Criminal Lawyers' Truth: A Dialogue on Putting the Prosecution to Its Proof on Behalf of Admittedly Guilty Clients*

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"Nothing that is wrong in
principle can be right in practice."

Carl Schurz***

"Have you a criminal lawyer in this burg?"
"We think so, but we haven't been able to
prove it on him."

Carl Sandburg****

An American lawyer in private practice is, in general, under no professional obligation to represent any particular individual charged with having committed a crime or indeed to accept any criminal defense work.[1] One of the special burdens borne by attorneys who do frequently take criminal cases is having to respond to the question, "How can you defend a person you know is guilty?" With regard to defendants who stubbornly insist upon their innocence, most laypersons will be satisfied more or less with the answer that was provided by the American Bar Association's now superseded Canons of Professional Ethics: that "otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense."[2] We all need the security of knowing that if we are

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*** Quotation in Container Corporation of America, *Great Ideas of Western Man* 100 (1973) (institutional advertisements collected and republished for Bryn Mawr College's 1976 Studies program).

**** THE PEOPLE, YES 154 (1936).

1. *See* ABA CODE OF PROFESSIONAL RESPONSIBILITY [hereinafter cited as ABA CODE], Ethical Considerations [hereinafter cited as EC] 2-26. A limited exception for instances "when a lawyer is appointed by a court or requested by a bar association to undertake representation of a person unable to obtain counsel" is set forth in EC 2-29.

2. ABA CANONS OF PROFESSIONAL ETHICS [hereinafter cited as ABA Canons]

unjustly accused of crime, we can get effective legal representation; and, as human beings who want to be trusted themselves, criminal lawyers need to be able to trust their clients.[3]

But when it comes to representing admittedly guilty criminal defendants—defendants who have admitted to their lawyers all of the elements of the offenses charged, and for whom no other good faith legal defenses can be found—even some lawyers experienced in civil litigation are inclined to be dubious.[4]

In a recent article, Lee Teitelbaum has given us an unusually clear example of what he approvingly calls "differential norms" for lawyers in civil and criminal cases:

> Suppose, for example, that D, somewhat unimaginatively, punches P in the nose. P initially seeks redress from D's pocketbook by instituting a civil action for battery. D consults lawyer

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No. 5. The ABA Canons were adopted in 1908 and amended and added to from time to time. They were superseded by the ABA Code of Professional Responsibility in 1970.

For an interesting example of an "only suspicious circumstances" case, see F. WINDOLPH, THE COUNTRY LAWYER 51-53 (1938).

3. *Cf.* Fried, *Reason and Action*, 11 NAT. L.F. 13, 27 (1966): "[H]aving no conception of the rights of others . . . [a person] could have no conception of his own rights." Nor can an absence of trust be strictly confined to a lawyer's professional life:

> It seems, at times, that everyone lies to me. Virtually every client has, at some point, lied to me. But not only criminals lie; witnesses, paid experts such as psychiatrists, prosecutors, even some judges lie. Many cops, I suspect, can no longer identify the truth.
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> As a result, I have grown more distrustful of people. I automatically search for motives and reflexively recall all prior inconsistent statements, however trivial—good habits for a criminal lawyer, if only they didn't carry over, insidiously, into my personal life.

Wishman, *A Criminal Lawyer's Inner Damage*, N.Y. Times, July 18, 1977, at 27, col. 1.

After finding his client guilty, a juror remarked to Milton Adler, a legal aid attorney in New York City, "Mr. Adler, you're a marvelous lawyer, but how on earth could you believe that awful man was innocent?" Adler's response was, "I believe my clients." Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L.J. 1179, 1311 n.352 (1975). Alschuler says that Adler did not really believe in the defendant's innocence, but that "a lawyer can usually *act* as though he believes his clients whatever his secret reservations." *Id.* In any event, even such pretense could serve to engender a sense of confidence in the reciprocal behavior of others.

4. *See generally* A. WOOD, CRIMINAL LAWYER 242 (1967); Wolfram, *Client Perjury*, 50 S. CAL. L. REV. 809, 862 n.209 (1977).

> A, admits that he punched P, and that he did it for the fun of it. Despite questioning by A, D offers no facts that would amount to a lawful excuse for his behavior. D, however, would like to deny the complaint to see if P can prove his case; it might, after all, end up "His word against mine." Under these circumstances, lawyer A advises D that he cannot file an answer denying true facts and will not do so. However strongly D may feel about avoiding liability, he is required to plead accurately, and counsel is bound by his signature on the pleadings to vouch for a good faith belief in the facts there asserted. The case is not, however, over. P may feel so aggrieved that he files a complaint with the police which leads to a criminal prosecution against D for the crime of battery. D consults lawyer B, admits all the facts, but again says that he wishes to deny the charges and see what will happen. Lawyer B agrees to that step.
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> Both lawyers, it should immediately be said, acted properly, although their conduct differed. Each followed the general injunction to advance the lawful objectives of his client, although A refused to enter a denial and B agreed to do so . . . .
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> . . . .
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> Unlike the civil case . . . it is a lawful objective for the criminal accused to put his opponent to its burden of proof . . . .[5]

Although the ABA Code of Professional Responsibility (hereinafter referred to as ABA Code) does not deal specifically with the defense of admittedly guilty criminal defendants, there is no real question about the accuracy of Teitelbaum's understanding of what a criminal lawyer is permitted to do. In the mid-nineteenth century, the leading commentator on professional ethics in the United States wrote that

> Nothing seems plainer than the proposition, that a person accused of a crime is to be tried and convicted, if convicted at all, *upon evidence,* and *whether guilty or not guilty,* if the evidence is insufficient to convict him, he has a *legal right* to be acquitted . . . . It is . . . [the duty of] an advocate . . . as Baron Parke has well expressed it, to use ALL FAIR ARGUMENTS ARISING ON THE EVIDENCE.[6]

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5. Teitelbaum, *The Advocate's Role in the Legal System,* 6 N.M.L. REV. 1, 19-20, 22 (1975).

6. G. SHARSWOOD, A COMPEND OF LECTURES ON THE AIMS AND DUTIES OF THE PROFESSION OF LAW 42-44 (1868).

Presently, the ABA's aspirational *Standards for Criminal Justice: The Defense Function* assume that lawyers will be defending cases in which "the defendant has admitted to his lawyer facts which establish guilt and the lawyer's independent investigation establishes that the admissions are true but the defendant insists on his right to trial."[7] And the American College of Trial Lawyers' *Code of Trial Conduct* for its members provides that "a confidential disclosure of guilt alone does not require a withdrawal from the case . . . ."[8]

Indeed, perhaps the strongest statement of the American position with respect to the defense of admittedly guilty clients has come from three justices of the United States Supreme Court:

> [A]bsent a voluntary plea of guilty, we . . . insist that [defense counsel] defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is . . . . 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 . . . . In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.[9]

The justifications that have been offered in support of what we can now simply call "the American position"—that lawyers for

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7. ABA, STANDARDS RELATING TO THE DEFENSE FUNCTION [hereinafter cited as ABA DEFENSE STANDARDS] § 7.7(a) (1971).

8. AM. C. TRIAL LAW., CODE OF TRIAL CONDUCT § 4(a) (1963). This subsection goes on to say that the lawyer, "should never offer testimony which he knows to be false." *Id.* A further qualification that, "[A]fter a confidential disclosure of facts clearly and credibly showing guilt, a lawyer should not present any evidence inconsistent with such facts," was deleted in 1972. *See* D. MELLINKOFF, THE CONSCIENCE OF A LAWYER 217 (1973).

9. United States v. Wade, 388 U.S. 218, 257-58 (1967) (White, Harlan, & Stewart, JJ. concurring in part, dissenting in part).

Distinguished academic commentators have expressed similar views. *See, e.g.*, Fuller, *The Adversary System,* in TALKS ON AMERICAN LAW 30, 32 (Berman ed. 1961); Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions,* 64 MICH. L. REV. 1469, 1471 (1966); Noonan, *The Purposes of Advocacy and the Limits of Confidentiality,* 64 MICH. L. REV. 1485, 1491 n.28 (1966).

admittedly guilty clients may plead them "not-guilty" (thereby requiring the prosecution to come forward with its evidence), and argue that the offense charged has not been proved—have rarely been questioned or even carefully examined.[10] The desirability of some critical scrutiny, however, is suggested by at least five considerations.

First, as Teitelbaum's example clearly demonstrates, the American position is not a necessary concomitant of the Anglo-American "adversary system" of onesided advocacy by opposing counsel before an impartial judge or jury, which applies in civil as well as criminal cases. Nor is the American position, in its entirety, a necessary outgrowth of the Anglo-American legal tradition specifically with respect to the adjudication of criminal cases. In England, members of the bar are admonished that,

> If . . . [a] confession [by a defendant to a barrister] has been made before the proceedings have been commenced, it is most undesirable that an advocate to whom the confession has been made should undertake the defence, as he would most certainly be seriously embarrassed in the conduct of the case, and no harm can be done to the accused by requesting him to retain another advocate.[11]

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10. Only three published views opposed to the American position have come to the author's attention. Anne Strick, a non-lawyer, argues for a legal system in which, "if a guilty party insisted on pleading not guilty, he would have to do so without the knowing help of a lawyer." Siegel, *Your Day in Court—Is It Justice?*, L.A. Times, Aug. 30, 1977, Part IV, at 1, col. 2. *See also* A. STRICK, INJUSTICE FOR ALL 63-65, 123-24 (1977). F. Lyman Windolph, an attorney, contended that "a lawyer who continues to defend a client from whose lips he has received a private confession of guilt" is "in most instances . . . a dishonest lawyer," who has been "false to his trust." F. WINDOLPH, *supra* note 2, at 49-50. Carl F. Taeusch, a professor at the Harvard Business School, took the position that, "No lawyer can work for the acquittal of a client who has confessed to him his guilt . . . without ceasing to be professional and ethical . . . ." C. TAEUSCH, PROFESSIONAL AND BUSINESS ETHICS 52 (1926).

11. W. BOULTON, A GUIDE TO CONDUCT AND ETIQUETTE AT THE BAR OF ENGLAND AND WALES 70 (6th ed. 1975). Although Boulton "is not an official publication of the Bar Council it is a work of considerable authority." Letter to the author from Philip Gaudin, for the Secretary of the General Council of the Bar, January 14, 1978.

When a confession is made during a trial, the English barrister may continue to represent the defendant and put the prosecution to its proof. BOULTON, *supra*, at 70-72. Solicitors are not called upon to refuse to take the cases of even defendants who have confessed before trial, T. LUND, A GUIDE TO THE PROFESSIONAL CONDUCT

Second, heated controversies *have* arisen recently in this country about the propriety of certain other criminal defense practices that also raise questions with respect to lawyer truthfulness: putting a defendant on the stand to testify in the usual way when the lawyer knows from the defendant's own statements that he will commit perjury, and the lawyer can't talk him out of it; attempting to discredit the testimony of a prosecution witness whom the defendant has acknowledged is telling the truth; and giving a defendant legal advice that (in light of what the defendant has said), the lawyer knows may induce perjured testimony.[12] Arguments in favor of the

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AND ETIQUETTE OF SOLICITORS 106-07 (1960), *as quoted in* D. MELLINKOFF, *supra* note 8, at 165; however, David Mellinkoff reports that, "The English bar even recommends . . . [the] before-and-during trial rule to English lawyers practicing where the profession is not split." D. MELLINKOFF, *supra* note 8, at 165 (citing ANNUAL STATEMENT OF THE GENERAL COUNCIL OF THE BAR 14 (1915)).

With regard to the before-trial withdrawal rule, Professor Micael Zander, of the London School of Economics and Political Science, who has written extensively on the legal profession in England responded to the author's inquiries as follows:

> The statement that you quote is still in the latest guide to the etiquette of barristers. I am afraid there has not been any literature on the subject, nor has its impact been assessed empirically. I am not aware of any proposals for reform having been made in this country.

Letter to the author, Sept. 6, 1977.

The English bar's before trial-during trial distinction would appear to be based on the dilemma that would confront courts if lawyers were permitted to withdraw during trials: either mistrials would have to be declared—with defendants being able to obtain repeated mistrials through last minute confessions to their lawyers—or admittedly guilty defendants would be forced to carry on at trial without legal representation, before judges and juries who would have been made aware of their guilt by their own lawyers. *Cf.* Freedman, *supra* note 9, at 1477 (discussing withdrawals at trial to avoid presenting perjured testimony by clients).

The Canadian Bar permits lawyers to put the prosecution to its proof without regard to when a defendant admitted his guilt. CANADIAN BAR ASS'N, CODE OF PROFESSIONAL CONDUCT § 9.

12. *See, e.g.*, Freedman, *supra* note 9; Noonan, *supra* note 9; M. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM [hereinafter cited as LAWYERS' ETHICS] chs. 3, 4, 6 (1975); Meagher, *A Critique of "Lawyers' Ethics in an Adversary System,"* 4 FORDHAM URB. L. REV. 289, 289-97 (1976); Rotunda, Book Review, 89 HARV. L. REV. 622 (1976); Noonan, Book Review, 29 STAN. L. REV. 363, 363-66 (1977); Polster, *The Dilemma of the Perjurious Defendant,* 28 CASE W. RES. L. REV. 3 (1977); Wolfram, *supra* note 4, at 848-68.

