

1999

Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?

W. William Hodges

Indiana University-Indianapolis

Follow this and additional works at: <https://uknowledge.uky.edu/klj>

Part of the [Legal Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Right click to open a feedback form in a new tab to let us know how this document benefits you.

Recommended Citation

Hodges, W. William (1999) "Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?," *Kentucky Law Journal*: Vol. 87 : Iss. 4 , Article 5.

Available at: <https://uknowledge.uky.edu/klj/vol87/iss4/5>

This Article is brought to you for free and open access by the Law Journals at UKnowledge. It has been accepted for inclusion in Kentucky Law Journal by an authorized editor of UKnowledge. For more information, please contact UKnowledge@lsv.uky.edu.

Rethinking the Way Law Is Taught: Can We Improve Lawyer Professionalism by Teaching Hired Guns to Aim Better?

BY W. WILLIAM HODES*

I. A STRANGE NEW THEORY OF LEGAL ETHICS— EVEN PLAYING BY THE RULES IS UNETHICAL

I did not realize it at the time, but in retrospect, I must have sensed in October 1993 that we were in for a particularly disturbing bout of lawyer-bashing. Even before O.J. Simpson killed two people in Los Angeles and jumped on the redeye to Chicago, I must have sensed that it was going to be particularly disturbing, because *this* lawyer-bashing was going to be unleashed—or at least tolerated—by the elite stratum of the profession. Things only got worse after the “Trial of the Century,” of course, because the unpopular and unjust¹ result in that case gave the elite

* Professor of Law, Indiana University School of Law-Indianapolis. B.A. 1966, Harvard College; J.D. 1969, Rutgers University.

¹ I am on record as approving of the ethics and professionalism of the “Dream Team” defense lawyers in the O.J. Simpson case. See W. William Hodes, *Lord Brougham, the Dream Team, and Jury Nullification of the Third Kind*, 67 U. COLO. L. REV. 1075 (1996). At the same time, it is not inconsistent to believe—as I and most Americans do—that the result the lawyers achieved was unjust. See *id.* at 1077.

Even Alan Dershowitz, a member of the “Dream Team,” thinks it plausible to see the result of the trial as either just or unjust, depending on how long- or short-term the view. See ALAN M. DERSHOWITZ, *REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM* 16 (1996) (“I will try to explain why even jurors who thought that Simpson ‘did it’ as a matter of fact could reasonably have found him not guilty as a matter of law—and of justice.”). Elsewhere in his book, Professor Dershowitz discusses what he refers to as a different “genre of jury nullification,” see *id.* at 93-98, which is virtually indistinguishable from what I was calling “jury nullification of the third kind.” Hodes, *supra*, at 1075.

bar further license to distance itself from what it saw as the not altogether savory trial and criminal defense bars.² Distance was going to be especially desirable because *these* criminal defense lawyers not only toiled on behalf of a particularly odious client, but they had also had the bad taste to win.

But that was later. In October 1993, the Professional Responsibility Section of the Association of American Law Schools was holding a weekend teaching conference in Washington, D.C., focusing on the teaching of legal ethics in general and on adversarial zealousness in particular. The featured luncheon speaker was Stanley Sporkin, United States District Judge for the District of Columbia,³ justly famous in the world of legal ethics for surveying the wreckage of yet another looted savings and loan institution and lamenting, "Where were the lawyers?"⁴ With this battle cry, Judge Sporkin, who had earlier risen from enforcement attorney to General Counsel of the Securities and Exchange Commission, made an essential point about legal ethics. When a transaction lawyer representing a client committing fraud crosses over the line into knowing

² See *infra* Part II. The elite bar could never put its finger on *exactly* what the "Dream Team" did that was wrong or what it should have done instead of what it did do. Instead, the elite bar joined the popular chorus in insisting that something *must* be wrong with the justice system if an obviously guilty defendant can be acquitted of two brutal murders. Moreover, there must have been something unethical and unprofessional about lawyers who would manipulate the system to take advantage of its evident weaknesses. See *infra* notes 87-92 and accompanying text, demonstrating that even a former defense attorney, now a well-respected law professor, could not break out of this mold.

³ See Audiotape of Stanley Sporkin, *Rethinking the Way Law Is Taught: Is There an Inconsistency in Attempting to Teach Ethics Where the Substantive Subjects Presuppose an Adversarial System?* (Oct. 15, 1993) (on file with author).

⁴ This is the commonly accepted paraphrase of Judge Sporkin's lament. What he actually wrote was: "Where were these professionals [lawyers and accountants], a number of whom are now asserting their rights under the Fifth Amendment, when these clearly improper transactions were being consummated? Why didn't any of them speak up or disassociate themselves from the transactions?" *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901, 920 (D.D.C. 1990); cf. Donald C. Langevoort, *Where Were the Lawyers? A Behavioral Inquiry Into Lawyers' Responsibility for Clients' Fraud*, 46 VAND. L. REV. 75 (1993). Langevoort asserts that lawyer complicity may be attributable in part to the irreconcilable tension between client loyalty and the requirement to obey law. More plausibly, it may be attributable to ego, stress, and over-identification with the client interfering with the lawyer's cognition of the realities of the situation until it is too late for easy extrication. See *id.* at 95-111.

participation or facilitation,⁵ the lawyer loses the immunity from liability and just censure that ordinarily accompanies the professional role.⁶

⁵ See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(d) (1998). In order to be unethical, actionable or criminal, a lawyer's participation in a client's frauds must be "knowing" or "willful" or occur with some other high level of scienter. See *id.* The line between legitimate representation and illicit participation also invokes the most difficult epistemological question of legal ethics: "What does a lawyer know?" For example, see *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964), a stock fraud case from an earlier era. With respect to the element of willfulness, Judge Henry Friendly wrote:

[T]he Government can meet its burden by proving that a defendant deliberately closed his eyes to facts he had a duty to see . . . or recklessly stated as facts things of which he was ignorant. . . . In our complex society the accountant's certificate and the lawyer's opinion can be instruments for inflicting pecuniary loss more potent than the chisel or the crowbar. Of course, Congress did not mean that any mistake of law or misstatement of fact should subject an attorney or an accountant to criminal liability simply because more skillful practitioners would not have made them. But Congress equally could not have intended that men holding themselves out as members of these ancient professions should be able to escape criminal liability on a plea of ignorance when they have shut their eyes to what was plainly to be seen or have represented a knowledge they knew they did not possess.

Id. at 862-63 (citations omitted).

⁶ See generally Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 CAL. L. REV. 669 (1978). The literature on what moral philosophers call "role differentiation" is vast and cannot be recounted here in any detail. In brief, the traditional argument is that when lawyers are "on duty," they are *required* by their professional role to maximize client interests through all legally available means even if in their private capacities they would oppose what the client seeks. Since lawyers are professionally required to take aggressive action on behalf of clients, it is *by definition* not unethical or "unprofessional" for them to do so. Moreover, it is not morally wrong either, since lawyers are only doing their jobs or playing the role that the system has assigned to them.

The most extreme critics of role differentiated behavior by lawyers attack the legitimacy of lawyering itself. A more responsible argument is that since any particular lawyer is not required to accept any particular client's cause, lawyers *can* be subject to moral censure for the choices they do make. Significantly, this concession has been made by one of the strongest and most vocal *supporters* of the adversary system. See MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 65-71 (1990).

Once the decision has been made to represent a client in a particular matter, however, the lawyer may *not* pull punches or choose half-hearted measures because

Zealousness *within* the bounds of the law?⁷ Not bloody likely, the former

of lingering disagreement with the client's aims. That *would* be unethical, for the client would be stuck with—and often be paying for—a non-zealous lawyer who was not willing to loyally serve the client's interests *as defined by the client*. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a).

As will be seen throughout this Article, there is a further and critical distinction between transaction lawyers and litigation lawyers that implicates how we ought to view their respective roles. Transaction lawyers are typically involved at the earliest stages of a client's project and have multiple opportunities to help shape its course, for good or for ill. When a client's project turns out to be a fraudulent one, it is therefore natural for onlookers at least to suspect that the lawyers were implicated in the wrongdoing. Litigation lawyers, by contrast, typically arrive on the scene after the basic story has played itself out and the basic facts are set. A crime has been committed, a contract has been breached, a dangerous product has caused harm. It is rarely plausible, therefore, to imagine that these lawyers are complicit in any wrongdoing, save cases of *new* wrongs committed during the litigation, such as perjury or destruction of evidence. To put it simply, although O.J. Simpson's defense lawyers were attacked mercilessly in the press and in society generally, no one ever accused them of killing anyone.

⁷ The title of this *Kentucky Law Journal* symposium issue was taken from the "axiomatic norm" of Canon 7 of the old Model Code: *A Lawyer Should Represent a Client Zealously Within the Bounds of the Law*. See MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980). Agreeably to some and to the chagrin of others, *see infra* notes 72-74 and accompanying text, the Model Rules of Professional Conduct, promulgated in 1983 by the American Bar Association to replace the Model Code, do not contain a mandatory reference to zealousness. See MODEL RULE OF PROFESSIONAL CONDUCT Rule 1.3. *But see id.* Rule 1.3 cmt. This comment reads: "A lawyer . . . may take whatever lawful and ethical measures are required to vindicate a client's cause or endeavor. A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf." *Id.* Without explanation—and without apparent justification—the next sentence of the same comment continues as follows: "However, a lawyer is not bound to press for every advantage that might be realized for a client." *Id.*

With respect to the other half of the old formula, which set limits on partisanship, the Model Rules are sharper.

A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent, but a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law.

Id. Rule 1.2(d). There are still significant problems of interpretation and application, of course. Beyond the problem of scienter, *see supra* note 5, the last

regulator was correctly saying; not unless the law of accessorial liability is somehow made to disappear.⁸

In his luncheon address, *Rethinking the Way Law Is Taught: Is There an Inconsistency in Attempting to Teach Ethics Where the Substantive Subjects Presuppose an Adversarial System?*,⁹ Judge Sporkin was hunting different game. Still in thrall of his important and sound insight that lawyers should be held accountable for giving illicit aid and comfort to wrongdoing clients but oblivious to the different roles that lawyers play in

part of Rule 1.2(d) requires distinguishing between good faith test case litigation, classic civil disobedience by appealing to higher law, and *surreptitious* civil disobedience, which is no different than law-breaking.

⁸ In all discussions of “the bounds of law,” as used in the Model Code and elsewhere, there is a legitimate anterior question of what should count as “law” without resorting to tautology. This was referred to as “the boundary claim” in David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468, 471 (1990).

The boundary claim and whether a proposition should count as “law” merely because embodied in a traditional legal format, such as a statute or a court order, were debated elegantly and brilliantly in a trio of papers presented at a Forum on the Teaching of Legal Ethics, sponsored by the W. M. Keck Foundation at the William and Mary School of Law in March 1996. See William H. Simon, *Should Lawyers Obey the Law?*, 38 WM. & MARY L. REV. 217 (1996); David Luban, *Legal Ideals and Moral Obligations: A Comment on Simon*, 38 WM. & MARY L. REV. 255 (1996); David B. Wilkins, *In Defense of Law and Morality: Why Lawyers Should Have a Prima Facie Duty to Obey the Law*, 38 WM. & MARY L. REV. 269 (1996).

