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A True Crime: A Review of Janet Malcolm, *The Crime of Sheila McGough*

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Janet Malcolm's *The Crime of Sheila McGough* is a fascinating but frustrating meditation about one woman's fateful encounter with the criminal justice system, and another's investigation of that encounter. Malcolm's claim that she desires to know the truth, that she is going to reconstruct what happened, and that her factfinding mission will free Sheila McGough, combined with her skepticism that she will be able to save McGough, makes her narrative compelling. *The Crime of Sheila McGough* is frustrating because the charges Malcolm files against the criminal justice system, and, more broadly, the adversary system, are serious, and deserve a sustained commitment. But just as Malcolm loses patience with her heroine, she loses interest in her story of the structurally flawed legal system. This review is an evaluation of Malcolm's narrative, of her efforts to persuade her readers of the truth of her twinned narratives, that Sheila McGough is innocent, and that the adversary system is incapable of finding the truth.

I

Sheila McGough was a sole practitioner in Northern Virginia in 1986 when she defended a con man named Bob Bailes in the United States District Court for the Eastern District of Virginia. She had less than four years experience practicing law when hired by Bailes, who was charged with giving a bank false information to obtain a loan. McGough lost the case (as she sees it), but not Bailes.

Shortly before Bailes was tried and convicted on the bank charge, he placed his last ad in the Classifieds section of the Wall Street Journal. The ad, published on June 13th, indicated that S.S. Smith, an Abingdon, Virginia lawyer, was a Trustee in Bankruptcy who was selling insurance companies owned and controlled by a bankrupt corporation. As Malcolm later tells us, Smith was a former lawyer for Bailes who was neither a bankruptcy trustee nor a seller of insurance companies. He also had no knowledge Bailes had placed this ad. Frank Manfredi, a disbarred lawyer and convicted felon, responded to the ad, and eventually contacted Bailes. By June 18th, Manfredi and his partner, Francis Boccagna, contracted with Bailes to purchase two insurance companies for \$900,000. Bailes's con was that he was not selling just any insurance companies; these were companies governed by charters dating from the 1890s, before insurance was subject to detailed state regulation, and thus exempt from state regulation. The contracting parties agreed that the buyers would make a \$75,000 down payment. Manfredi and Boccagna, who did not plan on building an insurance business (they were planning on flipping the property to an "ultimate buyer"), did not put up their own money. Instead, nearly a month after contracting with Bailes, Manfredi and Boccagna found Philip Zinke. But Zinke was not to put up any money either. Zinke contacted an acquaintance named Kirkpatrick MacDonald, an investment banker, and MacDonald agreed to put up the \$75,000, which was wired to Sheila McGough's trust account through the offices of a New York lawyer named Alan Morris.

As Malcolm notes, "[t]he history of what happened next exists in two versions: the government's and Sheila McGough's." (At 9) According to the government, McGough told Boccagna and Manfredi, as well as their lawyer, Morris, that the \$75,000 would be held in escrow. Instead of keeping her promise, however, when the money was wired to her account, McGough disbursed \$70,000 to Bailes, and kept \$5,000 for herself. In McGough's version (which Malcolm notes was not told at her trial), she had neither

played a role in this transaction, nor had agreed to hold the down payment in her trust account. Instead, she was desperately trying to prepare her defense of Bailes in his upcoming trial. Because she believed Bailes was a legitimate businessman, she allowed him to use her office, her telephone, and her trust account for the \$75,000 down payment. When the money was wired to that account, she gave Bailes \$70,000, because Bailes told her to keep \$5,000, for, as it were, a down payment on her legal fee.

When the money disappeared, the patsy, McDonald, began a crusade. First, he sued McGough for the return of the money. Shortly before trial, the case was settled, with McGough's malpractice insurer agreeing to pay McDonald \$75,000 plus interest. Not content, McDonald demanded the federal government indict McGough. It finally did, and on November 21, 1990, McGough was convicted on fourteen of fifteen counts of fraud, obstruction of justice, witness tampering and perjury. She was sentenced to three years in prison, and served most of that time. She was also disbarred.

II

Malcolm became interested in Sheila McGough's claim after receiving a letter from her in the winter of 1996. McGough claimed that "federal prosecutors in my hometown [Alexandria, Virginia] investigated me for four years, and when they failed to turn up anything illegal in what I was doing, they made up some crimes for me and found people to support them with false testimony." (At 6) Malcolm believes this story to be true. In Malcolm's view, McGough was tried, convicted and sent to prison for being "irritating." And how did she irritate the federal government? McGough continued to defend Bob Bailes after his conviction in the summer of 1986 "as if nothing had happened, as if he were still a person with rights rather than a convict without any, and as if the appeal stage of a case were the same as the pretrial and trial stages." (At 8)

This charge alone deserves a serious hearing. Malcolm, however, makes another charge; McGough was convicted because her lawyers were unable to offer a powerful, and, in her view, truthful, counter-story to compete with the prosecutor's compelling narrative. "With their hands tied by the double bonds of the rules of evidence and the stubborn silence of their client, they could do little more than rush around putting out little fires in waste baskets as the entire building burned to the ground." (At 12) McGough, then, was the victim of both a vindictive federal government and of a system of rules seemingly designed to arrest any narrative flow, a system guarding "the ideal of unmediated truth, truth stripped bare of the ornament of narration." (At 3)

A.

