

*The Ethics of the Adversary System**

by

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Abstract:

This article considers many commonly advanced criticisms of the adversary system. It provides an analytic framework that includes the likely results of changed ethical rules and that distinguishes and analyzes separately two different possible goals of the system, seeking the truth and promoting justice. The article is also unusual in the range of supporting materials that it synthesizes, which includes contributions from economic theory, psychological studies, philosophy, and traditional legal ethics.

The article concludes that changes in ethical codes meant to increase lawyers' duty to promote the truth will have a perverse result, decreasing the accuracy of litigation. This will occur because compliance with the rule will be difficult to verify, and, under these circumstances, many attorneys will not comply with the changed rules. When some attorneys promote the truth and other do not, those who do not will have the advantage, to the detriment of the truth-finding functions of the courts.

The article also concludes that encouraging lawyers to pursue justice as a goal is also likely to have perverse effects. Because lawyers are less representative of society than clients, the collective censorship by lawyers of clients' claims is likely to produce results inconsistent with democratic values or social mores. Even where clients' claims are inconsistent with then-existing law, their presentation serves important law-changing functions and participatory values. At best, giving lawyers the duty of scrutinizing clients' claims creates burdens on clients.

The article also addresses some possible alternative methods for improving the accuracy of litigation without creating conflicting duties for lawyers.

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I. INTRODUCTION

Recently, and in a variety of areas, changes to substantive law, procedural law, and ethical rules have increased lawyers' duties to disclose information. These changes impose duties on lawyers to act as filters on clients' action, limiting the ability of take the form have been foreshadowed and rationalized by philosophical critiques of the adversary system.

These critiques have two flaws. First, they are almost entirely theoretical, neglecting empirical evidence on such issues as client satisfaction with the legal system, the production of evidence in adversarial and inquisitorial processes, the problem of failure to comply with rules, and, perhaps most seriously, how imposing duties on lawyers to restrict client choices will cause special harm to the poorest and least educated clients.

Second, they fail to consider systematically two separate goals of the legal system, truth and justice. Their arguments for changes to improve the truth-producing capacity of the adversary system neglect the harm to justice that these changes will cause, and vice versa.

Although the changes so far have been on the edges of the adversary system, further changes could lead to serious disruptions in the balance between justice and truth that we now have. Consequently, it is imperative to consider seriously and systematically how attempts to increase lawyers' obligations to control their clients affects the truth-producing capacity of the adversary system, its ability to achieve justice, and the ability of clients, particularly the poor and ill-educated, to have access to justice and to have a system of justice seen to address their needs.

II. THE ADVERSARY SYSTEM IN RETREAT

Despite its fundamental status in the American system of justice,¹ the adversary system is under attack. Critics argue that the adversary system produces injustice, because it allows lawyers to conceal evidence that is harmful to their clients' cases and argue for immoral results. Two of the most prominent of these critics are David Luban² and Alan Goldman,³ who have set out detailed and trenchant accounts of the problems that the system poses.⁴

¹ E.g., *Hickman v. Taylor*, 329 U.S. 495, 514 (1946); *Herring v. New York*, 422 U.S. 853, 857-58 (1974). Although the adversary system is fundamental, it is generally not constitutionally mandated, so that lawyers may be made responsible for turning in their clients for false statements. See *Nix v. Whiteside*, 475 U.S. 157 (1986). But see MONROE FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 8 (1975) [hereinafter FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*]. The provision for trial by jury in civil cases, U.S. CONST. amend. VII, and the provision for the assistance of counsel, U.S. CONST. amend. VI, may limit the ability to have investigative judges.

² DAVID LUBAN, *LAWYERS AND JUSTICE* 169 (1988) [hereinafter LUBAN, *LAWYERS AND JUSTICE*].

³ ALAN GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 96 (1982).

⁴ By mentioning these two, I do not mean to ignore the contributions of others. For example, Carrie Menkel-Meadow, as part of a symposium on the adversary system, has argued that postmodernist ideas invalidate the adversary approach. Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996). Closely examined, though, as Monroe H. Freedman observes, she only argues for the consideration of other alternatives, not identifying a particular approach that she believes would work better. See Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63, 67 (1996) (citing Menkel-Meadow, 38 WM. & MARY L. REV. at 11-12). Moreover, her arguments rely on Luban's, see *id.* at 5 n.2 (including a "see generally" cite to Luban's *The Good Lawyer*).

Other contributions to the field largely endorse the contributions of Luban and Goldman. See W. Bradley Wendel, Book Review, *Professional Roles and Moral Agency: Ethics for Adversaries: The Morality of Roles in Public and Professional Life*, 89 GEO. L.J. 667 & n.4 (2001) (reviewing ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES: THE MORALITY OF ROLES IN PUBLIC AND PROFESSIONAL LIFE* (1999)) (citing Luban and Goldman first in his list of authorities in the area of legal ethics).

These criticisms have been enormously influential.⁵ In several areas, including the Model Rules governing lawyers' ethical practices, federal statutes, and the Federal Rules of Civil Procedure, the recent trend is to broaden disclosure of formerly confidential information. Thus, in 2003, the American Bar Association's Model Rules of Professional Conduct modified the scope of a lawyer's discretion⁶ to disclose to encompass non-criminal acts that do not involve imminent risks of death or bodily harm,⁷ as well as fraud or crimes causing financial loss.⁸

Moreover, other arguments have been less sweeping than those of Luban and Goldman. For example, Carrie Menkel-Meadow, as part of a symposium on the adversary system, has argued that postmodernist ideas invalidate the adversary approach. Carrie Menkel-Meadow, *supra*. Closely examined, though, as Monroe H. Freedman observes, she only argues for the consideration of other alternatives, not identifying a particular approach that she believes would work better. *See* Monroe H. Freedman, *The Trouble with Postmodern Zeal*, 38 WM. & MARY L. REV. 63, 67 (1996) (citing Menkel-Meadow, 38 WM. & MARY L. REV. at 11-12).

