Truth, Justice, and the Criminal Defense Lawyer[1]

Richard Zitrin

The duty of the criminal defense lawyer has been, and continues to be, to do one's level best to see that guilty clients are acquitted. Yes, I'm stating it baldly for effect, but also to comport with reality. The first reality: most criminal defendants—even most who go to trial—are, in truth, guilty, at least of something, if not the crime charged. No one, even the most zealous prosecutor, wants to see the truly innocent convicted. The second reality: despite lofty statements about establishing "historical truth" or searching for absolute Truth, seeking truth is not and has not been the purpose of the criminal trial for the last 150 years. Nor should it be. Criminal trials are not primarily about truth. But they can and should be about justice.

Before coming back to these simple but important concepts, let me remind readers of the story of one Charles Phillips, eulogized in Professor David Mellinkoff's wonderful 1973 treatise *The Conscience of a Lawyer*.[2] In 1840, the actions of Phillips, one of England's leading barristers, captivated the British public and press. Phillips was defending a man named Courvoisier, accused of murdering Lord Russell. During the course of the case, Courvoisier confessed his guilt to Phillips, putting the lawyer in the unenviable position of having to decide whether to advocate on behalf of a guilty man. When he chose to go forward, Phillips gained little but disapprobation, including from the Bishop of London, who called his defense "a late most melancholy and remarkable occasion," and presented a petition from "the inhabitants of London" on the floor of the House of Lords which said that "God's word" could not be reconciled with what Phillips had done.

Criminal trials are not primarily about truth.

Phillips was not the first to give his all for his client. In 1820, Lord Brougham had defended Queen Caroline in the House of Lords against charges of adultery. In the 20 years between Queen Caroline's case and that of Courvoisier, English common law developed what Prof. Mellinkoff described as a "customary rule . . . requiring counsel to defend regardless of his opinion as to guilt or innocence." But while "customary," the rule had not gained widespread public acceptance. It was, in the opinion of the legal periodical *The Jurist*, "inconsistent with the laws of morality, since it amounts to neither more nor less than that a man is bound to deceive, if it be for the interest of his client." Concluded *The Jurist*, "if an accused person be really guilty, he has no moral right to any defense."[3]

In the development of our criminal justice system, the battle was won by the supporters of Phillips and Brougham—or perhaps more accurately by those who placed due process of law, or justice under the law, above all else, even absolute or historical truth. But the issue remains alive in the court of public opinion, and even lawyers disagree widely on how far an attorney should go in the defense of a guilty client. Ergo this article.

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Unlike in England, for many years people on our side of the Atlantic did an excellent job of deluding themselves about criminal defense lawyers, often painting them as great popular heroes by emphasizing myth and ignoring reality. Almost all of us have been brought up with one generation or another of Perry Mason, a lawyer who uses all the tricks in the book, but only for his seemingly limitless stable of innocent clients. Going back a hundred years, the West Coast's first great criminal defense attorney, Earl Rogers, claimed that he only represented people he believed innocent, at least according to his biographer and daughter, the noted journalist Adela Rogers St. Johns.[4] TV shows and movies made heroes of lawyers who, like Atticus Finch in *To Kill a Mockingbird*, do their level best to get justice for their falsely accused clients. Real life lawyers like Jake Ehrlich, Gerry Spence, and even F. Lee Bailey became folk heroes to many, appealing to America's quintessential love of the lone gunslinger taking on the forces of the state.

But often, the reality of criminal defense work, at least at trial, involves using all possible skill and persuasion to convince the jury to acquit a guilty client. Throughout our history, our most revered lawyers have done just that, as our Fifth and Sixth Amendments require. The legendary Clarence Darrow did far more work for guilty clients than the innocent. And even Abraham Lincoln, our most sacrosanct hero, in his most celebrated case, the defense of "Duff" Armstrong (you'll recall the use of an almanac to prove that the key eyewitness couldn't have seen by moonlight because the moon had already set when the crime took place), almost certainly represented a guilty man.

Not until the trials of the Menendez brothers and, more significantly, O.J. Simpson, did the American public truly abandon its defense lawyer hero myth. People now echo the distraught Fred Goldman, who declared during the Simpson trial that "this is not justice." People re-focused on that toughest of all questions: "How can you try to get that guilty person off?" But to most experienced criminal defense lawyers, that question is old news, as old as the Courvoisier case. Which brings us back to the issue of Truth and Justice, and the purpose of a criminal trial.