Malcolm makes a strong case that McGough was irritating in her defense of Bailes after his conviction in 1986. Malcolm offers as an example an August 1988 hearing, during which McGough argued the illegality of a sentence, resulting from a guilty plea by Bailes in 1975, in part because Bailes's medical condition left him incompetent to plead guilty. The transcript indicates an increasing "irritation" on the part of Judge James Turk, who threatens McGough with "substantial sanctions" for bringing what Turk believes is a frivolous claim. After the hearing, McGough's motion was denied, but the court did not impose sanctions. Turk was one of four judges called by the prosecution in its case

against McGough, but Malcolm notes that "[h]e apparently bore her no ill will, and his testimony did her no great harm." (At 33) So if Turk bore McGough no ill will, and if his testimony caused her little harm, we must look elsewhere for the embodiment of the vindictive government.

Malcolm turns her attention to Mark Hulkower, the prosecutor in McGough's case. McGough herself blames Hulkower for her imprisonment. Malcolm, brutally honest with herself and her readers, notes that "[i]f Sheila is my heroine, then Hulkower has to be my villain." (At 51) But her report of her conversations with Hulkower makes it clear that he had joined the United States Attorney's Office in the Eastern District of Virginia in 1989, after McGough had been indicted. Hulkower graduated from law school in 1985, making him a relatively young attorney when he tried the McGough case. Hulkower may be a villain, but his relative inexperience as a lawyer, and his brief experience as a prosecutor in the Eastern District of Virginia, suggest it is unlikely that he is *the* villain. And Malcolm knows better. McGough may remain Malcolm's heroine, but Malcolm makes no attempt to sustain the designated role she has assigned Hulkower to play. Later in her narrative, after an excursion into Bailes's past as a con man, Malcolm returns to McGough's claim that overzealous prosecutors framed her. Malcolm reiterates her view that Manfredi and Boccagna, and their lawyer, Morris, lied when they testified that McGough told them she would hold the down payment in her escrow account. She then says about Hulkower: "[I]t isn't at all clear that Hulkower knew this and was cynically supporting a theory he didn't believe in. I think he believed Sheila was Bailes's gun moll and had lied and cheated on his behalf." (At 110) Hulkower may be guilty of accepting at face value and presenting to the jury testimony that on close examination appears incredible, but that can only make him a dupe, not a villain.

Late in her narrative, Malcolm discusses "the incident of the two judges." (At 114) After Bailes was convicted and sentenced in 1986, McGough attempted to have him released to a halfway house in Washington, D.C., "so he could work with attorneys on a Chapter 11 case," in McGough's words. (At 117) McGough first asked federal District Judge Charles Richey to endorse a writ issued by Bankruptcy Judge George Bason allowing Bailes to be moved from Allenwood Prison to the halfway house. Richey agreed to do so, as long as the United States Attorney's Office for the District of Columbia endorsed the order. The Office, however, refused. Three days later, on Monday, March 16, 1987, McGough approached Judge Stanley Harris, who signed an order transferring Bailes. But McGough failed to inform Harris that she had first approached Richey, who had conditioned his approval on acquiescence by the U.S. Attorney's Office. When the U.S. Attorney's Office told Judge Harris about McGough's colloquy with Richey, Harris rescinded his order and eventually testified against McGough. Malcolm doesn't claim that either Judge Richey or Judge Harris, the latter of whom also complained to the District of Columbia Bar Association about McGough's conduct, conspired against McGough. Malcolm's narrative makes it clear that one reason for the refusal of the U.S. Attorney's Office to agree to the transfer of Bailes was that Assistant U.S. Attorney John Birch was annoyed, indeed irritated, with McGough's earlier efforts on behalf of Bailes. Unfortunately for McGough and Malcolm, there is no evidence that Birch or others in his office instigated or fostered the case against McGough. The charge that vindictive members of the federal government framed McGough thus lacks any explanatory power. One consequence of these dead ends is a reframing by Malcolm of the reason McGough

was convicted.

