On Making the True Look False and the False Look True

Murray L. Schwartz
ON MAKING THE TRUE LOOK FALSE AND THE FALSE LOOK TRUE

by

Murray L. Schwartz*

I deeply appreciate the honor of being invited to join the list of distinguished persons who have delivered this prestigious lecture. That invitation arrived almost a year ago to the day. I shall not give you a day-by-day account of how I undertook over the past twelve months to prepare the remarks I shall deliver this morning—including the false starts, the change of topics, the voluntary and involuntary shelving of the project—but I think it only fair that I give you a brief account of how I got where I am and a brief preview of where that is.

In the past, I have undertaken to consider the moral accountability of lawyers for the methods they use and the ends they obtain on behalf of their clients.1 These earlier efforts were limited to lawyers who function as counselors, negotiators, and civil litigators. Deliberately eschewed were criminal defense lawyers. I did not undertake to consider the moral dimensions of the question, "How can you represent him when you know he's guilty?" The invitation to deliver this lecture provided me with the challenge and opportunity to think my way to an answer to that question.

Somewhere along the way, I decided I could make my task somewhat easier if certain rules of professional behavior could be brought into convergence with moral conceptions. And, it seemed to me, the very recently decided U.S. Supreme Court case of Nix v. Whiteside2 provided a foundation for the undertaking. That is, if analysis of that case showed that the Constitution did not protect several very troubling tactics of lawyers, the profes-

* David G. Price and Dallas P. Price Professor of Law, University of California, Los Angeles.

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In the preparation of these remarks, the author was greatly assisted by so many of his UCLA Law School colleagues that to recognize them here would largely replicate the UCLA Law Faculty roster. Two, however, deserve special notice for assistance that went far beyond collegial cooperation. They are Dean Herbert Morris and Professor Stephen C. Yeazell. Further, Ilene Goldberg, UCLA Law '88 and Amy Wells, UCLA Law '88, furnished essential research help. Needless to say, the author is the person to be held responsible for errors, omissions, and wayward views.


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sional rules could—perhaps should—be changed, and the moral dilemmas posed by the question might be reduced to a manageable size. I therefore undertook to consider, as illustrations, two tactics of lawyers that appeared to me to pose the greatest conflict with the spirit if not the letter of *Nix v. Whiteside*: impeachment of truthful witnesses and exploitation of inaccurate testimony.

In the first part of these remarks, I shall report the results of that effort. I shall then consider, in light of that discussion, the moral implications of the "How can you represent him" question.

This effort will not take us into *terra incognita*. Indeed, at least four major articles on significant aspects of these topics have appeared since I began fashioning these remarks. Because I am not able to speak in text and footnotes simultaneously, oral attribution is impracticable, even though we live in a time in which lack of attribution has derailed one Presidential candidate. I must, however, refer to one article published in 1978, "The Role of Counsel in the Suppression of Truth," which is the closest in its analysis and argumentation to my own development. Its author is my old friend, one A. Kenneth Pye, a name, I am advised, that is not unfamiliar to members of the SMU community. Attribution in this instance seemed politic, even if it were not required.

I. JUSTIFICATION OF TRIAL TACTICS

I begin with consideration of the two trial tactics. The first is the attempt of lawyers, through impeachment or other types of cross-examination, to impugn or negate the testimony of witnesses they know to be telling the truth. In the terms of the title of this talk, that is the attempt to make the true look false. The second is the exploitation by lawyers of evidence, introduced by the other side, that is favorable, but which they know to be incorrect. In the terms of the title of this talk, that is the attempt to make the false look true.

What I shall first discuss is how these tactics match up against the 1985 decision of the Supreme Court of the United States in *Nix v. Whiteside*, which I shall describe in an oversimplified way.

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Earlier discussions are cited in Pepper, *The Lawyer's Amoral Ethical Role*, supra, at 613-14 nn.1, 3, 5, 7; see also A. GOLDMAN, *The Moral Foundations of Professional Ethics* 90-155 (1980).

Just before his trial for murder, the defendant Whiteside told his court-appointed attorney Robinson that he intended to testify that when he stabbed the deceased, he thought the deceased was pulling out a pistol and that he had seen something metallic in the deceased's hand. The last part—about "something metallic"—was inconsistent with Whiteside's prior statements to Robinson and with other evidence. Robinson told Whiteside that such testimony would be perjury. When Whiteside stated that he intended nevertheless to testify he had seen something metallic, Robinson responded that if Whiteside insisted on committing perjury, he would advise the court that Whiteside was committing perjury, seek to withdraw, and attempt to impeach Whiteside's false testimony. When Whiteside later took the stand, he explained why he thought the deceased had a gun, but admitted that he had not actually seen one and did not claim that he had seen something metallic. The jury returned a verdict of second degree murder.

In his attack on his conviction, Whiteside subsequently contended that he had been deprived of a fair trial by Robinson's threats, which prevented him from testifying that he had seen a gun or something metallic. The case ultimately reached the Supreme Court of the United States. Chief Justice Burger wrote for the majority of five Justices; Justice Blackmun wrote a concurring opinion for Justices Brennan, Marshall, Stevens and himself; and Justice Stevens wrote a concurring opinion. 5

Whiteside's contention was assessed under the two standards for determining whether a defendant failed to receive effective assistance of counsel, the Strickland v. Washington 6 "prejudice" and "performance" standards 7 set forth in the preceding term. All nine Justices agreed that Whiteside's contentions did not, as a matter of law, satisfy Strickland's prejudice standard. The majority also concluded that Robinson's performance had satisfied Strickland's performance standard: his performance had been well within the range of effective representation under "prevailing professional norms." 8

