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> "There is only the fight to recover what has been lost And found and lost again and again: and now, under conditions That seem unpropitious. But perhaps neither gain nor loss. For us, there is only the trying. The rest is not our business."
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> T. S. Eliot[1]

## I. Introduction

A persistent crisis in the ordinary expectations of patterns of living triggers a nostalgic yearning for the way it was. So Glendon. So Kronman. Let me confess at once: me too. Except the critics are right. The Golden Age of American lawyering that Glendon sees in the 1950s and 1960s was hardly golden. It was "a regulated cartel."[2] And Glendon herself reminds us of its invidious discrimination. A partner at Cravath told her when she interviewed for a job in the waning moments of that Golden Age: "'I couldn't bring a girl in to meet Tom Watson [of IBM] any more than I could bring a Jew.'"[3] Presumably, to bring in a "black" would not even have occurred to him. Of course, the practice had more stability then and, surely, it was more genteel.

Anthony Kronman's nostalgia is for a lost ideal. Drawing on Aristotelian moral and political thought, Kronman breathes rich, intellectual life into the figure of the lawyer-statesman, a person of practical wisdom, sound judgment, and resolute public-spiritedness.

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1. T.S. ELIOT, *East Coker*, *in* THE COMPLETE POEMS AND PLAYS 1909-1950 at 128 (1971).
2. Richard A. Posner, *Barflies*, NEW REPUBLIC, Oct. 31, 1994, at 41.
3. MARY ANN GLENDON, A NATION UNDER LAWYERS 28 (1994).

Historically, Kronman may be on firmer ground than Glendon. The ideal of the lawyer-statesman had a hold on some lawyers who actually achieved great fame as statesmen. The list Kronman assembles, however, makes it clear that their fame came from their positions as presidents, senators, cabinet holders, and judges, not from their work as lawyers. Does the word "lawyer" or the word "statesman" spring to mind when you hear the names Thomas Jefferson, Alexander Hamilton, John Marshall, James Madison, Abraham Lincoln, Stephen Douglas, William Seward, Salmon Chase, Daniel Webster, Henry Stimson, Dean Acheson, Cyrus Vance, and Carla Hills? It is not that some of these people did not have notable legal careers. Webster and Lincoln did. But Madison hardly ever practiced, and Jefferson's practice was largely that of a debt collector. Of course, that is the main problem with the list and one problem with the ideal. It is difficult to see how the figure of the lawyer-statesman is connected to the practice of law.

Nevertheless, almost everyone who reads these two books seems to agree that both Glendon and Kronman have described the current malaise among lawyers rather well. At the risk of oversimplifying two complex books, Glendon seems to have gotten the externalities right, and Kronman, the internalities. Glendon shows us what we can see if we look — and it doesn't look good. Kronman bores right inside — and it just doesn't feel good. What to do? I don't know. Neither, I'm afraid, do Glendon and Kronman. Surely, we cannot return to a Golden Age that never was, nor can we recover a lost ideal simply by articulating it. What I can do, and what most of us can do, is take on one small job at a time.

Glendon and Kronman look at the whole landscape. It is daunting to look at the complex whole and even more daunting to try to fix its countless broken parts. Although I mentioned earlier that the critics of Glendon and Kronman are right, Glendon and Kronman are also right. They have each articulated in multiple ways what currently troubles us.

When I teach professional responsibility, I tell my students that there are two dominant themes to the course. The first is professionalism. Stripped to its core, professionalism means we serve the client and the public interest above self-interest. Money is always secondary. Always. The second theme is the adversary system and its implications. The adversary system is a system of adjudication with a neutral decision-maker and partisan advocates. We often act

in ways that are particularly partisan because the system is set up that way; but our first obligation is to the processes, procedures, and institutions of the law.[4] How we work out the conflicts between client and system is the essence of professional ethics. Oh, and yes, our consciences are our own. Our advocacy can be hired. Not our conscience.

I believe in those themes. I also believe that Glendon and Kronman believe in them. However, ideas about the demands of professionalism and the limits of advocacy must be argued for and explored in context. In this essay, I will explore one particular issue keeping Kronman's lawyer-statesman ideal in mind. I believe this ideal has been a positive and discernible force in the central moral tradition of lawyering.[5] Therefore, I will examine one particular ethical issue and attempt to locate the application of that ideal within the vagaries of actual legal practice.

The issue I have chosen is one of the most difficult, especially for criminal defense lawyers: how to cross-examine the truthful witness.[6] Here is a place for practical reason and nuanced judgment. Here is a place where values clash and the lawyer-statesman's public-spiritedness is tested. I conclude that we have gone off-track within the past twenty-five years or so, at least in our rhetoric about this subject and, most likely, with our practice, too. With Kronman, I believe the way we talk and the ideals we set for ourselves do much to shape the way we act and what we choose.

## II. The Central Tradition

In the fourth edition of Francis Wellman's classic text, *The Art of Cross Examination*,[7] well-known trial lawyer Emory Buckner summed up his view on the ethics of cross-examination as follows:

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4. Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1162 (1958) [hereinafter *Joint Report*].

5. I believe the central moral tradition has been captured best in the *Joint Report*. *Id.*; *see* Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311 (1990).

6. Monroe Freedman describes it as "the most difficult and painful" of three issues he identified many years ago as the "hardest questions" for the criminal defense lawyer. MONROE H. FREEDMAN, UNDERSTANDING LAWYER'S ETHICS 161 (1990) [hereinafter FREEDMAN]; Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966) [hereinafter *Three Hardest Questions*].