Other critics of the adversary system, such as Richard Wasserstrom, also advance concerns about the special nature of lawyers as professionals. These raise some special issues that I will discuss later. *See infra* p. 58 & n. 190. Some argue for broader discretion for lawyers to disclose. *See* Simon, *infra* note 6. Because an argument for lawyer discretion is less radical than the critiques of Goldman and Luban, I will not address it a length separately.

⁵ They have been heavily relied upon by more recent critics of the adversary system. *See supra* n. 4. *See also, e.g.*, Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 n.1 (1996) (using a “see generally” cite to Luban’s *The Good Lawyer*); John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45 n.4 (1996) (citing Luban’s *Lawyers and Justice: An Ethical Study*, *supra* note 2, as an example of the “intense debate” over the adversary system).

⁶ William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083, 1090 (1988).

⁷ Compare MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.6(b)(2) (2003), at http://www.abanet.org/cpr/mrpc/rule_1_6.html with MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.6(b)(2) (2003); *see* MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.6(b)(3) (2003) (adopted August 2003).

Earlier changes have expanded the duty to reveal past presentation of false evidence.⁹ Controversial issues of corporate legal ethics in the Sarbanes-Oxley act¹⁰ and the SEC's implementing regulations¹¹ have also recently brought the broader issues of legal ethics to the fore. Although these changes are in the area of corporate disclosure, they can be expected to influence the further administrative and judicial debate over the adversary system. The 1993 amendments to Federal Rule of Civil Procedure 26 increased the mandatory disclosure required of parties and attorneys.¹² The 1983 amendments to Federal Rule of Civil Procedure 11 prohibited lawsuits advanced for an improper purpose, even if they are well-supported in fact and law.¹³

⁸ Compare MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.6(b)(3) (2003), at http://www.abanet.org/cpr/mrpc/rule_1_6.html with MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.6(b)(3) (2002).

⁹ Compare MODEL RULE OF PROFESSIONAL RESPONSIBILITY 3.3(a)(4) (1983) (duty to correct presentation of false evidence); ABA Comm. On Professional Ethics and Grievances, Formal Opinion 87-353 (1987) (same) with MODEL CODE OF PROFESSIONAL CONDUCT DR 7-102 (1980) (no description of such a duty).

¹⁰ Sarbanes-Oxley Act of 2002, § 307, Pub. L. No. 107-204, § 307, 116 Stat. 745 (2002), codified at 15 U.S.C. § 7245.

¹¹ Implementation of Standards of Professional Conduct for Attorneys, Exchange Release No. 34-47276; Ic-25929 (January 29, 2003), available at <http://www.sec.gov/rules/final/33-8185.htm> (last visited September 8, 2003) (to be codified at 17 C.F.R. Pt. 205).

¹² See Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 431 (1993).

¹³ Amendments to the Federal Rules of Civil Procedure, 97 F.R.D. 165, 197 (1983). The 1993 amendments to rule 11 decreased the consequences of failure to comply with rule 11. See Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 422-23 (1993). At the same time, they provided a new duty to disclose information with respect to facts pled with particularity. *Id.* More recent amendments have deleted this requirement. See Fed. R. Civ. P. 26(a)(1); Proposed Amendments to the Federal Rules of Civil Procedure, 181 F.R.D. 18, 57 (1999).

Unfortunately, the debate over the adversary system has been surprisingly narrow in the scope of issues it has considered. The critics of the adversary system and the rules they have influenced have a strongly deontological and individualistic bent. That is, they focus on the lawyers' conduct to the exclusion of the consequences that different rules for lawyers' behavior have on their clients and on the system of justice.¹⁴ To some extent, the defenders of an adversary system of also ignored these considerations, focusing instead on the assumed need for a strong attorney-client relationship.¹⁵

This narrow focus has impaired the quality of the debate. As one observer in 1996 summarized then-recent changes by saying that "in principle our legal system has begun the shift away from the adversarial model of justice; this movement, however, is taking place in a haphazard manner without much study or guidance."¹⁶ Nothing has happened in the subsequent years to alter this judgment.

This article starts with the premise that a decision over ethical rules must consider the consequences of those rules and the endogenous psychological preferences of those subjected to the rules. As a result, it generates different and important conclusions about how the system works and the desirability of some of its features.

¹⁴ This may result from the intellectual division of labor among the three groups of people likely to address the area: lawyers, philosophers, and social scientists. Neither philosophers nor lawyers are empiricists; neither lawyers nor social scientists tend to worry about what ought to happen, rather than what actually happens; and neither social scientists nor philosophers have the experience with the legal system that would create skepticism about the willingness of lawyers to follow rules.

¹⁵ See, e.g., FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, *supra* note 11, at 8.

¹⁶ John S. Dzienkowski, *Lawyering in a Hybrid Adversary System*, 38 WM. & MARY L. REV. 45, 46 (1996).

The most significant consequence that the critics of the adversary system omit is the limited effectiveness of a duty to disclose. The critics' posited requirement of an ethical duty to promote truth is important only because of the limitations of the present system on discovering truth. The attempt to create duties for lawyers is an implicit recognition of the weakness of the present system in discovering truth.

Unfortunately, that very weakness means that lawyers and clients will succeed in evading new requirements. Trying to require lawyers to promote truth and justice may actually reduce the ability of the legal system to produce truth and justice.¹⁷ Those attorneys and clients who ignore the rules requiring disclosure of adverse information will benefit from those rules, because their rule-abiding opponents will disclose harmful facts without receiving the benefit of reciprocal disclosure from the attorneys who do not follow the rules requiring disclosure and their clients. The adverse impact of such changes is likely to be concentrated on the poor and those with less access to the legal system, because they will have less ability to select attorneys willing to ignore the rules.