Further, the majority stated—if it did not expressly hold—that Robinson's behavior was precisely what it ought to have been. Robinson had performed "[t]his special duty of an attorney to prevent and disclose frauds

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5. Justice Brennan and Justice Stevens wrote separate concurring opinions. 475 U.S. at 176, 177, 190.
7. Id. at 678. To prevail under a claim of ineffective assistance of counsel, defendant must show both deficient performance and prejudice of the defense by the deficient performance. In other words, defendant must show that counsel's errors were so serious that they deprived him of a fair trial, one whose result is reliable. Id. However, defendant need not show that counsel's deficient conduct more likely than not altered the outcome in the case. Id. at 693. Rather, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." Id. at 694. The performance standard requires that the defendant show counsel "made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment." Id. at 687. This standard requires a showing that counsel's performance was not reasonable under "prevailing professional norms." Id. at 688. The defendant must identify the acts or omissions of counsel that he claims are unreasonable. In considering the claim, the court must determine if, in light of all the circumstances, the conduct was outside the range of professionally competent assistance. Id. at 690.
8. 475 U.S. at 175.
upon the court . . . ." The concurring Justices argued that neither the second nor the third point was required for decision; indeed, in their view the Supreme Court of the United States had no jurisdiction to promulgate rules of ethical conduct for lawyers practicing in the state courts.

Whatever the limitations and disagreements, all members of the Court expressed the view that the reason for the prohibition of perjury is that it undermines the principal objective of the trial: the determination of truth. The majority was explicit about "the very nature of a trial as a search for truth" and "the responsibility of an ethical lawyer, as an officer of the court and a key component of a system of justice, dedicated to a search for truth, [being] essentially the same whether the client announces an intention to bribe or threaten witnesses or jurors or to commit or procure perjury . . . ." A contrary rule "is wholly incompatible with the established standards of ethical conduct." The concurring Justices agreed: "All perjured relevant testimony is at war with justice since it may produce a judgment not resting on truth. Therefore it cannot be denied that it tends to defeat the sole ultimate objective of a trial."16

I propose to take seriously the emphasis in both the majority and the concurring opinions that the principal objective of the trial is the determination of truth. I propose to consider what the world of professional behavior would look like if we accepted that description of the primary objective of our litigation system. Specifically, I propose to examine what would happen to specific tactics of lawyers were we to take seriously that statement of the objective of a trial. From this vantage point, I shall pursue the implication of Nix v. Whiteside that truth-obscuring tactics, other than perjury, bribery, and threats to jurors and witnesses, are highly suspect, if not clearly improper.

The agreement among the Justices in Nix v. Whiteside that the objective of a trial under the adversary system is the determination of truth would on its face seem unexceptionable if not self-evident. This is not to say that one who devises an adjudicatory system may not have other objectives in mind, or that there will not be constraints upon the process that themselves make the

9. Id. at 171.
10. Id. at 189.
11. Id. at 190.
12. In ABA Comm. on Ethics and Professional Responsibility, Formal Op. 7-353 (1987), the Committee adopted the holding of Nix v. Whiteside in its interpretation of MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3(9), (2), (4), and 3.3(b) (1983). Specifically, the Committee opined that, absent contrary state requirements, a lawyer who learns of client perjury prior to the conclusion of the proceeding has an obligation to disclose the perjury to the tribunal, and a lawyer whose client intends to testify falsely before a tribunal must advise the client of the consequences of giving false testimony, including the lawyer's study of disclosure. If the client persists, the lawyer must limit the examination of the client to subjects on which the client will testify truthfully, not permit the client to testify, or disclose the client's intention to the tribunal.
13. 475 U.S. at 166.
14. Id. at 174.
15. Id.
16. Id. at 185. The quotation comes from, and was cited to, In re Michael, 326 U.S. 224, 227 (1945).
determination of truth more difficult, if not impossible. It is at least to say that one who devises an adjudicatory system would scarcely operate on the assumption that whether the system is likely to ascertain the truth is an irrelevant consideration. Clearly, it would be a necessary objective of the system. It is also to say that one who devises an adjudicatory system is likely, as did the Supreme Court, to put the objective of ascertaining the truth at the very top of the list of objectives.

The role of the lawyer within our adjudicatory system derives from its structure. Within that system each party is assigned the principal role in presenting and prosecuting its own cause and in challenging the cause of the opposing party; the judge and jury are impartial and relatively passive arbiters. This separation of functions between the parties and the use of lawyers to advance their opposing interests constitute the essential elements of the adversary system. From this clash of adversaries, it is said, the truth will emerge, or at least will emerge more frequently than through any other mode of proceeding. From this conception comes the model of the advocate as the single-minded champion of the client.

That this model of the advocate does not always enhance or reinforce the objective of truth-determination is made apparent by Nix v. Whiteside. On the one hand, exploitation of a client's perjury implements the lawyer's total commitment to the client's cause; on the other hand, it interferes with the determination of truth. Thus, the prescription of rules of behavior for the advocate is caught between the truth-determining purpose of the trial and the lawyer's commitment to the client.

It may be thought that I have too quickly disposed of what I have blandly termed "constraints upon the process that themselves make the determination of truth more difficult, if not impossible." It is a commonplace that evidentiary privileges and exclusionary rules can and do keep truthful, probative evidence from the trier of fact. Although some of those rules, such as those applying to coerced confessions, are based, in part at least, upon doubts about reliability of the evidence, other exclusions have a different foundation: vindication of the values upon which the fourth and fifth amendments are founded. If the likelihood that evidence is true were the only determinant of its admissibility, the rules of evidence admissibility would be very different from what they are. That this is not so is due of course to the existence of other values, values derived from such fundamental parts of our legal corpus as the fourth amendment. The deliberate social choice (founded upon constitutional interpretation) has been to subordinate the truth-ascertainment function of the trial to these other values. Even so,

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17. This description of the structure of the adversary trial and the lawyer's role within it is more fully presented in Schwartz, Zeal of the Civil Advocate, supra note 1. Other recent descriptions may also be found in Goodpaster, supra note 3; Pepper, The Lawyer's Amoral Ethical Role, supra note 3; Subin, supra note 3.