In 1966, Monroe Freedman presented a lecture on legal ethics in which he concluded that the untruthful practices described in the text were justified. According to Freedman, in reaction to this lecture, which contained the substance of his subsequent "three hardest questions" article, Freedman, *supra* note 9, several federal judges, including Warren Burger (then a judge of the Court of Appeals for

legitimacy of using certain of these practices even on behalf of admittedly guilty defendants rest on some of the same justifications offered in support of the American position on putting the prosecution to its proof[13] and seem to presuppose the correctness of that position.[14]

Third, while some justifications for the American position imply that it is not only permissible but desirable for attorneys to customarily seek acquittals, a norm of that kind is not reflected in the actual behavior of American criminal lawyers. Nationally, about two-thirds of all felony defendants plead guilty,[15] usually at the suggestion of their own lawyers,[16] often as the result of considera-

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the District of Columbia Circuit), unsuccessfully attempted to have him disbarred and dismissed from his teaching position. *Id.* at 1469 n.1; LAWYERS' ETHICS, *supra*, at viii. Apparently, the Chief Justice has denied this charge. *See* Wolfram, *supra* note 4, at 824-25 n.54.

Another controversial defense practice is that of introducing evidence which is accurate but misleading in light of the defendant's admission of guilt to his lawyer. For an example of such misleading evidence, see LAWYERS' ETHICS, *supra*, at 33. The English Bar condemns this practice, *see* W. BOULTON, *supra* note 11, at 71-72, as does the Canadian Bar, CANADIAN BAR ASS'N, CODE OF PROFESSIONAL CONDUCT [hereinafter cited as CANADIAN CODE] § 9; and the recent reaction of a very able justice of the Hawaii Supreme Court was that it must be improper. However, the American College of Trial Lawyers' *Code of Trial Conduct* was amended in 1972 apparently for the purpose of sanctioning the practice. *See* note 8 *supra*.

13. *See, e.g.*, Freedman, *supra* note 9, at 1475 (putting an admittedly guilty defendant on the stand to perjure himself justified by attorney-client confidentiality); LAWYERS' ETHICS, *supra* note 12, at 43-44, 48-49 (discrediting truthful witness on behalf of admittedly guilty defendant justified by defendant's right to counsel).

14. *See, e.g.*, Freedman, *supra* note 9, at 1471. *Cf.* Wolfram, *supra* note 4, at 860:

> While it may be difficult to distinguish between such activities as participation in a plea of "not guilty" to an accurately and fairly charged offense on one hand and client perjury on the other, the line drawing process should proceed on considerations in addition to the suggestion that restrictions will be corrosive of the attorney-client relationship.

15. NATIONAL LEGAL AID AND DEFENDER ASS'N, THE OTHER FACE OF JUSTICE 30 (1973). In 1975, sixty-five percent of the cases filed in the federal district courts were disposed of by guilty pleas. [1975] DIRECTOR OF THE ADMINISTRATIVE OFFICE OF THE UNITED STATES COURTS, ANNUAL REPORT Table 53, at 264. Professor John Kaplan says that, "[I]n the typical urban court, 90% of the charged defendants will plead guilty." Kaplan, *American Merchandizing and the Guilty Plea: Replacing the Bazaar with the Department Store*, 5 AM. J. CRIM. L. 215, 215-20 (1977).

16. *See* Blumberg, *The Practice of Law as Confidence Game*, 1 L. & SOC'Y REV. 15, 35-38 (No. 2, 1967).

ble pressure from their lawyers,[17] and often in circumstances in which convictions could probably not have been obtained if the cases had been brought to trial.[18] A common attitude among private defense counsel seems to be the one expressed by a Texas attorney: "Even if there were enough judges and juries to take every case to trial, I would favor [the present methods]. Nine out of ten defendants are clearly guilty, and their cases should be disposed of as quickly as possible."[19]

Fourth, recent empirical studies have raised very disturbing doubts about the effectiveness of the criminal justice system in *either* controlling crime[20] *or* protecting the rights of innocent defendants,[21] and it would seem to be important to inquire into any possible causal connections between the American position and these problems.

Fifth, with the heightened post-Watergate, post-A.B.A.-ethics-requirement[22] concern in law schools with questions of professional responsibility,[23] an increasing number of students will probably want to know whether, as John Noonan puts it, "an honest person [can] practice regularly as a criminal defense lawyer in the United States."[24]

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17. *See, e.g.*, Alschuler, *supra* note 3, at 1247-48, 1287-88, 1309-11.

18. *See* Finkelstein, *A Statistical Analysis of Guilty Plea Practices in the Federal Courts*, 89 HARV. L. REV. 293 (1975); Note, *Plea Bargaining and the Transformation of the Criminal Process*, 90 HARV. L. REV. 564, 573-74 (1977).

19. Comment, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys*, 50 TEX. L. REV. 60, 111 (1971).

20. *See, e.g.*, Shinnar & Shinnar, *The Effects of the Criminal Justice System on the Control of Crime: A Quantitative Approach*, 9 L. & SOC'Y REV. 581 (1975). The detrimental effects of crime include, of course, not only the direct harms done to victims, but also the inhibiting effects of the fear of becoming a victim and the indirect negative effects such fears may in turn have on efforts to eliminate racial, ethnic and economic segregation in housing and public schools. There is, however, demographic evidence indicating that crime rates will decline in the next decade, irrespective of any improvements in the criminal justice system. *See* Toby, *A Prospect of Less Crime in the 1980's*, N.Y. Times, Oct. 26, 1977, at 35, col. 1.

21. *See, e.g.*, Alschuler, *supra* note 3, at 1278-1306.

22. ABA STANDARDS FOR THE APPROVAL OF LAW SCHOOLS § 302(a) (as amended in 1974). *See* 60 A.B.A.J. 1212 (1974).

23. *See* Goldberg, *1977 National Survey on Current Methods of Teaching Professional Responsibility in American Law Schools*, 1977 NATIONAL CONFERENCE ON TEACHING PROFESSIONAL RESPONSIBILITY (Pre-Conference Materials, Goldberg ed.) vii-xlv (1977).

24. Noonan, *supra* note 12, at 363.

The following imaginary dialogue explores some of the justifications that have been (or might be) offered for the American position, and some of the costs that it may entail for the criminal justice system, the legal profession, and society generally. The participants in the dialogue are

> Mr. Baker, a senior partner in a large law firm, who specializes in civil litigation for large corporate clients; he is the Chairperson of the State Bar Association's Professional Disciplinary Board; and
> Mr. Charles, whose general law practice (as a sole practitioner) includes the frequent representation of criminal defendants; Mr. Charles is also the President of the State branch of the American Civil Liberties Union and often handles public interest cases on a *pro bono* basis.

A textual note on possible alternatives to the American position as it exists today follows the dialogue.

JUSTIFICATION I: A PERSON IS INNOCENT UNTIL HE IS CONVICTED

Baker: I know that the American position is something of a "sacred cow" to you criminal lawyers and civil libertarians, but I just don't understand how you can justify trying to get an acquittal for a defendant who has admitted to you that he's guilty.

Charles: But if he hasn't been convicted yet, then he isn't guilty. His admissions are irrelevant. Or don't you go along with the maxim that "a defendant is innocent until proved guilty"?

Baker: That just means that once a criminal case *gets* to trial, the prosecution has the burden of proof.[25] The question we're discussing is whether cases involving admittedly guilty defendants should ever be brought to trial. Oh, and I guess the maxim also means that the government and newspapers and employers and so forth should not treat a defendant as being guilty before he is convicted.[26]

Charles: And why not?

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25. Blunt v. United States, 322 A.2d 579, 584 (D.C. 1974) (sustaining constitutionality of District of Columbia pre-trial detention statute as applied to a defendant who threatened a witness).

26. There is, of course, more to this point than Baker's afterthought suggests. For example, the right to bail has often been explained as a concomitant of the presumption of innocence. *See, e.g.*, Stack v. Boyle, 342 U.S. 1, 4 (1951); State v.

Baker: Because he might be innocent.

Charles: Because he *is* innocent until he's convicted.

Baker: Are you just trying to make a semantic point? I realize that the maxim equates "guilt" with conviction, and that the way a jury convicts is by bringing in a verdict of "guilty." Perhaps we need another term for a defendant who has done all of the acts that constitute the offense charged and has no other defense, but has not yet been convicted. But surely that term shouldn't be "innocent."

Charles: It has to be, because the law just doesn't recognize the concept that you seem to have in mind. What shall we call it? "Pre-conviction guilt"?

Baker: I'll accept that name for the concept. And, of course, the law *does* recognize it. When the legislature wants to forbid certain conduct, it tells people not to engage in the conduct; it doesn't just say, "Don't get caught and convicted of engaging in it." And since we believe in freedom and individual initiative in this country, we insist that the legislature tell us *exactly* what it is we shouldn't do.[27] Because we're expected to "self-apply" these rules,[28] the law must want us to be able to think of ourselves as being guilty if we violate them.

Charles: Good political science lecture, but you're still a long way from demonstrating that as far as the criminal justice system

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Konigsberg, 33 N.J. 367, 164 A.2d 740, 743 (1960); Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829, 834, 836 (1972). The presumption of innocence has also been relied upon as a basis for relieving pre-trial detainees from excessively harsh confinement conditions. *See, e.g.,* Rhem v. Malcolm, 371 F. Supp. 594, 622-23 (S.D.N.Y. 1974). *But see* Tyrrell v. Taylor, 394 F. Supp. 9, 18 (E.D. Pa. 1975) (relying on Blunt v. United States, 322 A.2d 579 (D.C. 1974)). .

On the other hand, certain adverse civil consequences can be imposed on an unconvicted person on the basis of facts that would constitute a criminal offense. For example, it is generally held that attorneys can be disciplined professionally for having committed crimes unrelated to their professional activities without having been previously convicted of the crimes, and even after being acquitted. *See* Selinger & Schoen, *"To Purify the Bar": A Constitutional Approach to Non-Professional Misconduct,* 5 NAT. RES. J. 299, 361-64 (1965).

27. Baker might have gone on to point out that it is possible for a government to make its citizens fearful of official and unofficial punishments for engaging in a much wider range of activities than is arguably prohibited even by vague laws that have been formally promulgated. This was a technique employed by the Nazi regime in Germany for the precise *purpose* of drastically curtailing individual autonomy and initiative. *See* B. BETTELHEIM, THE INFORMED HEART 270-71 (1960).

28. *See* H. HART & A. SACKS, THE LEGAL PROCESS 132-33 (tent. ed. 1958).

is concerned anyone's rights turn on whether he is "guilty-though-not-convicted."

Baker: Well, I can think of one example. The Federal Fugitive Felon Act[29] punishes people who commit state crimes and then flee across state lines "to avoid prosecution," though they have not been convicted and even when there is no prosecution pending at the time of flight.[30] But if there is no prosecution pending, *and I'm innocent of the state crime,* I can flee all the way to Hawaii to avoid a later prosecution without violating the Act.[31]

JUSTIFICATION II: ADMISSIONS OF GUILT ARE UNRELIABLE

Charles: We've gotten pretty far away from lawyers' responsibilities. But one thing you said a while back stuck in my mind. Didn't you say that newspapers and employers shouldn't prejudge a defendant's guilt?

Baker: That's right.

Charles: Even if they learn that he has confessed to the police?

Baker: Correct.

Charles: But if a defendant blurts out a confession to his *own lawyer,* the lawyer should be able to prejudge to his heart's content! That's absurd.

Baker: Oh, I'm not suggesting that a criminal lawyer jump to conclusions about his client's admissions.[32] We don't do that in civil cases; we look for every possible good faith claim or defense. The ABA Standards say that if a defendant's admissions before trial show guilt and they are *confirmed by "the lawyer's independent*

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29. 18 U.S.C. § 1073 (1970).

30. *See, e.g.,* Lupino v. United States, 268 F.2d 799 (8th Cir. 1959).

31. *Id.* at 802; *accord,* United States v. Reing, 191 F.2d 297, 298 (3d Cir. 1951) (dictum) (unclear if state prosecution pending at time of flight).

32. Richard Uviller has urged that "the first 'spontaneous' account of the accused" not necessarily "stand thereafter as the Truth against which counsel must measure later variations in the story." Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea,* 123 U. PA. L. REV. 1067, 1077 (1975). Freedman cites an English authority that would require that there be "such a 'clear confession' that the attorney is 'really irresistibly driven' to a conclusion of guilt," and which holds that "an attorney would not be justified in drawing a conclusion of guilt when the client has given 'perhaps a whole series of contradictory statements.' " LAWYERS' ETHICS, *supra* note 12, at 54-55, *quoting* T. LUND, *supra* note 11, at 106; *see also* W. BOULTON, *supra* note 11, at 72.

investigation," the lawyer must withdraw rather than let the defendant perjure himself.[33] (Emphasis added.) I'm saying that when a lawyer has a reliable admission of that kind, he shouldn't go to trial at all.

Charles: But admissions by defendants are inherently unreliable. Defendants may confess falsely to protect someone else, or because they feel they are under great pressure to confess . . . .

Baker: Or they may confess just to get attention. I know the whole litany.[34]

Charles: Well then.

Baker: Those are all understandable motivations for an innocent person to confess and accept, or even seek punishment; but they don't explain why an innocent person would admit his guilt to his lawyer and then try to get off.

Charles: Suppose the defendant who admits his guilt to his lawyer really believes he is guilty, but he isn't. Suppose he knows "that he pulled the trigger and that the victim was killed, but not that his gun was loaded with blanks and that the fatal shot was fired from across the street."[35] It may not be very public-spirited of the defendant to want to be acquitted, but we don't send innocent people to prison for not being public-spirited.

Baker: And I'm not sure we ought to tailor our day-to-day rules of professional responsibility to fit far-fetched situations like that.[36]

JUSTIFICATION III: A GUILTY DEFENDANT HAS CONSTITUTIONAL RIGHTS TO DUE PROCESS, COUNSEL, AND A JURY TRIAL

Charles: It seems to me that our discussion so far has been interesting, but rather academic—unless you are proposing that we amend the United States Constitution. The Constitution says that no defendant shall be deprived of liberty except by "due process of

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33. ABA DEFENSE STANDARDS § 7.7(a), (b) (1971). The Canadian Bar takes the position that misleading evidence may not be introduced "if the accused clearly admits to his lawyer the factual and mental elements necessary to constitute the offense, [and if] the lawyer . . . [is] convinced that the admissions are true and voluntary." CANADIAN CODE § 9. *See* note 12, *supra.*

34. *See, e.g.*, D. MELLINKOFF, *supra* note 8, at 149-50.