A secondary criticism of the adversary system is the argument that the failure to require directly non-adversarial conduct of lawyers will contribute to the worsening of ethical standards of lawyers. These critics overlook the true constraint on lawyers, which is the structure of the adversary system. This system requires lawyers to present their claims in terms of arguments that appeal to unbiased judges and jurors. The ethical structure of the adversary system resembles a discourse-based ethics such as that suggested by Jürgen Habermas, in which procedural

¹⁷ *Contra* Lasso Rogelio, *Gladiators Be Gone: The New Disclosure Rules Compel a Reexamination of the Adversary Process*, 36 B.C. L. REV. 479, 511 (1995).

considerations about the circumstances in which ethical rules are developed replace a substantive ethical code.¹⁸ Moreover, the need to think in terms of justice encourages lawyers to cultivate ethical thinking.¹⁹

Other advantages of the adversary system are largely neglected in its assessment by critics of the system and many of its defenders. Critics of the adversary system neglect the consequences of providing additional powers to the lawyers' perspective. A system in which representatives of the parties assume judicial powers to decide whether clients' claims should be pressed privileges versions of justice favored by those representatives.²⁰ Moreover, such a system will affect these clients not only in their presentation of individual cases, but also in their ability to change the law.²¹

An additional, neglected advantage of the adversary system is the increased satisfaction participants in such a system have with the system. This is especially felt by those who lose their cases,²² and this satisfaction helps maintain voluntary compliance with legal decisions. Such preferences exist even among people who are not citizens in or residents of the United States and

¹⁸ See, e.g., JÜRGEN HABERMAS, BETWEEN FACTS AND NORMS 264 (1996) [hereinafter HABERMAS, BETWEEN FACTS AND NORMS] (arguing that “the communicative and participatory rights that are constitutive for democratic opinion- and will formation acquire a privileged position”); JÜRGEN HABERMAS, JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS 1-2 (1993) [hereinafter HABERMAS, JUSTIFICATION AND APPLICATION].

¹⁹ See *infra* p. 74.

²⁰ HABERMAS, JUSTIFICATION AND APPLICATION, *supra* note 18, at 12.

²¹ See *infra* page 58 & n. 192.

²² See *infra* pp. 39-42 & nn. 124-134.

other common-law countries that already practice the adversary system, so these preferences constitute an important, independent reason for adoption of an adversary system.

The subsequent material will consider these issues in more detail.

III. LAWYERS' ETHICS WITHIN THE ADVERSARY SYSTEM

A. The Adversary System and Its Critics

In the adversary system, the lawyer's goal is to serve her client. Each lawyer provides evidence to support her side. The constraints on the lawyer's role are primarily procedural limits on what the lawyer can do in promoting her client's interest.²³ The lawyer has a duty to avoid putting forward false information herself²⁴, but has no general duty to promote truth, justice, or the other side's interests.

²³ Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031 (1975) ("The business of the advocate, simply stated, is to win if possible without violating the law."). *See also, e.g.*, MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-19 ("The duty of a lawyer to his client and his duty to the legal system are the same: to represent his client zealously within the bounds of the law."). The Model Rules do not expressly carry forward this obligation, but some argue that it should be understood. *See* MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 72 (1990) [hereinafter, FREEDMAN, UNDERSTANDING LAWYERS' ETHICS]. (Professor Freedman has since written an updated version with a co-author, MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 72 (2002), but I prefer to rely on the earlier, work of which he was sole author in case statements in the later edition might be thought to represent the work of his co-author.)

²⁴ *See* MODEL CODE OF PROFESSIONAL CONDUCT DR 7-102(A)(4) (1980) (prohibiting the lawyer from "knowingly use perjured testimony or false evidence"); MODEL CODE OF PROFESSIONAL CONDUCT DR 7-102(A)(5) (prohibiting the lawyer from knowingly making a false statement of law or fact); MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.2(d) (1983) (prohibiting the lawyer from assisting in illegal or fraudulent conduct); MODEL RULE OF PROFESSIONAL RESPONSIBILITY 3.3 (1983) (prohibiting the lawyer from making a false statement of material fact or law or offering evidence known to be false); MODEL RULE OF PROFESSIONAL RESPONSIBILITY 4.1 (1983) (prohibiting the lawyer from making a false statement of fact or law even in non-adversarial settings).

Defenders of the system have argued that the adversary system fully informs court. Although each side will advance the evidence that promote its view on the ultimate merits,²⁵ all relevant evidence will help one side or the other, so the court will receive all relevant information.²⁶ Because each side has no general duty to disclose facts that harm that party, both parties have a incentive to seek out facts, which will make it more likely that all the facts will be discovered.²⁷ Defenders of the system argue that the adversary system avoids prejudgment of cases. “An adversary presentation seems to be the only effective means for combating this natural tendency to judge too swiftly in terms of the familiar that which is not yet fully known.”²⁸

Critics of the system have two separate objections. First, they fear that the absence of a duty to disclose information that undercuts her client’s case will interfere with the system’s ability to produce the results required by the substantive law. For example, because a defense lawyer can conceal her knowledge that the plaintiff’s injuries are much more serious than the plaintiff realizes, the plaintiff will settle a case for far less than he ought.²⁹ Thus, Judge Marvin

²⁵ See Luke M. Froeb & Bruce H. Kobayashi, *Naive, Biased, Yet Bayesian: Can Juries Interpret Selectively Produced Evidence?*, 12 J. L. ECON. & ORG. 257, 260 (1996).