7. FRANCIS L. WELLMAN, THE ART OF CROSS-EXAMINATION (4th ed. 1936).

> The purpose of cross-examination should be to catch truth, ever an elusive fugitive. If the testimony of a witness is wholly false, cross-examination is the first step in an effort to destroy that which is false. One should willingly accept that which he believes to be true whether or not it damages his case. If the testimony of a witness is false only in the sense that it exaggerates, distorts, garbles, or creates a wrong sense of proportion, then the function of cross-examination is to whittle down the story to its proper size and its proper relation to other facts. A composite photograph of a man's face with its ears ten times enlarged is not a true photograph of the man. If the cross-examiner believes the story told to be true and not exaggerated, and if the story changes counsel's appraisal of his client's case, then what is indicated is not a "vigorous" cross-examination but a negotiation for adjustment during the luncheon hour. If this fails, counsel should accept the story and get his settlement by the judgment of the court or verdict of the jury. No client is entitled to have his lawyer score a triumph by superior wits over a witness who the lawyer believes is telling the truth. Lawyers can do more for the improvement of the administration of justice in their daily practice than by serving on committees or making speeches at bar associations, however helpful that may be.[8]

In quick, bold strokes, these statements capture the essence of the subject. First, the purpose of cross-examination is to "catch truth," not to make the false look true and the true, false.[9] Second, a lawyer should willingly accept the truth, "whether or not it damages his case." Finally, "no client is entitled to have his lawyer score a triumph by superior wits over a witness who the lawyer believes is telling the truth." These quotations represent moral positions based on a larger understanding than is typical today of the adversary system and the lawyer's role in that system. It captures the spirit of the famous 1958 Joint ABA-A.A.L.S. Report on Professional Responsibility,[10] which argues that the lawyer as advocate "plays his role badly, and trespasses against the obligations of professional responsibility, when his desire to win

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8. *Id.* at 204-05. This pre-eminent book was first publicized by The Macmillan Company in 1903 and has appeared in four editions and fifty printings during the past six decades. *Id.* Publisher's Note (Collier-Macmillan Ltd., 1962).

9. *See* Murray L. Schwartz, *On Making the False Look True and the True, False*, 41 SW. L.J. 1135 (1988).

10. *Joint Report*, *supra* note 4.

leads him to muddy the headwaters of decision, when, instead of lending a needed perspective to the controversy, he distorts and obscures its true nature."[11]

Moreover, Buckner shows care and concern for the witnesses themselves. Although couched in strategic language, he admonishes lawyers: "[T]here should be no place in cross-examination for indignation, shouting, belligerent hostility."[12] Throughout the years, many textbooks and treatises echoed these sentiments: truth should not be thwarted, and individuals caught up in the system should be treated with courtesy and respect.[13] Even when concentrating on strategy and tactics, many authors still seem to espouse positions which favor truth and respect over advantage.[14] Moreover, these authors do not distinguish between civil and criminal trials when discussing the art and the ethics of cross-examination. Briefly, this is the central moral tradition on the question of cross-examination.

I am not arguing that, historically, there were not those who believed otherwise. You only have to read Jerome Frank's *Courts on Trial* for examples of those who hold a different view.[15] In fact, reading Frank, you would be led to believe that what I call the central moral tradition is not central at all. Frank writes:

> [A]n experienced lawyer uses all sorts of stratagems to minimize the effect on the judge or jury of testimony disadvantageous to his client, even when the lawyer has no doubt of the accuracy and honesty of that testimony. The lawyer considers it his duty to create a false impression, if he can, of any witness who gives such testimony.[16]

Citing other authors, Frank goes on to give examples. Rapid cross-examination may ruin the testimony of a "'truthful, honest'" but "'over-cautious witness.'"[17] Lawyers may "try to prod an irritable

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11. *Id.* at 1161. The Joint Report was influential in shaping the ABA's 1969 *Model Code of Professional Responsibility*, as the many footnote references in the Code attest. *See generally* MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1969).

12. WELLMAN, *supra* note 7, at 206.

13. *See, e.g.*, JAMES RAM, A TREATISE ON FACTS AS SUBJECTS OF INQUIRY BY A JURY (4th Am. ed., New York, Baker, Voorhis & Co. 1890); W.H. HYATT, HYATT ON TRIALS (1924).

14. This idea was expressed in the early chapters of Wellman's book, particularly chapter ten.

15. JEROME FRANK, COURTS ON TRIAL 80-102 (1949).

16. *Id.* at 82.

17. *Id.*

but honest 'adverse' witness into displaying his undesirable characteristics in their most unpleasant form, in order to discredit him with the judge or jury."[18] If a witness has an inflated ego, the lawyer "will 'deftly tempt the witness to indulge in his propensity for exaggeration, so as to make him "hang himself."'"[19] Finally, Frank quotes the great Wigmore:

> An intimidating manner in putting questions . . . may so coerce or disconcert the witness that his answers do not represent his actual knowledge on the subject. So also, questions which in form or subject cause embarrassment, shame or anger in the witness may unfairly lead him to such demeanor or utterances that the impression produced by his statements does not do justice to its real testimonial value.[20]

The language quoted, of course, conveys Wigmore's disapproval of such tactics. In fact, Frank himself disapproves. Before doing so, however, he concludes:

> These and other like techniques, you will find unashamedly described in many manuals on trial tactics written by and for eminently reputable trial lawyers. The purpose of these tactics — often effective — is to prevent the trial judge or jury from correctly evaluating the trustworthiness of witnesses and to shut out evidence the trial court ought to receive in order to approximate the truth.[21]

Frank admits that it is "excessive" and a misdescription of "all contemporary American trials" to say that "'one party or the other is always supremely interested in misrepresenting, exaggerating or suppressing the truth.'"[22] Nevertheless, is there not also a tradition here, one that might be seen as inconsistent, even opposed to the Wellman-Buckner model I previously characterized as the central moral tradition? Arguably, it is a tradition, but one that has not been dominant as an ideal, at least until recently. And there's the rub. The ascendancy of this minority view has all but obliterated an ideal that always involved compromise and difficulty, but was still able to inspire people of practical reasonableness.

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18. *Id.*
19. *Id.*
20. FRANK, *supra* note 15, at 82-83.
21. *Id.* at 85.
22. *Id.* at 87.

Nevertheless, when the ideal goes, the heart goes too. It is the loss of the lawyer-statesman ideal that Kronman laments, and rightly so.

## III. *Courvoisier's* Case[23]

To recover the ideal, let me first resort to a description of a famous nineteenth century English case.[24] In 1840, a great hue and cry erupted over the tactics used by English barrister Charles Phillips in his defense of the valet Benjamin Francois Courvoisier for the murder of his employer, Lord William Russell.[25] In the aftermath of this trial, many of the most important issues surrounding the ethics of trying a criminal case were clarified and some perimeters set. Of considerable concern were the ethics of cross-examination.