35. Freedman, *supra* note 9, at 1472.

36. On this point, Monroe Freedman seems to agree with Baker. *Id. Cf.* LAWYERS' ETHICS, *supra* note 12, at 52.

law," and that all defendants—and there's no exception for guilty defendants—have a right to be represented by counsel, and a right to a jury trial. To my mind, those provisions add up to a complete justification for the American position.

Baker: Hold on! Let's look at them one at a time. The Supreme Court has never squarely held that the American position is mandated by the due process requirement. Whether it *should* be considered necessary to due process is the question we're discussing.[37]

Charles: And a defendant's right to counsel . . . .

Baker: Surely doesn't mean a right to have a lawyer do anything that the defendant wants him to do . . . hire good actors as witnesses—bribe jurors, etc.

Charles: But it must mean that even a guilty defendant has the right to have a lawyer do *something* for him. If the lawyer can't put the prosecution to its proof, the whole notion of the defendant having a right to counsel becomes unintelligible.

Baker: No it doesn't. At a minimum, counsel could still try to get a lenient sentence for his guilty client.

Charles: And I would surmise from your "generous" approach to a guilty defendant's constitutional rights that notwithstanding the words of the Constitution he doesn't really have a right to a jury trial either. I'll wager I can even guess your reasoning: the Constitution also guarantees the right to a jury trial in some kinds of civil cases,[38] but that doesn't mean that you, as a lawyer, can take to trial the case of a defendant who has admitted his civil liability.[39]

Baker: Precisely.

Charles: Well, that kind of reasoning shows that you don't recall very much from law school about the role of the jury in criminal cases in the Anglo-American legal tradition. Don't you remember the famous seventeenth century English prosecution of the

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37. *See* V. Countryman, T. Finman & T. Schneyer, The Lawyer in Modern Society 242 (2d ed. 1976).

38. U.S. Const. amend. VII.

39. *See* note 5 *supra* and accompanying text. Fed. R. Civ. P. 11 provides in part:

> The signature of an attorney constitutes a certificate by him that he has read the pleading; [and] that to the best of his knowledge, information, and belief there is good ground to support it . . . . For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action.

Quaker, William Penn, for addressing an unlawful assembly?[40] And how could you forget the trial of John Peter Zenger, the colonial New York printer, who was accused of publishing material without the required authorization of the British mayor?[41]

Baker: They were both acquitted, weren't they? By juries?

Charles: That's right—even though neither one of them denied the charge against him. The juries just refused to convict.[42] And those cases and others established the principle that in criminal cases the jury has the absolute power to acquit any defendant.[43] In a civil case, the jury must follow the law or its verdict will be set aside. But in a criminal case it can effectively nullify the law.

Baker: Some of my partners would say that's lawlessness, and that we certainly shouldn't do anything to encourage it!

Charles: Exactly what judges have said in refusing to instruct juries that they have an absolute power of acquittal.[44] But at the same time, courts have frequently said that jury nullification is a valuable part of our criminal justice system.[45] It can take care of particular cases, that the legislature couldn't foresee, in which the defendant has violated the letter of the law but is not really blameworthy.[46] And it can make sure that defendants are not sent to jail for breaking laws—often old laws—that are not consistent with the community's current ethical standards.[47]

Baker: My partners wouldn't care much for that kind of thinking.[48] But, in any event, I'm not sure I understand what the

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40. *See* Simson, *Jury Nullification in the American System: A Skeptical View,* 54 TEX. L. REV. 488, 492 (1976).

41. *See* J. VAN DYKE, JURY SELECTION PROCEDURES 228 (1977).

42. *See* authorities cited notes 40 and 41 *supra.*

43. *See* J. VAN DYKE, *supra* note 41, at 226.

44. *See, e.g.,* Sparf and Hansen v. United States, 156 U.S. 51, 101 (1895); United States v. Dougherty, 473 F.2d 1013, 1134, 1136 (D.C. Cir. 1972); United States v. Moylan, 417 F.2d 1002, 1006 (4th Cir. 1969) (using the "lawlessness" terminology); State v. McClanahan, 212 Kan. 208, 510 P.2d 153, 159 (1973). *But see* Transcript at 8729, United States v. Anderson, Crim. No. 602-71, (D.N.J. 1973).

45. *See, e.g.,* United States v. Simpson, 460 F.2d 515, 519 (9th Cir. 1972); United States v. Dougherty, 473 F.2d 1013, 1130 (D.C. Cir. 1972); United States v. Adams, 126 F.2d 774, 775-76 (2d Cir. 1942).

46. *See* United States v. Dougherty, 473 F.2d 1013, 1142 (D.C. Cir. 1972) (Bazelon, J., dissenting).

47. *See* United States v. Adams, 126 F.2d 774, 775-76 (2d Cir. 1942).

48. For sharply contrasting views regarding both the precedential and policy bases for jury nullification, *compare* J. VAN DYKE, *supra* note 41, at 225-51 *with* Simson, *supra* note 40.

jury's power of nullification has to do with a lawyer's representation of guilty defendants.

Charles: Just this: if one takes seriously the courts' endorsements of the value of the nullification power, then I think that one can reasonably conclude that a guilty defendant has a *right* to put his case to a jury as an appropriate one for nullification; and if a guilty defendant has this right, surely he also has a right to have the assistance of counsel; and under our present procedures, there isn't any way a defendant can be acquitted on any basis without pleading "not-guilty."

Baker: So, unless the defendant admits his guilt in open court—which he can't be forced to do—the prosecution is automatically required to come forward with its evidence. Breathtaking!

Charles: Will you agree then that I've made out a constitutional justification for the American position?

Baker: No. All you've shown is that given present procedures there is a constitutional justification for a part of the American postion: the part about pleading admittedly guilty clients "not-guilty." And you've justified arguing to the jury (to the extent judges and the ABA Code let you[49]) that the defendant should be acquitted *despite* his guilt. You haven't given me any reason yet why you should be permitted to mislead the jury by arguing that the prosecution has failed to meet its burden of proving the elements of the offense charged.

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49. Practices among courts differ widely regarding the extent to which defense counsel will be allowed to argue to juries non-legal factors calling for acquittal. *Compare* Transcript 8386-94, United States v. Anderson, Crim. No. 602-71 (D.N.J. 1973) (argument against Vietnam war permitted), *excerpts quoted in* J. VAN DYKE, *supra* note 41, at 239-40 *and* A. WEINBERG, ATTORNEY FOR THE DAMNED 121, 139 (1957) (Clarence Darrow's argument in a 1920 prosecution in Chicago of members of the Communist Labor Party) *with* State v. Reynolds, 41 N.J. 163, 195 A.2d 449 (1963) (holding attorney was properly restrained from presenting argument about racial discrimination in America on behalf of defendants seeking to avoid death penalty). If only to avoid reversals on appeal, trial judges probably tend to permit borderline arguments.

The ABA CODE does not deal specifically with the subject of non-legal arguments by counsel, but it does emphasize that arguments should be based on admissible evidence. DR 7-106(C)(1), (4). The ABA STANDARDS do not differentiate between civil and criminal cases in condemning all appeals to jurors' emotions and the injection of any issues "broader than the guilt or innocence of the accused under the controlling law." ABA DEFENSE STANDARDS § 7.8(d)(1971).

JUSTIFICATION IV: A GUILTY DEFENDANT HAS A CONSTITUTIONAL RIGHT NOT TO INCRIMINATE HIMSELF

Charles: There is another provision in the Constitution that clearly justifies the American position in all of its aspects, and that is the fifth amendment privilege against self-incrimination. In case you've forgotten that too, it says that no person "shall be compelled in any criminal case to be a witness against himself."[50] The privilege against self-incrimination means that *every* defendant has the right to remain silent and put the prosecution to its proof.[51]

Baker: I know that's what most criminal lawyers and scholars say, but I really don't believe it stands up. I've tried to think this whole question through, and my conclusion is that most guilty defendants do *not* have the *right* to use the privilege against self-incrimination.

Charles: That certainly is a novel theory—so novel that it would require a constitutional amendment to implement it. The Supreme Court has stressed "the right of a person to remain silent,"[52] and the Court has never differentiated between innocent persons and guilty persons.

Baker: Nor, under my theory, would I expect the courts to do so. An adjudicatory process charged with deciding whether a defendant is guilty or innocent that prejudged that very issue would amount to hardly more than a sham. Therefore, the courts would have to *permit* all defendants to take advantage of the privilege.

Charles: I rest my case.

Baker: Not so fast. Remember, in this discussion we're not looking at the privilege from the point of view of the courts, which can't decide in advance that some defendants are guilty, but from the perspective of defense lawyers who can—that is, if I've persuaded you that lawyers can reasonably treat some admissions of guilt as reliable. Lawyers (and rulemakers for the profession) need to know whether guilty defendants really have a *right* to use the privilege and therefore to have the assistance of counsel in doing so.

Charles: Well the answer is that they do. *Any* defendant who

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50. U.S. CONST. amend. V.

51. "Even the accused who knows that he committed the crime is entitled to put the government to its proof. Indeed the accused who knows that he is guilty has an absolute constitutional right to remain silent." (footnote omitted) Freedman, *supra* note 9, at 1471.

52. Malloy v. Hogan, 378 U.S. 1, 8 (1963).

could not remain silent would be confronted with what Mr. Justice Goldberg called a "cruel trilemma of self-accusation, perjury or contempt."[53]

Baker: I think that that is a good way of describing the situation that some innocent defendants would face were it not for the privilege.[54] If they told the truth, they would supply facts that would make it appear more likely that they were guilty.[55] What could be more nightmarish than to be coerced into helping to perpetrate an injustice against one's self? But I don't understand why it is always or even usually "cruel" to require (by humane means, of course) a guilty defendant to incriminate himself.

Charles: Mr. Justice Field said, "It is plain to every person who gives the subject a moment's thought."[56] The privilege *originated* in England as a protection for defendants who were pretty clearly guilty[57] . . . .

Baker: Guilty of being religious or political dissidents.[58] As

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53. Murphy v. Waterfront Comm'n, 378 U.S. 52, 55 (1964).

54. For a detailed evaluation of the role of the privilege against self-incrimination in protecting the innocent, see Ellis, *Vox Populi v. Suprema Lex: A Comment on the Testimonial Privilege of the Fifth Amendment,* 55 IOWA L. REV. 829, 844-50 (1970).

55. *See* E. GRISWOLD, THE FIFTH AMENDMENT TODAY 9-22 (1955).

56. *See* Ellis, *supra* note 54, at 838:

> We *feel* that it is cruel. Beyond that we cannot go. We are unable to improve upon Justice Field's statement that
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> > [t]he essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration. It is plain to every person who gives the subject a moment's thought. [Brown v. Walker, 161 U.S. 591, 637 (1896) (dissenting opinion).]
>
> We cannot explain why it is "obvious" or "plain" to every man, or ought to be.

57. *See* Ellis, *supra* note 54, at 835, quoting L. LEVY, ORIGINS OF THE FIFTH AMENDMENT 331 (1968).

58. L. LEVY, *supra* note 57, at 332:

> Above all, the right was most closely linked to freedom of religion and speech. It was, in its origins, unquestionably the invention of those who were guilty of religious crimes, like heresy, schism, and nonconformity, and, later, of political crimes like treason, seditious libel, and breach of parliamentary privilege—more often than not, the offense was merely criticism of the government, its policies, or its officers. The right was associated then with guilt for crimes of conscience, of belief, and of association. In the broadest sense it was a protection not only of the guilty, or of the innocent, but of freedom of expression, of political liberty, of the right to worship as one pleased.

well as I can make sense out of the history, governmental deprivations of religious and political liberties so often came to be viewed as illegitimate by later regimes as well as by the public that all such deprivations were treated as at least possibly unjust; and the privilege arose as a rough-and-ready barrier against this kind of injustice.

Charles: And I suppose that you are one of those people who think that the privilege isn't necessary in the United States today to protect civil liberties, because we have adequate guarantees in the first amendment against legislation depriving people of their freedoms of religion, speech and association.[59]

Baker: No, that's not my attitude at all. From time to time the Supreme Court still sustains statutes that unjustifiably punish political or religious beliefs. And I'm even more worried about instances in which the government decides on the basis of political considerations to prosecute individuals for non-political offenses.[60] At least until we create some more effective formal safeguards against repressively motivated prosecutions,[61] the privilege against self-incrimination can still be justified in terms of its traditional role of protecting the religious and political liberties of guilty persons. And, therefore, the American position can be justified in those cases

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59. In 1968, Judge Henry Friendly expressed confidence that such a position would be justified in the future. Friendly, *The Fifth Amendment Tomorrow: The Case for Constitutional Change*, 37 U. CIN. L. REV. 671, 696-97 (1968).

60. *See* LAWYERS' ETHICS, *supra* note 12, at 80-81; Minor, *Political Crime, Political Justice, and Political Prisoners*, 12 CRIMINOLOGY 385, 393 (1975) ("*[P]olitical justice* is the discriminatory application of the machinery of criminal justice to the disadvantage of specific individuals or groups because they are perceived as threatening to the power of the established regime.").

61. William Kunstler has suggested,

> We might follow the example of an experiment going on in one of the Scandinavian countries, where, if a defendant believes that he has been charged with a crime solely because he's active politically or has certain dissenting thoughts about government policy, he's tried in a separate court, where he may put into evidence all the reasons he has for believing he's being politically prosecuted. The government may respond by trying to prove that it's not prosecuting him for his politics but solely for the commission of a crime. If the court finds the government's proof convincing, the defendant is then tried on a criminal charge . . . . [T]his innovation is . . . a recognition of the fact that true political trials cannot be conducted within the strictures that apply to ordinary criminal trials.

