clients. It is neither moral, just, nor in the furtherance of liberty and the betterment of society to allow criminal defense attorneys to win acquittals for their guilty clients. For far too long the Rules have sacrificed the interests of law abiding individuals, victims, and society to the psychic and monetary benefit of criminal defense lawyers and the guilty criminals whom they defend. The justification that this sacrifice has been done in furtherance of individual liberty and that it is necessary to defend the guilty in order to protect the rights of the innocent is a sham and a delusion. It is time that attorneys admit this farce to themselves and change their rules and behavior to conform to the highest standards of ethics and to the image that they have portrayed to themselves and the lay public.

Amending Rule 3.1 to remove the second sentence alone, or by replacing the second sentence with one that specifically prohibits a criminal defense attorney from doing other than pleading a guilty client guilty, would appear to benefit all but the guilty: society, the public at large, the court system, victims, the innocent who have been wrongly accused, and even, in one sense, criminal defense attorneys, who would focus their attention to the innocence or guilt of their client. Defense attorneys would become seekers of truth and justice, the true goal and calling of all attorneys. The only people harmed by the change would be those guilty of the crimes of which they have been accused and the lawyers who benefit monetarily and psychically from acquittal of the

(b)(1) (West 2003) *with* MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) & cmt. 6 (2003) ("A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary to prevent reasonably certain death or substantial bodily harm."). In Florida, a client's intention to commit a crime would apply for any crime, and in states following Model rules it would apply for a crime involving imminent death or substantial bodily harm. FLA. BAR REG. R. 4-1.6 (b)(1); MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2).

⁶⁰ MODEL RULES OF PROF'L CONDUCT R. 1.6.

guilty. With lawyers unable to pretend that those who have confessed to them were not guilty, there would be fewer trials. Guilty defendants who would want trials would be forced to lie to their attorneys, resulting in their attorneys being less prepared (than currently) to face the prosecution's evidence, and increasing the likelihood of those clients being convicted. Proportionately less criminal defense time would be spent trying to get guilty people acquitted, which would mean more time would be devoted to attempting to get the wrongly accused acquitted.