In *Courvoisier's* case, Phillips initially believed that his client was innocent.[26] Why he believed this is not clear. One reason may have stemmed from the barrister-solicitor split in the English bar. Phillips was "briefed" on the case by a solicitor and, most likely, did not even talk to the client before trial.[27] Therefore, he was probably "instructed" as to the client's innocence.[28] After the first day of trial, wherein Phillips had cross-examined two key prosecution witnesses, Courvoisier confessed his guilt to Phillips.[29] Nevertheless, he refused to plead guilty and expected his lawyer "to defend [him] to the utmost."[30] Shaken by the revelation, Phillips proceeded to do an unusual thing. The case was being tried by a jury and two judges. One judge was the Lord Chief Justice Tindal, who presided. The other was Mr. Baron Parke, who "assisted . . . Tindal in reading evidence to the jury, made some comments to the jury, and made some rulings on questions of law."[31] Phillips went to Parke, told him of the confession, and asked him whether he should withdraw from the case.[32] Judge Parke was "much an-

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23. Regina v. Courvoisier, 173 Eng. Rep. 869 (1840).

24. For a lucid and powerful rendition of the story, see DAVID MELLINKOFF, THE CONSCIENCE OF A LAWYER (1973).

25. *Id.* at 141-45.

26. *Id.* at 62.

27. *Id.*

28. *Id.*

29. MELLINKOFF, *supra* note 24, at 132.

30. *Id.* at 133.

31. *Id.* at 135.

32. *Id.* at 134-35.

noyed" at Phillips for this breach of client confidence;[33] yet, he told him that he was bound to defend the client, and in doing so, "to use all fair arguments arising on the evidence."[34] The meaning of that phrase is at the heart of the issue I am discussing.

It should be noted that it was only four years before *Courvoisier's* case that Parliament had passed the Prisoner's Counsel Bill,[35] allowing lawyers to speak to juries on behalf of accused felons.[36] Moreover, there was a nagging public question at that time as to whether a lawyer could ethically defend a person the lawyer knew to be guilty of the crime charged.[37] On the surface, that question has not troubled the professional conscience of lawyers in England or in America.[38] In both countries criminal defendants have a right to a lawyer, and lawyers have a duty to give those clients the best possible defense.[39] The issue that still plagues us, however, is what it means for a lawyer to give the best possible defense to a guilty client. We know lawyers cannot introduce perjury or false evidence into trial; but can they portray a false case or perpetrate false inferences by cross-examining known truthful witnesses in an attempt to make them look like liars, or at least mistaken in reporting what is the truth?

Before Courvoisier's confession to his lawyer, Phillips had already cross-examined two key prosecution witnesses. The first was Sarah Mancer, the maid, who had testified to events surround-

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33. The confidentiality rules governing lawyers' conduct were less clear in those days. *Id.* at 138. Today, in the precise circumstances facing Phillips, it is still not clear what the lawyer should do. In cases involving perjury discovered after the fact, the lawyer has an obligation to "take reasonable remedial measures." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.3(a) (1995). Whatever is done, it is clear that the perjury cannot be allowed to stand. *See id.* Rule 3.3 cmt. The lawyer's duty to take action continues "to the conclusion of the proceeding, even if compliance requires the disclosure of [confidential] information." *Id.* Rule 3.3(b). Analogously, if the lawyer learns during trial that his own cross-examination has produced some improper result, the lawyer may have an obligation to fix it. Phillips seemed to have created the suggestion during his cross-examination of the maid, Sarah Mancer, that she was implicated in the murder. Arguably, Phillips remedied this matter in his closing remarks to the jury. *See infra* text accompanying notes 64-65.

34. MELLINKOFF, *supra* note 24, at 140.

35. Act for Enabling Persons Indicted of Felony to Make Their Defence By Counsel or Attorney, 1836, 6 & 7 Will. 4, ch. 114 (Eng.).

36. MELLINKOFF, *supra* note 24, at 57.

37. *See, e.g., id.* at 141-49. Mellinkoff provides a glimpse of this question with perspectives from the popular and academic press, as well as from the religions establishment.

38. *Id.* at 184.

39. *Id.* at 106.

ing the discovery of the deceased, as well as details about the demeanor and behavior of the accused.[40] Mancer appeared "pale, breathless and trembling in every fibre of her frame."[41] Phillips exploited some odd expressions Mancer used to test her impartiality and reliability.[42] Some said he went further, suggesting the maid herself may have been implicated in the crime.[43]

The second witness was a police officer, constable John Baldwin. Baldwin had testified truthfully that there had been no disturbance of dust on the roof of the house next door and, therefore, no outsider could have come into the house that way.[44] However, he also testified falsely that he did not know about the reward money being offered on the case.[45] Phillips demonstrated forcefully the perjury on the second point,[46] casting so much doubt on the truth of the first point that the chief judge charged the jury not to believe anything to which the constable had testified.[47]

After Courvoisier's confession, Phillips cross-examined a third witness, which raised additional concerns about the subject we are investigating. Charlotte Piolaine was a surprise witness at the trial.[48] Indeed, Phillips had only fifteen minutes warning before she was announced.[49] Her testimony was that she had employed Courvoisier (under the name "Jean") for a brief period approximately four years prior to trial; that recently he had visited her and asked to leave a parcel with her; that she was curious about the parcel from something she had read in a French newspaper; that "Jean" had not returned for the parcel; and, that she opened the parcel and discovered silverware, later identified as having been stolen from Lord Russell's house.[50] Although Phillips was reasonably certain Piolaine was telling the truth regarding the package, he had no idea of her motive, nor whether she was lying or mistaken on any specific point. Indeed, he was not certain she was not an accomplice. Therefore, he attacked her credibility,