Comments from William Kunstler (interview in *Playboy* magazine), *reprinted in part in* S. DASH, READINGS IN PROFESSIONAL RESPONSIBILITY AND THE ADMINISTRATION OF CRIMINAL JUSTICE 237, 239 (1971).

too.[62] As Monroe Freedman and others keep reminding us, repressive communist regimes and rightist dictatorships have been ruthless in making certain that dissidents would not be defended very vigorously by their lawyers.[63]

Charles: I'm going to nominate you to be the next President of our Civil Liberties Union!

Baker: Oh no you're not. Not as long as you civil libertarians keep blurring the distinction between persecuting political dissidents and punishing killers, rapists and thieves. You don't really believe that all prisoners are "political prisoners," do you?

Charles: I've never said that. But I do believe that our present criminal justice system is an absolute disgrace! It doesn't deter crime; it doesn't even concern itself with the root causes of crime. It doesn't rehabilitate offenders; it rarely even tries. What it does do is sweep up some poor, screwed-up kid who gets his few kicks in life by doing things that he shouldn't do and that hurt other people; it locks him up with a bunch of even more screwed-up people; and it turns out a really bitter, alienated, and much more dangerous individual.[64] And now you're going to tell me that I shouldn't even try to keep this from happening—at least by pleading the kid "not-guilty" and arguing that the prosecution hasn't proved its case.[65]

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62. Even F. Lyman Windolph, a lawyer who was opposed to the American position as applied to most criminal cases stated that,

> If there were a state in the Union (the condition is happily contrary to fact) in which a statute made it a criminal offense for a father to teach the theory of evolution to his child, I should not advise a father who had taught his child what he believed to be true to submit himself to the penalties prescribed by the statute.

F. WINDOLPH, *supra* note 2, at 48.

63. *See, e.g.*, LAWYERS' ETHICS, *supra* note 12, at 2; D. MELLINKOFF, *supra* note 8, at 271.

64. Charles's specific complaints are consistent with "a mood of skepticism about the morality and the utility of the criminal sanction, taken either as a whole or in some of its applications," which, as Herbert Packer observed, has been a feature of "much of the intellectual history of our times." *See* H. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 170-71 (1968).

65. *See* Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 12 (1975):

> Because a deprivation of liberty is so serious, because the prosecutorial resources of the state are so vast, and because, perhaps, of a serious skepticism about the rightness of punishment even where wrongdoing has occurred, it is easy to accept the view that it makes sense to charge the defense counsel with the job of making the best possible case for the accused—without regard, so to speak, for the merits.

Baker: Yes, I *am* going to tell you that, even though I agree that the criminal justice system is defective in a number of ways. There are two reasons why the American position just isn't the right way to deal with those problems. In the first place, it produces unequal results in terms of which admittedly guilty defendants get convicted and which get acquitted. The results depend entirely on the purely fortuitous factor of how strong the prosecution's evidence happens to be in each particular case.[66] And in the second place, when you and your clients take it upon yourselves to try to decide for the legal system that it's wrong for them to receive the punishments provided by law, I think you are usurping the role of the legislature—just as surely as the lawyer who lets his disbelief of his client's protestations of innocence affect his representation usurps the role of the judge or jury.[67] As you reminded me a while ago, we have provided an institutional check on legislative "mistakes" about the rightness of punishment, in the form of jury nullification.[68] But I've never heard anyone argue for the legitimacy of client-lawyer nullification—and that's what misleading a jury in accordance with the American position amounts to.

Charles: Surely you realize that both of the arguments you've just given me apply also to cases involving religious or political liberties.

Baker: Yes, I do. But the history of the privilege against self-incrimination seems to require that an exception be maintained for those cases. And an exception can be justified by reference to the legal tradition that restrictions on interests at least arguably protected by the first amendment are uniquely suspect.

Charles: But what about interests protected only by the fourteenth amendment? What about racially discriminatory prosecu-

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Many criminal lawyers share this skepticism about traditional theories and forms of punishment. *See* A. Wood, *supra* note 4, at 75, 85, 227-31.

66. *Cf.* Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 60 (1958) ("[T]he practice of [prosecutors plea] bargaining hardest when the case is weakest leads to grossly disparate treatment for identical offenders—assuming, for the moment, that they are offenders.").

67. "[A lawyer] is not to usurp the province of the jury and of the judge, and determine what shall be the effect of evidence—what shall be the result of legal argument." Samuel Johnson, as reported in 5 Boswell's Life of Johnson 28, *quoted in* Orkin, *Defence of One Known to be Guilty*, 1 Crim. L.Q. 170, 172 (1958).

68. For an argument that even jury nullification constitutes an unwise and perhaps unconstitutional infringement of legislative powers, see Simson, *supra* note 40, at 512-13, 517.

tions,[69] or charges brought vindictively against particular defendants?[70] You're suggesting such a fuzzy distinction between kinds of cases that lawyers wouldn't be able to apply it themselves, much less explain it to their clients.

Baker: I realize there are problems in deciding exactly where to draw the line. But the alternative represented by the American position as it exists today lets the "tail" of a very few (albeit important) cases of political repression in this country wag the "dog" of permissible lawyer conduct in millions of utterly non-political criminal prosecutions.[71]

Charles: Suppose a bill managed to get through the legislature imposing the death penalty for stealing a loaf of bread. Are you saying that all I could do for a defendant who admitted to me that he stole a loaf is to try to persuade the jury that the law is monstrous? Are you saying that even in that case I couldn't challenge the sufficiency of the prosecution's evidence of guilt?[72]

Baker: Of course you could. I would probably do it myself. Lawyers, like other people, may occasionally find themselves in situations in which they are *morally* justified in being unfaithful to the law. And I think you've identified such a situation.[73] But let's

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69. For an analysis of the current state of the law with regard to establishing that a particular prosecution is unconstitutionally discriminatory, see Cox, *Prosecutorial Discretion: An Overview,* 13 AM. CRIM. L. REV. 383, 403-08 (1976).

70. With regard to a prosecutor's professional responsibilities when his personal feelings are involved, see LAWYERS' ETHICS, *supra* note 12, at 82-84. Freedman also discusses the "Al Capone" situation, in which an individual who is suspected of having committed very serious crimes that cannot be proved becomes the target of an investigation calculated to turn up evidence of relatively minor offenses.

71. In presenting an earlier version of this article at a conference attended by lawyers and legal scholars from several Asian and Pacific countries, the author commented that while in many nations political repression was obviously the "dog," in contemporary Japan, for example, repression was apparently both popularly perceived and treated by the legal system as the "tail"—with ordinary crimes against persons and property viewed as the "dog." Professor Julius Stone observed that changes in popular beliefs regarding the relative dangers to a society of repression and ordinary crimes might well be cyclical; and he also raised the question of how these beliefs could come to diverge from the objective realities of life in a particular society.

72. The example is from F. WINDOLPH, *supra* note 2, at 48. Although he believed that in general guilty defendants are under an obligation to confess, Windolph said that he would not advise a defendant in this situation to plead guilty.

73. Here Baker has in mind the same limited utilitarian principle of ethical justification reflected in the Model Penal Code's "choice of evils" doctrine:

> Conduct which the actor believes to be necessary to avoid an immi-

be honest with ourselves: our unfaithfulness as lawyers is a species of civil disobedience. And the rules of professional responsibility should make us face up to the same hard ethical questions that others who are contemplating disobedience should consider.[74]

JUSTIFICATION V: THE AMERICAN POSITION RESPECTS A DEFENDANT'S MORAL AUTONOMY

Charles: Frankly, your position sounds to me a lot like lawyers "playing God." Defendants—even admittedly guilty defendants—are morally autonomous human beings. And, as such, they're the ones who ought to be deciding whether to be truthful or not in court about their past actions. Lawyers should respect their clients' moral decisions.

Baker: Look, I'm not suggesting that lawyers administer truth serum to their clients so that if they're guilty they'll plead guilty. But if a defendant wants to mislead the court, I don't see why he usually shouldn't have to mislead his lawyer too.

Charles: Because that's an unreasonable burden to put on a defendant.

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nent harm or evil to himself *or to another* is justifiable provided that

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged. . . .

MODEL PENAL CODE § 3.02(1) (Proposed Official Draft 1962) (emphasis added).

74. Freedman points out that:

> Frequently, the lawyer who helps the client to save a losing case by . . . [inducing the client to perjure himself] is acting from a personal sense of justice . . . . I have sometimes referred to that attitude (with some ambivalence) as the Robin Hood principle. We are our client's "champions against a hostile world," and the desire to see justice done, despite some inconvenient fact, may be an overwhelming one. But Robin Hood, as romantic a figure as he may have been, was an outlaw. Those lawyers who choose that role, even in the occasional case under the compulsion of a strong sense of the justness of the client's cause, must do so on their own moral responsibility and at their own risk, and without the sanction of generalized standards of professional responsibility.

LAWYERS' ETHICS, *supra* note 12, at 75.

On the ethical issues involved in civil disobedience generally,see Wasserstrom, *The Obligation to Obey the Law,* 10 U.C.L.A. L. REV. 780 (1963), and Fried, *Moral Causation,* 77 HARV. L. REV. 1258, 1268-69 (1964). In a forthcoming article, the author will consider in some detail the subject of disobedience of procedural rules and rules of professional responsibility by lawyers who believe that their clients are innocent.

Baker: Not if the misleading is morally unjustified, as it usually is.[75]

Charles: That's for defendants to decide.

Baker: No. It's for their lawyers to decide too—because they are the ones whose conduct we're talking about, and they're also morally autonomous human beings.[76]

Charles: Well then, they should autonomously decide to help to effectuate their clients' decisions.

Baker: To do anything? That's like saying that a gun dealer should help to effectuate a customer's decision to hold up a bank.[77] And guilty defendants are hardly disinterested judges of whether or not they should be punished.[78] The old ABA Canons used to say that "[A lawyer] must obey his own conscience and not that of his client."[79] I think it was a terrible mistake not to include a similar statement in the new ABA Code.

Charles: Oh! Get off it! You wouldn't have all those fat corporate clients if you refused to help them whenever you thought they were acting immorally.

Baker: Fair enough. But as I mentioned before, our economic and social philosophy in this country places a high value on individ-

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75. The rationale for a claim that a guilty defendant has no moral obligation to confess has been stated by Windolph as follows:

> [T]he moral duties of a criminal are those of every wrongdoer—to repent and (if possible) to make restitution. If a further duty of confession exists, it must be because the offender believes, *or ought to believe,* either that his punishment will benefit himself; or that it will deter others from committing like offenses; or finally, that he is so dangerous a person as to make it necessary that he be imprisoned or executed for the protection of society.

F. WINDOLPH, *supra* note 2, at 47-48 (emphasis added). Obviously, even this formulation falls far short of establishing a universal "right of self-defense" for guilty defendants. *But see* Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum,* 25 CLEV. B. ASS'N J. 91, 98-100 (1954).

76. *See generally* Flynn, *Professional Ethics and the Lawyer's Duty to Self,* 1976 WASH. U.L.Q. 429.

77. Jeremy Bentham went so far as to suggest that a lawyer who assisted an admittedly guilty client in avoiding conviction fitted the usual definition of an accessory after the fact to a crime. 7 THE WORKS OF JEREMY BENTHAM 474 (Bowring ed. 1962).

78. *See* F. WINDOLPH, *supra* note 2, at 48.

79. ABA CANONS No. 15. However, Canon 15 also provided that, "In the judicial forum the client is entitled to the benefit of any and every remedy and defense that is authorized by the law of the land, and he may expect his lawyer to assert every such remedy or defense."

ual initiative. So, we think there are social benefits in maintaining a system in which lawyers are almost always willing to help clients pursue their lawful objectives, whatever they may be.[80] And that system would break down if lawyers refused to help on the basis of anything less than a *certainty* that a client's objectives were immoral: "immorality beyond a reasonable doubt," as it were.

Charles: Are you sure that's not just convenience in search of a theory? In any event, that view of the lawyer's role—indeed that kind of economic and social philosophy—may have made sense at an earlier point in our history (though I think even that's questionable), but it isn't socially beneficial any more.

Baker: Perhaps. But I'm not sure the problems are as much with that view of the lawyer's role as with the failure of some of my colleagues to understand that it does *not* imply that lawyers are moral ciphers, or even merely moral advisers.[81] In any event, to get back to the American position, I still don't see why lawyers should defer to decisions by admittedly guilty defendants to mislead courts. You can't just assume that they have a legal right to do it; that's the very question we've been arguing about. And I don't think you've yet made out a case for the social benefits of the American position in ordinary criminal cases.[82]

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80. *Cf.* Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation,* 85 YALE L.J. 1060, 1073 (1976) (reaching a similar conclusion on the basis of the client's individual rights, rather than social benefits).

81. "In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible. He may emphasize the possibility of harsh consequences that might result from asertion of legally permissible positions." ABA CODE, EC 7-8.

82. Another possible ethical justification for the American position might rest on asserted non-utilitarian moral rights of clients to a lawyer's friendship and of lawyers to bestow such friendship. *See* Fried, *supra* note 80; Shaffer, *Christian Theories of Professional Responsibility,* 48 S. CAL. L. REV. 721, 725-27 (1975). *But see* Dauer & Leff, Correspondence: *The Lawyer as Friend,* 86 YALE L.J. 573 (1977). However, there is little reason to believe that, even under the American position, friendship or anything remotely resembling it is characteristic of dealings between criminal defendants as a group and their lawyers:

> Since he usually has been guilty of some crime (some previous crime, if not the one with which he is currently charged), the client of the criminal lawyer is typically an unreliable, dishonest person. Consequently, the status difference between attorney and client is disparate, taxing to the limit even the professionally defined relationship that is designed to ameliorate this problem. The attorney must continually

JUSTIFICATION VI: THE AMERICAN POSITION PROTECTS THE INNOCENT

Charles: Let's look then at the social benefits of the American position.