18. The most fervent defender of this model has been Professor Monroe Freedman. See Freedman, Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966).
the continuing controversy over the fourth amendment’s exclusionary rule suggests that even that fundamental choice has not been an easy one.

This conflict between truth-ascertainment and these other values suggests the need for a general principle to determine which should prevail. If, as Nix v. Whiteside states, the primary objective of the adversary trial is the determination of truth, I submit the following principle:

The adoption of a procedural, evidentiary, or professional rule that requires or permits the obscuring, distortion, or prevention of the admission of truthful evidence, or that exploits inaccurate evidence, requires a powerful justification.

I shall proceed upon the assumption that the necessary powerful justifications support the existing rules providing for the exclusion of truthful evidence, such as the privileges and the protection of fourth and fifth amendment values. What I shall consider is the application of the above principle to the impeachment and cross-examination of truthful witnesses and the exploitation by an advocate of testimony known to be false.

I have chosen these two tactics because they seem to be stark examples of C.P. Harvey’s comment:

As to the “art” of the advocate, there is no inherent reason why it should be respectable at all. On the contrary, a cynic, taking a leaf out of the works of Mr. Stephen Potter might define it as “spokesmanship” or the art of misleading an audience without actually telling lies.”

Prima facie, impugning or negating the truthful testimony of a witness interferes with the truth-ascertainment objective of a trial, and exploitation of inaccurate evidence does so as well. What is in order, then, is a consideration of the justifications that are commonly asserted to support these practices, to determine whether they constitute “powerful justifications” that properly subordinate truth-ascertainment.

I turn to the tactic of impeaching the truthful witness and shall first briefly consider several often-cited justifications for this tactic. I shall do so briefly, because I believe both that they have been effectively criticized by others and that Nix v. Whiteside has completely disposed of those justifications.

One such justification is that lawyers do not or cannot “know” whether testimony of clients or witnesses is true or false. Sometimes this argument has been expressed in terms that stress the indeterminacy of truth, sometimes as the proposition that “truth” in a lawsuit is that which a jury deter-

20. Although familiar to trial lawyers, the tactic attained controversial status when used as an illustration in Freedman, supra note 18.
22. Freedman, supra note 18, at 1472; Subin, supra note 3, at 136-43. The lawyer should not interpose his beliefs as to the facts in a case. The ABA’s MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(C)(4) (1980) provides in part that a lawyer shall not “[a]ssert his personal opinion as to the justness of a cause, as to the credibility of a witness . . . or as to the guilt or innocence of an accused.”
mines, not that which a lawyer knows or thinks he or she knows. In Nix the Supreme Court unanimously accepted the trial court's conclusion that Whiteside's lawyer Robinson knew that Whiteside intended to commit perjury and that Whiteside's proposed testimony about seeing "something metallic" would be perjurious.

A related justification is based on the reactions of the client, not the lawyer: once clients become aware that their lawyers will refuse to impeach truthful witnesses, they will be less forthcoming in disclosing matters they believe will lead their lawyers to engage in such behavior. In both its evidentiary and professional forms, the lawyer-client privileged communication doctrine is thought to be essential to effective representation. Clients who are concerned that their lawyers will turn their confidences against them will not reveal all they know. This secretiveness will, it is argued, cut against their own interests, since it may both keep from their counsel favorable information and also disable them from being fully prepared for the introduction of unfavorable evidence.

Any doubt about the inadequacy of this justification was dispelled by Nix v. Whiteside. That case made clear that the defendant could not complain that his lawyer threatened to expose his false testimony even though the lawyer's knowledge of the truth or falsity came from the client. It is hard to see why the client should fare any better with respect to impeachment of a truthful witness if the lawyer's knowledge of the truthfulness of that testimony is based substantially, if not wholly, upon the client's disclosure.

A different type of justification is deontological; that is, it does not depend upon consequences: there is something about the adversary system, criminal prosecutions, or the lawyer-defendant relationship that requires the criminal defense lawyer to take advantage of every possibility on behalf of the client, excepting only that which is clearly illegal. From this point of view, it is simply "wrong" to require the defendant's professional representative not to impeach truthful witnesses.

"Guilty" or not, a criminal defendant has a right to representation, and the defense attorney has a correlative duty to represent the defendant. That dyadic relationship does not, however, determine the extent of the limitations upon how the lawyer may represent the defendant. Nix v. Whiteside makes clear that not everything goes.

The most common defense of the impeachment of the truthful witness is that the prosecution has the burden of proof beyond a reasonable doubt, and cross-examination of a witness known to be telling the truth is merely a way of forcing the prosecution to carry that burden. Close analysis suggests a

23. See M. FREEDMAN, Lawyers' Ethics in an Adversary System 43-49 (1975) (attorneys are obligated to try to impeach adverse witnesses they know are telling the truth); see also Ball, supra note 21, at 568-71.
24. 475 U.S. at 172.
25. Freedman, supra note 18.
27. Babcock, Defending the Guilty, 32 CLEV. ST. L. REV. 175 (1983-1984); Freedman,
somewhat more complex line of argument.