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40. *Id.* at 73-81.
41. MELLINKOFF, *supra* note 24, at 73.
42. *Id.* at 73-81.
43. *Id.* at 192.
44. *Id.* at 82.
45. *Id.* at 82-86.
46. MELLINKOFF, *supra* note 24, at 86.
47. *Id.* at 208.
48. *Id.* at 88. Charlotte Piolaine was Courvoisier's first employer in England. *Id.*
49. *Id.*
50. *Id.* at 93-99.

suggesting the hotel she kept might be a gaming house, and probing her motive in coming so late to the trial.[51]

*Courvoisier* was a famous case. After it came to light that the defendant had confessed his guilt to his lawyer, the press and public opinion combined to vilify Phillips. The *London Examiner*, for example, was particularly hard on the lawyer. A full nine years after Courvoisier was convicted and executed, the *Examiner* renewed its attack.[52] Up to this point, Phillips had suffered in silence; however, after receiving a letter from Sam Warren, an American lawyer who stoutly defended Phillips's conduct, Phillips published Warren's letter in addition to his own, elaborating his defense to charges of unethical conduct.[53]

In 1854, Judge George Sharswood of Pennsylvania published *An Essay on Professional Ethics*,[54] one of the most influential books on lawyer's ethics ever published in the United States. In it, Sharswood refers to Courvoisier in a section of the book dealing with fidelity to clients, and appends a brief summation of the facts and the text of the Warren and Phillips letters.[55] Likewise, David Mellinkoff's book on the case, published in 1973, brings to bear on it both historical and ethical reflection. I recite this subsequent commentary to suggest the importance of the case to the ethical tradition of lawyering.

In his defense, Phillips addresses three points that were raised by the press against him. First, it was charged that Phillips should have given up the brief as soon as Courvoisier confessed. The abstract principle that every person is entitled to a lawyer was, of course, a customary rule of the English Bar. Indeed, the first press comments on Phillips's conduct accepted the principle without critique and generally praised Phillips for doing a good job in tough

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51. MELLINKOFF, *supra* note 24, at 93-100.

52. *Id.* at 187.

53. *Id.* Ironically, it was this same Sam Warren, law partner of Louis Brandeis, who was later to die as a result of "keen cross-examination" of him in a tragic family trust dispute. Noonan, *Distinguished Alumni Lecture—Other People's Morals: The Lawyer's Conscience*, 48 TENN. L. REV. 234-36 (1981).

54. GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS (5th ed., Philadelphia, T. & J.W. Johnson & Co. 1896). Sharswood's Essay is cited as the dominant influence on the ABA's first *Canons of Ethics* (1908), and he "posited differences between personal and professional morality that remain central to contemporary debates over legal ethics." DEBORAH L. RHODE & DAVID LUBAN, LEGAL ETHICS 112 (2d ed. 1995).

55. SHARSWOOD, *supra* note 54, at 103-07, 183-96.

circumstances.[56] However, after the public and certain religious leaders excoriated him for doing so, the press soon followed suit. No doubt some would do the same today. Yet, the principle that everyone has a right to counsel is deeply embedded in our traditions. The real issue then, and the real issue now, would be: how does a lawyer try the case when the truth comes to light during the trial, but after the lawyer has already cross-examined witnesses. Baron Parke's position remains the central one. Stay the course. Do what you can using "all fair arguments arising on the evidence."[57] In fact, writing in 1902, the American, George Warvelle, stated that the precedent was settled in *Courvoisier's* case.[58] Even in 1840, Phillips argued that there was widespread agreement in the profession that he was right to stay the course as counsel for the accused.[59]

The second accusation that Phillips met was that he wrongly appealed to God as to "his belief in Courvoisier's innocence," even after the defendant had confessed to his lawyer.[60] The short answer Phillips gave was that he did not say this.[61] A customary rule of advocacy forbids a trial lawyer from giving his personal opinion on the case at hand. It was the rule then. It is the rule now.[62]

The third accusation was disposed of just like the second. Phillips was accused of casting the guilt for the crime on an innocent person, the maid, Sarah Mancer.[63] Of course, the accusation did not have any bite when Phillips actually cross-examined Mancer. At that time, he believed his client was innocent and could not be sure of Mancer's guilt. Nevertheless, the accusation persisted that he blamed her in his jury summation, after he knew his client was guilty. Not only did Phillips deny that he accused Mancer before the jury,[64] he quoted himself as saying precisely the opposite, using contemporary newspaper accounts to demonstrate the point. In one quoted account, he said to the jury:

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56. MELLINKOFF, *supra* note 24, at 141.
57. *Id.* at 140.
58. *Id.* at 176 (quoting G. WARVELLE, ESSAYS IN LEGAL ETHICS 134-38 (1902)).
59. SHARSWOOD, *supra* note 54, at 190 (reprinting Phillips's letter).
60. MELLINKOFF, *supra* note 24, at 220.
61. *Id.* at 221.
62. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-106(c)(4) (1986); MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.4(c).
63. MELLINKOFF, *supra* note 24, at 194.
64. *Id.*

> [L]et me do myself justice, and others justice, by now stating that in the whole course of my narrative with which I must trouble you, I beg you would not suppose that I am in the least degree seeking to cast the crime upon any of the witnesses. God forbid that any breath of mine should send persons depending on the public for subsistence into the world with a tainted character.[65]

The issue of the ethics of cross-examining the truthful witness was not raised by Phillips in his refutation. Perhaps it had gotten lost in the revised attack in the press, but it surely was part of the original attack. So let us re-visit each of the three crucial cross-examinations to learn what we can about Phillips's ethics and the central tradition.