²⁶ FED. R. EVID. 401.

²⁷ See Steven Matthews & Andrew Postlewait, *Quality Testing and Disclosure*, 16 RAND J. ECON. 328 (1985) (mandating disclosure will decrease the amount of information available); David L. Engel, *An Approach to Corporate Social Responsibility*, 32 STAN. L. REV. 1, 37-58 (1979) (arguing that, when noncompliance would be profitable because undetected or undersanctioned, it is 'surprisingly difficult to construct' a categorical argument for voluntary compliance).

²⁸ Lon Fuller, *The Adversary System* in TALKS ON AMERICAN LAW 39-40 (Harold Berman 2d ed., 1971). See also Lon Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160 (1958).

²⁹ Luban, *The Adversary System Excuse*, *supra* note 155, at 115.

Frankel's *The Search for Truth: An Umpireal View*, argues that lawyers in litigation should be bound to the same standards that SEC rule 10b-5 requires of securities law attorneys.³⁰ This view was reflected in the 1993 mandatory disclosure amendments to Federal Rule of Civil Procedure 26(a).³¹ This objection challenges the ability of the adversary system to produce truth.

Second, critics of the adversary system fear that the lawyer's single-minded goal of serving the client's interests will allow the client to obtain a result to which the client is legally entitled, but which is not just. For example, a lawyer will allow the client to plead the statute of limitations to bar a just claim. Goldman and Luban emphasize this criticism, although they are also concerned with the withholding of evidence.³² A scheme of truth promotion will not satisfy these critics of the adversary system, because some claims that are factually true and legally valid may nonetheless be unjust. These views are reflected in the "proper purpose" requirement added to Federal Rule of Civil Procedure 11, which attempts to bar even legally justified claims or defenses if advanced for an improper purpose.

Critics of the adversary system attack the empirical foundations of the system. Luban criticizes this as "untested speculations from the armchair."³³ Simon, who studied the ethics of

³⁰ See Frankel, *supra* note 23, at 1057-58 (citing 17 C.F.R. § 240.10b-5 (1974)).

³¹ See Amendments to the Federal Rules of Civil Procedure, 146 F.R.D. 401, 431 (1993).

³² See *supra* nn. 2-3.

³³ LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 72. See also David Luban, *Rediscovering Fuller's Legal Ethics*, 11 GEO. J. LEGAL ETHICS 801 (1998). In other contexts, Luban has conceded some advantages for the adversary system.

The institutional strength of the adversary system is that giving parties sole responsibility for presenting their own cases arranges incentives so that every point of view gets investigated and

public interest lawyers claims, “[T]he proponents of this theory have never been able to formulate an adequate account of it. Their theory has rested on the notion that opposing biases somehow neutralize each other, rather than simply creating confusion. But they have never explained why this is so.”³⁴ Critics could also argue that the necessity that lawyers argue for one side might explain why they are less likely to perceive facts that favor the other side, but does not itself justify a lawyer’s withholding information that the lawyer knows to be harmful to her client.

Critics further argue that, in reality, the expense of finding evidence will limit the information the court receives.³⁵ Moreover, blundering lawyers will not find evidence that they

presented as fully and sympathetically as possible. From the standpoint of decisional accuracy, partisan advocacy ensures that salient arguments are not overlooked. From the standpoint of respect for human variety, giving full voice to all positions is more just. We may put it the other way around: to exclude or silence voices makes the human world less just. Whatever harmony results is an illusion, a suppression of conflict - and justice is conflict.

The distinctive virtue of the adversary system lies in its ability to elicit more voices and more input than alternative systems. Even critics of the adversary system concede the importance of this virtue.

David Luban, *Taking Out the Adversary : The Assault on Progressive Public-Interest Lawyers*, 91 CALIF. L. REV. 209, 217 (2003).

³⁴ Roy D. Simon, Jr., *Fee Sharing Between Lawyers and Public Interest Groups*, 98 YALE L.J. 1069, 1140 (1989) (public interest groups adhere to high ethical standards, as measured by the extremely low rate at which such groups are sanctioned).

³⁵ *Id.* This is especially an obstacle where expert witnesses are involved, because of the expense of retaining them and supplying them with information on which they can base their opinions.

should. Because the poor will have fewer resources with which to find good lawyers and finance their search for truth, the adversary system favors the wealthy.

As Luban observes, the defenders of existing rules simply repeat the idea of an adversary system. For example, in Monroe Freedman's justification of participating in the deception of the court, he observes that "[t]he attorney functions in an adversary system based upon the *presupposition* that the most effective means of determining truth is to present to a judge and jury a clash between proponents of conflicting views."³⁶ Nowhere in his original work does Freedman examine the validity of that presupposition.³⁷ Luban also suggests that the success of inquisitorial systems shows that modifying the American system to include a general duty for lawyers to promote the truth would improve the system.³⁸

These arguments are all somewhat theoretical. They depend for their persuasive power on assumptions about reality. Does the incentive to discover more data that the adversary system provides outweigh the harm caused to the truth-finding process from the withholding of relevant

³⁶ See Monroe Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1470 (1966) [hereinafter Freedman, *The Three Hardest Questions*] (emphasis added).

³⁷ Thus, as Luban observes, "it is misleading to call the justification by the adversary system an argument. It is more like a presuppos[i]tion accepted by all parties before the arguments begin." LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 54. For criticism see John T. Noonan, *The Purposes of Advocacy and the Limits of Confidentiality*, 64 MICH. L. REV. 1485 (1966); John T. Noonan, *Professional Ethics or Personal Responsibility?*, 29 STAN. L. REV. 363 (1977) [hereinafter Noonan, *Professional Ethics*]. In his more recent work with a co-author, Freedman addresses many of these deficiencies. See FREEDMAN & SMITH, *supra* n. 23, at 36-39.