Assignment to the prosecution of a beyond-a-reasonable-doubt burden of proof makes clear that, if errors are to be made, they are to be made on one side only. We are willing to tolerate verdicts of not guilty, even though a less rigorous standard might produce a larger number of verdicts that correspond with the actual facts. In the sense of the extent to which the trier of fact must be convinced of the correctness of the proposed outcome, the search for truth is one-sided.\textsuperscript{28} If errors are to be made by the trier of fact, they are to be made on one side of the scales only. And, from this assignment of burden of proof to the prosecution, it is argued, impeachment of a truthful witness must follow. For that tactic will "put the prosecution to its burden."\textsuperscript{29}

The nexus between cross-examination and burden of proof is not, however, self-evident. The burden of proof justification requires a fuller analysis, one that requires a consideration of the probativeness of evidence, including both its relevance and weight.

Whether the testimony of a witness is admissible at all depends upon its basis and relevance. Relevance needs no explication. Basis is a different matter. It is not enough that a witness testifies she knows the defendant killed X, even if the defendant's lawyer knows that the defendant killed X. If the witness' testimony about her knowledge is based upon the fact that a friend or the police told her that the defendant killed X and that she always believes her friend or the police, that testimony would be inadmissible.

The defendant's lawyer would not be engaging in improper examination if he adduced that the testimony of the witness is inadmissible on this ground, even though that testimony is correct as to the ultimate fact. The predicate or basis for the witness's statement would be insufficient for her testimony to be put to the trier of fact. Indeed, if that was the only testimony the prosecution was able to offer, the defendant would unquestionably be entitled to an acquittal.

The weight to be given to the testimony of a truthful witness depends upon what, borrowing from the 1977 decision of the Supreme Court of the United States in \textit{Manson v. Brathwaite},\textsuperscript{30} I shall call the "level of certainty" of the witness. A witness might testify about the occurrence of an event by describing her state of mind on the witness stand in a variety of ways: "I know," "I'm almost positive," "I'm pretty sure," "I think so," or "I'm more certain than not," expressions that reflect different levels of certainty as perceived by the witness herself. In turn, this level of certainty is related to what, again borrowing from \textit{Manson v. Brathwaite}, I shall call the "quality of the evi-
Truthful "I know" statements are of a higher evidential quality than truthful "I'm pretty sure" statements.

This "quality of the evidence" is related to the burden of proof. To sustain the higher burdens of proof, such as beyond a reasonable doubt and clear and convincing, requires a higher quality of evidence than does sustaining a lower burden, such as a preponderance of the evidence. Accordingly, there would seem to be little dispute that a defense lawyer is entitled to bring out on cross-examination the witness's self-perceived level of certainty, insofar as it pertains relevantly to the burden of proof. Only in the rare case in which the defense lawyer knows that the witness's self-perceived level of certainty is correct may cross-examination be barred.

If this is so, it seems equally the case that the defense attorney should be entitled to show that the witness is not justified in the level of certainty she believes she has. Although the witness believes she is "certain," the circumstances upon which the witness relies may not justify that certainty. More accurate would be a statement by the witness that she is "almost positive" or is "pretty sure." If this is the case, problems of the witness with sensory perceptions (sight, hearing), or confusion or distraction, are relevant matters that are appropriately the subject of cross-examination of a witness. Even though the ultimate conclusion is true, the witness's level of certainty as to that conclusion may be over-stated. To show that the witness is incorrect in her own assessment of her level of certainty would also seem to be appropriate cross-examination.

Does it make a difference that the cross-examiner is the prosecuting attorney, the defense attorney in a criminal case, or the lawyer for the plaintiff or the defendant in a civil case?

Those who wrote the American Bar Association's Standards Relating to the Administration of Criminal Justice thought there was a difference between the defense and the prosecuting attorney in this respect. The current Prosecution Function Standards provide that a prosecutor is prohibited

31. Id. at 114.
32. That this is so would seem indisputable. Authoritative support is scarce, however. The issue has appeared most frequently in eyewitness identification cases. See United States v. Anderson, 739 F.2d 1254, 1257-59 (7th Cir. 1984) (considering the so-called "Telfaire" instructions on the issue (United States v. Telfaire, 469 F.2d 552, 558 (D.C. Cir. 1972)). The specific question, whether—absent other evidence—a jury's inference of a higher level of certainty than that expressed by the witness would be permitted to sustain the burden of proof beyond a reasonable doubt requirement, has seldom been addressed. In almost all the reported cases the eyewitness testimony did not constitute the entire corpus of the prosecution's proof, so that the jury was permitted to consider other evidence in determining the weight to be given the eyewitness's testimony. Cf. L. SAND, J. SIPERT, W. LAUGHLIN & S. REIS, MODERN FEDERAL JURY INSTRUCTIONS 7-20 & comment (1985).
33. When the witness says "I know," and the lawyer is certain that the witness is honestly and accurately reflecting her level of certainty ("knows"), none of the reasons that support the additives of factors to show the witness is mistaken about her level of certainty exists. No cross-examination in that rare case should be permitted.
34. STANDARDS FOR CRIMINAL JUSTICE (2d ed. 1980 & Supp. 1986) is a compilation of standards relating to the function of prosecution and defense attorneys. Standards relating to the function of the prosecutor are contained in Chapter Three. The companion standards on the function of the criminal defense lawyer are contained in Chapter Four.
from using "the power of cross-examination to discredit or undermine a wit-
ness if the prosecutor knows the witness is testifying truthfully." On the
other hand, the Defense Function Standards provide: "A lawyer's belief or
knowledge that the witness is telling the truth does not preclude cross-exam-
ination, but should, if possible, be taken into consideration by counsel in
cconducting the cross-examination." 36

At first blush, that differentiation between prosecution and defense coun-
sel appears quite consistent with a burden of proof analysis: inasmuch as the
prosecution has the burden of proof beyond a reasonable doubt, the defense
lawyer may properly cross-examine to show that the testimony of the wit-
ness is at such a low level of certainty as not to satisfy the quality of the
evidence required to sustain that burden. On the other hand, the defense
attorney has no burden at all. There is accordingly no similar permission
accorded to the prosecuting attorney to challenge the testimony of witnesses
for the defense, as long as the prosecuting attorney is aware that their testi-
mony as to the underlying facts is true and that they are testifying as to their
own knowledge regardless of the correct level of certainty.