*A. Sarah Mancer*

At the time of Sarah Mancer's cross-examination, Phillips believed his client to be innocent. In her signed statement, Mancer said: "I saw his Lordship ~~dead~~ murdered in bed."[66] She had crossed out the word "dead" and replaced it with "murdered." Yet she testified she did not say she ever saw the man "murdered."[67] Phillips exploited this testimony, suggesting that perhaps Mancer was not truthful. He added further suspicion by contrasting precisely what she said and did the morning the body was discovered with what Courvoisier said and did.[68] David Mellinkoff summarized as follows:

> By the end of Mr. Phillips' cross-examination the tidy package of Miss Mancer's story was somewhat crumpled. Whether she knew more than she had yet told was far from clear. Certainly cross-examination had raised questions not raised on direct. At the very least her actions on the day of the discovery of the murder were confused and subject to unfavorable inference.[69]

Since all of this was prior to Phillips's knowledge of his client's guilt, such probing and exploiting were well within Emory Buckner's description of proper cross-examination: to catch the elusive truth or at least to whittle down the story to its proper size and its

65. SHARSWOOD, *supra* note 54, at 194.
66. MELLINKOFF, *supra* note 24, at 192.
67. *Id.* at 73-74.
68. *Id.* at 81.
69. *Id.*

proper relation to other facts.[70] Moreover, any suggestion by Phillips that the maid was involved with the crime was completely disavowed in Phillips's summation. By that time, of course, he knew the truth. It would have been unconscionable to knowingly accuse an innocent person of a crime she did not commit.

### *B. Constable Baldwin*

The testimony of the second witness, Constable Baldwin, also took place before Phillips knew the truth.[71] Baldwin testified that he checked the roof for footprints, but saw only undisturbed dust and no broken tiles, thus pointing to an inside job.[72] However, he also testified that he did not know of the reward being offered for conviction of the murderer.[73] The testimony about the reward was folly. The reward was public knowledge, and other police officers knew of its existence.[74] Phillips skillfully cross-examined the witness to prove he was lying. Perjury, of course, is something that should always be exposed. The tradition is clear on this. Moreover, there was evidence likely planted by the police, linking Courvoisier with the murder.[75] There had been a thorough search made of Courvoisier's trunk after the discovery of the murder, and nothing suspicious was found.[76] A reward was offered. Then, while Courvoisier was in jail, another search of the same trunk found bloody gloves, handkerchiefs, and a shirt-front.[77] If ever rough cross-examination is appropriate, it is to expose corrupt police work. Even if Phillips knew that Courvoisier was guilty, this kind of cross-examination is warranted for the same reason we have an exclusionary rule: to keep police work more honest.

### *C. Mrs. Piolaine*

The third witness, Mrs. Piolaine, was a surprise.[78] Phillips had no time to prepare or double-check her story. He attacked her credibility by suggesting it was nearly impossible that she had not

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70. *See supra* notes 7-8 and accompanying text.
71. *See* MELLINKOFF, *supra* note 24, at 205.
72. *Id.*
73. *Id.* at 83-85.
74. *Id.* at 205.
75. *Id.* at 90, 205.
76. MELLINKOFF, *supra* note 24, at 205.
77. *Id.* at 90.
78. *Id.* at 88.

made any connection between the parcel and the famous trial before the afternoon of the first day of trial.[79] He also suggested she was an unsavory character by asking if the hotel she ran was a "gaming house."[80] The import was that there was more to this witness than meets the eye. Although Phillips went overboard in cross-examining Mrs. Piolaine, he did so because she was a surprise witness. He knew very little about her and was simply reacting to the circumstances.

Let Mellinkoff have the final word on both the cross-examination of the police and of Mrs. Piolaine:

> Phillips tested the evidence, questioning the testimony that came from men encouraged by the hope of special reward to somehow produce evidence that would convict. Questioning all the possibilities of perjury, not good perjury or bad perjury, perjury directed to conviction of the guilty or perjury to convict the innocent or perjury by habit, but all perjury, all misjudgment, all chance of error. In such a process, some mud. Unfair to Charlotte Piolaine. As it turned out, unquestionably. But as she comes to the stand a witness out of nowhere, the defense makes one quick calculation. Regardless of what my man has done, he does not have to submit to conviction by lies or mistakes. How do I know what motivates this woman, or where the police have found her at the 11th hour? If defense counsel weighs too cautiously the undoubted risks of giving offense, in this and the case of every other witness, he loses all effectiveness. False witness is not packed standard. It comes chic and seedy, horny pawed and manicured, virginal and dissolute, bald, crewcut, and bearded. The lawyer makes his quick decision, and in doubt that decision is weighted for him on the side of his client. He may make mistakes, and those mistakes too must go into the accounting of a system of justice. The need for competent counsel with guts, overawed neither by popular clamor for a victim nor by the majesty and force of official accusation, brushes now lightly, now sharply against other and equally urgent requirements of a system of justice.[81]

Although this language is not the calm and balanced prose of Tony Kronman, it strives in the same direction. Both system and client

79. *Id.* at 94-99.
80. *Id.*
81. MELLINKOFF, *supra* note 24, at 210.

must be served. "False witness is not packed standard."[82] Neither is truth. Testimony must be whittled at to get a rough approximation. This is where good judgment, respect for persons, vigorous defense, and an overriding sense of obligation to the processes, procedures, and institutions of the law combine to push first in one direction (the perjury of the police must be exposed); then to withdraw (an innocent person must never be wrongfully condemned); then to push once again in the pressure of the moment (the client did give her the package, but was she hiding something important, too?). Judgments on the specifics will vary, and a blanket rule cannot capture all the complexity of these kinds of cases. Yet, some principles are beacons: perjury must be exposed and the innocent cannot be blamed.

## IV. Off the Tract

So where and when did we get off the track? Oddly, perhaps coincidentally, I think I can document the time and the progression. It occurred within the past twenty-five years. So Glendon and Kronman are not bad historians after all. The place to look? The three editions of the prestigious American Bar Association's *Standards for Criminal Justice Prosecution Function and Defense Function.*

In the first edition, adopted in 1971, Standard 7.6(b) for the defense function reads as follows:

> A Lawyer's belief that the witness is telling the truth does not necessarily preclude appropriate cross-examination in all circumstances, but may affect the method and scope of cross-examination. He should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness is testifying truthfully.[83]

The commentary to this provision was so lengthy and replete with ethical concerns, it could have been written by Emory Buckner. First, it was clearly stated that "the high purpose" of cross-examination and impeachment is to expose "falsehood, not to destroy truth or the reputation of a known truthful witness."[84]

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82. *Id.*

83. AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE Standard 7.6(b) (1st ed. 1971) [hereinafter 1971 STANDARDS FOR CRIMINAL JUSTICE].