³⁸ Luban, *The Adversary System Excuse*, *supra* note 155, at 93. See also John Langbein, *The German Advantage in Civil Procedure*, 52 U. CHI. L. REV. 823 (1985). Others have reached conclusions contrary to Langbein's. Benjamin Kaplan, *Civil Procedure—Reflections on the Comparisons of the Systems*, 9 BUFF. L. REV. 409, 420-21 (1960).

information? Those assumptions are difficult to verify directly. However, as the immediately following section shows, psychological, economic, and social science research all provide some support for the adversary system. Such data, while helpful, are not the complete story, because they assume the willingness of participants in the system to comply with the system's rules. The next subsequent section develops the idea that lawyers and clients will not always comply with the rules; under those circumstances, the advantages of the adversary system are even greater.

B. Promoting Truth As an Alternative to the Adversary System

1. The Adversary System and the Production of Truth

There are several respects in which social science research supports the adversary system. First, economic analysis shows that mandatory disclosure rules generally decrease disclosure, by creating incentives not to carry out the investigations that may then have to be turned over to another side.³⁹ This supports the argument that privileges of confidentiality may be necessary to encourage parties to discover information about their own cases.

Economic analysis also suggests that the adversary system will work better than an inquisitorial system.⁴⁰ The model, although abstract, takes into account the competition between the parties in producing evidence, the burdens of producing evidence, the tendency of the parties

³⁹ Matthews & Postlewaite, *supra* note 27, at 330. Their analysis expressly concerns the analysis of monopoly sellers of goods, which is analogous to the issue of someone attempting to sell (settle) a case. *Id.* at 339. It assumes that demand does not depend significantly on income; under these circumstances when someone seeks information, the seller will want to provide it.

⁴⁰ See Froeb & Kobayashi, *supra* note 25, at 269. See also Hyun Song Shin, *Adversarial and Inquisitorial Procedures in Arbitration*, 29 RAND J. ECON. 378 (1998) (concluding that even if it decision makers are, on average, as well informed as the two parties, the adversarial procedure is superior because of its ability to allocate the burden of proof in an effective manner, and thereby extract the maximal informational content from apparently inconclusive contests).

to produce to the jury only favorable evidence, and the bias and naiveté of the decision maker.⁴¹

The authors conclude, “The net effect of the adversarial system is to mitigate the prior bias of the jury.”⁴²

Second, empirical psychological research comparing the adversarial system with its inquisitorial rivals supports the adversary system. A pathbreaking set of experiments, since confirmed in many respects, compared four different procedures: a client-selected adversarial investigator and advocate, like that existing in the United States; a court-appointed inquisitorial investigator; two court-appointed adversarial investigators and advocates; and two court-appointed inquisitorial investigators, in which each inquisitor, while not aligned with a party, presented only one party's case to the court.⁴³

The adversarial system like that used in the United States was best in all three respects tested. It had the greatest ability to cancel out initial bias of the decision maker.⁴⁴ It was best at

⁴¹ *Id.* at 270.

⁴² *Id.* at 269.

⁴³ JOHN W. THIBAUT & LAURENS WALKER, *PROCEDURAL JUSTICE: A PSYCHOLOGICAL ANALYSIS* (1975). An earlier version of this work, with an additional co-author, was John Thibaut, Lauren S. Walker, & E. Allen Lind, *Adversary Bias in Legal Decisionmaking*, 86 HARV. L. REV. 836 (1972), but was criticized on methodological grounds in Mirjan H. Dameska, *Presentation of Evidence and Factfinding Precision*, 123 U. PENN. L. REV. 1083 (1975), and Peter Brett, *Legal Decisionmaking and Bias: A Critique of an Experiment*, 45 U. COLO. L. REV. 1 (1973). *See also* E. Allen Lind, John Thibaut, & E. Allen Walker, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129 (1973). Much of this work is summarized in the context of alternative dispute resolution in Nancy A. Welsh, *Remembering the Role of Justice in Resolution: Insights from Procedural and Social Justice Theories*, 54 J. LEGAL EDUC. 49, 52-53 (2004).

⁴⁴ THIBAUT & WALKER, *supra* note 43, at 41-52. The American-style adversary system proved best even with French experimenters and subjects. *Id.* at 52-53. *See also* John Thibaut et al., *The Ethics of the Adversary System*

canceling out internal biases resulting from the sequencing of presentation.⁴⁵ And, it best compensated for sampling error in the discovered facts, so that random variation in the facts originally known to the attorney had less effect on the results of the litigation under the adversary system than under competing systems.⁴⁶

Thibaut and Walker concluded that their investigations “have produced generally encouraging information about the capacity of the adversary system to protect the weaker party and to moderate decision-maker bias.”⁴⁷ They also conclude, “It is perhaps the main finding of the body of our research, therefore, that for litigation the class of procedures commonly called ‘adversary’ is clearly superior.”⁴⁸

Although the adversary system has one defect discovered by these investigations—for a variety of reasons, witnesses tend to provide more support for the case of the side that calls them⁴⁹—it was superior overall. Moreover, this superiority may explain Italy's recent shift from

al., *Comment, Adversary Presentation and Bias in Legal Decisionmaking*, 86 HARV. L. REV. 386, 391-401 (1972).

⁴⁵ THIBAUT & WALKER, *supra* note 43, at 62-63, 66 (describing “the capacity of an adversary system to generate balanced final judgments under conditions that afford both advocates fair access to their most effective resources”); MICHAEL J. SAKS & REID HASTIE, *SOCIAL PSYCHOLOGY IN COURT* 208 (1978).