I agree with Professor Simon that what he calls “Narrow Positivism,” namely that the mere pedigree of a rule should end all debate about where the bounds of law lie, is unsound. See Simon, *supra*, at 220-27. But I also agree with Professors Luban and Wilkins that in practice, most lawyers appropriately adopt a more nuanced “Wide Positivism” that permits moral and political ideas to inform the “true” content of law. See Luban, *supra*, at 258-59; Wilkins, *supra*, at 278-79. In the end, I agree most with Professor Wilkins’s bottom line position that *because of their role in operating the system of justice*, lawyers should have to meet a higher rather than a lower burden to justify civil disobedience. See *id.* at 289-93. The mere fact that someone is a lawyer, in other words, changes the calculus on how that person ought to respond to challenging legal-moral dilemmas. See Geoffrey C. Hazard, Jr., *My Station as a Lawyer*, 6 GA. ST. U. L. REV. 1, 13-16 (1989).

All three authors in the William & Mary Keck Foundation Forum agreed, of course, that in many situations, perhaps most, all routes lead to the easy conclusion that a certain proposition is law (and that it ought to be obeyed).

⁹ Sporkin, *supra* note 3.

different legal settings,¹⁰ he applied the same analysis and reached the same conclusion with respect to lawyers whose *only* aid and comfort to clients came in the form of representation in *already ongoing* litigation. Under the guise of raising questions about where the outer limits of zealotry in litigation might lie, he launched an all-out attack on the very heartland of zealous advocacy.¹¹

Judge Sporkin did not directly answer his own rhetorical question about the possible inconsistency between legal ethics and the adversary system. Instead, he told a series of what he evidently thought were horror stories about “unethical” lawyers or lawyers practicing “minimalist” ethics.¹² Put these stories together, however, and the conclusion he was trying to draw was inescapable. Aggressive action taken *within* the current boundaries of the adversary system is often “unethical” action, and the law schools are thus doomed to the inconsistency suggested in Judge Sporkin’s title. Given that an adversarial system has no use for ethics, he told the nation’s teachers of legal ethics, you should either give up teaching this useless knowledge, or you should improve your teaching of legal ethics by taking a leading role in efforts to abolish the adversary system, or at least radically curtail it.¹³

Listening again to the audiotape of the 1993 event, which was about half prepared speech and half question-and-answer session, I was again struck by the breadth of Judge Sporkin’s attack. This was equal opportunity lawyer bashing. Lawyers for manufacturers of a “killer product” were unethical when they resisted production of damaging documents in discovery, even though they had a concededly nonfrivolous objection *that they litigated in the open*.¹⁴ It was unethical for government lawyers to

¹⁰ See *supra* note 6.

¹¹ See Sporkin, *supra* note 3.

¹² *Id.*

¹³ See *id.* Some academics are indeed at the forefront of efforts to erode seriously the adversary system. See *infra* Part III.

¹⁴ See Sporkin, *supra* note 3. The documents in question had been provided to a government agency under a special secrecy agreement. When the plaintiffs in the case sought discovery, both the manufacturers *and the government agency* argued strenuously that production in this private litigation would not be in the public interest because it would make it more difficult for the agency to secure like documents in the future.

Judge Sporkin ordered production, and I am not here quarreling with that decision. But I am dismayed (and said so at the time) that a federal judge—by definition an elite member of the profession—would think it “unethical” for the company’s lawyers even to *litigate* the question.

argue in favor of a harsh jail sentence for a middle-aged woman, a street person who was convicted for a second time of selling drugs, *even though the Federal Sentencing Guidelines*¹⁵ *called for that sentence, and even though Judge Sporkin as the sentencing judge had little discretion to depart from it.*¹⁶

Judge Sporkin reserved his greatest scorn for criminal defense lawyers who go beyond procedural and constitutional deficiencies in the prosecution's case and argue for acquittal *on the merits*, even when they know the defendant is factually guilty.¹⁷ In his rulebook, it is permissible to vindicate the values of the Fourth Amendment by moving to suppress the only evidence against a guilty drug dealer, but it is unconscionable to take seriously the Sixth Amendment's guarantee of a jury trial by trying to coax the jury into factual error.¹⁸ In both cases a factually guilty defendant "walks," but only in the latter are the defendant's lawyers insolently "wrapping themselves in the flag of the Constitution."¹⁹

In those pre-O.J. days of late 1993, the best stories from the trenches were about the trials growing out of the assault on Reginald Denny,²⁰ which

¹⁵ U.S. SENTENCING GUIDELINES MANUAL (1998).

¹⁶ See Sporkin, *supra* note 3. It should not go unnoticed that, in this and several other examples Judge Sporkin discussed, he could not enforce his view of what legal ethics requires because his view was not supported by the "law" of lawyering. Whatever one thinks of the "boundary claim" of deciding what is outside the bounds of law, and thus at least presumptively off-limits for lawyers, *see supra* note 8, it is clear that what Judge Sporkin says at a luncheon address is not law. What he says in a judicial opinion is law, but that law can be overruled on appeal and new law substituted in its place. In nonconstitutional settings, the law can be further modified by an "appeal" to political actors, including members of the public.

¹⁷ I do not disagree with Judge Sporkin that criminal defense lawyers frequently have this knowledge. *See Hodes, supra* note 1, at 1098 n.59; *see also id.* at 1083-84 (quoting, among other sources, the "Rules of the Justice Game" set out in ALAN M. DERSHOWITZ, *THE BEST DEFENSE* (Vintage Books 1983) (1982), which hold that "almost all" criminal defendants are in fact guilty and that "all" criminal defense lawyers, prosecutors, and judges are aware of this).

Where Judge Sporkin and I disagree, of course, is that I believe it would be unethical for a criminal defense lawyer *not* to argue for acquittal on the merits—if that seemed tactically wise—merely because the lawyer had this inconvenient knowledge about factual guilt. See the discussion of the films *Cape Fear* and *The Devil's Advocate*, *infra* notes 44-55 and accompanying text.

¹⁸ See Sporkin, *supra* note 3.

¹⁹ *Id.*

²⁰ During the April 1992 riot after the verdicts in the Rodney King case, Damian Williams and Henry Watson pulled white truck driver Reginald Denny out of the

took place during the riot that grew out of the acquittal of the police officers who assaulted Rodney King.²¹ Where were the lawyers in the trials of Damian Williams and Henry Watson? As recounted with evident disgust by Judge Sporkin, they were not missing in action, as in the *Lincoln Savings & Loan*²² case, but all too busy actively throwing sand in the wheels of justice.²³

One defendant's lawyer had the nerve to suggest to the jury that perhaps the man clearly shown on videotape smashing a rock down on the victim's skull was not even the same man sitting at the defense table. The other defendant's lawyer suggested that perhaps the tape really showed that

cab of his truck and assaulted him with bricks and other implements. The events were captured on police and news videotapes and clearly showed Williams hurling a brick at the head of Denny while he lay on the ground and then performing a celebratory dance in the manner of a football player after scoring a touchdown. Watson had at about the same time put his foot on Denny's neck, pinning him to the ground. See Jim Newton & Henry Weinstein, *3 Suspects Seized in Beating of Truck Driver During Riot*, L.A. TIMES, May 13, 1992, at A1. Williams and Watson were charged with multiple counts of assault, mayhem, and attempted murder, but the jury acquitted them both on most counts, convicting Williams only on four misdemeanor assault charges and a felony mayhem charge and Watson only on a single misdemeanor assault charge. See Edward J. Boyer & Jesse Katz, *Jury Convicts Denny Defendants on Reduced Charges, Acquits on Others*, L.A. TIMES, Oct. 19, 1993, at A1; Edward J. Boyer & Jesse Katz, *Attempted Murder Acquittal, Deadlock Wind Up Denny Trial*, L.A. TIMES, Oct. 21, 1993, at A1. Williams's convictions were affirmed on appeal. See *People v. Williams*, 54 Cal. Rptr. 2d 521 (Ct. App. 1996).

²¹ Ex-convict Rodney King was arrested by four officers of the Los Angeles Police Department after a high-speed automobile chase on March 3, 1991. The officers, claiming that King was resisting arrest, subjected him to a savage beating that was captured on videotape by a bystander. See *The Rodney G. King Beating*, L.A. TIMES, Apr. 30, 1992, at A20. The officers were charged with assault, but a state court jury acquitted them on April 29, 1992, immediately touching off one of the most violent riots in American history. See Marc Lacey & Shawn Hubler, *Rioters Set Fires, Loot Stores, 4 Reported Dead*, L.A. TIMES, Apr. 30, 1992, at A1; Greg Braxton & Jim Newton, *Looting and Fires Ravage L.A.; 25 Dead, 572 Injured; 1,000 Blazes Reported*, L.A. TIMES, May 1, 1992, at A1. Subsequently, the four officers were tried in federal court on charges of violating Rodney King's civil rights, and two of them were convicted on April 17, 1993. See *United States v. Koon*, 833 F. Supp. 769, 774 (C.D. Cal. 1993), *aff'd in part and vacated in part*, 34 F.3d 1416 (9th Cir. 1994), *j. aff'd in part and rev'd in part*, 518 U.S. 81 (1996).

²² *Lincoln Sav. & Loan Ass'n v. Wall*, 743 F. Supp. 901 (D.D.C. 1990).

²³ See Sporkin, *supra* note 3.

his client was trying to *protect* the victim from further injury at the hands of others.²⁴

But where was the unethical or unprofessional lawyer behavior that was Judge Sporkin's reason for telling the story in the first place? Even assuming the lawyers in the Denny beating case *knew* that their clients were both physically present and loaded to the gills with *mens rea*,²⁵ which tactic or argument was *unethical*, as opposed to possibly unwise? What exactly should the lawyers have done—ethically speaking—to carry out their constitutional duty to provide effective assistance of counsel?

When pressed on these points in the question and answer period, Judge Sporkin initially could say only that ethical counsel should plead their clients guilty when they know of their clients' factual guilt. This will not wash, however, for lawyers can only *recommend* that their clients plead guilty and have no right or power to force the issue if the clients reject the prosecutors' last best offer for a plea bargain.²⁶ A second response was that

²⁴ See *id.* Judge Sporkin could have added the further point that the first lawyer tried to spin the jury an alternative yarn about how the same person (if he was one of the defendants) did not mean to hurt the victim but had himself been victimized by being caught up in the tumult of mob psychology. Most trial lawyers would, I imagine, avoid arguing in the alternative in such extreme fashion on the tactical ground that it is too risky. While it is true that convincing even one juror of the mistaken identity would at least hang the jury, the risk is great that all jurors would have less confidence in *any* aspect of the defendant's case.

²⁵ In my article on the use of jury nullification in the O.J. Simpson case, see Hodes, *supra* note 1, I assumed throughout that everyone involved in the case, including not only the lawyers on both sides but also the jurors, "knew" that the defendant was *factually* guilty, meaning that they knew that no one other than the defendant wielded a knife and stabbed the two victims to death. That made no difference to my judgment that the defense lawyers acted properly, and I would make the same judgment in the Reginald Denny case.