Baker: Fine. But you'll have to start us off.

Charles: Well, for one thing, since you care so much about the rights of innocent defendants have you ever stopped to think how important the American position is in protecting the innocent?

Baker: The American position doesn't even come into play until a defendant has admitted his or her guilt . . . .

Charles: But there are innocent defendants who feel morally guilty[83] or who mistakenly think that they are legally guilty, and who are afraid that if they don't conceal facts that seem to be incriminating even from their own lawyers they are going to be convicted. For example, a defendant charged with homicide who didn't really understand the concept of self-defense might stubbornly insist that he wasn't the person who did the killing—when at trial the prosecution could clearly establish that he was—and never tell his lawyer facts about his altercation with the victim that would show that legally he had killed in self-defense.[84]

Baker: So the lawyer tries to get the defendant to be honest, by making clear to the defendant that under the attorney-client privilege the state can't force the lawyer to reveal what the defen-

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> check the stories of his clients if he is to avoid entanglements that may become embarrassing. Lawyer and client can never appear as equals, as readily happens in the practice of business law.

A. WOOD, *supra* note 4, at 250.

> The lack of a visible end product offers a special complication in the course of the professional life of the criminal court lawyer with respect to his fee and in his relations with his client. The plain fact is that an accused in a criminal case always "loses" even when he has been exonerated by an acquittal, discharge, or dismissal of his case. the hostility of an accused which follows as a consequence of his arrest, incarceration, possible loss of job, expense and other traumas connected with his case is directed, by means of displacement, toward his lawyer.

Blumberg, *The Practice of Law as Confidence Game*, 1 L. & SOC'Y REV. 15, 26-27 (1967). *But see* Noonan, *supra* note 12, at 365: "I can imagine the gut feeling of fellowship leading a lawyer to go along with a client's lie."

83. *See* D. MELLINKOFF, *supra* note 8, at 150-53.

84. This example is essentially Freedman's. *See* LAWYERS' ETHICS, *supra* note 12, at 4-5.

dant tells him. And the lawyer also emphasizes an attorney's professional obligation not to reveal client confidences voluntarily.[85] Isn't that enough?

Charles: Sometimes it is. But remember that a defendant like the one in my example is really worried that he will be hurt in some way by telling the lawyer the truth, so you have to be able to assure him that he won't be disadvantaged *in any way* by being honest. Without the American position, we wouldn't be able to give assurances of that kind to defendants generally because it might turn out, of course, that the truth that some other defendant is induced to tell would be nothing more than an admission of guilt.

Baker: And then that guilty defendant *would* be disadvantaged by what he had said, in that you could no longer put the prosecution to its proof. You would have misled him.

Charles: Right.

Baker: So you're saying that to avoid misleading guilty defendants, we have to keep the American position and let you criminal lawyers continue to mislead judges and juries.[86]

Charles: That kind of glib comment sounds as though it makes more sense than it really does. You should think hard sometime about what the consequences might be if we begin to say that in some situations lawyers are permitted to lie to their clients. But, without the American position, even if we did continue to give assurances, some *innocent* defendants might no longer be honest with us. If they knew the consequences of admitting one's guilt, they might not want to risk . . . .

Baker: Losing their chance to have their lawyers try to mislead the judge or jury.

Charles: If you want to put it that way, yes. But as I pointed out before, we don't put people in jail for not being public-spirited, or for not trusting the system.

Baker: Don't you see that that kind of reasoning would keep us from prohibiting *any* conduct by defense lawyers on the grounds of its untruthfulness?[87] Because an innocent defendant might conceal facts from his lawyer rather than risk losing his opportunity to present witnesses who will perjure themselves, should we make it

85. *See* ABA DEFENSE STANDARDS, Commentary b to § 3.2 (1971).

86. The issue is posed in this way by Freedman. *See* LAWYERS' ETHICS, *supra* note 12, at 46-47.

87. *Cf.* Wolfram, *supra* note 4, at 858-59 (making the same point in response to a similar argument for permitting client perjury).

permissible for a lawyer representing an admittedly guilty defendant to offer the testimony of witnesses that he knows will testify falsely?

Charles: Some of my colleagues at the criminal bar would say we should make it permissible.[88] But I think we can reasonably draw distinctions—as matters of degree—by weighing the importance of a particular practice as an inducement for innocent defendants to tell the truth, against its potential dangers in terms of letting the guilty go free. Besides, the American position also helps to protect the innocent from governmental misconduct.

Baker: I'm afraid you'll have to spell that one out for me too.

Charles: According to the Supreme Court, the Constitution requires that illegally obtained evidence be excluded even when it pretty clearly shows that a defendant is guilty—not so much to protect the particular defendant, but to discourage the government from violating the rights of innocent persons in the future.[89] It's what you might call a prophylactic approach.

Baker: And is it your position that that approach requires that admittedly guilty defendants be able to take advantage of the exclusionary rule?

Charles: Yes it is. And, for the same reason, admittedly guilty defendants should be able to resist cases brought against them on the basis of weak evidence. If the government can get cheap convictions against the guilty, the next thing you know they'll be charging and sometimes even convicting the innocent without much proof.[90]

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88. *See* LAWYERS' ETHICS, *supra* note 12, at 38.

89. *See* Mapp v. Ohio, 367 U.S. 643 (1961); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure,* 69 YALE L.J. 1149 (1960).

90. *See* G. SHARSWOOD, *supra* note 6:

> The tribunal that convicts without sufficient evidence may decide according to the fact; but the next jury, acting on the same principle, may condemn an innocent man. If this is so, is not the prisoner in every case entitled to have the evidence carefully sifted, the weak points of the prosecution exposed, the reasonable doubts presented which should weigh in his favor?

Cf. Uviller, *supra* note 32, at 1077 (discussing the exposure of a prosecution witness's perjury, on behalf of a defendant whom the lawyer believes is guilty).

Charles might also have argued that if lawyers could not put the prosecution to its proof on behalf of admittedly guilty clients, some lawyers might be less willing to do so on behalf of clients they only believed were guilty—or even unpopular clients. *Cf.* Comments of Lord Brougham, 55 PARL. DEB. H.L. (5th ser.) 1402 (1940), *quoted in* D. MELLINKOFF, *supra* note 8, at 144.

Baker: But we're only talking about the guilty defendant who *admits* his guilt to his lawyer. Since the police and prosecutors couldn't count on any particular defendant doing *that,* I don't see them going wild if the American position were abandoned.[91] Though, if I'm wrong, it could be kept just for hearings on motions to exclude illegally obtained evidence, and to get cases dismissed in which that evidence would have been introduced.

JUSTIFICATION VII: THE AMERICAN POSITION PROTECTS SOCIETY FROM THE GUILTY

Baker: Apart from cases involving illegally obtained evidence, you seem to rate the dangers of the American position enabling many admittedly guilty defendants to escape punishment as pretty small. Why?

Charles: Well, look at the statistics and use your common sense. Though the figures vary widely, only about one defendant in four gets off completely, by dismissal or acquittal,[92] and it just stands to reason that in most of these cases defense counsel have something more to go on than the overall weakness of the prosecution's evidence. Around two-thirds of all defendants plead guilty,[93] and I would guess that the great majority of "American position cases" are disposed of that way. Actually, I think it would be dangerous for us to *abandon* the American position.

Baker: What do you mean?

Charles: I mean that a defendant who admitted his guilt to a lawyer and then learned that this prevents the lawyer from putting the prosecution to its proof would just go to another lawyer and lie.[94]

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91. Baker could have made the additional point that even under the American position the presence of illegally obtained evidence or a weak prosecution case often does not result in a dismissal of charges or an acquittal but only in a plea bargain to a reduced sentence. *See* Kaplan, *supra* note 15, at 218; Note, *Plea Bargaining and the Transformation of the Criminal Process, supra* note 18, at 580-81 (1977).

92. For the twenty-nine federal district courts with the largest aggregate number of criminal cases in the period 1970-74, for example, the average percentage of non-convictions was 25.8. The percentages from district to district ranged from 11.2 to 41.3. *See* Finkelstein, *supra* note 18, at 313. In California, to cite another example, in 1968 only "14.4 percent of all criminal dispositions resulted in either dismissal, acquittal, or the failure to prosecute for other reasons." Bechefsky & Katkov, *Plea Bargaining: An Essential Component of Criminal Justice,* 52 CAL. ST. B.J. 214, 217 (May-June 1977).

93. *See* note 15 *supra.*

94. *See* LAWYERS' ETHICS, *supra* note 12, at 33; D. MELLINKOFF, *supra* note 8, at 165.

And once the word got out, there would be a lot of guilty defendants who would lie to their lawyers in the first place. As a result, far fewer guilty defendants would be persuaded by their lawyers to plead guilty, and lawyers who had not been told the truth would be less able to enforce any restraints against client and witness perjury.[95]

Baker: Are you sure you're not exaggerating the potential lying problem? I know that in civil cases, some officers of our corporate clients start off by being, shall we say, not altogether candid with me; but they would have to be exceptionally durable psychologically and very inventive to stick with their stories through the mock examinations I subject them to in preparation for trial.[96] And I also give them a very strong warning about the damaging consequences of having false testimony exposed in the courtroom.[97]

Charles: But remember, Baker, in the cases you are talking about usually all that is at stake is money—and stockholders' money at that—not the money of the executives with whom you are dealing. Criminal defendants have more to lose: the respect of their families and friends, present and future jobs, and even their freedom. And for many of them it all happens so suddenly. You know, I've just been reading a wonderful book by Victor Li that compares our criminal justice system with the system in the Peoples' Republic of China.[98] In China, when a person shows any signs of deviating from the community's standards, his neighbors or co-workers begin

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95. *See* LAWYERS' ETHICS, *supra* note 12, at 33. For an example of client perjury consistent with false information given to a second attorney, see F. WINDOLPH, *supra* note 2, at 44.

96. *See* Wolfram, *supra* note 4, at 857 n.185.

97. With reference to guilty defendants, Baker's point would probably be that the exposure of a defendant's perjury could count against him at sentencing. *See* Wolfram, *supra* note 4, at 815. The present author has gotten the sense from the statements of both civil and criminal lawyers who have spoken in his Legal Profession course that while many lawyers are hesitant to talk frankly with clients about the ethics of their behavior, the lawyers' ethical views may consciously or unconsciously be affecting the "practical legal advice" that they give clients. Some lawyers may feel that clients would resent their ethical advice. Others may simply feel more fluent in practical than in moral discourse. In either event, the confusion, if it exists, is troublesome.

Baker might also have cited evidence that the Supreme Court's decision, in Miranda v. Arizona, 384 U.S. 436 (1966), that a person in police custody may not be questioned until the person has been informed of his right to remain silent, and of the fact that his statements may be used against him in court, has not resulted in a drastic decline in confessions to the police. *See* Ellis, *supra* note 54, at 855-56.

98. V. LI, LAW WITHOUT LAWYERS ch. 3 (1977).

to put pressure on him right away to reform.[99] In this country, a person can engage in all kinds of anti-social behavior and we think that it's not our business to do anything about it—that is, until he commits a crime and gets caught. And then, as Li says, the experience for him is like "falling off a cliff."[100] Some defendants really get to feel pretty desperate.

Baker: That reminds me of Harry Kalvin's comment at the time of all those courtroom disorders in the sixties. He said, "We're a little puzzled now as to why defendants have behaved so well in the past."[101] I think it's definitely worth considering how it is that so many defendants and potential defendants are regularly led off cliffs with so few problems of violent resistance, flight, escape, bribery, intimidation or other disruptions of "the system."

Charles: One possibility occurs to me; but, I must say, it's not one that I find very appealing. The fact is that we *do* hold out a lot of hopes to defendants that they can be acquitted even if they are guilty.[102]

Baker: And one of those hopes . . . .

Charles: Is the belief that even if they are guilty, good lawyers can work with them to keep the prosecution from proving it.[103]

Baker: But you said a few moments ago that very few admittedly guilty defendants actually do get acquitted. If you're right that almost all of them end up pleading guilty, the hopes that the American position holds out are hopes that "insiders" in the criminal justice system know are illusory.

Charles: I'm not sure that I'm really prepared to accept the conclusion that you're suggesting: that the American position can be regarded as primarily a mechanism to "cool out" defendants. It was certainly never intended to perform that function—and, we haven't yet discussed its role in plea bargaining. However, the theory is an interesting one, and I do wonder whether abandonment

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99. *Id.* at 44-46.

100. *Id.* at 39.

101. Baker has long since forgotten where he read this statement by the late Professor Kalvin, but he's certain he has it right.

102. *See, e.g.,* Frankel, *From Private Fights Toward Public Justice,* 51 N.Y.U.L. REV. 516, 520 (1976): "It is as if we said to a defendant: 'You may have the most elaborate form of trial in the world. Your chances of getting off, even if you are guilty, will be better here than they would be elsewhere.' "

103. "[Defendants] are in the main too optimistic: they believe that if their attorneys were willing to fight vigorously on their behalf, they might be acquitted." Alschuler, *supra* note 3, at 1310.

of the American position might not be dangerous to society, at least to some extent, in terms of the loss of its "cooling out" potential.

Baker: What kinds of defendants do you think would be the most dangerous if they were not "cooled out"?

Charles: I'm not sure. But the answer might not be the one that would immediately suggest itself to most people. Remember that white-collar offenders from "respectable" middle-class backgrounds may have much farther to "fall" psychologically, from freedom through conviction to imprisonment, than young people from inner city slums who have committed violent crimes.[104]

COST I: GUILTY DEFENDANTS ARE NOT ADEQUATELY PUNISHED

Baker: I'm still inclined to be skeptical about your claim that admittedly guilty defendants don't often escape punishment. I'm thinking particularly of well-to-do defendants, including mobsters, whose cases lawyers can afford financially to take to trial. But even if all of them pleaded guilty, I'd be concerned that they would not receive adequate punishments.