⁴⁶ THIBAUT & WALKER, *supra* note 43, at 39. *See also* Lind, *supra* note 86, at 1135, 1141-43.

⁴⁷ *Id.* at 54.

⁴⁸ *Id.* at 118.

⁴⁹ Neil Vidmar & Nancy M. Laird, *Adversary Social Roles: Their Effects on Witnesses' Communication of Evidence and the Assessments of Adjudicators*, 44 J. PERSONALITY & SOC. PSYCHOL. 888 (1983). Moreover, adversary attorneys' interviews with witnesses tend to bias their testimony; inquisitorial interviews do not. Blair H. Sheppard & Neil Vidmar, *Adversary Pretrial*

its inquisitorial system towards a more adversarial system.⁵⁰ As even some advocates for American adoption of inquisitorial ideas concede, other continental systems have also been criticized for lack of adversariness.⁵¹

Despite the combination of several types of research, Luban dismisses the work of Thibaut and Walker on the superiority of the adversarial system as “inconclusive” without much discussion.⁵² He does suggest that “there are inherent limitations on how closely such experiments are done.”⁵³ However, these laboratory experiments probably understate the advantage of the adversarial system. Because all the data were known to the experimenters, participants in the experiments would have been caught if they cheated. Real life is not so simple. As the next section suggests, the problem of limited compliance with ethical rules requiring the disclosure makes the adversary system even more attractive.

2. The Ineffectiveness of Duties of Disclosure in the Face of Lawyers’ and Clients’ Disobedience of Rules

The ethical defects the adversary system are often described as a result of lawyers’ adversarial attitudes or their willingness to adopt a rule of role differentiation, in which what is

Procedures and Testimonial Evidence: Effects of Lawyer's Role and Machiavellianism, 39 J. PERSONALITY & SOC. PSYCHOL. 320, 329 (1980). Finally, judges tend to view the witnesses for a side as being more supportive of that side. Vidmar & Laird, *supra*, at 893-95.

⁵⁰ Lawrence J. Fassler, *The Italian Penal Procedure Code: An Adversarial System of Criminal Procedure in Continental Europe*, 29 COLUM. J. TRANSNAT'L L. 245, 245-78 (1991); Pizzi & Marafioti, *supra* note 99, at 1-3.

⁵¹ LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 99 & n.56.

⁵² Luban, *The Adversary System Excuse*, *supra* note 155, at 93 & n.37.

⁵³ *Id.*

ethically impermissible for ordinary citizens becomes ethically permissible for lawyers.

However, lawyers are merely responding to the demands of their clients. If clients sought to promote the truth, we would not need an ethical rule requiring lawyers to do so: the requirement that lawyers follow clients' legitimate instructions would suffice.

Clients frequently want to lie or conceal evidence where it will help them. Where the truth is obvious, an ethical duty to disclose is unnecessary. Thus, a duty to disclose makes a difference only where the opposing party's other means for discovering evidence failed. The sort of evidence likely to trigger a duty to disclose is evidence that only the lawyer and client know, such as statements from a client to his lawyer and documents from a party's files. In many of the famous cases of failure to disclose—Dalkon Shield,⁵⁴ theophyllin,⁵⁵ benlate,⁵⁶ tobacco⁵⁷, asbestos⁵⁸; employment discrimination⁵⁹—lawyers have merely been following their clients' wishes. In other cases, as Texaco's apparent destruction of evidence in a race discrimination

⁵⁴ SHELDON ENGELMAYER & ROBERT WAGMAN, LORD'S JUSTICE: ONE JUDGE'S BATTLE TO EXPOSE THE DEADLY DALKON SHIELD I.U.D. 71-75 (1985).

⁵⁵ Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1058, 1074 (Wash. 1993).

⁵⁶ In re E.I. du Pont de Nemours & Co., 918 F. Supp. 1524 (M.D. Ga. 1995) (fining du Pont \$115 million for withholding information), *reversed*, 99 F.3d 363 (11th Cir. 1996).

⁵⁷ *The Deposition: Cigarette Defector Says CEO Lied to Congress About View of Nicotine*, WALL ST. J., at A1 (January 26, 1996) (alleging perjury by corporate officers and "charg[ing] that B&W in-house lawyers repeatedly hid potentially damaging scientific research, including altering minutes of a scientific meeting").

⁵⁸ *E.g.*, Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 141, 413 S.E.2d 630 (1992).

⁵⁹ Alison Frankel, *Tale of the Tapes*, AMERICAN LAWYER 64 (March 1997).

case shows, clients can and will destroy evidence without the lawyers' knowledge.⁶⁰ Indeed, under existing Model Rule 1.2(d) and like rules, they may be right (from their selfish perspective) to conceal information.⁶¹

But the instances in which a duty to disclose is desirable imply a limitation on the successfulness of regulating lawyers.⁶² A duty to disclose is desirable in precisely those cases in which it will not be effective. If clients continue to want to conceal evidence under those circumstances, then they will seek out lawyers to effectuate those desires or simply leave lawyers uninformed.⁶³ It does not require believing that lawyers are less honest than any other group in society to believe that clients who want unethical lawyers will be able to get them.⁶⁴ In the latter

⁶⁰ See N.Y. Times

⁶¹ Model Code 7-102(A)(4) (a lawyer cannot "knowingly use perjured testimony or false evidence"); Model Rule 3.3 (a lawyer cannot make a false statement of material fact or law or offer evidence known to be false, and must take reasonable remedial measures, even if the information is privileged). Cf. DR 7-102(A)(7); MR 1.2(d) (both prohibiting the lawyer's participation in the creation of false evidence). Compare DR 7-102(A)(5) (prohibiting knowingly making a false statement of law or fact) with MR 4.1 & 1.2(d) (prohibiting the lawyer from making a false statement of fact or law to a third person and prohibiting a lawyer's assisting a client in a criminal or fraudulent act through *failing to disclose* a material fact).