Unlike situations in which a lawyer might be *participating* in a client's crimes or frauds, see *supra* notes 5-8 and accompanying text, where the lawyer's scienter is critical, lawyers may defend clients vigorously regardless of what they know about the facts. Indeed, once they make the decision to provide a defense, they are obligated to press ahead with the *same* vigor, whether or not they know.

²⁶ See Sporkin, *supra* note 3. Model Rule 1.2(a) reads in pertinent part: "In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify." MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1998). Several Ethical Considerations of the Model Code were to the same effect, see MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-7, 7-8 (1980), and of course applicable constitutional law also requires informed decision making by the *client*

perhaps counsel should simply not agree to provide representation in such cases. That is fine for any particular lawyer, but some lawyer—perhaps the proverbial “last lawyer in town”—will and should come forward to defend.²⁷ If not, a lawyer will eventually be appointed to take each case in any event. If those lawyers tried to mount a defense on the merits, how could *they* escape Judge Sporkin’s censure?

Pressed further, Judge Sporkin insisted later in the question and answer session that if the case was to be tried, then counsel could of course engage in “zealous” advocacy, but that this could not include “obscuring the facts,” where the lawyer knew the facts.²⁸ His point was not merely that counsel must prevent *the client* from *testifying* falsely that he had not even been present or from presenting a faked alibi. Virtually everyone agrees that those tactics are beyond the bounds of law.²⁹ In Judge Sporkin’s view, *counsel* should also be prevented from arguing to the jury that his client was not guilty *because someone else was*.³⁰

in this area. *See, e.g.*, Parke v. Raley, 506 U.S. 20, 28-29 (1992) (“It is beyond dispute that a guilty plea must be both knowing and voluntary.”).

As will be seen, *see infra* text accompanying note 51, in the film *Cape Fear*, fictional lawyer Sam Bowden did plead his fictional client guilty, *without* the client’s informed consent, even though there was an available defense tactic that could have obscured the facts of his client’s guilt.

²⁷ *See* Charles W. Wolfram, *A Lawyer’s Duty to Represent Clients, Repugnant and Otherwise*, in *THE GOOD LAWYER* 214 (David Luban ed., 1983).

²⁸ Sporkin, *supra* note 3.

²⁹ *See* MODEL RULES OF PROFESSIONAL CONDUCT Rules 3.3(a)(4) and 3.3(b), which not only prohibit a lawyer from knowingly presenting perjured testimony but also require the lawyer to take “reasonable remedial measures” if the false evidence is presented and the lawyer learns of it later. *Id.* Rule 3.3. This duty holds even if the lawyer must disclose otherwise confidential client information. *See id.* A well-known dissenting view comes from Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966), who argues that presentation of a client’s perjured testimony is immoral and almost always foolish, but ultimately required of defense counsel if the client cannot be dissuaded. Professor Freedman’s views have not prevailed on this point. Moreover, imposition of a duty to interdict client perjury does not violate the Sixth Amendment. *See* Nix v. Whiteside, 475 U.S. 157, 164-76 (1986).

³⁰ *See* Sporkin, *supra* note 3. When the O.J. Simpson case later came onto the scene, it is highly likely that Judge Sporkin would have agreed with me that Simpson was factually guilty and that his lawyers knew it. *See supra* note 17 and accompanying text. Presumably, therefore, he would have limited Simpson’s lawyers to a defense based on provocation or diminished capacity, or some other

In this Article, I argue that Judge Sporkin reached the wrong conclusion about the mission and method of American law schools because he was wrong about both ethics and the adversarial system. His view of ethics was too stingy, his view of the adversary system too alarmist. My conclusion is evident from my title, which is an unapologetic play on Judge Sporkin's. We will improve our teaching of legal ethics and professionalism only if we recognize that *underzealousness* in litigation is today more of a problem than lawyers who exceed the bounds of law. We must teach our students to wear the label of "hired gun" proudly³¹ and to have the skill and the courage to do their assigned jobs with professional élan.

II. POPULAR AND PROFESSIONAL DISCONTENT WITH THE ADVERSARY SYSTEM AND WITH THE LAWYERS WHO OPERATE IT

One of the reasons that too many of today's young lawyers lack the courage to fight unpopular fights is that they have witnessed a barrage of attacks on adversarial zeal. These attacks are found in political debate³² and

defense that did not challenge the basic facts of the killings. It should be evident that I do not agree that a defense so badly hobbled in its choice of tactics could validly be described as "zealous."

³¹ See Ted Schneyer, *Some Sympathy for the Hired Gun*, 41 J. LEGAL EDUC. 11, 22-25 (1991) (arguing that neither the client-centered nor the public-regarding view of legal ethics is always preferable in all circumstances, but that the "hired gun" model is most justifiable in the criminal defense context). Professor Schneyer agrees that underzealousness and disloyalty to clients is often more of a problem in contemporary practice than is violation of the rules of conduct, even in the criminal defense context. *See id.* at 23-24.

³² For reasons of space, I will not discuss in any detail the many contemporary situations in which lawyer-bashing (and judge-bashing) have become standard tactics employed in electoral campaigns. *See, e.g., A Transcript of the First Televised Debate Between Clinton and Dole*, N.Y. TIMES, Oct. 7, 1996, at B8.

In Stanley A. Goldman, *First Thing We Do, Let's Kill All the [Defense] Lawyers*, 30 LOY. L.A. L. REV. 1 (1996), the author, writing the introduction to a symposium of articles about attacks on criminal defense lawyers in particular, noted that when Charles Manson prosecutor Vincent Bugliosi ran for Los Angeles District Attorney against the incumbent John Van de Kamp, he attacked Van de Kamp on the ground that, before Van de Kamp won office for the first time, he had been a public defender. *See id.* at 2-3.

Sadly, in my home state of Indiana, former Attorney General Pamela Carter ran the same kind of campaign ads against her opponent, an experienced public defender and criminal defense attorney. She later defended the ads by saying that they were legitimate efforts to inform the public of the contrasting experiences of

the popular culture, and come from social critics as well as the elite leaders of the profession. Too much of the organized bar's highly publicized effort to improve "professionalism" and "civility" has uncritically adopted the public's uninformed contempt for hard-nosed lawyering.³³ In many

the two candidates. "His has been to keep criminals out of prison, while the role of the attorney general is to keep them in prison." Kim L. Hooper, *Carter Defends TV Ad; It's an Unfair Slam, Say Defense Lawyers*, INDIANAPOLIS STAR, Oct. 17, 1992, at B1. The ads were also defended on similar grounds by Ann DeLaney, then the Executive Director of the Indiana Democratic Party and also a lawyer. Ms. DeLaney returned to this theme with comparable disingenuousness in her disagreeable little book, *Politics for Dummies*. DeLaney states:

Criminal defense attorneys also have a difficult time getting elected to office. Fairly or not, a defense attorney can be identified with the clients she has represented in the past. . . . [While it is probably unfair to make this association in elections generally], when you are choosing a prosecuting attorney or another officeholder associated with the criminal justice system, you may find the criminal defense attorney's background relevant information for you to consider.

ANN DELANEY, *POLITICS FOR DUMMIES* 152-53 (1995).

³³ What has come to be known as the professionalism "movement" has generated a massive outpouring of studies, reports, books and articles. The movement has proceeded through countless bar association meetings and academic gatherings. The seminal document is A.B.A. COMM'N ON PROFESSIONALISM, ". . . IN THE SPIRIT OF PUBLIC SERVICE: A BLUEPRINT FOR THE REKINDLING OF LAWYER PROFESSIONALISM" (1986) [hereinafter ". . . IN THE SPIRIT OF PUBLIC SERVICE"]. This document, commonly referred to as the *Stanley Commission Report*, was subsequently published at 112 F.R.D. 243 (1986). The reference in the title to "the spirit of public service" is borrowed from the leading contribution to the idea of "professionalism" of an earlier era. See ROSCOE POUND, *THE LAWYER FROM ANTIQUITY TO MODERN TIMES* 5 (1953). Pound states:

The term refers to a group of men pursuing a learned art as a common calling in the spirit of a public service—no less a public service because it may incidentally be a means of livelihood. Pursuit of the learned art in the spirit of a public service is the primary purpose. Gaining a livelihood is incidental, whereas in a business or trade it is the entire purpose.

Id.

See also A.B.A. SEC. ON LEGAL EDUC. AND ADMISSIONS TO THE BAR, *LEGAL EDUCATION AND PROFESSIONAL DEVELOPMENT—AN EDUCATIONAL CONTINUUM, REPORT OF THE TASK FORCE ON L. SCHS. AND THE PROF.: NARROWING THE GAP* (1992) [hereinafter *NARROWING THE GAP*]. The *MacCrate Commission Report*, as this document is called, deals extensively with the perceived need of law schools and other legal institutions to help young lawyers develop the core skills necessary for modern law practice, but it included an important section stating the

respects, the effort has degenerated into a barely disguised attack on the adversary system and the lesser lights of the profession.³⁴ At the same time, as I argue in Part III of this Article, an anti-lawyer mood and a disdain for practice has taken over much of the legal academy as well, so that law schools do not provide as strong a voice as they might for the kind of professionalism I advocate.

fundamental values of the profession and urged their inculcation both before and during practice. Many of the values championed by the MacCrate Commission parallel those most often identified with professionalism. *See id.* at 135-221.

During roughly the same period, a movement for "civility" blended with the drive towards professionalism. Prominent members of the bar decried what they branded as "Rambo lawyering," and claimed that lawyers who follow a "hardball" or "scorched earth" policy in discovery and at trial are a detriment to society. Advocates of more civility usually conceded that "uncivil" lawyers were attempting to maximize client interests, *using legally available tactics*, but they asserted that public values ought to trump the value of client service. *See, e.g.*, John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563 (1994).

The *Stanley Commission Report*, for example, posited that the lawyer's duty to the system of justice "must transcend" the lawyer's duty to the client where the two conflict. ". . . IN THE SPIRIT OF PUBLIC SERVICE," *supra*, at 280. While there are specific rules of professional conduct that require the sacrifice of client interests in exceptional situations—client perjury, for example, *see* MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3—that proposition cannot be true *as a general matter*, or there could be no adversary system at all.

³⁴ Several academics have criticized the "professionalism" and "civility" movements on exactly this ground. *See, e.g.*, Rob Atkinson, *A Dissenter's Commentary on the Professionalism Crusade*, 74 TEX. L. REV. 259 (1995); Amy R. Mashburn, *Professionalism as Class Ideology: Civility Codes and Bar Hierarchy*, 28 VAL. U. L. REV. 657 (1994); Ronald D. Rotunda, *Lawyers and Professionalism: A Commentary on the Report of the American Bar Association Commission on Professionalism*, 18 LOY. U. CHI. L.J. 1149 (1987); Jay Sterling Silver, *Professionalism and the Hidden Assault on the Adversarial Process*, 55 OHIO ST. L.J. 855 (1994).

It should be understood, of course, that neither these scholars nor I disagree that overly aggressive and uncivil tactics are *morally* troubling and that they can be counterproductive. Nonetheless, these concerns do not put hired gun adversarial ethics outside the bounds of law; rather, they heighten the moral dilemma of role differentiation experienced by the most conscientious lawyers. *See supra* note 6. Moreover, even if, as a matter of personal preference, I agreed completely that hardball tactics were almost always inappropriate, I would not agree that they should be proscribed by mere fiat without open debate. *See infra* notes 35-36 and accompanying text.