84. *Id.* Standard 7.6(b) commentary at 272.

There was an awareness that lawyers "may believe that the temperament, personality or inexperience of the witness provide an opportunity, by adroit cross-examination, to confuse the witness and undermine his testimony in the eyes of the jury."[85] However, "it is not proper to use those tools to destroy the truth, or to seek to confuse or embarrass the witness under these circumstances."[86] In short, "methods of impeachment against a witness who had testified truthfully so undermines the administration of justice that it should be avoided."[87] Finally, it was understood that these complex matters are "subjective," and "largely unenforceable."[88] They are, therefore, "addressed essentially to conscience and honor," even though "[e]xperienced advocates and judges can, over a period of time, identify the lawyer who practices in conformity with high standards as distinguished from those who do not."[89]

Less than ten years later, the second edition changed the operative language of what became Standard 4-7.6(b) by removing the second sentence of the former provision. The language that admonished criminal defense lawyers not to misuse cross-examination "to discredit or undermine" the truthful witness was deleted because "[t]here are some cases where, unless counsel challenges the prosecution's known truthful witnesses, there will be no opposition to the prosecution's evidence, and the defendant will be denied an effective defense."[90] The commentary to the standard repeated portions of the first edition, stating that there is no duty for counsel to "try to impair or destroy the credibility" of a truthful witness.[91] It further admonished the lawyer to avoid this and like tactics, but only if this can be done while still providing "an effective defense for the accused."[92] In fact, the commentary went further, stating:

> [W]here the defendant has admitted guilt to the lawyer and does not plan to testify, and the lawyer simply intends to put the state to its proof and raise a reasonable doubt, skillful cross-

85. *Id.*

86. *Id.*

87. *Id.*

88. 1971 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 83, Standard 7.6(b) commentary at 273.

89. *Id.*

90. AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE Standard 4-7.6(b) (2d ed. 1980).

91. *Id.* Standard 4-7.6(b) commentary at 4-92.

92. *Id.*

> examination of the prosecution's witnesses is essential. Indeed, were counsel in this circumstance to forgo vigorous cross-examination of the prosecution's witnesses, counsel would violate the clear duty of zealous representation that is owed to the client.[93]

Thus, there appeared to be a shift from an aspiration not to undermine truthful witnesses, to a duty to do so, at least in some cases. Nevertheless, the black-letter Standard still did not explicitly say that such a duty existed.

In 1991 the third edition of the Defense Standards was passed. Standard 4-7.6(b) is now stark: "Defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination."[94] Though some lip service is paid to ethics, the commentary is written largely in terms of tactics, repeating much of the language quoted above in describing the commentary in the second edition. To compare the language of the third edition to that of the first is to inhabit a vastly different moral universe. The vision in the third edition is extreme role differentiation, focusing on zealous representation, virtually ignoring moral duties to other people or to the truth-seeking function of the adversary system.

What has happened to account for the change in moral vision between that articulated in the first edition of the ABA's Defense Function Standards, adopted in 1971, and the third edition, adopted in 1991? What happened in twenty years? What happened is what often happens in law and in life: the minority opinion became the majority opinion. Moreover, it should not be thought that this change really occurred over the period of 1971-1991. The two different moral visions that are caught in the first and the third editions of the ABA Standards have existed side-by-side for a long time, as I previously suggested by the contrasting quotations from Emory Buckner and Jerome Frank.[95]

The dual concerns for truth-finding and for the rights of individual participants in the system have needed adjustment from time to time in Anglo-American legal history, with concerns for the rights of criminal defendants making steady advances over the

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93. *Id.* at 4-93 (citing MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1), EC 7-10 (1980)).

94. AMERICAN BAR ASS'N, STANDARDS FOR CRIMINAL JUSTICE Standard 4-7.6(b) (3d ed. 1991) [hereinafter 1991 STANDARDS FOR CRIMINAL JUSTICE].

95. *See supra* notes 12, 16 and accompanying text.

years. Moreover, a fiercer sort of adversariness has been on the rise in civil matters since the latter part of the nineteenth century, when lawyers began to represent huge corporate interests.[96] Whatever the historical confluence of pressures and arguments, the appropriate moral stance of the lawyer, representing clients in an adversarial system of justice, has been the subject of debate as changes in procedures and substantive rights have occurred. Nevertheless, the current issues are not very different from those that have been argued historically. What has changed is the ideal. The 1971 Standards admit that such matters are "subjective . . . largely unenforceable . . . addressed essentially to professional conscience and honor."[97] The commentary begins with these words: "The ethic of our legal tradition has long recognized that there are limitations on the manner in which witnesses should be examined beyond those which are contained in the rules of evidence."[98]

The 1991 edition begins with the same words. The sentence that follows, however, states that "[w]itnesses should not be subjected to degrading, demeaning, or otherwise invasive or insulting questioning unless counsel honestly believes that such questioning may prove beneficial to his or her client's case."[99]

Appeals to honor and conscience are gone. In place of the lawyer's discretion and judgment is an admonition to degrade, demean, invade, and insult if there is any tactical advantage to be gained by the client. I suggest there may be tactical advantages in casting the guilt on an innocent. Is that fair game, too? It seems as if the struggle to balance competing values is over in light of the history of the ABA Standards. But it is not over. There is no lost cause because there is no gained cause: "There is only the fight to recover what has been lost, and found, and lost again."[100]

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96. *See, e.g.*, Thomas L. Shaffer, *The Unique, Novel, and Unsound Adversary Ethic*, 41 VAND. L. REV. 697 (1988).

97. 1971 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 83, Standard 7.6(b).

98. *Id.* Standard 7.6(b) commentary at 270-71.

99. 1991 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 94, Standard 4-7.6(b) commentary at 224.