The argument is that "false charges of criminality and true charges of impropriety--was a deadly combination." (At 121) This is a far cry from showing that McGough's irritating style as a lawyer caused her indictment and conviction. Malcolm notes that even when Mark Rochon, one of McGough's lawyers, claims that "[t]he U.S. Attorney's Office in Alexandria goes after lawyers," (at 124), this and other statements "subtly undermined Sheila." (At 123) The best Rochon can do make an *ad hominem* attack on Hulkower, finding it "'deliciously ironic--that he's now in private practice representing child-molesters.'" (At 126)

As Malcolm unravels the sorry story of Sheila McGough, the villains become quite clear and numerous. Malcolm interviews one of the original buyers, Frank Manfredi, in Sing Sing prison. Already disbarred and a felon when he contacted Bailes in June 1986, Manfredi is again in prison (for grand larceny) when contacted by Malcolm. Manfredi's doubtful testimony that McGough told him that she would hold the down payment in her escrow account directly led to McGough's conviction. Alan Morris, Manfredi's lawyer, was characterized by Hulkower on appeal as a "lawyer of unimpeachable credentials." (At 79) Morris also testified that McGough had agreed to hold the down payment in escrow. During her investigation, Malcolm learns that after McGough's trial Morris was disbarred for stealing escrowed client funds and was convicted of theft. Malcolm learns that Philip Zinke, who in 1991 changed his name to Philip Schuyler, Count Von Preysing, was convicted of stealing five million dollars from his partners (a conviction that was later reversed on appeal). In 1993, Zinke escaped imprisonment when he ratted on Norman Lida, a lawyer with whom Zinke was involved in a money-laundering scheme. Mack Cain, a legal assistant for Bailes's former lawyer S.S. Smith, testified that McGough asked him to notarize documents signed outside of his presence and to lie in the MacDonald civil case. Smith later tells Malcolm that Cain was a "lower level" Bob Bailes personality type, and offers his opinion that Cain lied at McGough's criminal trial. About the aggrieved patsy, MacDonald, Malcolm finds nothing. She does, however, report Rochon's antipathy toward MacDonald: "I've always felt there was something I didn't find out about him that could have helped to pull this case apart.... [T]here was more to that guy than came out on the stand. The hostility he had went way beyond the bounds." (At 126)

But the clearest villain of Sheila McGough's story is Bob Bailes. Malcolm extensively and persuasively details Bailes's long history as a con man and sociopath. In addition to documenting Bailes's radioactive effect on those who came into contact with him, Malcolm informs us of a conversation between Bailes and another former attorney of his, William Sheffield:

The last time I saw Bailes alive, I reminded him. I said, "Bob, you ought to be completely ashamed of yourself for what you did to Sheila McGough." He said, "What did I do to her?" I said, "You lying scoundrel, you know what you did to her." And he said, "Well, she went to jail, but it wasn't my fault." I said, "What do you mean, it wasn't your fault? Do you remember that trick you pulled on me about the money from those fellows up in northern Virginia?" "I don't remember." He did. I said, "I wish to God I had warned her." And he went on

and made up some big story about how that wasn't his fault. He tried to make it sound as if it was because of her *greed* that that had happened.

Sheila McGough may refuse to accept that Bob Bailes caused her downfall, but Malcolm makes a persuasive case that he, and not Mark Hulkower or any other prosecutor or judge, should be designated as the villain of her story.

B.

Malcolm also contends the truth cannot withstand the onslaught of a well-constructed narrative at trial. McGough had the truth on her side, and Hulkower a well-constructed narrative. The ensuing result, in Malcolm's view, was preordained: "Trials are won by attorneys whose stories fit, and lost by those whose stories are like the shapeless housecoat that truth, in her disdain for appearances, has chosen as her uniform." (At 67) Even jurors understand that the truth is not what the competing parties present: "The method of adversarial law is to pit two trained palterers against each other. The jury is asked to guess not which side is telling the truth--it knows that neither is--but which side is being untruthful in aid of the truth." (At 78)

Malcolm's claim that trials are not about the discovery of the truth is not new. When legal realists like Thurman Arnold and Jerome Frank turned their attention to the conduct of trials, they were disdainful of the assertion that the trial was a search for the truth. Arnold repeatedly tweaked those triumphalists praising the progress of our "Anglo-American" institution of trial by jury by calling it trial by combat.[footnote 2] Frank's highest encomiums were reserved for those who, like him, were "fact skeptics." Frank believed that "of all the possible ways that could be devised to get at the falsity or truth of testimony, none could be conceived that would be more ineffective than trial by jury." [footnote 3] More than a half century removed from the heyday of legal realism, what does Malcolm add to these charges?