“Zealousness within the bounds of the law” is still the watchword that young lawyers ought to adopt as a mantra from their law school days and hold constant throughout their legal careers. Or, as Robert Kutak, Chair of the ABA Commission responsible for drafting the Model Rules of Professional Conduct, once wrote, neatly capturing much of legal ethics: “[I]t may be a dog-eat-dog world, but one dog may eat another only according to the rules.”³⁵ Both of these formulations acknowledge that contemporary law practice reflects a tension in our society between two important values.

A competitive and individualistic spirit dominates the American culture. Americans are not shy about demanding their “rights,” no matter that the other side may have rights as well, and no matter whether the supposed transgressor is a private person or a public entity. It is therefore hardly surprising that such a culture generated a legal system and a lawyer corps that can give full play to this spirit. At the same time, the law generally must impose *some* limits on individual aggressiveness, to preserve public order and prevent chaos. The same need for setting limits applies to the adversary system as well: zealousness, but *within* the bounds of law. To substitute a different metaphor, even hardball is played according to the rules.

When we do move towards the “limitations” end of the spectrum, curtailing what lawyers may do to advance the goals of clients, any new limits must be debated in the open and imposed only through established legislative or judicial channels. Lawyers and aspiring lawyers cannot fairly be criticized for practicing “minimalist” ethics if they obey every existing rule.³⁶ That is the rule of law. In his 1993 luncheon address, by contrast,

³⁵ Robert J. Kutak, *The Adversary System and the Practice of Law*, in *THE GOODLAWYER*, *supra* note 27, at 172. Mr. Kutak, an Omaha lawyer, died suddenly in 1983, shortly before adoption of the Model Rules and before publication of the Luban book.

³⁶ I am neither claiming that the current rules of the adversarial game are indifferent to non-client interests nor that they should be. Moreover, I not only recognize that further inroads on wholly client-centered lawyering might be justified, I have argued in favor of such amendments at numerous academic and professional gatherings and in print. See 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* §§ 1.6:109-114 (2d ed. 1990 & Supp. 1996) (noting that the confidentiality provisions of the official version of the Model Rules are far too stringent and do not permit some disclosures that are “forced” by the operation of other law).

The point of the text is that unless such amendments are adopted according to

Judge Sporkin proposed a world in which even playing by the rules is not good enough. He attempted to narrow the bounds of law by personal fiat, without even suggesting how the rules of the existing adversary game might be modified or making a reasoned argument as to why they should be.³⁷

In the broader culture, of course, Judge Sporkin is on stronger ground. That untutored culture sometimes assumes that the current rules of the game are already much more restrictive than they are, so that aggressive lawyering is by definition unethical or unprofessional. Other times, the broader culture learns what the current rules are but finds them so lax that it brands *the rules* as immoral. In that case, calling a lawyer who plays by the rules an “ethical” lawyer is simply a cruel oxymoron.

Consider, for example, the well-accepted set of obscurantist tactics that seemed to bother Judge Sporkin the most. At least in criminal cases, defense counsel may, through cross-examination or through presentation of truthful but misleading evidence, attempt to convince the trier-of-fact that the facts are not what the lawyer actually knows them to be.³⁸ So long

established procedures, they are not part of the “law” of lawyering. Lawyers are bound to comply with the law as it *is* and should not be coerced into following the law as I (or Judge Sporkin) might prefer it to be.

³⁷ Cf. Carrie J. Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996).

After I critique the adversary system, you will wonder what I would substitute for it. It should be obvious that as a postmodern, multicultural thinker I have no one panacea, solution, or process to offer—instead I think we should contemplate a variety of different ways to structure process in our legal system to reflect our multiple goals and objectives.

Id. at 11-12. But Professor Menkel-Meadow, like Judge Sporkin, makes no serious attempt to explain what a real-life lawyer faced with a real-life piece of litigation should actually do—how far a real life lawyer may actually go—in order to serve the client loyally but also ethically. Professor Menkel-Meadow’s “postmodern” critique of the adversary system is further discussed below. *See infra* notes 65-73 and accompanying text.

³⁸ *See* 1 STANDARDS FOR CRIMINAL JUSTICE, The Defense Function, Standard 4-7.6 (2d ed., Supp. 1986) (“[Defense counsel’s] belief or knowledge that the witness is telling the truth does not preclude cross-examination.”). This formulation is significant because the comparable Standard for prosecutors is hedged significantly. *See id.* The Prosecution Function, Standard 3-5.7.

Cross-examining the truthful witness was one of the three “hardest” ethical conundrums posed in Freedman, *supra* note 29. Although controversial in 1966, when the article was written, Professor Freedman’s affirmative answer to this question is now mainstream, and thus the question itself is no longer “hard.” The best and most often quoted evidence of this is the famous passage from Justice

as they do not rely on false or fabricated testimony, lawyers may “spin” in closing argument whatever alternative theories of the case they choose. This can include Judge Sporkin’s *bete noire*: the notion that the evidence—properly understood—does not prove beyond a reasonable doubt that my client “did it;” therefore, somebody else probably did.

In an editorial comment in *The Responsive Community*, a communitarian magazine, social critic Amitai Etzioni, after noting that lawyers are already forbidden from employing certain tactics, such as suborning perjury, asked why the “public dismay” over the O.J. Simpson case could not be “galvanized” in favor of further limitations:

For instance, how about prohibiting lawyers from pleading a client not guilty when they know he is guilty; and similarly prohibiting lawyers

Byron White’s opinion in *United States v. Wade*, 388 U.S. 218 (1967):

But defense counsel has no . . . obligation to ascertain or present the truth. Our system assigns him a different mission. . . . [W]e . . . insist that he 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. . . . [M]ore often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth.

Id. at 256-68 (White, J., dissenting in part and concurring in part) (footnotes omitted).

See also Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 DUKE L.J. 921, and Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135 (1988), both of whom argue that changes in ethically acceptable tactics can only be brought about by changes in evidence and procedural law.

As to “making the false look true,” Professor Schwartz’s article also contains a discussion of a well-known Michigan ethic’s opinion, *see* Mich. State Bar Comm. on Professional and Judicial Ethics, Informal Op. CI-1164, *summarized in* [Ethics Opinions 1986-1990] Law. Man. on Prof. Conduct (ABA/BNA) 901:4757 (1987). The opinion (and Professor Schwartz) approve of a criminal defense lawyer’s use of a truthful alibi defense where the alibi was germane only because the victim of the crime was mistaken about the time when the crime had occurred.

Justice White’s famous comment and the Michigan opinion provided the backdrop for a spirited exchange between a law professor and a criminal defense attorney. *See* Harry I. Subin, *The Criminal Lawyer’s “Different Mission”: Reflections on the “Right” to Present a False Case*, 1 GEO. J. LEGAL ETHICS 125 (1987); John B. Mitchell, *Reasonable Doubts are Where You Find Them: A Response to Professor Subin’s Position on the Criminal Lawyer’s “Different Mission,”* 1 GEO. J. LEGAL ETHICS 339 (1987); Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1987).

from challenging the other side's veracity when they know it is telling the truth? . . .

....

Nobody questions the need to protect the rights of the defendant, but these rights do not include allowing those who are guilty to walk because they have as lawyers the best fiction writers money can buy.³⁹

The trouble with these and similar "magic bullets" prescribed in the wake of the Simpson case to cure whatever seemed to be ailing the criminal justice system⁴⁰ is that they substitute for our constitutional system of trial by jury an ad hoc and extraconstitutional system of trial by lawyer. Instead of having to convince twelve jurors of guilt beyond a reasonable doubt,⁴¹ the government can all but extinguish a citizen's liberty by creating actual knowledge in the mind of a single lawyer.⁴² Moreover, singling out for the chop the defense tactics of misdirection through cross-examination and spinning alternative (fictional) stories in closing argument shows contempt for the jurors and is therefore also elitist and anti-democratic.⁴³ It also

³⁹ Amitai Etzioni, *On Making Lawyers a Bit More Socially Responsible*, 5 RESPONSIVE COMMUNITY 4, 6-7 (Fall 1995).

⁴⁰ See Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV 989, 990-92 (1996) (arguing that slap-dash lawmaking designed to make unjust acquittals like the one in the Simpson case less likely in the future will probably lead to more unjust convictions).

⁴¹ In a few states, conviction by less than a unanimous vote of a twelve-person jury is sufficient. This has been held not to violate the Sixth Amendment. See *Apodaca v. Oregon*, 406 U.S. 404, 407-12 (1972). That particular reform would not have made a difference in the Simpson case, of course, since there were *no* votes to convict on that jury. This fact did not deter Simpson-era reformers from proposing broader use of non-unanimous verdicts, however. At least the reasonable doubt standard is still constitutionally secure. See *In re Winship*, 397 U.S. 358, 361-64 (1970) (holding the requirement of proof beyond a reasonable doubt in criminal proceedings to be inviolate).

⁴² The client known by the lawyer to be factually guilty could still proceed to trial *pro se*, but that would be in violation of a different part of the Sixth Amendment. The defendant would receive a jury trial, but it would be without the assistance of counsel.

⁴³ Although most discussion of troubling adversarial tactics focuses on criminal defense work, contempt for jurors—and the lawyers who supposedly manipulate them—is one aspect of the discussion that carries over most clearly into the civil field. Today, the chief whipping boy for the excesses of the civil justice system is the case in which a woman recovered a large compensatory and punitive damages

ascribes almost mystical powers of persuasion to one side's lawyers and conveniently forgets that the other side can meet this fire with persuasive fire of its own.

This argument about trial tactics is richly played out in two contemporary lawyer-bashing films, *Cape Fear*,⁴⁴ a Martin Scorsese remake of the 1962 classic, and *The Devil's Advocate*.⁴⁵ Both turn on crucial and brutal cross-examinations of the victim in sexual assault cases—except that in *The Devil's Advocate*, a *coup de théâtre* gives the lawyer a second chance to cross-examine, which he refuses, and in *Cape Fear*, the cross-examination never takes place. Indeed, there is no courtroom scene in *Cape Fear* at all.

The Devil's Advocate opens with a close-up of the victim finishing her direct testimony against the Florida high school teacher who molested her. After a brief scene in which defense counsel Kevin Lomax, played by Keanu Reeves, debates with himself over how to proceed in light of his knowledge that his client is guilty, the film proceeds immediately to the cross-examination. Lomax is able to catch the young girl in a series of lies and exaggerations, although she sticks well to her basic story. The audience is not shown any redirect examination or the closing argument of either counsel, but surely few viewers were surprised to find themselves next viewing the victory party after the inevitable acquittal—inevitable, that is, in a lawyer-bashing film based on the concomitant premise that jurors are mere puppets in the hands of smooth-talking

award from McDonald's Restaurant after she spilled a scalding cup of take-out coffee in her lap while driving. See *Liebeck v. McDonald's*, No. CV-93-02419, 1995 WL 360309, at *1 (N.M. Dist. Aug. 18, 1994). Social critics, television pundits, and everyday people on the street delight in ridiculing the verdict. See, e.g., Sandra Torry, *Tort and Retort: The Battle Over Reform Heats Up*, WASH. POST, Mar. 6, 1995, at F7.