Charles: Because of plea bargains for reduced charges or sentences?

Baker: Yes.

Charles: Well, for whatever reassurance it may be to you, some recent research indicates that many defendants who plea bargain actually get little or nothing in return for their pleas, because the prosecution overcharged them in the first place for bargaining purposes.[105] And then, of course, you've heard of those bad apples in our criminal defense barrel, the "cop-out lawyers," who are unwilling or incompetent to take cases to trial.[106] You can be sure that they don't get many concessions from prosecutors.

Baker: Talk about cooling defendants out! A lot of them can't even manage to trade-in their hopes that their lawyers will get them off, for reduced punishments. But the prosecutors don't let on,

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104. "Erik [a fourteen year old] was convicted [of homicide] and sentenced to 15 years to life. Says [prosecutor] Whalen: 'He showed no awareness of conscience or remorse. He grinned like crazy. He probably figures that prison is not a hell of a lot worse than other places he's been.'" TIME, July 11, 1977, at 19.

105. Study by the Institute of Criminal Law and Procedure at Georgetown University, reported in the Honolulu Star-Bulletin, July 4, 1977, at 6, col. 3. *See also* Kaplan, *supra* note 15, at 217.

106. *See* Alschuler, *supra* note 3, at 1181-98.

and their own lawyers probably mislead them.[107]

Charles: That's true. But they're our bad apples; and you have yours too. Usually, plea bargaining doesn't work all that badly. Remember, as Judge Marvin Frankel has pointed out, when defendants are convicted after trial, "we impose probably the most severe sanctions of any country in the so-called civilized world."[108] Plea bargaining lets us get around barbaric mandatory-minimum sentencing laws, and in general provides some room for leniency.[109]

Baker: Maybe too much room. Because of plea bargaining, fewer defendants are sentenced to jail these days,[110] and more remain at large where they can continue to commit crimes.[111]

Charles: Do you really want to get into a separate discussion of leniency?

Baker: No. I realize that there are cases in which defendants—including admittedly guilty defendants—deserve leniency, and in those cases they should get it. But the trouble with plea bargaining is that instead of dealing with the question of leniency strictly on the merits, it takes into account an utterly irrelevant factor: the strength of the prosecution's case.[112] Because of pressures on the judicial system, the prosecution *has* to show at least some leniency unless it has an absolutely air-tight case against the defendant. I've just read about a study that was done in Alameda County, California, that showed that if all the defendants who pleaded guilty had insisted on being tried, the County would have needed more than *seven times* the number of judges it actually had. And the taxpayers won't pay for them.[113]

Charles: I'm not convinced that the strength of the prosecution's case is *utterly* irrelevant to leniency. When it comes to subtle issues like intent, provocation, or self-defense, it doesn't seem to me altogether irrational to say that the greater the doubts about a de-

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107. *Id.* at 1194-97.

108. Frankel, *supra* note 102, at 520.

109. *See* Bechefsky & Katkov, *supra* note 92, at 282-83.

110. "[Research studies] give data which show that the largest contribution to the reduction in . . . [the probability of being committed to jail having been convicted of a crime] is due to plea bargaining which reduces a large fraction of felonies into misdemeanors." Shinnar & Shinnar, *supra* note 20, at 602 n.29.

111. *See id.* at 605-07.

112. *See* Alschuler, *supra* note 66, at 57-60.

113. *See* Bechefsky & Katkov, *supra* note 92, at 279.

fendant's guilt, the greater the leniency that should be shown to him.[114]

Baker: It is altogether irrational in cases involving admittedly guilty defendants.

COST II: THE AMERICAN POSITION IS CONDUCIVE TO RECIDIVISM

Charles: Your attitude calls to my mind Barbara Babcock's warning against letting our knowledge of a defendant's guilt be translated into "unfair shuttling of the person through the system."[115] Up to this point, we haven't talked very much about the feelings of admittedly guilty defendants when they first talk to their lawyers and then again after their cases have been disposed of by the criminal justice system.

Baker: I agree with you that a defendant's attitudes are important, not only to him, but to all of us. I've read that eighty percent of all serious crimes are committed by repeat offenders.[116] But you don't really believe that the American position promotes rehabilitation, do you?

Charles: That's exactly what I believe—and so do others. From the point of view of rehabilitation, the more convictions obtained only after a trial, the better.

Baker: Why?

Charles: Well, it's been put different ways: some commentators say that the adversary trial process promotes "the satisfaction of the parties,"[117] and that would include guilty defendants; others suggest that vigorous representation shows respect for a defendant's dignity,[118] dramatically affirms a defendant's continued "status as

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114. *See* Enker, *Perspectives on Plea Bargaining*, in PRESIDENT'S COMMISSION ON LAW ENFORCEMENT AND ADMINISTRATION OF JUSTICE, TASK FORCE REPORT: THE COURT 108, 113-14 (1967); Spector, Book Review, 76 YALE L.J. 604, 606-07 (1967). *But see* Alschuler, *supra* note 66, at 69-79.

115. Babcock, *Problems in Professional Responsibility*, 55 NEB. L. REV. 42, 51 (1975).

116. *See, e.g.*, Shinnar & Shinnar, *supra* note 20, at 597-99. Criminologists have also estimated that some 60-80% of persons who become objects of the criminal justice system, at least through arrest, are later accused of other crimes. *Id.* at 592-96.

117. *See, e.g.*, C. CURTIS, IT'S YOUR LAW 3-4 (1954). *But see generally* Wolfram, *supra* note 4, at 833 n.91.

118. *See, e.g.*, LAWYERS' ETHICS, *supra* note 12, at 2-3.

a member of the community,"[119] or manifests trust in him.[120] From my own experience, I can tell you that a lot of guilty defendants are just not willing at first to face up to the fact that they are morally, or even legally guilty. They think that they should get off because they were drunk, or they had been insulted and were angry—that kind of thing.[121] A trial is an educational experience for them and helps to reconcile them to being punished.[122]

Baker: There are others—including judges—who believe that *pleading guilty* is the first step on the road to rehabilitation.[123] But I can't say that I've seen any empirical evidence to support their claims. Do you have any, other than your own experiences, to support yours?

Charles: Not really. But it stands to reason . . . .

Baker: No it doesn't—at least not with regard to *admittedly* guilty defendants. What in the world is "dignified" about getting your lawyer to mislead other people on your behalf?[124] Far from promoting rehabilitation, I think that the American position is conductive to recidivism. When a lawyer advocates a factual position

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119. C. FRIED, AN ANATOMY OF VALUES 130 (1970).

120. *Id.* at 130-31.

121. *See, e.g.*, A. TREBACH, THE RATIONING OF JUSTICE 248 (1964).

122. The author owes this argument to two former colleagues at Hawaii, Barbara Babcock and Karen Czapanskiy, both experienced defense lawyers, and both now at the Justice Department. Mellinkoff puts the argument this way:

> The "Guilty" verdict is the demonstration to the accused, and to those who still love him, as well as to ourselves, that a process of justice has been at work, and having seriously considered the possibilities of error, has come to a deliberate conclusion that here is a man who ought to be punished.

D. MELLINKOFF, *supra* note 8, at 154.

123. *See* ABA STANDARDS RELATING TO PLEAS OF GUILTY, Commentary to § 1.8(a)(ii)(1967).

124. *See* Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975). Frankel notes that:

> [A]mong the laymen who do not honor us [lawyers] for our dealings with the truth are many beneficiaries of such stratagems. One of the least edifying, but not uncommon, of trial happenings is the litigant exhibiting a special blend of triumph, scorn, complicity, and moral superiority when his false position has scored a point in artful cross-examination or some other feat of advocacy. This is a kind of fugitive scene difficult to document in standard ways, but described here in the belief that courtroom habitues will confirm it from their own observations.

Id. at 1040-41. *Cf.* Noonan, *supra* note 12, at 364.

that both the lawyer and the defendant know is not true, I think that it only serves to confirm and solidify beliefs on the part of the defendant that could have already contributed to his criminal behavior: namely, beliefs that all social institutions are essentially corrupt,[125] and that practically everyone is willing to do anything that he can get away with that seems likely to "work."[126]

Charles: I think that you're rather naive to believe that lawyers serve as role-models for their clients—either bad or good.

Baker: Perhaps. But a lot of young offenders in particular could certainly use some good ones for a change. And, given their customary life-styles, they're not likely to come into contact with any better candidates than their lawyers.

COST III: THE AMERICAN POSITION IMPAIRS PUBLIC CONFIDENCE IN THE INTEGRITY AND RATIONALITY OF THE CRIMINAL JUSTICE SYSTEM

Charles: We've talked a lot about the protection of society from guilty defendants. But, of course, any one of us in "society" could turn out to be a defendant some day. Therefore, another

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125. *Cf.* Bress, *Professional Ethics in Criminal Trials: A View of Defense Counsel's Responsibility,* 64 MICH. L. REV. 1493 (1966):

> [A] lawyer who condones perjury does not advance the cause of justice. Whether he is acquitted or convicted, an accused who sees his lawyer employ unethical tactics will emerge from his trial filled with justifiable contempt for the law, for his own unscrupulous counsel, and perhaps for the entire legal profession. (Footnote omitted.)

Id. at 1497. For the observations of several private defense lawyers in Texas with regard to the attitudes of defendants toward lawyers, see Comment, *In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys, supra* note 19, at 110-11.

126. *Cf.* Greenbaum, *Attorneys' Problems in Making Ethical Decisions,* 52 IND. L. J. 627 (1977).

> People with legal problems frequently have troubles, in part, because they have difficulty in their relationships with others. Lawyering has therapeutic implications even though the lawyer is not a therapist. To adopt a phrase, the attorney is either a part of the solution or a part of the problem. There is no way to stand apart. There are many variations on this theme. An important one is that troubled individuals frequently view their world as one where people exist principally to use each other and do not have constructive mutual relationships. The attorney who acquiesces in being only a tool of such a client may be reinforcing those perceptions and behaviors which tend to involve the client in difficult situations.

Id. at 635.

objective of our rules governing the professional responsibilities of criminal lawyers should be to promote a general sense of security in terms of safeguards against being unjustly convicted of a crime.

Baker: Sadly, the survey data that I've seen definitely does *not* reveal that kind of public confidence in the criminal justice system as a whole.[127] But I take it that you think that the American position measures up pretty well as far as our sense of security is concerned.

Charles: Yes, I think it does. If even admittedly guilty defendants can have the assistance of counsel in contesting the charges against them, then the rest of us know that we can also count on such assistance. And if even admissions of guilt do not limit the positions a lawyer can take on a client's behalf, then we can't help but feel that attorney-client confidentiality is truly sacrosanct.

Baker: I would have thought that we had plenty of assurances on those scores without the American position. For most ordinary people—people who are not deliberately walking a tightrope over the chasm of criminality—wouldn't it be enough for them to know that they would have counsel available to challenge vigorously any accusations that *they* believed were false?

Charles: Possibly. But why not give them the additional assurances of the American position?

Baker: Because, while the American position spreads reassurances with one hand, it plants seeds of doubt with the other.

Charles: At the bottom of the chasm, under the tightrope? There's not much sunlight down there.

Baker: Come on; I'm serious. Aren't ordinary citizens going to wonder, "If the criminal justice system puts up with this much untruthfulness on the part of defense counsel, might it not also tolerate similar or still less truthful behavior on the part of those who would prosecute us, or be witnesses against us?"

Charles: You know as well as I do that the answer is no. The

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127. In 1963, extensive research into the attitudes of the lay public in Missouri revealed that,

> [t]here is a shocking lack of confidence among a large number of people concerning the possibility of obtaining a fair trial in our courts. Nearly one-third (32%) of those interviewed expressed a doubt as to whether they would have a better than 50-50 chance of obtaining a just verdict if they were accused of crime.

MISSOURI BAR, PRENTICE-HALL SURVEY, A MOTIVATIONAL STUDY OF PUBLIC ATTITUDES AND LAW OFFICE MANAGEMENT 173 (1963).

law doesn't condone perjury by anyone. And the responsibilities of prosecutors are different from those of defense counsel; prosecutors are even required to come forward with evidence that is favorable to defendants.[128]

Baker: But, remember, we're talking about ordinary citizens who may not know about those rules. And even if they do know about them, as I do, I think they're still going to wonder. I've heard so many "war stories" from defense lawyers about the need to use questionable tactics to counteract prosecutorial dishonesty that even I wonder.

Charles: Prosecutors' offices have their "bad apples" too. Sometimes we have to retaliate.

Baker: Given the American position, it's a little hard for an outsider to always be sure of exactly who is retaliating against whom.

Charles: Listen, as I thought I demonstrated a while ago, the reality is that the American position protects innocent defendants.

Baker: Maybe so. But it doesn't necessarily look that way to the ordinary citizen. Could you really blame him for feeling, as a potential innocent defendant, that his lawyer could get a more sympathetic hearing from an honest prosecutor—or at trial from a judge or jury—if all of those people weren't carrying around in the back of their minds a suspicion that the lawyer might be knowingly misleading them?[129]

Charles: If we abandoned the American position, I don't believe that prosecutors, judges or juries would behave one bit differently; nor do I think that your "ordinary citizen" ever really worries about that sort of thing.

Baker: Well, I can tell you about another problem that I am *sure* ordinary citizens worry about.

Charles: What's that?

Baker: "If our criminal lawyers are permitted to mislead judges and juries, how confident can we be that they won't also try to mislead us?"

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128. ABA Code, DR 7-103(B).

129. As a county prosecutor, former Chief Justice Warren agreed to dismiss charges against defendants that the public defender said he believed were innocent. *See* Alschuler, *supra* note 3, at 1219-20.