It initially appears that Malcolm is going to charge the rules of evidence (or their handlers and protectors) with dereliction of duty. At the beginning of her narrative, Malcolm states, "The story that can best withstand the attrition of the rules of evidence is the story that wins." (At 3) Federal Rule of Evidence 102 announces that the rules of evidence must be construed "to the end that the truth may be ascertained and proceedings justly determined." In beautifully evocative phrasing, Malcolm writes: "With their hands tied by the double bonds of the rules of evidence and the stubborn silence of their client, they could do little more than rush around putting out little fires in waste baskets as the entire building burned to the ground." (At 12) Malcolm repeatedly notes that the defense of McGough's lawyers to the "saturation bombing" (at 60) effect of Hulkower's "elegant story" (at 67) were futile attempts, provided for by the rules of evidence, to impeach the credibility of the government's witnesses. McGough's lawyers cross-examine Manfredi about his prior convictions (at 24), and Mack Cain about his prior bad work history. (At 67) The damage done by McGough's lawyers using the rules of evidence was minimal, and left Hulkower's story standing. Is Malcolm's objection, then, that lawyers are trained to use the rules of evidence in such a way as to miss the forest for the trees? Or is it that the rules themselves fail to work in service of the truth? Each of these objections resonates with me. Both the discrete nature of the currently structured rules of evidence

and the emphasis on exclusionary rules can lead some lawyers to think tactically rather than strategically about the struggle between the two competing narratives. That the rules appear designed to fail to achieve their stated objective is one of my hobbyhorses.

In the end, however, I think Malcolm resists both arguments. She does so through her threaded study of an item of evidence, the value of which is both discounted by McGough's lawyers and artfully repackaged by Hulkower in his narrative. That item of evidence is Alan Morris's telephone bill for July 1986, produced during the civil case against McGough. Morris and Manfredi testified that on July 15, 1986, Sheila McGough had promised them during a telephone call that she would hold the \$75,000 down payment in her escrow account. Before the bill was actually produced, Manfredi was deposed by Michael Wyatt, MacDonald's lawyer. Manfredi testified at that deposition that he was in Morris's office when Morris read "verbatim" to McGough a letter outlining the escrow agreement. During that telephone call, Manfredi said, McGough agreed to hold the down payment in escrow. One problem with Manfredi's testimony is that Morris's telephone bill records that the call to McGough was one minute in length. By the time Morris testified at McGough's criminal trial, the reading of the letter became "a short conversation" "just confirming the fact that you [McGough] are going to be holding the money in escrow, the \$75,000 coming down tomorrow." (At 23) Malcolm notes that McGough's lawyers failed "to bear down on the contradictions between the deposition and trial testimony of Manfredi, Boccagna, Morris, and MacDonald and to exploit the enormous exculpatory potential of the one-minute phone call by Morris." (At 111) But Malcolm is unconcerned with placing blame on McGough's lawyers for failing to exploit this item of evidence. Instead, that the "brute fact" of Morris's telephone bill can be used in service of Hulkower's narrative proves that truth is no match for narrative. "For truth to prevail at trial, it must be laboriously transformed into a kind of travesty of itself." (At 26)

So truth is no match for narrative. Do the rules of evidence promote narrative at the expense of the truth? As noted above, Malcolm begins her narrative with the claim that "[t]he story that can best withstand the attrition of the rules of evidence is the story that wins." (At 3) If narratives can repackage brute facts to show something other than the truth, as Malcolm claims with regard to Alan Morris's telephone bill, and if the rules of evidence "betoken[] the story-spoiling function of the law," then it seems that the rules of evidence ought to be celebrated, not disparaged. They strip bare narratives that offer untruths. "Law stories," Malcolm writes, "are empty stories. They take the reader to a world entirely constructed of tendentious argument, and utterly devoid of the truth of the real world, where things are allowed to fall as they may." (At 78) If the rules of evidence are designed to minimize those empty law stories, isn't that a good thing?

The problem with the rules of evidence, and the adversary system that fosters their use, is that they do not minimize the effect of false narratives. Instead, the rules are designed to foster such narratives. Malcolm notes the ubiquity of the word "objection" in a trial transcript: "The word 'objection' appears in the transcript perhaps more frequently than any other, and betokens the story-spoiling function of the law." (At 3) But as lawyers and evidence scholars know all too well, objections, even those that are sustained, often do little to spoil the examiner's narrative. And if the witness has managed already to smuggle in his answer, leading to the request by the objecting party that the court instruct

the jury to disregard that which it has just heard, the futility of that request is widely understood. When Hulkower points out to the jury that McGough settled the civil case brought by MacDonald for the full \$75,000, which "could be taken as a tacit confession of guilt," (at 19) he does so with the blessing of the rules of evidence.[footnote 4]

Malcolm tells a similar tale when discussing the impact of testimony from back-to-back witnesses about McGough's separate efforts asking them falsely to notarize documents. Malcolm persuasively shows that neither event was such an attempt by McGough. But the structure of the trial, including control over the selection of witnesses, as well as the order of their testimony, provides Hulkower with the opportunity to make this narrative appear to fit a pattern of criminal behavior by McGough. By the time, six days later, that McGough's lawyers are able to present a witness contradicting the testimony of one of Hulkower's witnesses, the damage has already been done. That Hulkower's narrative fit made it seem all the more likely it was true. The rules of evidence did not strip bare these stories, but instead encouraged their elaborate telling. The rules of evidence do interrupt the proponent's narrative. But this is a strength, not a weakness. The weakness of the rules of evidence is not that they spoil empty law stories, but that they allow such stories to be so readily told.