Looking a little deeper, however, we find that if the claim was legally frivolous, it would have been dismissed by the court as a matter of law and the lawyer who filed it sanctioned. At least that is what should have happened—*where are the judges?* But given that the claim survived to a jury trial and verdict, we must wonder what the jurors saw in the case that others did not. If the accident was so obviously the fault of the plaintiff herself, why were the lawyers from McDonald's able to convince everyone of that fact *except* the people who sat on the jury? Were the gullible jurors merely tricked into overlooking this point by irresponsible appeals to populist hatred of corporate giants and to the plaintiff's victimhood? That is possible, but it is also possible that McDonald's had a track record, unique in the fast-food business, of ignoring prior incidents and dangerously overheating its take-out coffee. See *id.*

⁴⁴ CAPE FEAR (MCA/Universal 1991).

⁴⁵ THE DEVIL'S ADVOCATE (Warner Bros. 1997).

lawyers, incapable of the complex thought that the defendant might be guilty despite the unpolished and partially deceptive testimony of his nervous young victim.⁴⁶

On the heels of this latest triumph, Kevin Lomax is recruited to the New York law firm headed by John Milton, played by Al Pacino. Milton, we soon learn, is the Devil—not just a metaphoric devil, but Satan himself, assuming the convenient human form of a lawyer.⁴⁷ Significantly, since this was a post-O.J. era film that was out to trash every aspect of criminal defense work, Lomax’s first assignment is simply to pick a jury that will guarantee acquittal of a guilty client the audience does not even meet.⁴⁸

⁴⁶ The analogous situation in the O.J. Simpson case was the popular perception that the jurors could not see what most others could: that Detective Mark Fuhrman was a racist who probably lied under oath *and* that O.J. Simpson killed two people with a knife. I have argued that the jurors *did* see and accept both of those facts but chose to ignore the second one. See Hodes, *supra* note 1, at 1102. That is what I called “jury nullification of the third kind,” *id.* at 1079, and what Professor Alan Dershowitz referred to as a different “genre” of jury nullification. DERSHOWITZ, *supra* note 1, at 93-98; see also *supra* note 25.

Damian Williams’s proffered defense of mistaken identity in the Reginald Denny case, see *supra* notes 20-24 and accompanying text, was similar. As Judge Sporkin pointed out, see Sporkin, *supra* note 3, although Williams’s lawyer made such an argument to the jury in the face of videotaped evidence, the jury was not fooled. Since Williams *was* convicted of *some* crimes, the jury at a minimum believed that he was present at the scene. See *People v. Williams*, 54 Cal. Rptr. 2d 521 (App. Ct. 1996). Most observers agree that the acquittal on the most serious charges was yet another example of mixed-motive jury nullification—sympathy for the rioters, fear of provoking yet another riot, and so on.

⁴⁷ That the Devil has the name of John Milton, author of the allegorical poem *Paradise Lost*, cannot possibly be a coincidence. But what does it mean? I leave that to my colleagues in the English literature departments and the film schools. I do have it on the good authority of my sixteen-year-old son, however, that in some high school classes, an expurgated version of *The Devil’s Advocate* is shown, and the link to John Milton’s poem discussed.

⁴⁸ See CAPE FEAR, *supra* note 44. See also Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 MCGEORGE L. REV. 291 (1998). The reference in the title is to Henry, Lord Brougham, an English barrister who, in 1820, defended Queen Caroline against charges of adultery by threatening to expose the like offenses of King George IV. His famous use of “greymail,” *id.* at 291, in a speech to the House of Lords has achieved iconic status as the height of adversarial—but still legal—advocacy. See *id.* at 292; see also Hodes, *supra* note 1, at 1104-08; Gerald F. Uelman, *Lord Brougham’s Bromide: Good Lawyers as Bad Citizens*, 30 LOY. L.A. L. REV. 119 (1996). Professor Uelman, it will be recalled, was part of the Simpson defense team. See *id.* at 119.

As the film progress, the link between merely *being* a criminal defense lawyer and serving the Prince of Darkness is made increasingly explicit. Kevin Lomax becomes involved in a case in which he must present perjured testimony in order to keep alive his unbeaten streak of jury trial victories, and his wife is driven insane. At the climactic end of the film, Lomax is transported back to the Florida courthouse of the opening scenes, and he is once again gathering his wits *before* the fateful cross-examination begins. Perhaps it was all a dream, or perhaps it was a vision of what happens to lawyers who are willing to play the Devil's game to the hilt. Given a second chance, Lomax refuses to cross-examine the young victim of his client's assault and withdraws from the case.⁴⁹ Disbarment is

Professor Alschuler was critical of many of the lawyers on both sides of the Simpson case but refrained from the kind of intemperate attack that was so common in the months after the verdict. Recognizing that Lord Brougham's exhortation to save the client "by all means and expedients, and at all hazards and costs to other persons" still did not include *unlawful* action, Professor Alschuler considered whether any of the defense team's tactics did stray outside the bounds of the law. Alschuler, *supra*, at 291-92, 313 (quoting 2 THE TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale ed., Albion Press 1821)). His chief candidate was its well-documented use of race-based peremptory strikes during jury selection, which is unlawful under *Georgia v. McCollum*, 505 U.S. 42 (1992) (holding that the rule of *Batson v. Kentucky*, 476 U.S. 79 (1986), forbidding prosecutors to challenge jurors solely because of race, applies to defense counsel as well as to prosecutors). See Alschuler, *supra*, at 311-13.

Still, the Supreme Court's *Batson-McCollum* jurisprudence is on shaky theoretical ground given that the Court has also insisted, in a line of cases beginning with *Taylor v. Louisiana*, 419 U.S. 522, 535-36 (1975) (disallowing the exclusion of women from jury venires on the basis of gender alone), that the jury be drawn from a "representative cross section of the community." *Id.* at 522. Moreover, the *Batson-McCollum* principle is virtually impossible to enforce and very easy to evade. See *Purkett v. Elem*, 514 U.S. 765 (1995). Thus, Professor Alschuler did not chastise too harshly on this ground. See Alschuler, *supra*, at 313-14.

Cf. Abbe Smith, "Nice Work if You Can Get It": "Ethical" Jury Selection in Criminal Defense, 67 FORDHAM L. REV. 523 (1998) (footnote omitted). In this article, Professor Smith confesses that, as a criminal defense lawyer, he has used race-based jury selection tactics. See *id.* at 526, 528. He adds, "In my view, I have no obligation as an attorney to fight cultural stereotypes unless they are being used against my client, or to serve the interests of the broader community, unless this somehow also serves my client." *Id.* at 529-30. There follows, of course, a footnote reference to Lord Brougham. See *id.* at 530 n.23.

⁴⁹ See THE DEVIL'S ADVOCATE, *supra* note 45.

threatened, but the film's point is made: Kevin Lomax has saved his soul by *refusing* to represent his client zealously within the bounds of the law.

In *Cape Fear*, the protagonist criminal defense lawyer is Sam Bowden, played by Nick Nolte. Fourteen years earlier, he represented a vicious rapist named Max Cady, played in the 1991 film by Robert DeNiro.⁵⁰ As Cady learned during the intervening years in prison, and as the audience soon learns from Bowden himself, the lawyer had "buried" an investigative report that could have been used to cross-examine the rape victim. Moreover, reading between the lines, there was probably enough in the report to have made the original cross-examination in *The Devil's Advocate* seem tame by comparison: Cady was guilty but the victim was promiscuous, and such information was admissible in the jurisdiction. Perhaps the jury, if presented with this information, might disbelieve the victim's story altogether, or perhaps it might believe that she had consented to the sexual encounter. Perhaps the prosecution, fearful of those scenarios, might have offered a more attractive plea bargain.

Sam Bowden, however, knowing that his client was guilty, was unwilling to use his skills as a lawyer to try to win an acquittal or a reduced sentence. Lying to his client about the impossibility of mounting a defense on the merits, Bowden unilaterally disarmed himself and assured that Cady had to accept a plea bargain that cost him fourteen years in prison.⁵¹ The film is about Cady's brutal campaign to take revenge upon Sam Bowden, his wife, and his young daughter.⁵²

It is doubtful that Judge Sporkin would approve of lying to a client, but he surely would approve of this fictional lawyer's bottom line—refusing to argue that a guilty client was in fact not guilty. It is difficult to reach that

⁵⁰ See *CAPE FEAR*, *supra* note 44. In the earlier film, the two key roles had been played by Gregory Peck and Robert Mitchum, respectively. See *CAPE FEAR* (MCA/Universal 1961). As befits an homage film, both actors had small parts in the 1991 remake.

⁵¹ Late in the film, Bowden argues to Cady with some plausibility that even if the trial had been conducted with full vigor, Cady might have been convicted anyway and received a much longer sentence. Not every jury falls for every lawyer's sleights of hand. Even if that were so, however, it is a fundamental principle of legal ethics that *the client* must make such crucial choices. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2(a) (1998). By withholding information about the report from his client, Bowden nullified Cady's right to participate in his own defense. See *id.* Rule 1.4 (stating that a lawyer must communicate with client so that client may make informed choices).

⁵² See *CAPE FEAR*, *supra* note 44.

bottom line position, however, without committing the first transgression. If lawyer Bowden had provided full information to client Cady, the defense of consent would have been back in the game. To their credit, the *Cape Fear* filmmakers did not quibble about this point but recognized that Bowden's action was completely unethical.⁵³ A colleague chastises him for violation of the rule of zealous advocacy, and during the final confrontation between Cady and Bowden, Cady demands at gunpoint that the lawyer recite Canon 7 of the Code of Professional Responsibility from memory—and pistol-whips him when he leaves out the word “zealously!”⁵⁴

In the film as a whole, Bowden is a sympathetic figure who never receives *just* punishment for his shocking betrayal of a client, only the horrific campaign of terror and violence inflicted by Max Cady. The audience is thus encouraged to forget Bowden's culpability, because it is utterly overbalanced by Cady's. Indeed, given the prevailing anti-lawyer sentiment, it would not be hard for many in the audience to see in Max Cady's evil a *vindication* of what Sam Bowden had done fourteen years earlier—perhaps Bowden did the *right* thing by refusing to defend his client *and* by lying to him. This is a sophisticated form of lawyer-bashing indeed: the lawyer is the sympathetic character, but only because he acts *against* the law's most fundamental creed.⁵⁵

⁵³ At the close of *The Devil's Advocate*, when Kevin Lomax refuses to cross-examine the witness, at least he has the decency to withdraw from the case. Presumably, a mistrial would be declared, and eventually some other lawyer would enter the case and defend zealously.