COST IV: THE AMERICAN POSITION DEMORALIZES AND ISOLATES THE CRIMINAL DEFENSE BAR

Charles: In limiting our discussion to the American position, I have the feeling that we're being a little unrealistic. Criminal lawyers who interview their clients carefully in an effort to discover possible defenses, and who independently check out incriminating statements, do not very often have to deal with open-and-shut admissions of guilt. If we abandoned the American position, lawyers could still put the prosecution to its proof in almost every case.[130] So, why bother to make a change?

Baker: Well, in terms of the American position's influence on public confidence in the criminal justice system, for example, a change could be beneficial even if it had little practical impact in criminal litigation. But I'm not willing to concede that so few defendants admit their guilt to their lawyers[131]—or at least *would* admit it if lawyers looked for the truth from the beginning with half the vigor they display later when they try to persuade defendants to plead guilty in return for concessions on punishment.[132] Your criminal practice has such a strong civil liberties cast, that I don't think that it's altogether representative. You've heard though, I'm sure, of criminal lawyers who make it clear to defendants at the outset that they don't *want* to hear admissions of guilt.[133] I remember reading one expert's opinion that, "Generally, . . . 'Truth' simply is not an operative factor to a defense lawyer."[134]

Charles: I know that there are some lawyers who do intentionally keep themselves ignorant of incriminating facts, but it's not considered an ethical, or even a very smart way to practice criminal law.[135] As we've seen, what a lawyer doesn't know *can* hurt his

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130. *See* LAWYERS' ETHICS, *supra* note 12, at 54-55.

131. *See* Frankel, *supra* note 124, at 1039:

> The clearest cases are those in which the advocate has been informed directly by a competent client, or has learned from evidence too clear to admit of genuine doubt, that the client's position rests on falsehood. It is not possible to be certain, but I believe from recollection and conversation such cases are far from rare.

132. *See* note 17 *supra* and accompanying text.

133. *See* LAWYERS' ETHICS, *supra* note 12, at 35-36; Alschuler, *supra* note 3, at 1311 n.351; Frankel, *supra* note 124, at 1039. *But see* Wolfram, *supra* note 4, at 842 n.123.

134. Uviller, *supra* note 32, at 1072.

135. *See* ABA DEFENSE STANDARDS § 3.2(b) and accompanying Commentary b (1971).

client! But if intentional ignorance is a problem today, it would be a much worse problem without the American position. Today, receiving an admission of guilt does constrain a lawyer to some extent—principally in relation to presenting testimony in conflict with the admission. If admissions prevented lawyers from even putting the prosecution to its proof, I doubt that many lawyers would ever let their clients admit anything.

Baker: That could be. But I think you're overlooking a deeper possible connection between the American position and the practice of intentional ignorance—and also between the American position and the tremendous pressure that lawyers subsequently often place on their clients to accept plea bargains.

Charles: And that is . . .

Baker: That many criminal lawyers will try very hard to avoid finding themselves in situations in which they will have to try cases in accordance with the norm embodied in the American position. They know, at least unconsciously, that they would feel guilty about being untruthful.[136]

[At this point, if the reader's patience were inexhaustible, Baker and Charles would work through the circumstances in which lawyers would be *obligated* to follow the norm embodied in the American position in ordinary criminal cases. And they would also consider the extent to which this norm does involve behavior that can fairly be characterized as affirmatively untruthful, *i.e.*, lying. The following points would probably be among those that would emerge from these discussions:

1. As indicated earlier, an attorney in private practice is in general under no obligation to represent any particular criminal defendant; therefore, he is free to refuse to take the case of an admittedly guilty defendant who wishes to plead "not-guilty." Public defenders, court appointed counsel, and private attorneys who have already agreed to take a case, however, do not appear to have such discretion[137] (at least if a right to withdraw in the event of an

136. *See* A. Wood, *supra* note 4, at 243-44; Noonan, *supra* note 9, at 1492; Wishman, *supra* note 3.

137. Although many private defense attorneys take the position that a lawyer is free to withdraw if the defendant refuses to accept the lawyer's advice to plead guilty, *see* Alschuler, *supra* note 3, at 1306-07, the ABA Standards provide that the decision as to what plea to enter is for the defendant to make. ABA Defense Standards § 5.2(a)(i)(1971). The ABA Code permits withdrawal only in certain enumerated circumstances, none of which clearly encompasses a simple admission of guilt. ABA Code, DR 2-110(C).

admission has not been expressly reserved[138]).

2. From the perspective of a lawyer's own conscience, whether "not-guilty" pleas would be regarded as lies would probably depend on whether they were being entered for any purpose other than to mislead the judge or jury; for example, a defendant *must* plead "not-guilty" in order to take advantage of the jury's nullification power, or to call the court's attention to unlawful conduct by law enforcement agencies in obtaining evidence. However, even if "not-guilty" pleas were never viewed as anything more than mere formalities, devoid of any significance as factual representations,[139] the well-known case of *Johns v. Smyth*[140] is authority for the proposition that a defense lawyer cannot stop there and refuse for reasons of conscience to *argue* a factual claim that the defendant has admitted to the lawyer is untrue.[141]

3. Although a lawyer is forbidden to state in court that he personally believes in a defendant's case,[142] an argument that the prosecution has failed to prove the offense charged is inevitably perceived by a judge or jury as something more than an exercise in logical reasoning. As Freedman has put it:

> Criminal defense lawyers do not win their cases by arguing reasonable doubt. Effective trial advocacy requires that the attorney's every word, action, and attitude be consistent with the conclusion that his client is innocent. As every trial lawyer knows, the jury is certain that the defense attorney knows whether his client is guilty. The jury is therefore alert to, and

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138. An opinion, under the now superseded ABA Canons, required that there have been such a reservation for an attorney to withdraw on the basis of his conviction that the defendant is guilty. ABA COMMITTEE ON PROFESSIONAL ETHICS, OPINIONS, No. 90 (1932).

139. Something of a debate has been carried on between Freedman and Noonan over the question whether a guilty defendant's plea of "not-guilty" is a lie. Noonan's position is that the plea really means only that, "I cannot be proved guilty of the charge by the ordinary process of law." Noonan, *supra* note 9, at 1491-92 n.28. In Freedman's view, as "the 'ordinary process of law' . . . includes the constitutional right to suppress relevant and truthful evidence that has been obtained in violation of constitutional rights," the plea can serve to hide the truth. LAWYERS' ETHICS, *supra* note 12, at 32.

140. 176 F. Supp. 949 (E.D. Va. 1959).

141. If *Johns v. Smyth* is correct in holding that a refusal to argue for reasons of conscience is not an exercise of a lawyer's professional judgment, then the refusal would not be sanctioned by DR 7-101(B)(1) of the ABA Code, and it would appear to be a violation of DR 7-101(A)(1). ABA CODE, DR 7-101.

142. ABA CODE, DR 7-106(C)(4).

> will be enormously affected by, any indication by the attorney that he believes the defendant to be guilty. Thus, the plea of not guilty commits the advocate to a trial, including a closing argument, in which he must argue that "not guilty" means "not guilty in fact."[143]

Responding to the claim by an eighteenth century English churchman that false arguments by lawyers are not lies in that "no confidence is destroyed, because none was reposed; no promise to speak the truth violated, because none was given, or understood to be given,"[144] a young Quaker went to the heart of the matter: Why, "if no one ever believes what advocates say, [do] they continue to speak[?]."[145]

Charles: I'll grant you that not being completely honest in court can sometimes make a criminal lawyer feel uncomfortable. But, as Richard Wasserstrom has pointed out, almost all lawyers engaged in advocacy will say on behalf of clients things they do not really believe,[146] and yet most advocates find this hypocritical professional lifestyle (if you want to call it that) "simpler, less complicated, and less ambiguous . . . than the moral world of ordinary life."[147] Why shouldn't this also be true of criminal lawyers practicing under the American position?

Baker: I think there are several factors involved. In the first place, a criminal defendant's admissions could reveal him to be a very dangerous person.[148] Were the defendant to actually threaten a future crime, his lawyer could report the threat to the police—as an exception to the general rule of attorney-client confidentiality.[149] But the norm embodied in the American position requires him to close his eyes to this same danger and try to protect the defendant's freedom. Second, the American position is *unique* in permitting lawyers to take factual positions that cannot be supported at a minimum by the notion of giving a client's credibility "the benefit

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143. Freedman, *supra* note 9, at 1471. *See* Meagher, *supra* note 12, at 294-95; Wishman, *supra* note 3.

144. W. PALEY, THE PRINCIPLES OF MORAL AND POLITICAL PHILOSOPHY 117-18(New ed. 1821; 1st ed. 1785), *as quoted in* D. MELLINKOFF, *supra* note 8, at 250.

145. J. DYMOND, ESSAYS ON THE PRINCIPLES OF MORALITY 130-31 (1834 [1st ed. 1829]), *as quoted in* D. MELLINKOFF, *supra* note 8, at 250.

146. *See* Wasserstrom, *supra* note 65, at 14.

147. *Id.* at 9.

148. See the comments of a former criminal lawyer quoted in A. WOOD, *supra* note 4, at 243. *See also* Alschuler, *supra* note 66, at 72-76.

149. ABA CODE, DR 4-101(C)(3).

of the doubt."[150] Third, since the whole process of plea bargaining assumes that the defendant is willing to admit his guilt,[151] if no agreement can be reached defense counsel may find himself being untruthful at trial in full view of other people—the prosecutor and perhaps the judge—who he knows are aware of his untruthfulness.[152] And finally, as we have seen,[153] once a defense lawyer is willing to go along with the American position, it may become quite difficult for him to explain to himself why as a matter of principle he should refrain from engaging in other untruthful practices—including, perhaps, clearly impermissible practices—on behalf of admittedly guilty defendants.

Charles: Maybe the criminal part of my practice is not representative, but I haven't often been bothered a great deal by those kinds of problems. I find criminal defense work worthwhile because I feel that I'm safeguarding some very hard-won human rights. And, to be honest, I just enjoy the challenge of trying difficult cases. Is there any empirical evidence that the criminal defense bar as a whole is as demoralized as you make it out to be?

Baker: Well, you should take a look at Arthur Wood's study of criminal lawyers and civil lawyers in private practice in five cities.[154] Wood found that a number of criminal lawyers do have attitudes similar to yours.[155] But, as a group, they were much less satisfied with their practices than the civil lawyers, and most of them had ambivalent or unfavorable attitudes toward criminal law practice.[156]

Charles: It certainly doesn't pay particularly well.

Baker: That was, in fact, their most common complaint.[157] But from his interviews, Wood concluded that many of them also

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150. Indeed, since a criminal defendant, unlike a party to a civil case, cannot be compelled to testify, the *only* person taking a particular untruthful position in the courtroom may be defense counsel.

151. *See* Frankel, *supra* note 124, at 1039-40.

152. *Cf.* Uviller, *supra* note 32, at 1079-80 (referring to the judge's reactions in this situation).

153. *See* note 87 *supra* and accompanying text.

154. A. Wood, *supra* note 4.

155. Wood identified a type of criminal lawyer who "enjoys the drama and thrill of the work or . . . derives moral satisfaction from protecting the rights of those accused of crime." However, Wood's finding was that, "Not more than one-fourth of the criminal lawyers can be placed in this category." *Id.* at 238.

156. *Id.* at 50-53.

157. *Id.* at 51.

have quite serious problems with regard to representing guilty defendants—and particularly defendants who admit their guilt.[158]

Charles: And many lawyers can't afford to be very fussy about their clientele: they need whatever criminal work they can get.[159]

Baker: So, they worry a lot about whether they should charge clients for advising them to plead guilty . . . [160]

Charles: Which would let them eat, while keeping their consciences unsullied by "lying" in court . . .

Baker: But would violate the norm embodied in the American position.

Charles: Violate the professional norm, forget your conscience, or get out of the legal profession! Another "cruel trilemma"! But are you sure that abandoning the American position wouldn't just leave them with an even crueler "unilemma" of being *forced* to find nonlegal work?

Baker: No, actually, I'm not. But instead of being paid for trying to mislead prosecutors, judges and juries, the emphasis could shift to straight-forward appeals for nullification-style ethical flexibility or for leniency—and more effective institutional arrangements might be devised for hearing such appeals. Also, a public with more confidence in the criminal justice system might be persuaded to provide additional financial support for the defense of accused persons who might be innocent. And by taking some of the pressure off the system, abandonment of the American position could help to assure that poor persons who might be innocent would receive prompt trials, and not be left to languish in jail until they are tempted to plead guilty just to get out, on probation or receive credit for time already served.[161]

[Baker and Charles would probably conclude their dialogue by discussing the relative isolation of criminal lawyers from the rest of the American legal profession. Criminal lawyers tend to come from

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158. *Id.* at 242-43. One criminal lawyer interviewed by Wood described his discomfort as follows:

> Yes, this may sound funny but I've always had a feeling of surprise after a trial in which the defendant is found guilty, that although he is led off to jail, I'm permitted to leave the courtroom free. That always gives me a funny feeling and I feel very grateful that I can go free.

159. *Id.* at 238.

160. *Id.* at 251.

161. *See* Alschuler, *supra* note 66, at 61-62.

lower socio-economic backgrounds than lawyers in other areas of practice,[162] and are less likely to have attended elite or state university law schools.[163] They are not very active in professional associations[164] or on bar disciplinary committees.[165] On the other side, criminal defense work has low prestige within the legal profession,[166] and most civil lawyers have unfavorable attitudes toward the practice of criminal law.[167] As former Attorney General Edward Levi once observed, "By and large the bar does not know what goes on in criminal cases."[168]

There is no direct evidence to suggest that this isolation is particularly attributable to the American position. There is, however, evidence that many civil lawyers resent being assigned to defend criminal cases because they are uncomfortable with "[t]he thought of representing the guilty;"[169] and, in Wood's study, "unethical practices" was the factor most often mentioned by civil lawyers as the reason for their unfavorable attitudes toward criminal practice.[170] Recently, a panel of law professors and legal researchers evaluating thirty legal specialties gave defense work an extremely low score on "reputation for ethical conduct," while according it above average ratings on such professionally attractive factors as "intellectual challenge" and "rapidity of change" in the applicable law.[171]

A number of benefits might follow from a much broader involvement of the legal profession in criminal law practice:[172] crimi-

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162. *See* A. Wood, *supra* note 4, at 35-36.