III

Malcolm also dwells upon two other issues crucial to those interested in the American legal system: trial by jury, and the duty of loyalty owed by attorney to client.

Malcolm walks away from her study of Sheila McGough's case wondering about the nature of jury trials and the lawyers who conduct them:

But then, if jurors are so unalterably fixed in their preconceptions, why do trial lawyers even bother to mount a convincing case? What is the point of trying to persuade the unpersuadable? And indeed, when trial lawyers lose a case, they almost invariably cite the composition of the jury as a reason--"With that jury, what else could you expect?" (The winner, of course, is only confirmed in his touching faith in the jury system.) In the heat of battle--while the case is still being argued--trial attorneys are evidently able to suspend their disbelief in the idea of an open mind and address the jurors as if they were speaking to people who are in a condition of healthy doubt about what they think, instead of in a chronic condition of complacent certainty." (At 131-32)

Little can be done about this state of affairs, Malcolm concludes. Trial lawyers are well aware of the absurdity of the adversary system, including trial by jury, but "[n]o one has thought of a better system." (At 79) Thurman Arnold made the same incisive criticisms decades ago, but for those trapped within the legal profession, Malcolm articulates the unease many trial lawyers and legal academics have concerning adversarial justice. The turn ordinarily taken by the legal profession is to propose reforms designed to control the "absurdism" of the trial. The Supreme Court attempts to control for bias by forbidding prosecutors from using peremptory challenges in a racially discriminatory fashion. It then later applies this rule to lawyers trying civil cases, to criminal defense counsel, and then to lawyers who strike members of the venire on the basis of gender. Some state courts

propose reforms making jurors active participants at the trial. If jurors are simply allowed to take notes, ask questions of witnesses (through the trial judge), and bring jury instructions with them while deliberating, the absurdity of trial by jury would vanish. Practicing trial lawyers attempt to assert control of their cases by turning to jury consultants, a variant of the New Age shaman, to show them the way to adversarial enlightenment. Legal academics sagely shake their heads at the irony of our current predicament, and suggest reforming the rules of evidence to lessen the amount of irrelevant or prejudicial information heard by jurors. Although these reforms may (temporarily) assuage the profession's troubled conscience and lessen its anxiety, Malcolm knows (and tells us) these cures have little or nothing to do with the disease.

Malcolm also offers an interesting view, necessarily colored by her conversations with McGough, about the nature of the lawyer's duty of loyalty to a client. Part of Sheila McGough's difficulties can be traced to her unwillingness to let go of Bob Bailes. Malcolm makes a trenchant point about loyalty and truth near the close of her story. In August 1987, McGough filed a Motion for a Reduction of Sentence, based on Bailes's physical infirmities. The motion was denied, probably in part because McGough was Bailes's pleader. Prison authorities had concluded that Bailes was faking his illnesses. McGough believed his illnesses were real, and thus, so to were his business dealings. "It seems to have occurred to neither side that he could be at once a con man and a sick man." (At 158) McGough's unwillingness to let go, carefully contrasted with the willingness of McGough's own attorneys to move on to other clients with other needs, was a virtue that became a vice in the view of several governmental authorities. And so Malcolm raises the troubling question of the extent (and value) of an attorney's duty of loyalty to any client.

Sheila McGough claims she refused to speak until after her client, Bailes, had died. After he died, Malcolm reports, McGough believed that "she was finally free of her burden of silence; she could speak about him to an outsider without fear of doing him harm." (At 11) Even framed this way, this seems untrue. The fiercely, indeed "incorrigibly loyal" (at 161) McGough, despite her continued defense of Bailes to Malcolm, betrays Bailes by drawing him in to her story. Assuming that McGough did not intend to divulge any attorney-client communications, the very act of speaking about one's innocence, as Malcolm herself acknowledges, requires someone to play the role of heavy, and Bailes is an awfully good candidate. As noted above, after reading *The Crime of Sheila McGough*, I am convinced that Bailes is the villain of the story. I had never heard of Bob Bailes before reading this book (I was living in Arlington, Virginia until mid-August 1986, and practicing law in Washington, D.C., just about the time Bailes, defended by Sheila McGough, was to go on trial in Alexandria, Virginia), and had McGough not written to Malcolm, I likely never would have. One reason why courts have concluded that the attorney-client privilege survives death is that clients may be concerned about their reputation, including their posthumous reputation. Sheila McGough set this book in motion with her letter to Janet Malcolm, and one consequence is that Bob Bailes's poor reputation is now known nationwide, not just in select courthouses in the mid-Atlantic.