⁵⁴ See *CAPE FEAR*, *supra* note 44. In Raymond M. Brown, *A Plan to Preserve an Endangered Species: The Zealous Criminal Defense Lawyer*, 30 *LOY. L.A. L. REV.* 21 (1996), the author, a noted criminal defense lawyer and an anchor on Court TV, *see id.* at 21, reminds us that this “Socratic dialog” about legal ethics was not in the original film or the novel from which both films were adapted, *see id.* at 30 n.29. He also notes the ironic point that by 1991, a majority of states had adopted the Model Rules of Professional Conduct in place of the old Model Code of Professional Responsibility and that the latter no longer contains such muscular language. *See id.* at 28-30. *But see* 1 *HAZARD & HODES*, *supra* note 36, § 1.2:102, at 24 (noting that the Model Rules “contain no single rule posing” a duty of zealousness “in such sharp terms,” but zealous service to clients is nevertheless “the single most fundamental principle of the law of lawyering”). *See also* MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3, Rule 1.3 cmt.

⁵⁵ There is an especially effective additional barb that Robert De Niro imports into the film with subtle maliciousness. When Max Cady first went to prison, he was illiterate, but during the years behind bars, he learned to read. He read widely in both law and literature. At the end of those years, he was handling his own legal affairs, and that is how he discovered Sam Bowden's perfidy. Several times during

Of course, Judge Sporkin finds support not only in the popular culture, in polling results about attitudes towards lawyers,⁵⁶ and among social critics.⁵⁷ Other members of the elite bar are frequently willing to participate in his kind of selective lawyer-bashing. The elite bar concedes that there are indeed bad apples among us, leads the effort to cleanse the bar of this unwanted element, and in the meantime tries to soothe the public with the thought that even now the good apples vastly outnumber the bad. This would be an uplifting and worthwhile message, if only defenders of the profession had a better eye for apples!

Instead, supposed friends—influential friends—of the American adversary system join the demagogues in identifying as the quintessential *bad* apples the lawyers who play by the rules and secure the acquittal of factually guilty clients (meaning O.J. Simpson most of all). Thus, the elite establishment bar attempts to purchase the respectability of the bar as a whole by drumming out of the corps the foot soldiers who do the nasty grunt work, exactly as they are supposed to according to the bar's own statements of principle. A few more such timid "defenses" of the rule of law and we are all undone.

Consider, for example, the standard catechism as recited by Bobby Burchfield, partner at the prestigious Covington & Burling law firm.⁵⁸ Mr. Burchfield bemoaned yet another set of poll results showing plunging respect in the nation for lawyers, referred to the O.J. Simpson case and the McDonald's scalding coffee case,⁵⁹ but then added that such cases epitomized "lawyers promoting theories just to obtain money for clients in civil cases or to get clients off from criminal liability."⁶⁰ In Mr. Burchfield's defeatist view, "that can't help but have an adverse affect [sic] on public opinion."⁶¹

But why should that be so? Suppose instead that elite lawyers like Bobby Burchfield took to the press and airwaves to explain to the public why the cases mentioned ought *not* to have an adverse effect on the esteem with which lawyers are held? Suppose that these elite lawyers educated the

the film, Cady refers to himself as a lawyer and taunts Bowden with the thought that the two men are in effect co-counsel on his case, or "colleagues," discussing a case. CAPE FEAR, *supra* note 44.

⁵⁶ See, e.g., Chris Klein, *Poll: Lawyers Not Liked*, NAT'L L.J., Aug. 25, 1997, at A6.

⁵⁷ See Sporkin, *supra* note 3.

⁵⁸ See Klein, *supra* note 56, at A6.

⁵⁹ See *supra* note 43.

⁶⁰ Klein, *supra* note 56, at A6.

⁶¹ *Id.*

public about what it means and should mean to represent a client *zealously* within the bounds of the law? Is the public incapable of understanding that good, ethical lawyers are *supposed* to “obtain money for clients in civil cases,” and to “get clients off?”⁶²

III. RETHINKING THE POINT OF LAW SCHOOL— THE LEGAL ACADEMY PILES ON

The elite of the legal profession includes not only lawyers and judges but legal academics as well. This branch of the legal profession is perhaps even more conflicted than the others about the place of adversarial zeal in contemporary law practice because law professors are responsible in the first instance for passing down the profession’s values to each generation of new lawyers.

But what *are* the profession’s values? As I have tried to demonstrate throughout this Article, the question whether American lawyers are too aggressive or not aggressive enough is contested, and different strata of the bar often give different answers.⁶³ No matter how the question is resolved, the legal academy will be greatly affected. If the profession’s values are still to include traditional client-centered, hired-gun advocacy, young lawyers will get their first instruction in aiming better and shooting straighter from the classrooms, clinics, and trial advocacy programs of today’s law schools. But if the elite segment of the bar (including some law professors) is correct, a major flaw of the American legal system is precisely its atomistic and adversarial quality. In that event, it will still fall to the law schools to breed this quality *out* of neophyte lawyers.

For this reason, the American Bar Association’s various commissions and committees on “professionalism” and “civility” efforts are well-stocked with legal academics and well-seasoned with citations to their writings. It is also fair to say that while the elite view has (not surprisingly) prevailed in these elite fora, contrary views—which are *also* more likely to be found in law schools than elsewhere—are usually given their due.⁶⁴

⁶² *Id.*

⁶³ See *supra* notes 56-62 and accompanying text.

⁶⁴ See A.B.A. SEC. OF LEGAL EDUCATION AND ADMISSIONS TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM: REPORT OF THE PROFESSIONALISM COMMITTEE (1996) [hereinafter TEACHING AND LEARNING PROFESSIONALISM: REPORT]. Articles critical of the notion that professionalism is a sorely needed quality that goes *beyond* playing within the legal and ethical rules, including some of those noted *supra* note 34, are cited by the ABA Section’s Professionalism Committee throughout the publication.

I personally cannot complain of being ignored either. The Professionalism

A good example of the academy's distaste for adversarial combat has been provided by Professor Carrie Menkel-Meadow, a tireless, prolific, and skillful proponent of alternative forms of dispute resolution.⁶⁵ Professor Menkel-Meadow was one of the featured speakers at a W. M. Keck Foundation Forum on the Teaching of Legal Ethics at the William and Mary School of Law in March 1996.⁶⁶ While nominally suggesting only that traditional bipolar litigation ought not to be woodenly applied to all situations, Professor Menkel-Meadow actually launched what she called a "postmodern and multicultural critique"⁶⁷ of the traditional adversary system. She sought to "shift the burden of proof" to defenders of the adversary system and to "rethink both the goals our legal system should serve and the methods we use to achieve those goals."⁶⁸ Of course, just as Judge Sporkin suggested in the very title of his 1993 luncheon address,⁶⁹ if the goals and methods of the law are reshaped, the world into which our law school graduates go will also change, and eventually the law schools will have to rethink the way law is taught.

One of the goals of the overall system that Professor Menkel-Meadow did *not* want to alter was finding the truth, and she criticized hired-gun tactics on the ground that they often work to obscure the truth instead, a criticism that was central to Judge Sporkin's 1993 talk.⁷⁰ The best defenses

Committee solicited my views, and I responded with a long letter in June 1995. The publication noted and fairly characterized the tenor of this letter, much of which is reflected in this Article. See TEACHING AND LEARNING PROFESSIONALISM: REPORT, *supra*, at 4 n.16.

⁶⁵ See generally Menkel-Meadow, *supra* note 37.

⁶⁶ See *supra* note 8.

⁶⁷ Menkel-Meadow, *supra* note 37, at 33.

⁶⁸ *Id.* at 6.

⁶⁹ See Sporkin, *supra* note 3.

⁷⁰ See *id.* Professor Menkel-Meadow agrees with Judge Sporkin that the current rules of adversarial ethics are insufficiently exacting with respect to specific tactics as well as generally.

[I]f the excesses of adversarial behavior concern us we could . . . require all lawyers, not just prosecutors to "do justice" in lieu of only serving their clients' interests, *prohibit the cross-examination of witnesses "known" to the lawyer to be telling the truth* and prohibit the presentation of any evidence at all "known" to be false by the attorney, and impose serious sanctions for violations of these rules.

Menkel-Meadow, *supra* note 37, at 38-39 (emphasis added) (footnotes omitted). Professor Menkel-Meadow's reference to "any evidence at all" is presumably a reference to the fact that the current rules prohibit presentation of any false evidence, but remedial measures by the lawyer are required only if the evidence is

of the adversary system, however, not only concede that it does not promote truth-seeking in any absolute sense but also maintain that this is often its *strength* because other values are often more important.⁷¹

Furthermore, where others fear that the official rules of the profession have inappropriately *de-emphasized* the true professional's commitment to client interests by removing the word "zealousness" from the enforceable rules of conduct and replacing it with a mere glancing reference in the accompanying official comment,⁷² Professor Menkel-Meadow worries

material. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1998).

⁷¹See *supra* note 38 and accompanying text; cf. Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988). Moral philosopher David Luban has been a persistent critic of what he often calls "the adversary system excuse." DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* at xix (1988); see also *id.* at 50-66. Professor Luban makes almost a blanket exception for criminal defense lawyers, however, and specifically with respect to the truth-finding function.

The political argument for zealous criminal defense does not claim that the adversary system is the best way of obtaining justice. It claims just the opposite, that this process is the best way of *impeding* justice in the name of more fundamental political ends, namely keeping the government's hands off people.

Id. at 63 (emphasis added).

It is true that the subordination of truth to other values occurs less frequently in civil litigation, especially as between private parties of roughly equal bargaining power. But that is in large part because the difference between criminal and civil litigation has already been accounted for in the actual existing rules of the game. Thus, some tactics that would be appropriate in a criminal case would *already* be *beyond the bounds of the law* in a civil case. In particular, lawyers defending a civil case may not so easily use the tactic of spinning the record facts to cajole a jury to reach a counter-factual result because in a civil case the opposition may call the lawyer's client to *testify* about the facts. (I am indebted to my friend and colleague Professor Nancy Moore of Boston University School of Law for this insight.)

The distinction between the civil and criminal brands of adversary ethics is well illustrated by the O.J. Simpson case. As I have written elsewhere, see Hodes, *supra* note 1, at 1077-78 n.5, his team of criminal defense lawyers knew he was factually guilty but were able to prevail in the case without violating significant rules of the game. I have long maintained, however, that his lawyers in the civil case acted *unethically* because they also knew that he was culpable in fact, and thus they *knowingly* presented false testimony when he took the stand. Ironically, even breaking the rules did not propel them to victory in the case.

⁷²Compare MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1980) ("A Lawyer Should Represent a Client Zealously Within the Bounds of the Law"), with MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 ("A lawyer shall act with

about the “loophole in the language of the comments—where zeal continues to rear its dragon-like smoke.”⁷³

In a sharp response to Professor Menkel-Meadow’s talk, Professor Monroe Freedman, one of the leading defenders of the adversary system, noted the ironic point that when Menkel-Meadow was involved in three separate disputes in her own life, she chose for herself the traditional litigation route.⁷⁴ This irony reflects a double standard that is all too common when elite lawyers survey the adversarial scene. Favored clients and favored causes deserve full-bore professional treatment, but others must make do with lawyers taking a less adversarial and more public-spirited view. This double standard is especially pronounced with respect

reasonable diligence and promptness in representing a client.”).

⁷³ Menkel-Meadow, *supra* note 37, at 40. In an earlier article, Professor Menkel-Meadow made clear her view that the law schools were on the wrong side of the debate about the necessity for more professionalism and more training in professionalism, and that the problem lay in the values transmitted during the law school years.

