When the Lawyer Knows the Client is Guilty:
Legal Ethics, and Popular Culture

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The question of what a criminal defense lawyer should do when the lawyer knows for certain that the client is guilty of the crime has bedeviled legal ethics for as long as that subject has existed. This talk is a shorter version of a paper Richard Weisberg will publish on the subject.

Let me start by recounting a couple of notorious trials in which a defense lawyer knew his client was guilty.

The first is the *Courvoisier* case, set in England in 1840, and described in detail in my colleague David Melinkoff's 1973 book *The Conscience of a Lawyer.* A English nobleman, Lord William Russell, was murdered in his sleep. Suspicion fell on Lord Russell's butler, Courvoisier, because of damaging circumstantial evidence against him, particularly the fact that some but not all of the missing property was found inside the walls of the butler's pantry. Courvoisier stoutly maintained his innocence.

Courvoisier was represented at his trial in the Old Bailey by Charles Phillips, who had a well-deserved reputation for emotionalism and flamboyance. Amazingly to us, it was only in 1836, four years before the Courvoisier case, that defense lawyers were even permitted to address the jury in an English felony case. Before that, the judge was supposed to represent the defendant!

On the first day of trial, Phillips aggressively cross-examined several prosecution witnesses and things were going well for the defense. On the second day of trial, a surprise witness appeared. Charlotte Piolaine owned a hotel in Leicester Square. She had previously employed Courvoisier. She testified that six weeks before the murder he had asked her to hold a package for him, which turned out to be the missing silver plate. Phillips' impromptu cross damaged Piolaine's reputation; he implied she was a liar and that her hotel was a gambling den. His 3-hour closing was extremely emotional and he managed to suggest that the other servants had something to do with the crime without actually saying so. The jury found Courvoisier guilty of murder, his appeal failed, and he was hanged.

Soon, an ethical scandal engulfed Phillips and it haunted him to his grave. Courvoisier had maintained his innocence until he saw Piolaine walk into the courtroom. He then confessed his guilt to Phillips, but insisted that Phillips continue to represent him. Soon word of this got out. There was an immense outcry against Phillips in the press. Not only laymen but many (though not all) lawyers condemned him for his aggressive defense and his reputation never recovered.

Lest you think this is ancient history, the current story of San Diego lawyer Steven Feldman and client David Westerfield is sobering. Westerfield was charged with abducting and killing a little girl named Danielle Van Dam, but her body had not been found. During plea bargaining, the prosecutor offered not to seek the death penalty if Feldman would disclose the location of the body. Since Feldman had that information, he knew beyond any doubt that Westerfield was guilty.

Before a deal could be struck, the police found the body and the plea bargain collapsed. The case went to trial and Feldman conducted an all-out defense. In cross examining Danielle's parents, Feldman brought out the fact that they had held sex parties in their home, suggesting that a guest at one of these parties might have killed the girl. Obviously, this was highly damaging to the parents' reputation, yet Feldman knew the inference he was seeking to raise was false. Westerfield was convicted and is presently on death row.

The sequel to the trial mirrored *Courvoisier*: there was a tremendous outcry in the local press. Conservative TV commentator Bill O'Reilly ran numerous segments on Fox News and demanded Feldman's disbarment. Feldman and his family were shunned. According to Feldman, the San Diego Bar Association's phone answering machine said "if you want information about the San Diego Bar Association, press 1; if you want to complain about Steven Feldman, press 2." In fact, Feldman's actions fell within the accepted conventions for criminal defense and the storm blew over. But the public response to Feldman's conduct bears an eerie resemblance to what happened to Charles Phillips 165 years ago.

b. Criminal defense of the client known to be guilty. How a lawyer who knows the client is guilty should conduct the defense is highly contested; meanwhile popular culture has its own unique perspective.

Obviously there's an issue of epistemology here: does a lawyer ever really "know" the client is guilty? Richard and I will deal with this problem in our published paper but for present purposes let's assume that the lawyer has complete certainty of the client's guilt.