IV

After this review was completed, but before it was posted, Craig Callen informed me that *The New Republic* had just published Judge Richard Posner's review of Malcolm's book. The title of Posner's review, *In the Fraud Archives*, suggests the criticism to come. Posner closes his review of *The Crime of Sheila McGough* as follows: "I wish only that [Malcolm] had changed the names of the characters in her story and presented it to the public as the fiction that it largely is." [footnote 5] Posner bases his conclusion on his review of the trial transcript, which I have not read. Is Malcolm's book then itself an example of her view that truth is no match for narrative?

Posner provides the reader with information absent from Malcolm's narrative. [footnote 6] We learn from Posner that MacDonald had a lawyer, named Blazzard, who testified that McGough told him that the \$75,000 remained in her trust account, when in fact she had disbursed all but \$5,000 two weeks earlier. Posner also offers details on two other insurance charter deals, one involving a man named Johnson, and another involving partners named Irwin and Sali. In both cases, refundable deposits were made to McGough's trust account, and some of those monies were disbursed to Bailes rather than retained in the trust account. The Johnson deal actually closed (McGough signed for Bailes, who was in jail), but Johnson never received the documents proving that the charter Johnson had bought could be used in all fifty states. When Johnson complained to McGough about not receiving the documents from Bailes, McGough lied, telling Johnson that Bailes was "on the road." Posner does not state whether Johnson received his money back. The other deal did not close. Irwin died, and Sali demanded the deposit back. McGough threatened to sue him and have him arrested. Again, Posner does not tell us whether Sali received the deposit. Finally, Posner notes that while a grand jury was investigating McGough, she learned the identity of three witnesses the government was planning to call. Bailes then brought a \$50 million suit against them. McGough took the suit to the federal courthouse to file, but refused to pay the filing fee. Because the filing fee was not paid, the suit was not accepted. However, each of these witnesses received a copy of this complaint.

In addition to this information not included in Malcolm's book, Posner offers a markedly different view of some of the facts recounted in Malcolm's book.

1. Posner offers a very different account of the "incident of the two judges." In Posner's description, McGough knowingly "executed" a fantastic scheme thought up by Bailes. McGough filed petitions for bankruptcy for several assetless corporations owned by Bailes. Subsequently, "[o]ther shell corporations owned by Bailes then filed claims against the bankrupts." McGough then pleaded with the courts for the release of Bailes to work on his bankruptcy cases. This was the background behind McGough's attempt to obtain the signature of Judge Richey, and later, Judge Harris, ordering Bailes's release to a halfway house in Washington, D.C.
2. McGough was tied to the insurance scam by the testimony of Morris and Manfredi. Both testified that McGough agreed to the escrow arrangement during a July 15th telephone conversation, and the letter sent by Morris confirmed the arrangement. Malcolm makes much of the fact that the phone call was one minute in length. Posner dismisses Malcolm's "brute fact" with the observation that "[a]lmost every case is replete with loose ends." [footnote 7] He then notes that the deposits in all three deals were made to McGough's trust account: "The only purpose could have

been to make sure that the deposit money was not disbursed before the deal closed, so that if the deal fell through the depositors could get their money back."

3. Posner next finds incredible McGough's claim that she was not an escrow agent, for, if that were the case, "the deposits would have been made to Bailes's bank account—and he did have a bank account, contrary to what McGough told Malcolm. Put differently, McGough had no reason of her own to want deposit money placed in her trust account; it could only have been the depositors' idea...." Relatedly, Posner declares McGough's claim that she did not represent Bailes in the sale of the charters is a lie.
4. Posner accepts the truthfulness of Mack Cain's testimony that McGough asked him falsely to notarize Manfredi's signature on the superseding contract.
5. Posner also discounts Malcolm's use of the post-trial criminal records of Morris and Manfredi. He does so with three distinct arguments. First, "these things occurred after McGough's trial and were unrelated to it." Second, neither MacDonald nor his lawyer Blazzard has ever been accused of wrongdoing. Third, "the shadiness of Morris and some of his clients is consistent with their having wanted the deposit retained in a lawyer's trust account until the deal with Bailes closed."