⁶² Professor Molot agrees that individual attorneys are largely helpless to alter the existing situation. Jonathan T. Molot, *How Changes in the Legal Profession Reflect Changes in Civil Procedure*, 84 VA. L. REV. 955, 1013-1014 (1998). However, he believes that social changes would enable attorneys to be more responsive to seeking justice. *Id.* For the reasons set forth in the text, I believe that such changes would eliminate many of the advantages that the adversary system provides for truth finding and party satisfaction with the legal system.

⁶³ See *Clearing Texaco's Lawyers*, AMERICAN LAWYER (Sept.-Oct. 1997).

⁶⁴ See, e.g., *After the Whistle Blows*, WASH. POST, at A18 (December 30, 1995) (fraud in "lab run by Nobel Prize-winning molecular biologist David Baltimore"); *Conniving Charities*, PROVIDENCE J.-BULL. (R.I.), at A10 (July 1, 1995) (fraud of executives of United Way and other charities); *Neal v. Carey Canadian Mines, Ltd.*, 548 F. Supp. 357, 366, 371 (E.D. Pa. 1982)

case, a lie is presented, but the lawyer is unaware of the lie and so cannot prevent it.⁶⁵ Moreover, the lawyers' inability to ascertain the truth or justice of clients' claims will cause lawyers to carry out their clients' wishes, even in instances in which the lawyers would not, if the lawyers knew all the facts.⁶⁶

Consequently, a sensible analysis of the effects of a rule increasing duties to disclose requires considering the problem of disobedience to such rules. The rest of this section of the article does this by considering the empirical and theoretical evidence on the frequency of concealment in violation of rules requiring disclosure, the consequences of differing rates of obedience to rules requiring disclosure, and the approach of non-judicial institutions promoting an adversary system to create truth.

a) The Frequency with which Lawyers and Clients Disobey Disclosure Rules

Because lawyers and clients do not want to admit to violating the rules, we do not know exactly how often people withhold evidence in violation of those rules.⁶⁷ However, the failure to disclose evidence from one party's files is difficult to detect, so the possible sanctions for being

(businesspeople intentionally failed to warn of asbestos-related diseases, despite advice from doctors).

⁶⁵ Noonan argues that professional ethics can abolish the "presentation of perjury" in the courtroom. Noonan, *Professional Ethics*, *supra* note 37, at 365. As this analysis shows, that is simply incorrect. At best only the lawyer's knowledge of perjury can be abolished. Noonan's equation of the two allows him to avoid answering the hard question about how much an increase in perjury he is willing to accept as the price of a reduction in lawyer's knowledge of perjury.

⁶⁶ Paul R. Tremblay, *Moral Activism Manque*, 44 S. TEX. L. REV. 127 (2002).

⁶⁷ See Michael J. Saks, *Do We Really Know Anything about the Behavior of the Tort Litigation System—and Why Not?*, 140 U. PA. L. REV. 1147, 1151-68 (1992).

caught provide little incentive to disclose harmful evidence.⁶⁸ “[A] victimized litigant will generally have no effective way to overcome a skillful spoliator’s assertion that all relevant documents have been produced.”⁶⁹ The evidentiary hurdles to showing discovery abuse⁷⁰ and the

⁶⁸ See, e.g., Geoffrey Hazard, Jr., *Discovery Vices and Trans-Substantive Virtues in the Federal Rules of Civil Procedure*, 137 U. PA. L. REV. 2237, 2240 (1989) (discussing incentives to construe requests to exclude the smoking gun); Wayne D. Brazil, *Improving Improve Judicial Controls over Pretrial Development of Civil Actions: Model Rules for Case Management and Sanctions*, 1981 AM. BAR FOUND. RES. J. 875, 883 (similar). Interestingly enough, Professor Hazard was later paid to endorse such concealment. See Stuart Taylor, Jr., *Sleazy in Seattle*, AMERICAN LAWYER April, 1994, at 5 (discussing Professor Hazard’s role in Washington State Physicians Ins. Exch. & Ass’n v. Fisons Corp., 858 P.2d 1054, 1058, 1074 (Wash. 1993)).

⁶⁹ Charles Nesson, *Incentives to Spoliate Evidence in Civil Litigation: The Need for Vigorous Judicial Action*, 13 CARDOZO L. REV. 793, 796 (1991). Because of “the low risk of reporting and punishment,” “disciplinary rules and subornation statutes can do little to control . . . witness coaching” through suggestion. Richard Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 27 (1995). Coaching through suggestion is described in the “anatomy of a murder” situation, in which a lawyer, by explaining the law, leads his client to understand what facts the client must claim existed in order to have a defense. See ROBERT TRAVER, ANATOMY OF A MURDER 32 (1958) (Traver is the pen name of John D. Voelker, a justice on the Michigan Supreme Court). For discussion of the ethics of the *Anatomy of a Murder* lecture, see DEBORAH RHODE & DAVID LUBAN, LEGAL ETHICS 320-21 (2d ed. 1995); GEOFFREY HAZARD ET AL., THE LAW AND ETHICS OF LAWYERING 443-44 (2d ed. 1994); DEBORAH RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD 212 (1994); FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS, *supra* n. 23 at 156-58; MARVIN FRANKEL, PARTISAN JUSTICE 15 (1980).