Here's a frame that may be helpful in thinking about the lawyer's dilemmas: strong vs. weak adversarialism. The concept of strong adversarialism prefers the objective of zealous representation and protection of client confidences above other values. Weak adversarialism allows the lawyer to conduct a defense on reasonable doubt grounds while doing less than the lawyer's best. Weak adversarialism in this situation promotes the truth-discovery function of criminal justice without severely undermining the adversary system and it diminishes the moral difficulties of criminal defense lawyers. I'm going to straddle the two by taking an *optional but not mandatory* weak adversarial position.

i. Perjury: The problem of what the lawyer should do when the client insists on committing perjury in direct testimony rarely comes up in practice because

criminal defense lawyers take care not to elicit a client's confession, so they don't know for sure the client will be lying..

Withdrawal from representation does not solve the problem. The Canadian rule, for example, states that "if the client persists in such a course, the lawyer should ... withdraw or seek leave of the court to do so." [Ch IX, comm. 11; Ch. XII comm. 4 treats this situation as obligatory withdrawal] If the lawyer is a public defender or other appointed counsel, as is true in the vast majority of cases, he or she will probably not be allowed to withdraw. A judge may refuse to allow withdrawal during the trial. Even if the lawyer withdraws, the client will now be wised up and will lie to the new lawyer, so little is accomplished except for salving the conscience of the withdrawing lawyer. Alternatively, the client can delay matters indefinitely by forcing sequential withdrawals of lawyer after lawyer.

The ABA Model Rules and the Canadian Code of Professional Conduct take a *weak adversarial* approach to the client perjury problem. They forbid the lawyer from offering evidence that the lawyer knows to be false; if perjury has already occurred, the lawyer "shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal" even though the lawyer learned of the perjury from a confidential communication.

Disclosure to the judge that the client will commit perjury (or already has done so) is quite problematic. What is the judge supposed to do with this information, assuming the client insists that the testimony is *not* perjured? The judge will have to conduct some sort of mini-trial testing whether the story is false. This mini-trial pits the lawyer against the client and destroys the relationship between them, perhaps necessitating the lawyer's withdrawal in mid-trial. Such a hearing would insure disclosure of a wide range of client confidences. Whatever the judge does, there will be a serious issue on appeal of abridgment of the defendant's right to testify.

Another solution—famously urged by Monroe Freedman—takes a *strong adversarial* approach. Freedman says that the lawyer should first try to talk the client out of testifying or of committing perjury. But if this remonstrance fails, the lawyer should put on the testimony in the usual question and answer form. This approach allows a lawyer to say to all clients "tell me the whole truth, because I won't use the information against you in any form," thus enhancing lawyer client communication (as opposed to existing system in which the lawyer tries to avoid knowing the client's guilt for certain). Friedman's solution is rejected by most ethicists and by all ethical codes. Criminal defense lawyers we've spoken to are uncomfortable with it. I reject it also because it would inject more perjury into criminal trials and push the criminal justice system further in the direction of finding falsehood rather than truth. In addition, it would be soundly rejected by public opinion and would worsen the already lamentable image of criminal defense lawyers.

A compromise solution (approved in many states including California) allows the client to testify in narrative (without the usual questions and answers). The lawyer should

not refer to the client's perjured testimony in closing argument. This method of presentation tips off the judge and prosecutor to what is going on, but it is unclear what the jury will make of it.

As a weak adversarialist, I'm casting a weak vote for this obviously suboptimal approach. It seems less problematic than withdrawal or disclosure to the judge and does less damage to the justice system in the event that the lawyer is wrong about whether the client is lying. It allows the judge, during sentencing, to take account of the probably-perjured testimony. Yet this approach preserves the client's right to tell the story as the client sees it, while minimizing the chance that the jury will acquit a guilty person.
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    ii. Cross-examining truthful witnesses: Should a lawyer who knows the client is guilty impeaching a witness whom the lawyer knows to be truthful, even if this would destroy the witness' reputation? The ABA's non-binding Standards for Criminal Justice take a strong adversarialist position. They suggest that a lawyer is expected to cross-examine a witnesses as if the lawyer does not know the client is guilty and that the witness is truthful, as Phillips did in *Courvoisier* and Feldman did in *Westerfield*.