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I have the privilege of teaching an orientation session on

Richard Zitrin is a partner in San Francisco's Zitrin & Mastromonaco. He teaches Legal Ethics at both UC Hastings and, since 1977, at the University of San Francisco, where he also serves as coordinator of the ethics curriculum.

ethics and morality to all incoming law students at the University of San Francisco. When I ask whether they believe that a lawyer's job is to seek the truth, most demur. But when I ask who among them believes that a lawyer's job is to seek justice, almost every hand shoots up. This from babes in the legal woods, on their second day of law school. And yet they're right, at least when it comes to representing the criminal defendant. Among those who agree is Justice Byron White, speaking in *United States v. Wade*[5]:

> [D]efense counsel has no . . . obligation to ascertain or present the truth. Our system assigns him a different mission. He must . . . defend his client whether he is innocent or guilty . . . . If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth . . . . 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.

These are strong words indeed, so strong that they bear re-emphasis: the "most honorable defense counsel" must act "regardless of what he thinks or knows to be the truth."

[W]hatever the role of the defense lawyer, it is not to be the client's judge or jury.

What does this mean? It means that short of perjury[6], lawyers must go the whole nine yards for their clients. Here's an example: The defendant is charged with robbery. The victim identifies the defendant as the robber, but mistakenly tells the police that the robbery occurred at 10:30 p.m. when it actually occurred at about 8:30. She makes this mistake perhaps because her watch was stolen in the robbery, perhaps because she briefly lost consciousness. The police put the mistaken time in their report.

Meanwhile, the defendant, seeing the wrong time in the police report, admits to his lawyer that he committed the robbery, but at 8:30, not 10:30. The defendant went from the robbery to a bar he frequents. Several of his friends and the bartender can provide him with an alibi for any time after 9:15, over an hour before the victim believes the robbery took place. There is no way for either the victim or the police to know that they have the time wrong. When the victim testifies to the wrong time at trial, the lawyer presents the "alibi," knowing that it's false.[7]

A committee of the Michigan State Bar evaluating these facts concluded that defense counsel acted properly under the principle of "zealous advocacy" to do everything within the bounds of the law to help the client: "Criminal defense counsel are not sent to the jail's interview room to be their client's one person jury."[8]

The Bar committee discussed the existence of more than one truth: what the defendant told the lawyer, different degrees of guilt, the factual truth of the alibi. Under these circumstances, the Bar seemingly had little difficulty in concluding that "it is perfectly proper to call to the witness stand those witnesses on behalf of the client who will present truthful testimony," even if the larger truth is that the defendant is guilty.[9]

I agree with this conclusion, but I confess I have some trouble with the discussion of relative truths. As my fellow alumnus used to say, let's "tell it like it is"[10]: the defendant committed the crime. But the Michigan opinion got one thing right: whatever the role of the defense lawyer, it is not to be the client's judge or jury.

In my view, the defense lawyer must put in the alibi testimony, in order to meet the standards Justice White ascribes to those "most honorable" members of the defense bar. To do less is to fail to test fully the prosecution's case, to pull one's punches when it comes to the only issue that is relevant in a criminal trial: not whether the defendant is guilty, but whether the state has proved that guilt beyond a reasonable doubt.

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Much has been written, and more discussed, about how far this permits a defense lawyer to go in arguing falsehoods to the jury, especially arguments the lawyer knows are untrue. My answer, again, is that not only may counsel do this, he or she must. To illustrate the point, let me borrow from one of the more intelligent debates on the proper role of defense counsel, the dialogue between Harry I. Subin and John B. Mitchell in the first volume of the *Georgetown Journal of Legal Ethics*.[11]

Subin, then and now an NYU criminal law professor,[12] had come to believe that one should only argue the case by testing reasonable doubt without arguing untruths. Mitchell, now a law professor at Seattle University, complained that Subin's strict adherence to the truth would unduly limit one's ability to argue the case or test the prosecution's evidence.

Mitchell hypothesized that he was defending a young woman accused of shoplifting a Christmas tree star. The store manager stopped the defendant when she walked straight through the store and out the door with the star in her hand. When stopped, the woman burst into tears. Just as the manager was about to take her to the store's security office, a small fire broke out in the camera section, and he rushed off to help put it out. When he returned five minutes later, the woman was still sitting where he had left her. Back in the security room, the manager asked her to empty her pockets. He found that the woman had nothing else belonging to the store, but did have a ten-dollar bill. The star cost $1.79.

Mitchell's fictitious client admitted her guilt to him: "[The star] was so pretty . . . . I would have bought it, but I also wanted to make a special Christmas dinner for Mama and didn't have enough money to do both . . . . But that start . . . I could just see the look in Mama's eyes if she saw that lovely thing on our tree."