100. T.S. ELIOT, *East Coker*, *in* THE COMPLETE POEMS AND PLAYS 1909-1950, *supra* note 1, at 128.

## V. Adversariness and Aristotle

Although historical in sweep and focused on a precise issue of lawyer's ethics, this essay is neither history nor ethics. It is an attempt to lay bare the way an ethical ideal becomes embedded in practice. It is also an attempt at graphics. Professors Glendon and Kronman have pointed to a malaise and crisis. In contrast, I have focused on one issue, attempting to illustrate how an ideal gets transformed into a crude ideology. That ideology goes under various guises, but the model of "neutral partisanship" captures it well enough. Under that model of lawyering, the lawyer is not responsible for ends chosen by the client, nor for the means used to accomplish those ends, as long as they do not run afoul of the rules of law or the rules of ethics.[101] Part of the problem is the notion of "rules" of ethics. It is a decidedly un-Aristotelian idea. It belies judgments made in complex situations by professional lawyers, who are trying to accommodate a variety of conflicting values in their everyday practice.

Here, another dose of history is illustrative. When the ABA decided to promulgate a code of ethics in 1908, it dubbed the document, *Canons of Ethics*. When Henry Drinker wrote his legal ethics book in 1953, he placed an epigram at the front of the text from Lord Moulton, which read: "True civilization is measured by the extent of Obedience to the Unenforceable."[102] But the *Model Rules of Professional Conduct*, the latest ABA version of an ethics code, was sold as "law for lawyers."[103] Recently, the American Law Institute embarked on an effort to restate the law for lawyers.[104] Thus, in our quest to make the ethics rules "enforceable," we have made them into rules of law.

Aristotle knew better. And the lawyer-statesman ideal is Aristotelian. Good decisions depend on experience, judgment, a lived tradition, embedded ideals, and character. Principles are necessary, too. But as Ronald Dworkin has reminded us, principles have weight and push us in a certain direction, while rules apply in

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101. RHODE & LUBAN, *supra* note 54, at 135-40.

102. HENRY DRINKER, LEGAL ETHICS 2 (1953).

103. Ray Patterson announced the theme before the *Model Rules* were drafted. Ray L. Patterson, *Wanted: A New Code of Professional Responsibility*, 63 A.B.A. J. 639 (1977).

104. RESTATEMENT (THIRD) OF THE LAW, THE LAW GOVERNING LAWYERS (Tentative Draft 1988-1991).

an all or nothing fashion.[105] Thus, the answers will not come mechanically if we look to principles rather than to rules. This is not to deny that we need clear rules for handling certain kinds of problems. Rather, it is to point to an issue like cross-examination and simply deny that a rule can be drafted that will take into account all of the competing values and contextual subtleties. "Neutral partisanship" will not cut it. Embodying that model into a hard rule of ethics produces Monroe Freedman's answer to the issue of cross-examining the truthful witness.[106]

Life and death issues aside, Freedman maintains that the lawyer has a strict ethical obligation to cross-examine the truthful witness to make her look mistaken, or a liar, or worse,[107] if "counsel honestly believes that such questioning may prove beneficial to his or her client's case."[108] If Emory Buckner could have written the commentary to the ABA Standards dealing with this issue in 1971, then, surely, Monroe Freedman could have been the author of the 1991 version. Interestingly, Freedman goes to great lengths to try to establish that both the *Model Code* and the *Model Rules* presently require vigorous cross-examination of truthful witnesses, and that it is the morally right thing to do; yet, he admits that he personally can no longer vigorously cross-examine a truthful prosecutrix in a rape case, so he stopped taking these cases.[109] This is curious. Freedman admits the injury done to the prosecutrix is "severe," and he just doesn't seem to have the stomach for it. Or the heart. Aristotle would have Freedman examine the emotional as well as the intellectual component of his ethical makeup. Perhaps some re-adjustment in the nature of John Rawls's "reflective equilibrium" is in order.[110] Of course, the problem is rooted in a simplistic, utterly modern conception of what the adversary system is and what it means, and its implications for lawyers.

Freedman's description of the adversary system begins with a shorthand version of the standard account, focusing on the dispute

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105. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 24 (1977).

106. *See Three Hardest Questions*, *supra* note 6, at 1474-75.

107. *Id.*

108. *See supra* text accompanying note 99.

109. FREEDMAN, *supra* note 6, at 168 n.20.

110. JOHN RAWLS, A THEORY OF JUSTICE 48-53 (1971). Rawls argued that there must be a constant interplay between theory and judgment before we can be satisfied with the ethical result.

resolution function of the system, and emphasizing the various roles played by judge, jury, and advocates. Within this standard account, there are disagreements among scholars about what is essential to the system and what is not.[111] Therefore, arguments about change or reform in the system often involve descriptive and normative elements that are not always sorted out clearly. Freedman, however, does not deal with these issues; instead, he moves quickly to equate the adversary system of adjudication with the entire United States constitutional structure.[112] His special focus is on "rights." Freedman explains, "[T]he adversary system represents far more than a simple model for resolving disputes. Rather, it consists of a core of basic rights that recognize and protect the dignity of the individual in a free society."[113] Now, Freedman's position represents a confusion of some importance. It involves a blurring of lines between matters that must be kept apart analytically, and that are different factually. The adversary system is a system of public adjudication of disputes, with an emphasis on different actors playing different roles.[114] The Constitution is the structure of our governmental system. Constitutional rights, embodied first in the Bill of Rights and elaborated thereafter in other amendments to the Constitution and Supreme Court decisions, are fundamental safeguards that "recognize and protect the dignity of the individual in a free society." That constitutional rights are vindicated through our adversary system is established, but to equate those rights with the system that vindicates them collapses important distinctions between means and ends. Rights are also vindicated through rules of procedure and evidence, yet those rules are not equated with the right, nor with the system itself, although the rules of procedure or of evidence must be altered sometimes when they substantially block the path to vindication.[115] Not to recognize these distinctions is to risk missing the true issues at hand.

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111. The main disputants are collected in Stephen Landsman's *Readings on Adversarial Justice: The American Approach to Adjudication* 15-19, 40-76 (1988).

112. FREEDMAN, *supra* note 6, at 13.

113. *Id.*

114. Lon Fuller, *The Adversary System*, *in* TALKS ON AMERICAN LAW 34-36, 39-45 (H. Berman ed., 1971).

115. Clearly, this is why the Supreme Court determined that an exclusionary rule of evidence is constitutionally mandated when authorities seize evidence in violation of the Fourth and Fourteenth Amendments. *See* Mapp v. Ohio, 367 U.S. 643 (1961).