However, this reliance upon the burden of proof runs into difficulty when
it is applied to civil litigation. Given the preponderance of evidence stan-
dard that is applicable in civil cases, with its marginal burden on the plain-
tiff, it could reasonably be argued that almost any level of certainty of a
witness would suffice. The quality of evidence that will sustain that burden
is at the lowest level. If that is so, it might be argued that cross-examination
of the truthful witness should not be permitted when the lawyer knows that
the witness is testifying from her own knowledge and that the testimony
accurately describes the underlying facts.

That argument does not seem sufficient to me. The weight a jury accords
a witness's testimony may well depend upon the jury's conclusion about the
level of certainty of the witness. The testimony of a witness whom the jury
believes really "knows" what happened will be given more credence in the
jury's overall assessment than a witness whom the jury concludes is only
"pretty sure" of the event.

This suggests that what is at stake is not so much the burden of proof but
the criteria for the assessment of the quality of evidence submitted by either
party to a lawsuit, whether it be civil or criminal.

How then can the difference in rules between prosecuting and defense at-
torneys be justified? The reason in my view has to do with a more general
constraint imposed upon the prosecuting attorney, one that is not directly
concerned with the burden of proof. That constraint is the obligation of the
prosecuting attorney to make timely disclosure to the defendant of the exist-
ence of evidence that tends to negate the guilt of the accused. 37 If the prose-

35. Id. Standard 3-5.7. This sentence is preceded by: "[t]he prosecutor's belief that the
witness is telling the truth does not preclude cross-examination, but may affect the method and
scope of cross-examination." Id.

36. Id. Standard 4-7.6.

37. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-102(B) (1980); MODEL
RULES OF PROFESSIONAL CONDUCT Rule 3.8(d) (1983); see also United States v. Bagley, 105
cuting attorney knows that the defense witness’s testimony that is favorable to the defendant is true, that public lawyer has an obligation to disclose the basis of that knowledge to the defendant. Prohibiting the prosecuting attorney from attempting to show that the favorable testimony of a defense witness lacks a certain level of certainty is at the least totally consistent with that obligation, if it is not required by it.

In sum, I would suggest, that in a regime governed by the *Nix v. Whiteside* version of the adversary trial:

(1) A lawyer who knows that the testimony of an adverse witness is accurate as to the underlying facts should nevertheless be permitted to cross-examine that witness to show the level of certainty that is the basis of the witness’s testimony, unless the lawyer knows that the witness’s own characterization of her certainty is correct.

(2) This proposed rule is based, not so much upon a rationale of burden of proof, as upon the relationship between the witness's level of certainty and the quality of her evidence. Although the quality of the evidence is related to the burden of proof, its impact is not limited to that burden. Quality of evidence considerations should be applicable to all evidence, whether submitted by a party with the burden or by a party who has no burden at all.

(3) The general policy of requiring prosecuting attorneys to advise the defense of evidence that is favorable to the defense also prohibits the prosecuting attorney from cross-examining a defense witness whom the prosecuting attorney knows is telling the truth.

The other half of my title, “Making the False Look True,” refers to what I have termed the exploitation of favorable evidence known to the lawyer to be incorrect. The issue is well presented by the State Bar of Michigan Ethics Committee in a 1987 Opinion. The defendant was charged with armed robbery of the victim. The defendant confided to his lawyer that he had indeed robbed the victim, stolen his watch, and knocked him unconscious, all at 2:00 p.m. When interviewed by the investigating detectives, the victim was mixed up about the time and recalled it as occurring at 11:00 a.m. At the preliminary examination months later, the victim relied on the detectives' notes to help him recall the time. Both the defendant and the defendant's lawyer are confident that the victim will testify at the trial that the robbery occurred at 11:00 a.m. Although the defendant does not propose to take the stand himself, he can produce two friends who will testify truthfully that at 11:00 a.m. he was with them, providing an alibi defense.

The question put to the Michigan committee was whether it was ethically proper for the lawyer to subpoena the two friends to provide the defendant with an alibi defense with their truthful testimony that the defendant was with them at 11:00 a.m. Note that the lawyer could not put the defendant on the stand to testify truthfully about his whereabouts at 11:00 a.m., because


the defendant would surely be called upon to respond to questions about the robbery that were independent of the time of its occurrence, and he would have to be advised that he would have to answer all questions truthfully. Were he to do otherwise, under the majority opinion in *Nix v. Whiteside*, the lawyer would have a professional obligation to disclose the falsity.

Should the lawyer (and the defendant) be able to avoid this risk by limiting the alibi testimony to that of the defendant's friends, who themselves run no risk of implicating themselves or him in the robbery? If the answer to that question is in the affirmative, it is evident that the lawyer will then be exploiting evidence he knows is untrue, the victim's recollection of the time of the robbery.

What are the "powerful justifications" that support this interference with the determination of truth? To be put aside quickly are general justifications such as, "a lawyer never knows," "the client won't tell all," and "the very nature of the adversary system demands it." These justifications were expressly or impliedly rejected in *Nix v. Whiteside*. I have similarly rejected them as justifications for impeachment of the truthful witness. They seem no more persuasive with respect to the exploitation of false evidence.