Mitchell, described how he would argue the case: "I will

not assert that facts known by me to be true are false or those known to be false are true. As a defense attorney, I do not have to prove what in fact happened . . . . Thus, in this case I will not claim that my client walked out of the store with innocent intent (a fact which I know is false); rather, I will argue:

> "The prosecution claims my client stole an ornament for a Christmas tree . . . . Now, maybe she did. None of us were there. On the other hand, she had $10.00 in her pocket, which was plenty of money with which to pay for the ornament . . . . Also, she didn't try to conceal what she was doing. She walked right out of the store holding it in her hand. Most of us have come close to innocently doing the same thing. So, maybe she didn't. But then she cried the minute she was stopped. She might have been feeling guilty. So, maybe she did. On the other hand . . . she didn't run away when she was left alone . . . . So, maybe she didn't. The point is that, looking at all the evidence, you're left with 'maybe she intended to steal, maybe she didn't. But, you knew that before the first witness was even sworn. The prosecution has the burden, and he simply can't carry any burden let alone 'beyond a reasonable doubt' with a maybe she did, maybe she didn't case . . . ."

One can't test reasonable doubt by arguing reasonable doubt.

Mitchell acknowledged that Subin would find this a "false defense," since the lawyer knows all along that the possibilities raised in the argument are not true. But he defended his argument by noting that he merely made inferences from the evidence which "raise a doubt by persuading the jury to appreciate 'possibilities' other than my client's guilt."

But Mitchell didn't go nearly far enough. In dancing around the proper role of the lawyer in testing "reasonable doubt," both Subin and Mitchell miss the point. One can't test reasonable doubt by arguing reasonable doubt. The only way to test reasonable doubt is to swing with one's best punch, not merely testing the prosecution's case, but attacking it directly, and as hard as possible. One must argue lack of guilt and leave the issue of reasonable doubt to the jury. Here's how I might argue the Christmas star case:

"Members of the jury, let's look carefully at the evidence the prosecution has presented against Martha. First, she walks out of the store holding the star in her hand. Not in her pocket, not in her purse, not in a bag. In her hand. She didn't conceal the star, didn't try to hide it. In fact, that's why she was caught — because she walked right out of the store with the star in plain view, where everyone could see it. That's not how you steal something. That's what happens if you forget you have it. Who hasn't absent-mindedly picked up something and started to leave without paying? Isn't that what this is about?

"Second, when the manager left her alone for five full minutes to deal with the fire, what did Martha do? If she had left, no one would have been the wiser. The manager didn't even have her name. But leaving is what a guilty person would do. Martha sat there and waited for the manager to come back. That's the behavior of someone who had nothing to hide, who knew she had not done anything wrong . . . ." The argument would then go on to discuss the money in the defendant's pocket and her crying in similar terms.

Is this arguing untruths? I am confident that it is not, in the context of the criminal case. This is an argument about proof, not truth. Anything less would defeat the whole purpose of the criminal justice system.

A more difficult question, as Monroe Freedman has long pointed out[13], is raised in cross-examining the known truthful witness. Put aside for the moment the typical emotionally-charged rape victim scenario, and take the elderly, our most vulnerable crime victims. Not only are they easy marks for criminals, but at trial they are likely to be subject to attacks on their eyesight, memory, and even mental capacity. What justification can there possibly be for excoriating an elderly witness known to be telling the truth? The answer—a difficult one, I'll admit—is that protecting a client's rights means taking (within legal bounds) a no-holds-barred approach. This is part of the "different mission" that Justice White ascribes to defense counsel. Anything less is not ensuring justice for the defendant.

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This certainly is far from seeking Truth. But many question whether it is even seeking Justice. The American public asks us, "What about justice for society?" For most people—and, increasingly, for many lawyers—criminal defense counsel fail to see the forest for the trees, engaging in single-minded efforts to protect rapists and murderers while losing touch with the larger needs of society: to see justice done, to put killers behind bars, to alleviate the suffering of victims and their families.

But it may be the system's critics who miss the true forest while examining trees labeled "Menendez" or "O.J." Justice for society can only occur when it is assured for all criminal defendants. For the defense lawyer, the trees are the horrible facts of many of their cases, while the forest is the American system of justice, and the principle that unless every person's rights are protected—even the most despicable—then ultimately no one's are. If Timothy McVeigh doesn't get as strong a defense as the young woman with the Christmas star—or an innocent woman with the Christmas star—what happens with the next McVeigh, where the evidence is a little less clear? Or the one after that? Where do we draw the line?

The answer is that juries can draw a line, but defense counsel cannot. Anything less than the most vigorous defense, a full-throttle attack on the prosecution's case, sends us down a slippery slope, where we may lose far more than is immediately apparent. After aberrant cases like O.J. Simpson's, the question we should ask as lawyers is not whether justice requires such a vigorous defense, but whether we can accept anything less as an alternative.

Endnotes

1. To write this article, I have borrowed liberally from Chapters 1

and 2 of The Moral Compass of the American Lawyer, by Richard Zitrin and Carol M. Langford, to be published in Spring 1999 by the Ballantine Publishing Group, a division of Random House, and Chapter 6, Problem 11 of our law school course book, Legal Ethics in the Practice of Law, by Richard A. Zitrin and Carol M. Langford, Michie (Lexis Law Publishing), 1995. I am particularly indebted to my co-author, Carol Langford, whose input, past and present, has been invaluable in writing this article.

2. DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER, West Publishing, 1973.
3. *Id.*
4. ADELA ROGERS ST. JOHNS, FINAL VERDICT, 1962
5. 388 U.S. 218, 250 (1967).
6. This comment is not meant to reject out of hand a discussion of the presentation of perjury, but merely to leave it for another time. What to do with perjury is subject to ongoing debate. The works of Monroe Freedman, in particular *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICHIGAN L.REV. 1469 (1966), and his two books, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM, Bobbs Merrill, 1975, and UNDERSTANDING LEGAL ETHICS, Matthew Bender, 1990, have tested the role of perjured testimony in the criminal trial. Earlier this year, a California appellate court, in People v. Johnson, 72 Cal.Rptr. 805 (1998), recommended the previously disfavored and virtually abandoned solution of having the defendant testify in the narrative.
7. *See* Michigan Ethics Opinion CI-1164 (1987), on which these facts are closely based.
8. *Id.*
9. *Id.*
10. Howard Cosell, NYU Law and ABC Sports (accent omitted).
11. *See* SUBIN, *The Criminal Defense Lawyer's Different Mission*, 1 GEO. J.LEG.ETHICS 125; MITCHELL, *Reasonable Doubts are Where You Find Them: A Response to Professor Subin's Position on the Criminal Defense Lawyer's Different Mission*, 1 GEO. J.LEG.ETHICS 343; and SUBIN, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J.LEG.ETHICS, 689, all 1987.

***Perjury**, from page 2*

nesses are lying. I have therefore suggested that different rules should be devised for criminal as against civil trials.[12]

Professor Hazard agrees:[13]

> Judges do not show similar solicitude for presentation of false evidence in civil cases. The reason behind the differentiation is not difficult to discern. The very fact of criminal prosecution means that an accused has been designated by official authority the prosecutor—as a semi-outlaw. The accused in the criminal case is therefore in special need of counsel. A civil claim does not have a similar imprimatur of public authority . . . . Accordingly, there is a good case that the balance between candor to the court and loyalty to the client should be struck differently for a criminal defense attorney than for other advocates.

Professor Hazard therefore recommends that we consider "[i]mposing more definite duties of candor on advocates in civil cases."[14]

Professor Hazard is to be commended on his willingness to change his position on a question that has been debated so fervently. Because he has been a leading spokesman for the American Bar Association on this and other issues, and because he is a member of the ABA's Ethics 2000 Commission, we have reason to hope that our ethical rules regarding client perjury will be changed to explicitly restore the traditional position of the bar on the perjury trilemma in criminal cases.

Endnotes

1. *See* FREEDMAN, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). The analysis has been expanded, and related to the Model Code and Model Rules in FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, Chapter 6 (1990).
2. ABA Model Rules of Professional Conduct, Rule 3.3, cmt. [7] (1998).
3. *See, e.g.*, ABA, Opin. 87-353 at 6-8; ABA, ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER, Ch. 10, *But Only If You Know* (Ed., R.J. Uphoff, 1995); and authorities cited in FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, pp. 139-141; B1-B8.
4. *See, e.g.*, Doe v. Federal Grievance Committee, 847 F.2d 57 (2d Cir. 1988).
5. SILVER, *Truth, Justice, and the American Way: The Case Against Client Perjury Rules*, 47 VAND. L. REV. 339, 358 (1994).
6. HAZARD, *The Client Fraud Problem as a Justinian Quartet: An Extended Analysis*, 25 HOFSTRA L. REV. 1041 (1997).
7. FREEDMAN, *Professional Responsibility of the Criminal Defense Lawyer:The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966); FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, Chapter 6 (1990).
8. HAZARD, *supra* note 6, at 1049.
9. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS, Chapters 5 and 6 (1990).
10. HAZARD, *supra* note 6, at 1051.
11. *Id.* at 1060.
12. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM, 40, 53-54, 56 (1975), saying in part:
    > [T]he attorney's responsibility will vary, constitutionally and otherwise, depending upon whether... the case is civil or criminal.... [T]he criminal defense lawyer is compelled by reasons of practicality and constitutional requirements to present and argue the client's perjury if the client insists upon so testifying. In a civil proceeding between two private parties, however, the practical and constitutional context is significantly different, and different answers to many of the same questions might well be required.

13. *See also* UNDERSTANDING LAWYERS' ETHICS, *supra* note 9, at 102, n. 83, quoting a rule that I drafted for the American Lawyer's Code of Conduct regarding client fraud, distinguishing criminal litigation from civil contexts.
13. HAZARD, *supra* note 6, at 1025.