163. *Id.* at 39-40.

164. *Id.* at 128-30.

165. *Id.* at 111.

166. *See* Lauman & Heinz, *Specialization and Prestige in the Legal Profession,* 1977 A.B.F. Res. J. 155, 166-67.

167. *See* A. Wood, *supra* note 4, at 50.

168. E. Levi, Four Talks on Legal Education 31 (1952).

169. *See* Alschuler, *supra* note 3, at 1258.

170. A. Wood, *supra* note 4, at 51.

171. *See* Lauman & Heinz, *supra* note 166, at 166-67.

172. Barbara Babcock is a particularly persuasive advocate of broader involvement. *See* Babcock, *supra* note 115, at 49-51.

To suggest that the American position stands as the only barrier to obtaining such involvement would obviously be a gross oversimplification. Economic problems of inadequate remuneration from mostly impecunious defendants, and the public's unwillingness to fund substantially larger public defender offices, are also formidable obstacles. *See, e.g.,* A. Wood, *supra* note 4, at 51; Lauman & Heinz, *supra* note 166, at 169-70. Indeed some "ethical" problems in defense work fre-

nal defense work, and therefore the defense of innocent persons, might be able to draw on the talents of more of the country's ablest, best educated, and most idealistic lawyers; tendencies toward the development of narrow and biased prosecutorial and defense frames of reference might be inhibited;[173] knowledge of the actual workings of the criminal justice system, and of its problems, would be more widespread in the bar[174] and in society generally; and bar association and other disciplinary authorities might show much more interest in clarifying[175] and enforcing[176] standards of professional responsibility in criminal law practice.]

Alternatives to the American Position

Assuming that the dialogue has left some doubts in one's mind about the merits of the American position as it exists today, the question then becomes what the alternatives might be. As a practical matter, that will be in the first instance a question of constitutional interpretation.[177]

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quently cited by private criminal lawyers themselves, such as soliciting clients and exploiting them, *see* A. Wood, *supra* note 4, at 109, are primarily economic in character.

However, another unfavorable aspect of criminal law practice for both criminal and civil lawyers, the undesirability of the criminal lawyer's clients, *id.* at 51, may relate as much to what the clients expect their lawyers to do, as to the clients' general character.

173. As in England, private practitioners who engaged in some defense work might also be called upon to prosecute cases.

174. For an example of a misconception among civil lawyers, see A. Wood, *supra* note 4, at 198-99. However, Arnold Trebach found that in New Jersey ten years of drafting lawyers to serve as unpaid assigned counsel for indigents had produced little interest within the bar generally in such criminal court reforms as more adequate discovery procedures for defendants. A. Trebach, *supra* note 121, at 208-209.

175. "[R]ight conduct [in representing admittedly guilty clients or other clients an attorney 'knows' are guilty] has never been well institutionalized in legal norms or well founded in traditional behavior." A. Wood, *supra* note 4, at 243.

176. *See* A. Wood, *supra* note 4, at 257:

> [There is a] tendency for public definition of a situation—in this case the expectation that criminal lawyers will deviate in various ways—actually to encourage these deviations. This reaction is even more likely the case when the deviant behavior is widely tolerated, as when professional norms for conduct are virtually unenforced in some areas.

177. The constitutional issues might arise either in criminal cases, in determining whether defendants had received fair trials, *cf.* Wolfram, *supra* note 4, at

If Charles is correct in asserting that the privilege against self-incrimination confers on guilty defendants in ordinary criminal cases not only the power but the *right* to put the prosecution to its proof, then this right would seem to extend to arguing that the prosecution had not met its burden; and it would be difficult to avoid the conclusion that even admittedly guilty defendants are entitled to the assistance of counsel in doing so. But doubts about the American position might nevertheless be reflected in the condemnation of other untruthful defense practices.[178]

Further, even under the assumption that the American position is constitutionally mandated, doubts about it could lead rule-makers for the legal profession to clearly accept, and courts to sustain, two kinds of options for private defense attorneys: first, an option predicated on the capacity of a defendant to intentionally and intelligently waive his right to counsel,[179] that would allow an attorney to take a criminal case with the express reservation of a right to withdraw *whenever* an admission of guilt was made;[180] and second, an option predicated on the ready availability of substitute counsel who would be willing to act in accordance with the American position, that would allow an attorney to withdraw on the basis of an admission, without any prior express reservation, so long as the withdrawal occurred before trial and the defendant was not otherwise prejudiced.[181]

If Baker is right that in ordinary criminal cases the American position is *not* enjoined by the fifth amendment, then rule-makers for the profession could go much further. Lawyers could be prohibited from making arguments inconsistent with defendants' admissions of guilt, other than perhaps at hearings on motions to dismiss

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841 n.121 (refusals by attorneys to participate in client perjury), or in contempt or disciplinary proceedings against defense counsel. *Id.* at 827-31.

178. *See* note 12 *supra* and accompanying text.

179. *See* Johnson v. Zerbst, 304 U.S. 458, 464 (1938).

180. *See* note 138 *supra* and accompanying text. *Cf.* Wolfram, *supra* note 4, at 867-68. The option of taking a criminal case with such a reservation would appear to be an adequate solution ethically to the dilemma pointed out by Noonan that the Constitution could be interpreted as requiring conduct by lawyers that an honest person could not engage in. Noonan, *supra* note 12, at 364. Whether lawyers who insisted on such a reservation would get much criminal defense business is, of course, a different question.

181. *See* note 137 *supra* and accompanying text. However, it might not be feasible to make either option available to public defenders. *See* Wolfram, *supra* note 4, at 868 n.229.

cases involving illegally obtained evidence. They could even be prohibited entirely from undertaking or continuing in the pre-verdict defense of admittedly guilty defendants on pleas of "not-guilty," except to the extent necessary to invoke jury nullification, and then possibly only after the defendants had admitted their "factual guilt" in open court.[182]

Such restrictions on the conduct of lawyers would probably result in some admittedly guilty defendants pleading guilty who would not do so today, especially if the restrictions were coupled with significant changes in the severity[183] and perhaps even the nature[184] of criminal sanctions. Other defendants would, however, doubtless still want to try to be acquitted by misleading the court.[185] Before deciding to abandon the American position, rulemakers for the profession would, therefore, have to face up to several questions not specifically addressed in the dialogue.

First, would it really be worthwhile to prohibit lawyer untruthfulness if the prohibition could often be circumvented simply by a defendant going to a second lawyer and lying? The answer may well be yes. Responding to the same kind of question with respect to the avoidance by defendants of a prohibition on the presentation by lawyers of perjured client testimony, Noonan has pointed out that, "That may be true, but there is a crucial difference this time around: neither the first nor the second attorney has knowingly acquiesced in perjury, a result of no small importance in preserving the integrity of a truth-seeking system."[186]

Second, given the continued *power* of admittedly guilty defendants under the fifth amendment to put the prosecution to its proof, could the legal profession and the criminal justice system countenance a departure from the philosophy expressed in Dr. Johnson's time-honored dictum that, "A lawyer is to do for his client all that

182. This possibility would assume that juries would be clearly instructed that they had a right of nullification. *See* note 49 *supra* and accompanying text.

183. *See, e.g.,* Rothman, *Doing Time,* N.Y. Times, Sept. 14, 1977, at A21, col. 2.

184. *See, e.g.,* McCarthy, *Making Prisoner "Pay" for Crime,* Honolulu Star-Bulletin & Advertiser, June 26, 1977, at E3, col. 1.

185. Anne Strick's image of a communitarian adjudication procedure for criminal as well as civil cases, based on "the assumption (as in a family model) that all concerned have a stake in fullest discovery and fair disposition," A. STRICK, *supra* note 10, at 217, seems to this author utterly unrealistic in an extremely heterogeneous and capitalistic society.

186. Noonan, *supra* note 12, at 365.

his client might fairly do for himself, if he could"?[187] Again, the answer may well be yes. To cite another instance in which this kind of question arises, there are good reasons why defense lawyers might be prohibited from arguing their clients' cases in public forums or in the media, while defendants themselves were allowed to make such out-of-court statements.[188] Edwin Greenebaum has recently observed with regard to client perjury that, "[A] client's choice to be represented by counsel is a choice to be represented by counsel who has limitations. A client accused of a crime does not have the right to go free on the basis of perjured testimony."[189] The same thing might be said of guilty defendants putting the prosecution to its proof.

Third, what of admissions of guilt in the course of trial? Is an admittedly guilty defendant to be left in possibly an even less favorable position, by his attorney's conspicuous withdrawal, than if he had not chosen to be represented by counsel in the first place? The desire to avoid an eventuality of this kind seems to underlie the restriction of the English withdrawal rule to before-trial admissions.[190]

In dealing with the similar risk that limiting lawyer involvement in client perjury to letting the client simply tell his story "may telegraph to judge or jury the lawyer's disbelief," Andrew Kaufman has asked whether it is "fair to respond . . . that whatever prejudice defendants suffer in such situations, they have brought it upon themselves by their own decision to commit perjury."[191] Of course, the "prejudice" referred to by Kaufman would lie in the impairment of an admittedly guilty defendant's supposed right to put the prosecution to its proof;[192] assuming abandonment of the American posi-

187. 5 BOSWELL'S LIFE OF JOHNSON 28, *as quoted in* Orkin, *supra* note 67, at 173. A very able justice of the Hawaii Supreme Court indicated to the author that he felt the American position could be justified on this basis.

188. Some of these reasons (which the author will discuss in a forthcoming article) are suggested in Mr. Justice Frankfurter's dissenting opinion in *In re* Sawyer, 360 U.S. 622, 668-69 (1959), and in the Commentary to § 1.1 of the ABA Standards Relating to Fair Trial and Free Press 92 (1968). In a notable recent criminal prosecution (subsequently dismissed) against the Mayor of Honolulu, the state trial judge issued an order prohibiting the lawyers on both sides from discussing the case publicly, but no order was even sought against the Mayor, who continued to proclaim his innocence (even purchasing television time to do so).

189. Greenebaum, *supra* note 126, at 634.

190. *See* note 11 *supra* and accompanying text.

191. A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 179 (1976).

192. *Cf.* Polster, *supra* note 12, at 28:

tion, no prejudice in this sense would be involved in the conspicuous withdrawal situation. The defendants in both situations, however, would have been placed in increased jeopardy by the conduct of their own lawyers, and the question arises in both situations whether this jeopardy is more appropriately attributable to the defendant's untruthfulness than to his *truthfulness to his lawyer.* In the perjury situation—as in cases in which a defendant admits his guilt before trial and still insists on pleading "not-guilty"—at least the *last* operative "decision" by the defendant is, as Kaufman points out, clearly a decision to be untruthful. But in the conspicuous withdrawal situation, the question is an uncomfortably close one;[193] and for this reason the English restriction has a certain appeal.

Indeed, some unease about the untruthfulness-or-truthfulness question, understood in another way, may underlie some objections to any abandonment of the American position. Given the available alternative of simply relying on that position, it does not seem unfair, as a matter of *weighing* causal factors, to attribute disadvantages from prohibitions on lawyer involvement in perjury, for example, more to an admittedly guilty defendant's "greed," so to speak, in also wishing to testify falsely,[194] than to his truthfulness. But the balance in cases involving only putting the prosecution to its proof seems close enough to make it possible to characterize abandon-

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> At this point [following an argument to the jury by the prosecutor citing the restraints placed upon the defense attorney] the defendant would almost certainly be in a worse position than had he not taken the stand. The weaknesses which previously existed in the state's case will now be overshadowed by the jury's knowledge that the defendant has lied under oath.

193. *See, e.g.,* Mellinkoff's reconstruction of the circumstances of the defendant's admission of guilt during trial in the famous 1841 case of *Regina v. Courvoisier.* D. MELLINKOFF, *supra* note 8, at 131-33.

A similarly close situation would arise if a defendant admitted his guilt only after perjuring himself and his lawyer then sought to withdraw. *See* McKissick v. United States, 379 F.2d 754 (5th Cir. 1967) (attorney permitted to withdraw, but mistrial ordered). Dans Aaron Polster proposes that a defendant be informed at the outset that any perjury will be reported immediately to the court, and that the attorney will testify against him in a subsequent perjury prosecution; but Polster assumes not only that attorneys will not be permitted to withdraw but that mistrials will be ordered. Polster, *supra* note 12, at 33-39.

194. It is, however, widely believed that a defendant is seriously disadvantaged by not taking the stand to assert his innocence. Freedman, *supra* note 9, at 1475.

ment of the American position as a penalization of defendants for having been honest about what they did, at least at one point, with their lawyers.

Around the world, public confidence in the truthfulness of lawyers has never been very high, and since the revelations concerning lawyer participation in the Watergate complex of misdeeds the confidence of the American public in the truthfulness of American lawyers has probably sunk to an all-time low. Obviously, this crisis of confidence cannot be attributed solely to the American position in criminal cases: corporation lawyers, tax lawyers, securities lawyers and personal injury lawyers have very serious credibility problems of their own, and the public is becoming increasingly aware of them. To the author's knowledge, not a single one of the Watergate conspirators came from the ranks of the criminal defense bar. However, what makes the American position especially troublesome to laypersons is that it *legitimates* untruthfulness in one kind of official decision-making; and because it does so, it can easily serve as a "model," or a convenient excuse, for untruthful behavior by lawyers and others in contexts far removed from the actual representation of criminal defendants. When, acting as his own lawyer, Richard Nixon decided to "stonewall it," he was, of course, merely putting the prosecution to its proof on behalf of his admittedly guilty client.[195]

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195. *See generally* Notes and Comment (Lessard) The New Yorker Magazine, May 23, 1977.