Does the burden of proof argument constitute a sufficiently "powerful justification" to permit professional conduct that obfuscates the ascertainment of truth in this way? Is exploitation of inaccurate testimony of a prosecution's witness any different from the exploitation of the defendant's own perjurious testimony?

As I have stated, the burden of proof standard in criminal cases expresses a powerful concern about erroneous conviction. It encompasses in procedural language the apothegm that it is better that ten guilty go free than that one innocent person be convicted. It reflects a decisional system in which, to the maximum extent, errors are to be made on one side only. If the prosecution's own case does not carry the necessary burden, the system demands a not guilty outcome, no matter how erroneous that outcome might appear to those who "know" the "true" story. Thus, the answer is that the burden of proof is a sufficiently powerful justification to permit exploitation of inaccurate testimony.

However, it is important to be clear on the limitation imposed by reliance on the burden of proof as the "powerful justification." The defendant's lawyer could not, in the robbery hypothetical, exploit the victim's mistake as to time by arguing that it showed the defendant did not commit the robbery at all, for that would be a knowing false statement by the lawyer. The lawyer could argue only that the testimony of the victim and the friends (known to the lawyer to be truthful) showed that the prosecution had failed to carry its burden of showing that the defendant had committed the robbery. In short, untrue testimony should not be exploited for its probative value; it should be used only to show that the prosecution has failed to meet its burden of proof.

39. See *supra* text accompanying notes 20-25.

40. See *supra* text accompanying notes 27-29.
I have previously suggested reasons why, unlike the defense attorney, the prosecuting attorney may not cross-examine a defense witness whom the public official knows is telling the truth. These seem equally applicable to an attempt by the prosecuting attorney to exploit defense evidence the prosecution knows is inaccurate. The same policy reasons should preclude that tactic on the part of the prosecuting attorney.

What about civil litigation? Given pre-trial devices such as requests for admissions, interrogatories, discovery, and depositions, the issue of the kind of mistake with which the Michigan committee was concerned is far less likely to arise. Nevertheless, a contrast between civil and criminal proceedings is illuminating. In a civil proceeding, is the burden of proof a sufficiently “powerful justification” to permit the exploitation of evidence known to be inaccurate—a tactic that unquestionably interferes with the ascertainment of truth?

Consideration of the function of the burden of proof in a civil case requires a negative answer:

[The burden of proof . . . by a “preponderance of the evidence” . . . is not great, and it is often shifted through the device of presumptions. In reality, it merely resolves the question how to decide when the opposing positions are in equipoise. It does not, as does the burden of proof in criminal cases, shift the scales markedly in the defendant’s favor. It does not speak forcefully to the probability of the defendant’s accuracy over that of the plaintiff.]

In sum, in a Nix v. Whiteside regime:

1. A criminal defense lawyer should be permitted to exploit testimony introduced by the prosecution that he or she knows is untrue, but only for the purpose of showing that the prosecution has not satisfied its burden of proof with respect to the matter with which the evidence is concerned.

2. Because of the policy requiring the prosecuting attorney to disclose to the defendant any evidence that may be favorable to the defendant, a prosecuting attorney should not exploit evidence he or she knows is untrue.

3. Lawyers in civil cases should not exploit evidence they know is untrue because the burden of proof upon the parties in civil cases does constitute a sufficiently powerful justification to override the truth-ascertainment objective of the trial.

II. MORAL ACCOUNTABILITY

In the beginning of this lecture, I stated that I proposed to discuss two topics: the justifications for certain tactics that lawyers use in litigation and the implications of that discussion for the moral assessment of the professionally proper behavior of criminal defense lawyers. Although the analysis of the tactics I have presented would reduce the incidence of cases in which lawyers achieve acquittals of clients they know have engaged in the criminal

41. See supra text accompanying note 35.
42. Schwartz, Zeal of the Civil Advocate, supra note 1, at 552.
conduct with which they are charged, by means that deliberately distort the truth, it has not eliminated them. And these are cases that at least prima facie raise serious moral issues. Even if the principles I have proposed were incorporated as substantive, procedural, or professional rules, there would remain such cases.

What this leads to is consideration of how the general question of a lawyer's moral accountability should be answered in the specific case of the criminal defense attorney; that is, may the criminal defense attorney who violates no substantive procedural or professional rule be called to account on a moral basis for the means used or the ends achieved for the client?

In previous discussions of the more general question, I concluded that lawyers may be held morally accountable for their behavior as professionals when they further the aims of their clients. Just as the client may be charged with morally wrongful conduct in achieving a lawful result, so the lawyer may be charged with morally wrongful conduct in lawfully assisting the client to achieve that result. The role of lawyer does not provide an absolute shield against a charge of immorality.

The analysis of the moral accountability of the civil advocate rested upon several assumptions: first, that morality is not coterminous with legality, and second, that the conduct or the result of the civil litigation was "immoral;" that is, the litigation had effected a moral wrong to the opposing party. Those assumptions, combined with the fact that lawyers in the United States generally have discretion to accept or reject clients and causes, led to my conclusion: "No persuasive reason appears as to why the individual lawyer who assists in achieving that [immoral] outcome should not be morally accountable for it." It followed that the lawful behavior of the lawyer could properly be criticized on moral grounds.

My analysis did not stop there. If all lawyers were to take seriously their moral accountability for representation in civil cases, a putative litigant with an apparently legally valid right could be unable to obtain a lawyer to help vindicate that right because all otherwise available lawyers would decline the representation on moral grounds. This possibility, remote though it may be, posed the fundamental question whether there would be something immoral about a legal system that made it impracticable for one with legal rights to vindicate those rights because all lawyers declined the representation.