[T]he traditional classroom fosters adversariness, argumentativeness, and zealotry, along with the view that lawyers are only the means through which clients accomplish their ends—what is “right” is whatever works for this particular client or this particular case. We extol loyalty to the client above all and neglect the responsibility of the lawyer to counsel the client about moral and other concerns. Our case-by-case method, which focuses on identifying principles of doctrine rather than principles of behavior, also encourages moral relativism. The values that we attend to in the classroom are apt to be individualism and autonomy, which we present as the basis for the adversary system, the Bill of Rights, and the standard of proof in criminal cases. We fail to teach our students that lawyering involves responsibility to and for others [than clients].

Carrie J. Menkel-Meadow, *Can a Law Teacher Avoid Teaching Legal Ethics?* 41 J. LEGAL EDUC. 3, 7 (1991) (footnotes omitted). As have many before and after her, Professor Menkel-Meadow has first inappropriately conflated and then confused mandatory rules of legal ethics with hortatory “rules” of morality and good deportment. See Sporkin, *supra* note 3 and accompanying text.

⁷⁴ See Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63, 68 (1996). Professor Freedman began his article with an ironic barb: “I have always admired the adversarial advocacy with which Professor Carrie Menkel-Meadow attacks adversarial advocacy. Also, given her postmodern skepticism that there can be any certainty in truth, I respect her certainty about her own version of truth.” *Id.* at 63.

to high-profile criminal cases, such as the O.J. Simpson case and the Rodney King and Reginald Denny beating cases.⁷⁵

When it comes to reshaping the law school and the law school curriculum itself to reflect a less adversarial approach, few can match the efforts of Dean David Link, who has been the Dean at Notre Dame Law School since 1975—currently the longest-serving dean in the nation.⁷⁶ According to Dean Link, Notre Dame long ago implemented a pervasive program of ethics instruction, one that self-consciously includes more than just extra time devoted to the rules of professional ethics.⁷⁷ Moreover, the Notre Dame program goes beyond the much-discussed and highly promising curricular reform of incorporating legal ethics issues into many substantive courses.⁷⁸ Students are further taught that lawyers can be counselors and mediators in addition to advocates.⁷⁹ Rather than “accepting

⁷⁵ As described *infra* notes 87-92 and accompanying text, Professor Barbara Babcock applied this double standard to the criminal defense bar *while delivering a talk to law students encouraging them to become involved in criminal defense work*. For reasons that she could not satisfactorily explain, O. J. Simpson was not entitled to the same vigorous defense that she herself had provided to a poor client while a public defender in Washington, D.C.

⁷⁶ See *Faculty Profile of David T. Link* (visited Feb. 24, 1999) <<http://www.nd.edu/~ndlaw/faculty/link.html>>. Dean Link is stepping down from his deanship in 1999.

⁷⁷ See David T. Link, *The Pervasive Method of Teaching Ethics*, 39 J. LEGAL EDUC. 485 (1989).

⁷⁸ See *id.* at 486. For more on this species of curricular reform, see DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (1994), a rich law school textbook that is about one half traditional legal ethics materials (including readings in moral philosophy) and one half legal ethics problem sets suitable for use in substantive courses appearing in the first year and throughout the curriculum. Professor Rhode, who recently completed a term as President of the Association of American Law Schools, see ASSOCIATIONS YELLOW BOOK, Summer 1998, at 387, has been advocating this understanding of the “pervasive” approach for some time. See generally Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992).

⁷⁹ See Link, *supra* note 77, at 486. This much is not surprising in a world in which the Model Rules of Professional Conduct have largely replaced the Model Code of Professional Responsibility, which was criticized at a symposium that was the intellectual birthplace of the Model Rules on the ground that its vision was limited to that of “downstate Illinois in the 1860s.” GEOFFREY C. HAZARD, ETHICS IN THE PRACTICE OF LAW 16 (1978). See MODEL RULES OF PROFESSIONAL CONDUCT Rules 2.1 (governing advice to clients), 2.2 (governing service as an intermediary), 4.4 (addressing respect for the rights of third parties), 6.1

adversarial ethics unquestioningly," students "discover the lawyer's potential as a peacemaker and as a leader in all levels of society."⁸⁰

This all seems admirably open-minded and pedagogically sound, yet I am left with a lurking unease about how a student would fare at Notre Dame if the student questioned adversarial ethics, *but then accepted them as best suited to solving the problems of many clients in many contexts*.⁸¹ At Notre Dame, students are encouraged to establish their own personal standards of professionalism and to face up to the difficult choices that a life in the law can bring. "Violate a canon of professional responsibility and you might lose your license to practice; violate your personal standards and you will lose all of your reasons for going to law school and becoming a lawyer."⁸²

Again, I admit to doubts about the full implications of what is being said, along with some unease. Does the program allow for the possibility that, for some people, going to law school and becoming a lawyer really do mean becoming a scorched earth tactician? Or is Dean Link's assumption that true professionals will always have personal standards that are "higher" than that?

In subsequent writings and talks, Dean Link has more clearly articulated an anti-litigation position that is more akin to that of Professor Menkel-Meadow and Judge Sporkin. In an op-ed in the *Chicago Tribune* written in 1995 during the O.J. Simpson trial, for example, he responded to the public perception that lawyers lack ethics *because* they are hired guns who sell their services to the highest bidder. Accepting this premise, he wrote, "It is incumbent upon our nation's law schools to develop lawyers who believe their primary responsibility is to bring about justice and peace between litigants, rather than strive for monstrous-sized verdicts."⁸³

(recommending voluntary *pro bono publico* service) (1998).

⁸⁰ Link, *supra* note 77, at 486.

⁸¹ See generally Carrie Menkel-Meadow, *To Solve Problems, Not Make Them: Integrating ADR in the Law School Curriculum*, 46 SMU L. REV. 1995 (1993). Somewhat mischievously, I have always wanted to ask Professor Menkel-Meadow how a problem-solving lawyer should respond if a client, in high dudgeon, states that he or she is having a "problem" with a detestable character and wants to "solve" the problem *by suing the bastard!*

⁸² Link, *supra* note 77, at 487.

⁸³ David T. Link, *Law Schools Must Lead Legal Profession Back to Its Roots*, CHI. TRIB., Sept. 1, 1995, § 1, at 27. Compare this to the remarks of lawyer Bobby Burchfield, *supra* notes 58-62 and accompanying text.

In 1997, during the Father Theodore Hesburgh Lecture at the Holy Cross Hospital in Fort Lauderdale, Dean Link was more blunt. "My solution for restoring the reputation of the legal profession is to scrap adversarial ethics."⁸⁴ As reported in *The Florida Catholic*, in his talk, entitled *Professional Ethics: The Revival of the Legal Profession*, Dean Link asserted that the adversary system leads lawyers to adopt a "least common denominator" approach that favors winning over "truth and compromise and the best result for all concerned."⁸⁵ The only hope Dean Link saw for the revival of the profession was that law schools would come to "want to produce lawyers who hunger and thirst for justice and healing and peace."⁸⁶

⁸⁴ Robert O'Steen, *Dean: Legal System Has Hit Bottom*, FLA. CATH., Dec. 11, 1997, at A1; cf. Roger Schechter, *Changing Law Schools to Make Less Nasty Lawyers*, 10 GEO. J. LEGAL ETHICS 367 (1996) (analyzing the reasons for the legal profession's unpopularity and the role legal education plays in contributing to this negative perception).

⁸⁵ O'Steen, *supra* note 84, at A1.

⁸⁶ *Id.* at A13; see also Roger I. Abrams, *Law School as a Professional Community*, in A.B.A. SEC. OF LEGAL EDUCATION AND ADMISSION TO THE BAR, TEACHING AND LEARNING PROFESSIONALISM: SYMPOSIUM PROCEEDINGS 53 (1996). The symposium was held in Oak Brook, Illinois, in October 1996, and was sponsored in part by the Professionalism Committee of the American Bar Association Section of Legal Education and Admissions to the Bar. This is the same committee that produced an influential publication. See TEACHING AND LEARNING PROFESSIONALISM: REPORT, *supra* note 64. Both the publication and the proceedings of the symposium are available in pamphlet form, as cited herein, from the ABA.

Dean Abrams of the Rutgers University School of Law in Newark proposed an even more fundamental transformation of the law school world. Like Professor Menkel-Meadow, see *supra* note 73, Dean Abrams sees law schools as replicating and modeling all that is bad in the adversary system, see Abrams, *supra*, at 56-57. There is too much of a power imbalance between teachers and students and too much competition as between students. See *id.* at 54-56. The curriculum is shot full of supposedly value-free teaching about argumentation and winning—even moot court programs are counter-productive because they reward only the best adversarial stylists. His solution is to create a "professional community" within the walls of the law school, teaching from the very outset that the *first* responsibility of lawyers is to act "with dignity and honor," meaning without incivility and discourtesy. *Id.* at 59.

More fundamentally, the changes in curriculum, atmosphere, and educational philosophy that Dean Abrams proposes are designed to

As a final example of an academic who worries that professional hired guns are a little too professional for the good of society, consider the surprising case of Professor Barbara Allen Babcock's Distinguished Lecture at my own school, entitled *Inventing the Public Defender*.⁸⁷ The case is surprising because Professor Babcock spent the first eight years of her illustrious career as a zealous and aggressive criminal defense lawyer, first with the firm of Edward Bennett Williams and then as a public defender.⁸⁸ Her 1983 article, *Defending the Guilty*,⁸⁹ is a classic defense of the role of criminal defense counsel, and I have assigned it often as a reading in my professional responsibility classes.

The point of the 1997 lecture in Indianapolis was to exhort students to take up the important work of criminal defense, whether as a public defender, in private practice, or as an occasional *pro bono publico* assignment. During her talk, she rehearsed with gusto the central story from her 1983 article, which also began as a presentation to an audience of law students.⁹⁰ Lawyer Babcock defended a middle-aged poor black woman, who was charged with her third heroin offense and was certainly guilty. There was no defense except that doctors at a public hospital reported that

rip[] away at the value-neutral facade [sic] that has allowed lawyers to proclaim objectivity in a world where there is a right and a wrong. Lawyers are officers of the court and protectors of the processes of the law, not hired guns. Lawyers must learn that what they do has moral consequences.

Id. at 61. With due respect (since I graduated from Rutgers myself), I must protest that even hired guns—if they are any good—are fully aware that what they do has moral consequences. Further, it is not as settled as Dean Abrams appears to think it is that playing the role of hired gun has only negative moral consequences. Indeed, I have put the contrary case myself.

[The O.J. Simpson defense team did involve the country in “confusion,” as Lord Brougham warned is sometime the unhappy fate of an advocate.] But if playing such a role, “zealously, within the bounds of law,” does contribute to society, at least in the long-run sense that it helps sustain an imperfect but morally justifiable system of trial by jury, warts and all, jury nullification and all, then perhaps we ought to conclude that what the defense lawyers did . . . was not only ethical, but may actually have been moral after all!

Hodes, *supra* note 1, at 1107-08.