After recounting these facts, Posner states: "The case that I have just outlined struck the trial judge, the jury, and the appellate judges as open and shut." [footnote 8] McGough's case clearly strikes Posner the same way. What should a less-than-fully-informed nonpartisan take from this attack by Judge Posner? Has he demolished Malcolm's narratives? Has Malcolm lied about Sheila McGough in order to further her goal of demonstrating that "truth is a nuisance in trial work"? (At 26) After reading and rereading both the book and Posner's review, I remain agnostic about McGough's guilt. Although Judge Posner's review necessitates a reconsideration of Malcolm's story, it does not require that one reject Malcolm's story. Here's why.

The new information Posner describes shows that McGough was willing to lie to protect Bailes, that others were conned into sending deposits to McGough's trust account, and that three potential witnesses were nearly sued in a blatant attempt at intimidation. Posner recounts McGough's lies to suggest her complicity in Bailes's con. Unlike Posner, Malcolm does not mention these particular lies by McGough to protect Bailes. She does however, mention McGough's admission of a similar lie. (At 129) Malcolm uses this admission to conclude that "[h]er confession to me ... was only further evidence of her honesty." (At 130) Neither McGough's lies in 1986 nor her admission that she lied on behalf of Bailes more than a decade later is clearly revealing of McGough's guilt or innocence. Model Rule of Professional Conduct 4.1 bars making a false statement of fact to a third person on behalf of a client. McGough's lies to other buyers about Bailes may disclose her involvement with Bailes, but may merely provide insight into McGough's strange understanding of zealous and loyal representation. Posner also elucidates other insurance deals participated in by McGough, information absent from Malcolm's book. Has Malcolm mislead us? Yes. On the other hand, in light of the information the reader already possesses, do those deals prove McGough's guilt? Not if you accept McGough's argument that she was accommodating Bailes by allowing him to use her trust account. If you don't accept that argument, the consistency of McGough's actions are relevant to proof that she was involved in Bailes's con. Relevant, but not decisive. Finally, Posner notes the failed \$50 million lawsuit. Posner concludes "[i]t is not to be believed that

Bailes conceived and prepared these suits all by himself—that McGough was meekly his messenger girl in bringing the papers to the courthouse. The defendants were witnesses against her, not against him." [footnote 9] But Malcolm shows repeatedly that Bailes was quite capable of misusing the legal system. And Bailes had attempted to aid McGough earlier, providing the fake superseding contracts that McGough allegedly asked Cain to notarize falsely. And though this is a mere loose end, why did McGough go to the trouble of intimidating possible witnesses by sending them copies of this lawsuit, but not pay the filing fee? Do Rule 11 sanctions really trouble a lawyer already as deeply involved in criminal activity as Posner suggests?

Posner's attack is not limited to the claim that Malcolm failed her duty to inform her readers fully of the facts of McGough's case. He also interprets differently facts noted and discounted by Malcolm. Malcolm never denies that the "incident of the two judges" appears quite harmful to McGough. But Malcolm consigns this event to a matter of "impropriety," not criminality, and uses the incident to make the quite sound point that "her lapse in the minor instance [not informing Judge Harris] damaged her credibility in the major one [the MacDonald fraud claim]." (At 121) Who's right? I don't know. The answer does not depend on whether you believe McGough intended to thwart the efficient working of the criminal justice system. McGough seems to have believed that was part of her job as a criminal defense attorney. Instead, it depends on whether you believe she was conspiring with Bailes to violate the law, or whether she was driven by an extraordinary notion of lawyerly zeal to pursue a client's interests. What about the "brute fact" that the telephone call to McGough from Morris was recorded as one minute in length? Were Morris and Manfredi lying? Posner's twofold response is unsatisfactory. Yes, all cases have loose ends, and some loose ends are more important than others. And those putting down a refundable deposit may be more willing to do so if the money is placed in some kind of trust account than in the seller's account. But hindsight, in the form of time and (occasionally) evidence discovered after the conclusion of the trial [footnote 10] often allows those loose ends to be tied up. Posner does not quote from Morris's confirmation letter. Malcolm does. Addressed to McGough, it states, in part: "This will confirm my conversation of July 15, 1986 with Robert Bayliss [Bailes] regarding the above matter. ... A) Down payment will be held in your bankruptcy account until closing of this transaction." (At 22) The letter clearly states that the down payment is refundable. But Morris's letter fails to mention any conversation with Sheila McGough. If Morris spoke with McGough, why would he write a confirmatory letter that fails to state that fact? Malcolm suggests an answer to this question. McGough had no conversation with Morris. She had permitted Bailes to use her account as an "accommodation," and when the money arrived in her account, she accepted that it was Bailes's. That's why she withdrew it and gave it to him. Only after she had withdrawn \$70,000 did she receive Morris's confirmation letter, which she showed to Bailes. Because she was preparing for Bailes's upcoming bank fraud trial, she allowed him to take care of it. (At 25) Maybe McGough's actions were unthinking, or worse, but that is a reason. Of course, the jury doesn't have to accept her version, which was, as Malcolm admits, not told at trial. Maybe the buyers's suspicions led them to demand that the down payments be placed in some kind of trust account. And clearly McGough should not have allowed her account to be used as she did. But Posner's conclusion that McGough was an escrow agent for Bailes regarding the insurance charters does not ineluctably follow. Malcolm argues that Bailes attempted to use the trust account of his former attorney,