My solution to this possible conflict—between the moral integrity of the system as a whole and the potentially immoral result effected by that system in a particular case—was a proposed algorithm by which a hypothetical judge might appoint a lawyer to represent such a putative party. That algorithm was composed of elements that are similar to those elaborated by the U.S. Supreme Court in *Mathews v. Eldridge* and *Lassiter v. Department*.

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43. Id. at 556-57; Schwartz, Professionalism and Accountability, supra note 1, at 671.
44. Id. at 558-59; Schwartz, Zeal of the Civil Advocate, supra note 1, at 557.
45. Id. at 558-59; see Donagan, Justifying Legal Practice in the Adversary System, in The Good Lawyer, supra note 1, at 123, 128-30.
nature and substantiality of the legal interests sought to be vindicated; gravity of the injury or damage to the party who would suffer the moral wrong as a result of the litigation; and adequacy of presentation of the cause without counsel.\(^{48}\)

If the hypothetical judge concluded that the moral balance required representation, he or she would appoint a lawyer to do so. This then, posed the so-called “last-lawyer-in-town” problem. What recourse would be available to the lawyer who was so assigned, but whose own moral sensibilities required that the representation be declined? I suggested that ultimately the lawyer would be remitted to civil disobedience based upon his or her moral convictions.\(^{49}\)

In these earlier efforts, I left open the moral accountability of the criminal defense lawyer. That this may have been the better part of valor may be discerned from the more than a few thoughtful recent discussions of the issue. These have varied as widely as could be: the lawyer is totally immune from moral assessment;\(^{50}\) whether the lawyer is immune depends upon the particular circumstances;\(^{51}\) and the criminal defense lawyer has no immunity at all.\(^{52}\)

Should the conclusion as to moral accountability be different for the criminal defense lawyer than for the civil advocate? Two differences between the roles of civil litigator and criminal defense lawyer come to mind.\(^{53}\) The first derives from the possible moral differences between the outcomes of a civil lawsuit and of a criminal prosecution.

In civil litigation the moral wrong is suffered by an identifiable person or entity, while in the acquittal of a “guilty” person it is, arguably, an abstraction, the “state,” that has lost, not an identifiable entity or person. In related fashion in civil litigation, it is the very outcome—award of damages, injunction, or denial of relief—that affects the positions of both parties, and thus may itself cause or right a moral wrong. In the criminal case only the defendant is, arguably, immediately affected by the result. There is no grant or denial of recompense to the victim. Thus, the argument would be that the moral quality of the “wrong” is different.

Yet this focus on the absence of an identifiable “party” and upon the immediate outcome is too limited. There are other consequences of an erroneous not guilty verdict in a criminal case. It may imply disbelief in the testimony and credibility of the victim; other witnesses’ reputations may be unjustifiably impugned. A verdict of not guilty may imply not only that the

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48. Schwartz, Zeal of the Civil Advocate, supra note 1, at 561.
49. Id. at 562-63. The analysis has been met with less than universal acclaim. See Ball, supra note 21, at 566-68; Pepper, Rejoinder, supra note 3, at 660.
50. Pepper, The Lawyer’s Amoral Ethical Role, supra note 3; Saltzburg, Lawyers. Clients and the Adversary System, 37 MERCER L. REV. 647 (1986).
52. Luban, supra note 1; Subin, supra note 3.
53. The special characteristics of the criminal trial are elaborated in Schwartz, Zeal of the Civil Advocate, supra note 1, at 548-50.
victim was mistaken or lied, but other invidious conclusions, such as the defendant in an assault with a deadly weapon case was merely protecting himself against an unwarranted vicious assault by the victim, when the opposite had in fact taken place.

Moreover, the argument for moral immunity on the asserted lack of an identifiable person who is immediately affected by the outcome of the criminal trial runs afoul of deep-seated notions of the moral purposes of the criminal law. In Kantian terms, failure to punish the guilty is, like punishment of the innocent, a fundamental injustice, a failure of the community's sense of justice and order. A community that fails to attain that end as a result of its rules for the determination of guilt and for the behavior of those, like lawyers, who implement them, has effected an immoral result, one that is unfair not only to the community at large, but also to those in similar circumstances who have not violated the law. 54

In short, this distinction between the civil and criminal lawyer will not carry the day.

A second possible difference turns on the right to counsel. Under our basic law, every criminal defendant is entitled to the effective assistance of counsel. No such general right exists in civil litigation. We have thereby decided that legal representation in criminal defense is a value of the highest social order. As such, we have made what is essentially a moral choice in favor of representation, recognizing that the price to be paid for the vindication of that value is the likely acquittal from time to time of those who are “guilty.”

Nevertheless, if representation by counsel were justified solely because the innocent need protection, a lawyer who knowingly assisted a “guilty” client to escape punishment would have no defense against a claim that the acquittal effected a moral wrong. But the reasons for the right to counsel are not limited to the protection of the innocent. Other reasons include such matters as assuring the appearance of a fair trial process and of constraining government officers to follow the rules established for their behavior, those powerful justifications to which I previously referred. It is inevitable that the full vindication of those values will result from time to time in “incorrect” not guilty outcomes.

Further, from a systemic point of view, it would be quite odd for the community to require the presence of lawyers to defend those charged with crime, whether or not they have committed the offense with which they are charged, and then for the community to condemn the lawyer who has faithfully carried out this assignment. 55

It should not make a difference in the community’s assessment of the morality of the lawyer’s behavior whether the means by which the lawyer is able to effect the acquittal of a defendant known by the lawyer to have com-

55. In using the term “community,” I intend to convey the idea of a consensus of values that underlies the legal system, as well as common understandings of what constitutes moral behavior. As I have previously asserted, within that system legality is not co-terminous with morality. The community may consider an act legal, but not moral.
mitted the offense that has been charged is or is not supported by a “powerful justification.” The community requires the lawyer to perform effectively according to “prevailing professional norms.” It is hard to imagine that prevailing professional norms do not include use of all legally available procedural, evidentiary, and substantive rules that are favorable to the defendant, whether those rules are supported by “powerful justifications” or not. In language I previously used, the criminal defense lawyer is “immune” from being called to moral accountability by the community.