Some legal ethicists advocate a weak adversarial position. They argue that a lawyer's cross-examination of a witness that the lawyer knows to be truthful should be limited to questions that undermine the prosecution's reasonable doubt case. A lawyer need not defend the case to the max, for example by harming the reputation of a witness who the lawyer knows to be truthful nor attempts to cast blame on persons the lawyer knows to be innocent. The Canadian Code of Professional Conduct takes this approach. "The lawyer is entitled to test the evidence given by each individual witness for the prosecution and argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offense charged, but the lawyer should go no further than that." (Rule IX, Comment 11)

My position falls between strong and weak adversarialism. I believe that the ethical rule should provide *an option* for a defense lawyer to do less than the lawyer's best, as the Canadian rule provides (provided the client is first warned that this is the lawyer's intention). The optional approach allows the defense lawyer who believes that client confidentiality trumps all other values to decline the weak option and go all-out on cross. For example, it allows a full-throttle defense when the client would, if convicted, be subjected to a wildly excessive punishment (such as life imprisonment for a non-violent crime under three-strikes laws). But it also allows the lawyer who is troubled by destroying the reputation or the psyche of a truthful witness to pull his or her punches. Surely some defense lawyers will welcome this change.

Part IV. Defending the guilty in popular culture

Popular culture rejects both strong and weak adversarialism. The duty of the lawyer is to take any necessary steps to *betray the client:* to assure that the guilty *be convicted* (or, if a guilty person has already been acquitted, to punish that person with dishonor or death). Sometimes this can be done by tipping the police off to a critical

witness who can demolish an alibi, or by not making a motion to exclude evidence that is legally excludible, or by not introducing exculpatory evidence, or by failing to effectively cross-examine a prosecution witness.

If this isn't possible because a guilty person has already been acquitted, the lawyer's duty is to arrange some other suitable punishment such as getting him arrested and convicted for some other crime or by arranging for the client's death or at minimum dishonor (as in *The Music Box*). I've identified about a dozen films and television shows that make the point, from which I've chosen 3 clips for you.

In *Devil's Advocate* (1997), cocky lawyer Kevin Lomax (Keanu Reeves) wins every case—that's because he's the Devil's son so has supernatural power. Early in the film he successfully defends a high school teacher, Mr. Gettys, against charges of sexually abusing a student named Barbara. He destroys Barbara on cross examination, even though he is certain that she's telling the truth and that Gettys is guilty. Later Lomax goes to work for John Milton (Al Pacino), managing partner of a Wall St. firm—who in fact is Satan. After various supernatural shenanigans, Lomax he finds himself trying the Gettys case over again at the end of the film. Let's see what happens:

In *From the Hip* (1987), lawyer Stormy Weathers (Judd Nelson) is defending Douglas Benoit (William Hurt) in a murder case. Convinced from his client's psychotic ravings that he is in fact guilty, and fearing that he may well be acquitted, Stormy goads Benoit into testifying by telling him he wouldn't be a good witness then taunts his own witness into actions that destroy him.

And Justice for All (1979) is a true classic of this subgenre. Conscientious defense lawyer Arthur Kirkland (Pacino again) is forced the defend his worst enemy, Judge Henry Fleming (John Forsythe), in a rape case. Although Kirkland at first believes Fleming's denials, Fleming confesses that he is in fact guilty but has arranged for perjured testimony by alibi witnesses that is certain to get him off. Now let's hear Kirkland's opening statement:

And in a recent episode of the prosecutor TV show *Close to Home,* the writers took the Westerfield case as their model—and morphed it into a lawyer betrayal story! just the opposite of the way Steven Feldman handled the real case.

d) The importance of pop culture

We often think of popular culture as disposable trash, to be quickly consumed and as quickly forgotten—and, of course, a lot of it is trash. Nevertheless, we in the popular culture movement believe it is important to study pop culture products for at least two distinct reasons. First, popular culture is a mirror of what people actually believe. Of course, the mirror is highly distorted, given the need for pop culture to entertain people and be sold at a profit, but it often furnishes tantalizing clues about public attitudes and beliefs. Looked at in that way, we might say that the guilty-client films suggest that

people believe that a good lawyer looks out for the public interest by making sure that guilty people don't get acquitted.