William Sheffield, in an earlier con. (At 102-03) We are to infer from Malcolm that the same con was used on McGough. Neither Malcolm nor Posner has proven McGough's actions reflected her guilt or innocence. As for Mack Cain, Malcolm notes that McGough's civil lawyer, Kenneth Labowitz, flatly contradicted some aspects of Cain's testimony. Was Cain a credible witness? In Posner's view, "Cain, a friend of Bailes, had no incentive to give false testimony against Bailes's accomplice." But Labowitz testified that Cain both knew why he was subpoenaed, and had told Labowitz that he was "generally conversant" about the Bailes-Manfredi transaction, including being present in Abingdon when the contracts with Manfredi were typed up. If Cain had been involved in this scam, wouldn't he have an incentive to deflect blame elsewhere? Maybe Cain wasn't involved, but a friendship with Bailes hardly seems enough to show a lack of incentive to lie. Finally, Posner offers several misleading arguments concerning Malcolm's use of the later troubles of Manfredi and Morris. First, although the convictions of Manfredi and Morris occurred after the McGough trial, for actions not concerning the events leading to McGough's conviction, that does not make them unrelated. Of course, the jury cannot be blamed for accepting testimony from witnesses who later are convicted of crimes. Although Malcolm is too harsh on the jury, that does not appear to be her reason for offering this information. In any after-the-fact recounting of a case, when trying to determine whose story is true, it is unreasonable to limit credibility assessments to actions taken before the trial. The post-trial convictions also don't require the reader to believe Morris and Manfredi were lying at trial. Second, that MacDonald and Blazzard are not shady characters tells us nothing about whether Morris and Manfredi lied about the July 15th conversation. Finally, that one is a shady character may lead one to a skepticism about human nature, but that shadiness can also lead one to misstate (or even invent) verbal agreements in "confirmatory" letters.

V

Malcolm, a constant presence in her narrative, concludes she has failed: "[L]ike Sheila's defenders in law, I know I haven't saved her with my journalist's brief." (At 161) But Sheila McGough never asked to be saved. What it appears she wanted was to be presented as something other than a prefabricated storyline ("naïve, unmarried woman was beguiled into crime by a con man who sent roses to her office," (at 10), is how she believed other writers had unfairly characterized her). The result was that instead of telling a story, McGough provided Malcolm with "a great number of wholly accurate and numbingly boring facts." (At 11) At this level, Malcolm succeeds. McGough is not encapsulated in a few well-chosen adjectives, but presented in unsettling and vivid terms. And while providing us with a vast array of facts, Malcolm never bores us.

Whether Malcolm has told us the truth about Sheila McGough remains unclear. Whether Malcolm has told us the truth about our adversary system remains unproven. That we want answers is demonstrated by from Judge Posner's review. That such answers remain unforthcoming may be our fate.

Footnotes

1. Professor, St. Mary's University School of Law, San Antonio, Texas.
2. Thurman W. Arnold and Fleming James, Jr., *Cases and Materials on Trials Judgments and Appeals* vi (1936) ("So long as our adversary method of litigation continues, so long as disputes are settled by means of trial by combat, this is the most effective point of view for the trial attorney"). *See also* Thurman W. Arnold, *Trial by Combat and the New Deal*, 47 Harv. L. Rev. 913 (1934) (presenting an early version of Chapter 8 of his 1935 book *The Symbols of Government*, titled *Trial by Combat*).
3. Jerome Frank, *Courts on Trial: Myth and Reality in American Justice* 20 (1949).
4. Federal Rule of Evidence 408 bars evidence of settlements or offers to settle in order to prove "liability for or invalidity of the claim of the amount," but not to prove "an effort to obstruct a criminal investigation or prosecution."
5. Richard A. Posner, *In the Fraud Archives*, *The New Republic*, April 19, 1999, at 29, 34.
6. *Id.* at 30. The information in this and the following paragraph is taken from this page of Posner's review.
7. *Id.*
8. *Id.*
9. *Id.* at 31.
10. For example, after the conclusion of the criminal trial of O.J. Simpson for murder, photographs were discovered showing Simpson wearing Aris gloves (the gloves that didn't fit) and Bruno Magli shoes.