There is, however, another moral perspective, that of a “moralist,” someone not bound by the community’s values. That the community’s sense of moral correctness may not always be congruent with that of the moralist needs no extensive argument. History—and not so distant at that—suggests that the community has not always reached the right moral assessment. From the moralist’s point of view, the commitment of the community to the enterprise will not suffice to support the claim of immunity.

The standards of the “moralist” and those of “the community” may coincide, but they may differ. The community’s assessment of what constitutes immoral behavior is not limited to that behavior which is illegal. Thus the community as well as the moralist might well condemn on moral grounds the seller of the Saturday Night Special or a plea of the statute of limitations against a claim for payment of a debt unquestionably owed to a currently impoverished creditor by a wealthy debtor who would scarcely notice the loss of the amount of the debt. On the other hand, community judgments about what constitutes moral or immoral behavior are necessarily and heavily affected by existing social institutions and legal concepts. For example, the concept of the burden of proof beyond a reasonable doubt—adumbrated earlier—rests upon an assumption of a particular mode of adjudication of criminality, the adversary system.

The moralist who is not limited by the community’s social institutions and legal concepts is not bound to accept the burden of proof as a “powerful justification.” The moralist may well view the adversary system as being unnecessarily protective, in some circumstances if not all, of those who have committed offenses, to the detriment of victims and of the community itself. The moralist might wish to avoid the acquittal of the “guilty” by moving toward an adjudicatory system that imports aspects of, say, the inquisitorial system.

Accordingly, although it cannot be gainsaid that the community’s sense of what is morally correct can be a powerful factor in how the moralist makes moral assessments, neither can it be gainsaid that the problem of moral account does not stop there.

The perspective of the moralist implicates the morality of the legal system of which the criminal defense lawyer is, by definition, an integral part. By hypothesis, the argument based on the right to counsel will not suffice from the moralist’s point of view for a conclusion that the lawyer is immune to

56. Schwartz, Zeal of the Civil Advocate, supra note 1, at 559-60.
57. Zabella v. Pakel, 242 F.2d 452 (7th Cir. 1957).
being called to moral accountability. The moralist is not bound to accept either the morality of the system in general or as applied in particular circumstances. From the point of view of the moralist, then, the lawyer may be called to moral accountability, so that the adequacy of the lawyer's defense to the charge of immoral behavior may be independently judged. In the final analysis, the criminal defense lawyer, like the civil litigator and the non-litigating counsel, must respond to the question, "How can you represent him . . . ?"

If that is so, there remains the question how, in a particular case, the moralist should determine whether the lawyer's justifications are a sufficient response to the charge of immoral behavior. In my view, the standard by which that question should be answered is similar to the standard for assessing truth-suppressing or distorting procedural, evidentiary, or professional rules: Are the tactics by which the lawyer effects the acquittal of a defendant he knows has committed the offense with which he is charged supported by powerful moral justifications? In the ordinary case, if the answer to that question is affirmative, the moralist's standard will be met; if it is negative, the standard will not be satisfied.

To illustrate, I return to the two practices I have discussed today: cross-examination of the truthful witness and exploitation of incorrect testimony. System-bound I may be, but it does seem to me that in the ordinary case a lawyer should have an adequate defense to the charge of a moralist that he has immorally achieved the acquittal of a defendant he knows has committed the offense through these means that distort the truth, similar to the lawyer's defense to a possible similar charge by the community. A lawyer who undertakes to provide a service that the Constitution demands, and who does so in ways that are both expected and powerfully justified, should have a sufficient answer to a charge of immoral behavior posed by the moralist in a particular case.

You will have noted that I have put my affirmative-negative response test in terms of the "ordinary case." What about cases in which the moralist is exceptionally troubled by the moral outcome, even though there is a powerful moral justification for the tactic? To attempt to provide a general way of balancing competing moral considerations is, fortunately, a task that need not be undertaken in order to address the immediate issue. In the context in which the moral dilemmas I have suggested arise, it seems fitting to call upon a concept that has played an important role in the earlier part of this essay: the burden of proof. In my view, it is appropriate to ask the moralist to show that the values that are implicit in our Constitution, in its requirement of defense counsel in criminal cases, and in the moral justifications that support the questioned tactics, are insufficient to warrant the conclusion that the outcome is morally correct; that is, that these values are outweighed by the egregiousness of the outcome.

It is my belief that it will be a rare case in which the moralist will be able

58. See Ball, supra note 21, at 568.
to bear that burden. But we are not dealing with a null set. Like the civil litigator, the criminal defense lawyer is not immune from moral accountability, although the sphere of such accountability is much smaller than the comparable sphere in civil litigation.

One added conclusion that may be drawn from this discussion suggests that, whether the proposed standard is accepted or not, there will continue to be moral dilemmas for those who practice criminal law, just as there are moral dilemmas for lawyers in other areas of practice. Try as we may, there is an inescapable moral dimension to that which we do. That we are lawyers in this society, under this constitutional regime, may reduce our moral dilemmas. It does not eliminate them. We are all, as we must be, “moralists.” After all, if our roles as lawyers meant that we never had to confront the morality of our professional efforts, we would be deprived of an essential part of our humanity. And I doubt that we would want that.