Second, pop culture influences, reinforces, and changes popular opinion. Numerous psychological studies indicate that people's opinions are heavily influenced by the pop culture they've consumed. If the question is, will you get mugged if you go to New York, people who watch a lot of TV are much more likely to say yes than those who watch little or none. People who watch a lot of TV believe in a meaner world—more crime, more drugs, more prostitutes, than people who don't. And so on.

The mechanism by which pop culture influences people's attitudes is called "cultivation theory" and it's drawn from cognitive psychology. The idea here is that people soak up the information conveyed by pop culture media without being critical about it. We maintain files in our brain on every conceivable subject and constantly add materials to the files from our personal experiences, conversations with others, or what we read or see in the news and entertainment media.

When we respond to a question like "do you trust lawyers" we access material in the "lawyers" file in order to give a quick answer (this is often referred to as "heuristic reasoning"). Whether we access a particular bit of information in the file depends on how recently it was filed, how many similar items are lodged in the file, and the vividness of the experience that put it there. Most importantly, we don't "source discount" very well. This means that we store data in the file which we've extracted from popular culture, failing to note that it was a fictitious story that provided the material.

The films, TV shows and novels that glorify lawyer betrayal of clients involve empathetic characters—lawyers who the audience likes—who sell out their clients to protect the public from vicious predators. Such media have been consistent, recent, and vivid—thus good candidates for strong cultivation effects. I speculate that this message of good-lawyer-betrayers creates a sort of cognitive dissonance between the model of good lawyers portrayed in media and the deeply held background belief that lawyers are tricky hired guns who can never be believed or trusted. Many people will resolve the dissonance by assuming that there are a few good lawyers, but their actions only emphasize the evil and corruption of all the other bad ones.

These pop culture images are exceptionally powerful. They may be deepening and reinforcing the public's contemporary distrust of lawyers who are just doing their jobs. Perhaps if lawyers were enabled to practice weak adversarialism, they could somehow begin to lessen the public's loathing of their function.

Communications between a lawyer and client are subject to legal professional privilege where they are for the purpose of seeking legal advice from a lawyer or giving legal advice to a client and are confidential. For example, notes of open court proceedings, or minutes of meetings, or correspondence with opposing lawyers are not subject to legal professional privilege. If a lawyer knows that the transaction they are working on is a principal offence, they risk committing an offence themselves. Who does it apply to? The duty of confidentiality applies to all staff employed by the lawyer. The lawyer's duties towards that client (in particular, the duty of confidentiality) continue, even when the case has completed. Legal ethics, principles of conduct that members of the legal profession are expected to observe in their practice. They are an outgrowth of the development of the legal profession itself. In the U.S., each state or territory has a code of professional conduct dictating rules of ethics. These may be adopted by the respective state legislatures and/or judicial systems. The American Bar Association has promulgated the Model Rules of Professional Conduct which, while formally only a recommendation by a (On the other hand, the lawyer cannot admit guilt against the client's wishes.) Rather, the lawyer's trial tactics and arguments must focus on the government's failure to prove all the elements of the crime. Example: Sam is charged with shoplifting. Sam admits to his lawyer that he took a watch, as charged. Sam's lawyer realizes that the store's hidden camera videotape is fuzzy and practically useless as prosecution evidence. In truth, the defense lawyer almost never really knows whether the defendant is guilty of a charged crime. Just because the defendant says he did it doesn't make it so. The defendant may be lying to take the rap for someone he wants to protect, or may be guilty, but only of a different and lesser crime than the one being prosecuted by the district attorney.