⁸⁷ Barbara Allen Babcock, *Inventing the Public Defender*, Address for Indiana University School of Law Distinguished Lecture Series (Sept. 29, 1997).

⁸⁸ See Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 175 (1983).

⁸⁹ *Id.*

⁹⁰ See *id.*

the client had a mental disease then actually listed in the *Diagnostic and Statistical Manual*. Geraldine—as Professor Babcock called her in the article and in both talks—had an “inadequate personality.”⁹¹ Using her skills as an advocate, Babcock was able to parlay this diagnosis, together with information provided by Geraldine’s family and friends, into a jury verdict of not guilty by reason of insanity! Inadequate to the last, Geraldine, who had taken little interest in the seven-day trial, burst into tears of joy. “I’m so happy for you,” she said to the lawyer who had just walked another guilty client.⁹²

None of this was surprising. I knew the story almost by heart. The surprising part came in the question-and-answer session when the conversation turned inevitably to the O.J. Simpson case. Barbara Allen Babcock, criminal defense lawyer and elite law professor, would not stand up for the Dream Team! Exactly what the lawyers did that was unprofessional or unethical, she could not say. Why the guilty Geraldine was entitled to a more vigorous defense than the guilty O.J. Simpson, she could not say.

At last, Professor Babcock muttered something about the case being unusual, the prosecutors too timid, and the judge too weak. Surely, however, she did not mean to suggest that the lawyers would have demonstrated their professionalism—as officers of the court—by protesting that their guilty client was receiving a windfall that he did not deserve. But what did she mean to suggest, as she was on a mission to bring young lawyers a message about the social worth of zealous representation for each unworthy client, within the bounds of the law?

IV. EPILOG:

RETHINKING THE WAY TRIAL ADVOCACY IS TAUGHT

If one of the purposes of the Association of American Law Schools is to provide food for thought for teachers at member schools, Indiana University School of Law should keep its dues current. I attended the 1993 AALS weekend conference in Washington, D.C., on professional responsibility, and I am still digesting the luncheon address delivered there by Judge Sporkin, *Rethinking the Way Law is Taught: Is there an Inconsistency in Attempting to Teach Ethics Where the Substantive Subjects Presuppose an Adversarial System?*⁹³ As has been evident throughout, this Article is itself a delayed reaction to his attack on the adversary sys-

⁹¹ *Id.* at 179.

⁹² *Id.* at 178-79.

⁹³ See Sporkin, *supra* note 3.

tem and, by implication, the nation's law schools. According to Judge Sporkin, it is a hopeless task to teach ethics while the adversary system is still in place, for it is per se "unethical" to practice law in an adversarial fashion.⁹⁴ In my view, by contrast, the law schools should be preparing young lawyers for combat *within* the adversary system by teaching them to aim better and to shoot straighter. That is the true meaning of professionalism.

Flash forward to January of 1999, and I again find myself at an AALS function—this time a panel discussion on trial advocacy at the annual meeting held in New Orleans.⁹⁵ Like Judge Sporkin's talk, the panel discussion, entitled *Teaching Law Students to be Advocates: Filling the Gap Between Teaching Substantive Law and Skills Training*,⁹⁶ was about the relationship between the substantive content of law and how to go about teaching it. This time the message was more appetizing. Unlike Judge Sporkin, the panelists in New Orleans all supported the adversary system and sought to help teachers help students master its demands.

This was no surprise given the career histories of the panelists, all of whom were or had been active litigators, and most of whom were law professors who maintained a litigation practice from within the academy.⁹⁷

⁹⁴ See *supra* notes 9-30 and accompanying text.

⁹⁵ See ASSOCIATION OF AMERICAN LAW SCHOOLS, *THE PROFESSIONAL RESPONSIBILITIES OF PROFESSIONAL SCHOOLS* (1999).

⁹⁶ See *id.* at 37.

⁹⁷ Several of the law professors active in the Litigation Section of the AALS are also leaders of the American Bar Association Litigation Section. The morning following the panel discussion described in the text, the ABA Section hosted a breakfast to promote contacts between the section and law professors and to enlist the aid of law professors in the ABA Section's efforts to improve the judicial system and teaching about the judicial system. See *id.* at 73.

I attended both the panel session and the breakfast meeting because—as I hope this Article demonstrates—I am an academic lawyer who *supports* the adversary system and does *not* routinely disparage the efforts of the practice wing of our profession. For comparison, refer to the views of Professor Carrie Menkel-Meadow and Deans David Link and Roger Abrams, *supra* notes 65-86 and accompanying text. Moreover, I too have been involved as a lawyer, a consultant, and an expert witness in several litigated matters during the twenty-plus years that I have been a full-time law teacher.

Candor requires me to disclose, however, that by the time of the meetings in New Orleans, I had decided to leave the teaching branch of the legal profession and to return to private practice on a full-time basis. By the time this Article is published, I will be a solo practitioner with a national consulting and litigation practice in the law of lawyering. It is not a coincidence that my swan song as an

The lead speaker was Russ Herman, a New Orleans plaintiffs' lawyer heavily involved in the national tobacco litigation and settlement and former President of the American Trial Lawyers Association.⁹⁸ The panel also included Professor Christopher Darden of Southwestern University School of Law—the same Christopher Darden who served as second-chair prosecutor in the O.J. Simpson case—and Professor Eleanor Myers of Temple University School of Law, an experienced litigator in national class actions in the antitrust and securities area. The final speaker was Professor Michael Tigar of the American University's Washington College of Law, whose most recent court appearance in a high profile case had been as lead defense counsel for Oklahoma City bombing defendant Terry Nichols.⁹⁹

Expressed in different ways and through the use of different examples, the panelists had a common message for the audience—a message intended to be reconveyed to law students: an advocate must be able to construct and then make come alive in the courtroom a central narrative of the case—a story or perhaps even a soundbite that will play to the in-court audience. At the same time, the panelists did not shrink from acknowledging that the story being “sold” need not actually be true, so long as it can be promoted through ethical means.

That formulation, of course, merely restates the central argument that animates this Article. What means *are* ethical (even if morally troubling), and thus required of the professional advocate, once actually engaged in litigation? Is it permissible to take advantage of the procedural and evidentiary rules of the adversary system in an effort to *obscure* the truth rather than to help search for it?¹⁰⁰ Is it permissible to try to make the false

academic consists of this Article on the adversary system, plus an article on the hardball and sometimes unlovely tactic of preparing or coaching witnesses to testify, known colloquially as “horseshedding.” That second article grew out of my experiences as a consultant and expert witness in asbestos litigation in Texas, in which the plaintiffs' lawyers had been accused of stepping over the line from zealous representation into subornation of perjury. See William Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of the Law*, 30 TEX. TECH. L. REV. (forthcoming 1999).

⁹⁸ Mr. Herman also appears as a legal commentator on such programs as *Good Morning America*, *The Today Show*, and *Newsline* on CNN.

⁹⁹ See ASSOCIATION OF AMERICAN LAW SCHOOLS, *supra* note 95, at 37.

¹⁰⁰ See *supra* note 38 and accompanying text. Justice White's famous comment about the “different mission” of criminal defense counsel, quoted in part *supra* note 38, concludes as follows: “[A]s 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

look true and true look false, so long as the evidence and testimony actually presented is not *itself* known to be false or fabricated?¹⁰¹

The lawyers and law professors at the New Orleans panel presentation, whether on the podium or in the audience, appeared to have moved beyond these self-doubts. Zealousness within the bounds of the law was their watchword, and the bounds of the law seemed capacious enough.¹⁰² The focus in New Orleans was more on how to convince students that the role of professional advocate is still an honorable one in a world where lawyer-bashing is a major league sport. Once the will is assured, of course, there is still the question of what are the best ways. The participants in New Orleans, at least, seemed to think that the academy might help fulfill its obligation to the profession to provide more explicit training in the technical skills of lawyering¹⁰³ by teaching hired guns to aim better.

Throughout the panel discussion and continuing into the question-and-answer period, however, and even into the joint lawyer-law professor breakfast the next morning, I was nagged with uneasy thoughts. Does Judge Sporkin know about these people?¹⁰⁴ Are they not emblematic of the problem he sees with both the legal profession generally and the law schools? Would Professor Menkel-Meadow disapprove?¹⁰⁵ Are not these professor-litigators creating more problems than they are solving?¹⁰⁶ Has Dean Link found a way to abolish the trial advocacy course at Notre Dame?¹⁰⁷

Partial answers to at least some of these questions have been provided in the speeches and writings of adversary system opponents discussed earlier in this Article. Near the end of her lament about the “trouble” with

truth.” *United States v. Wade*, 388 U.S. 218, 258 (White, J., dissenting in part and concurring in part).

Consider also the comment of Alan Dershowitz, another law professor who sometimes litigates: “[A] criminal trial is anything but a pure search for truth. When defense attorneys represent guilty clients—as most do, most of the time—their responsibility is to try, by all fair and ethical means, to *prevent* the truth about their client’s guilty from emerging.” *See Dershowitz, supra* note 1, at 166.

¹⁰¹ *See Schwartz, supra* note 38.

¹⁰² *See supra* notes 7-8.

¹⁰³ *See NARROWING THE GAP, supra* note 33, at 138-221.

¹⁰⁴ *See supra* notes 3-31 and accompanying text.

¹⁰⁵ *See supra* notes 65-73 and accompanying text.

¹⁰⁶ *See Menkel-Meadow, supra* note 81.

¹⁰⁷ *See supra* notes 76-86 and accompanying text.

the adversary system in our “postmodern, multicultural world,”¹⁰⁸ for example, Professor Carrie Menkel-Meadow reveals that she has given up teaching a course in trial advocacy.¹⁰⁹ This is a personal career choice (with overtones of academic freedom) that certainly ought to be respected, especially when made by an academic with such high standing and long seniority. But I worry, as does Professor Monroe Freedman in his response to her article,¹¹⁰ that she might be tempted to impose this choice on others. Would she vote in the curriculum committee or a full faculty meeting to abolish the course? Would she be willing to trench on the academic freedom of others and try to ensure that only a de-fanged course be taught—perhaps a course that would produce, in the manner of Dean David Link, only lawyers who “thirst for justice and healing and peace”¹¹¹ rather than winning cases for their clients?

The very last sentence of Professor Menkel-Meadow’s attack on the adversary system suggests that with multiple choices of forums and modes available for dispute resolution, “[n]ot everyone will have to be a ‘hired gun’ in an epistemological system that is crumbling as we speak.”¹¹² But will some of us and some of our students be allowed to be?

There is a enormous job of education to be done, both inside the law schools and out. The law schools, in the skills courses and throughout the curriculum, must teach students not only how to be lawyers but to have the *courage* to be lawyers. The second is sometimes as hard as the first in a world in which even lawyers often have contempt for what lawyers do. The bar as a whole must educate the public not to hate lawyers for the necessary job that we do, but it will make no progress in that regard unless it first educates itself.

¹⁰⁸ Menkel-Meadow, *supra* note 37, at 5.

¹⁰⁹ *See id.* at 40 n.170.

¹¹⁰ *See* Freedman, *supra* note 74, at 68.

¹¹¹ O’Steen, *supra* note 84, at A13.

¹¹² Menkel-Meadow, *supra* note 37, at 44.