One current example of the confusion is the debate over the recent change to Rule 26 of the Federal Rules of Civil Procedure. Under the amended version, counsel, on their own initiative, must turn over the names of witnesses and the location and categories of documents "relevant to disputed facts alleged with particularity in the pleading."[116] This is not an attack on the foundation of the adversary system, only a change in a procedural rule designed to expedite the exchange of information before trial and to create a more just and more efficient system of adjudication.[117] There may be good reasons for arguing against amended Rule 26, but the undermining of the adversary system is not one of them.

Equating the adversary system with constitutional rights is insufficient for Freedman. He goes even further by equating a lawyer's ethical duty with the protection of those rights. This is the theory Freedman uses to argue for a lawyer's duty to treat client perjury and the destruction of truthful witnesses as rights protected by a lawyer's duty of confidentiality. It is apparent that the Constitution undergirds the adversary system, rights, and lawyers' ethics in a strange and confusing amalgam for Freedman:

> The rights that comprise the adversary system include personal autonomy, the effective assistance of counsel, equal protection of the laws, trial by jury, the right to call and to confront witnesses, and the right to require the government to prove guilt beyond a reasonable doubt and without the use of compelled self-incrimination.[118]

Clearly, several of the rights identified above are rights constitutionally granted under our *criminal* justice system, but the meaning of those rights for defense lawyers is not axiomatic, though Freedman thinks so. Moreover, these arguments simply have no applicability to the *civil* justice system. Again, Freedman thinks otherwise. In fact he excoriates Charles Wolfram, who modestly suggested that the criminal defense lawyer "may attack the credibility of a truthful witness" while casting extreme doubt

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116. FED. R. CIV. P. 26(a).

117. *See* William W. Schwarzer, *The Federal Rules, The Adversary Process and Discovery Reform*, 50 U. PITT. L. REV. 703 (1989).

118. FREEDMAN, *supra* note 6, at 13. For good measure, Freedman claims due process of law is the substantial equivalent of the adversary system. *Id.* (citing GEOFFREY HAZARD, ETHICS IN THE PRACTICE OF LAW 122 (1978)).

that the principle "should be extended to civil cases."[119] Freedman asks rhetorically:

> If we were to adopt a special rule for civil cases, should it provide an exception for the witness whose testimony is truthful but misleading? Should there be an exception for the witness whose truthful testimony is serving an unjust cause? Should it be unethical for the lawyer to show on cross-examination that the truthful witness has received an unlawful fee for testifying?[120]

These questions make my point again. There should be no ethics "rule" on the subject at all. That does not mean we should not say something about it, and mean what we say. As Emory Buckner correctly stated in 1936, the purpose of cross-examination is to expose falsehood and catch the truth.[121] One must accept what is true and go on. If the testimony is out of proportion, it should be whittled down, but no client is entitled to a false case.[122] How this should be accomplished is a matter of context, judgment, and circumstance. Of course, mistakes will be made. Read the transcript of *Courvoisier's* case. Charles Phillips tried hard for the defense, but conflicting obligations led to mistakes. Our traditions tell us to strive toward an ideal. Trial lawyers participate in the truth-seeking function of the adversary system. They are also respectful of all people caught in the fray, particularly those who come forth as witnesses in any trial. The ABA Standards in 1971 remind us: "The policy of the law is to encourage witnesses to come forward and give evidence in litigation. If witnesses are subjected to needless humiliation when they testify, the existing human tendency to avoid 'becoming involved' will be increased."[123] If the lawyer-statesman ideal were working right,

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119. *Id.* at 168 n.22 (quoting CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 650-51 (1986)).

120. *Id.*

121. *See supra* note 7 and accompanying text.

122. *See supra* note 7. *Compare* 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) *with* 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). Notably, Subin had the last word in Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEGAL ETHICS 689 (1988).

123. 1971 STANDARDS FOR CRIMINAL JUSTICE, *supra* note 83, Standard 7.6(b) commentary at 273.

there would be no rule of ethics on the issue of cross-examining the truthful witness. The proper response by the bar to one who regularly engages in such practices would be not punishment but disdain.[124]

## VI. Conclusory Comments

In 1980 the *National Law Journal* reported a study that indicated lawyers were seeing mental health professionals in record numbers. Three reasons were given: (1) overwork; (2) forced aggressive behavior; and (3) constant deceptive practice.[125] Whatever the problem with overwork, I am certain it is what one does on the job that causes the stress. I am equally certain that too many lawyers in the modern world have bought into the extreme neutral partisanship model of lawyering and its corollary: extreme adversariness. The result is a belief that a lawyer has sold his or her soul to the client. Lawyers have been persuaded that their consciences can be bought, and it is a moral bargain. Despite Tom Shaffer's plea that the lawyer-client relationship is a moral relationship, one that must be open to moral change and dialogue in all particulars,[126] lawyers have swallowed the idea that clients make decisions that lawyers carry out; or worse, even when lawyers make decisions for clients, the decision must be narrow and selfish. No wonder there is a malaise. The lawyer's independence and moral agency has been denied. Aristotle taught that virtue and character lead to "happiness" or "flourishing."[127] But a lawyer is a hired gun, a tool with which clients wreck havoc on others. Officer of the court? Statesman? The words do not seem to mean much anymore. With Professors Glendon and Kronman, I wish they did. With T.S. Eliot, I know they will.

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124. This means we would once again understand the difference between a morality of duty and a morality of aspiration. *See* LON FULLER, THE MORALITY OF LAW 8 (1964).

125. Paulette Cooper, *Lawyers Succumb to Stress*, NAT'L L.J., Dec. 1, 1980, at 1.

126. *See generally* THOMAS SHAFFER & ROBERT F. COCHRAN, JR., LAWYERS, CLIENTS AND MORAL RESPONSIBILITY 1 (1994).

127. ARISTOTLE, NICOMACHEAN ETHICS.