⁷⁰ See *Shepherd v. American Broadcasting Co.*, 62 F.3d 1469 (D.C. Cir. 1995) (requiring proof of discovery abuse by “clear and convincing” evidence).

reluctance of judges to award compensatory sanctions⁷¹ mean that the rewards for dishonesty are not counterbalanced by great sanctions imposed on the few who are caught.⁷²

The anecdotal evidence from case law shows exactly what one would suspect from this pattern of easy concealment and low penalties, that evidence will often not be disclosed, even after express requests pursuant to court rules that require disclosure.⁷³ One author concludes,

⁷¹ See, e.g., Nesson, *supra* note 69, at 796-97 (“Nor are judges disposed to press intimations of unethical conduct when the alleged impropriety has not caused any lasting harm. The judge who is overseeing the discovery process (or, more likely, the magistrate) will likely tell the victim's lawyer, ‘You've got the evidence. Now get on with it.’”); Barbara J. Gorham, Note, *Fisons: Will It Tame the Beast of Discovery Abuse?*, 69 WASH. L. REV. 765, 786 (1994); John W. Heiderscheid, *Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal*, 68 OR. L. REV. 57, 77 (1989)

⁷² See Earl C. Dudley, Jr., *Discovery Abuse Revisited: Some Specific Proposals To Amend the Federal Rules of Civil Procedure*, 26 U.S.F. L. REV. 189, 190 (1992) (“[B]ecause discovery abuse is mostly rational, deliberate, economically motivated behavior, efforts to eliminate such behavior must focus on the incentives that lead lawyers and their clients to engage in it.”).

⁷³ Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp., 858 P.2d 1054, 1058, 1074 (Wash. 1993) (drug companies); Harre v. A.H. Robins Co., 750 F.2d 1501 (11th Cir. 1985) (fraudulent testimony by expert latter indicted for obstruction of justice, see Harre v. A.H. Robins Co., 866 F.2d 1303 (11th Cir. 1989)); *Grand Jury Looks at Dupont Actions: Investigation Involves Allegedly Withheld Test Data about Benlate Fungicide*, ORLANDO SENTINEL at B5 (October 19, 1995) (chemical companies); In re E.I. du Pont de Nemours & Co., 918 F. Supp. 1524 (M.D. Ga. 1995) (fining du Pont \$115 million for withholding information), *reversed*, 99 F.3d 363 (11th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3767 (May 8, 1997) (No. 96-1777).; Owens-Corning Fiberglas Corp. v. Watson, 243 Va. 128, 141, 413 S.E.2d 630 (1992) (asbestosis); Kathleen P. Browe, *Comment, A Critique of the Civility Movement: Why Rambo Will Not Go Away*, 77 MARQ. L. REV. 751 (1994).

Corporations now frequently destroy documents as part of a regular practice, hoping to conceal information while barring juries from inferring that the destroyed documents would have been evidence against them. See Dale A. Oesterle, *A Private Litigant's Remedies for an Opponent's Inappropriate Destruction of Relevant Documents*, 61 TEX. L. REV. 1185 (1983). This is because a claim of spoliation ordinarily requires “that the spoliator was on notice of the claim or potential claim at the time of the destruction.” Robert L. Tucker, *The Flexible Doctrine of Spoliation of Evidence: Cause of Action, Defense, Evidentiary Presumption, and Discovery Sanction*, 27 U. TOLEDO L. REV. 67, 79 (1995).

“The instances where car manufacturers and their lawyers have been found to conceal relevant information despite specific discovery requests and court orders are too numerous to name.”⁷⁴ Even public prosecutors, who are not directly responsible to clients, frequently ignore their constitutional duties⁷⁵ to disclose.⁷⁶ Because private lawyers depend on clients for gainful employment, they have even more reason to withhold evidence.⁷⁷

In addition to the evidence of cases in which withholding was attempted and failed, there is indirect evidence suggesting that concealment of evidence is common. A survey of litigators showed that in large cases, in 50% of the settled cases and in 33% of the fully tried cases, at least one side believed that the other had failed to uncover significant evidence.⁷⁸ Presumably the responding lawyers would have claimed that the reason for this failure to discover significant evidence was the absence of a proper discovery request, rather than dishonesty on the part of the

⁷⁴ Rogelio, *supra* note 17, at 526 n.96 (collecting cases).

⁷⁵ *Brady v. Maryland*, 373 U.S. 83 (1963).

⁷⁶ Bennett L. Gershman, *The New Prosecutors*, 53 U. PITT. L. REV. 393, 430-31 (1992) (prosecutors ignore ethical rules because harmless-error analysis allows them to get away with it). Luban observed, “[A]n unscrupulous prosecutor needs to get caught before [a decision requiring disclosure of exculpatory evidence] does the defendant any good, and it is a matter of conjecture how often the prosecution gets away with undisclosed [exculpatory] material.” David Luban, *Are Criminal Defenders Different?*, 91 MICH. L. REV. 1729, 1737 (1993). However, he fails to realize that the same problem exists for his proposed requirements of disclosure in civil cases, exacerbated by the attorney’s and client’s financial interest in non-disclosure.

⁷⁷ Simon cites the more modest role differentiation expected of prosecutors as a reason that the same standards can be applied to private lawyers. Simon, *supra* note 6, at 1091. Simon’s argument fails to consider the possibility that the prosecutor’s reduced responsibility to “clients” explains the imposition of greater duties on the prosecutor.

⁷⁸ Wayne D. Brazil, *Civil Discovery: Lawyers’ Views of Its Effectiveness, Its Principal Problems and Abuses*, 1980 AM. B. FOUND. RES. J. 787, 870-71.

responding attorney. However, the failure of counsel to draft adequate discovery requests in so many high stakes cases would be inexplicable. Furthermore, those who have been caught failing to respond to discovery have generally used the argument that the opposing side's discovery requests were improperly phrased.⁷⁹ The courts' rejection of these claims⁸⁰ suggests that similar, undetected refusals to respond are in fact not justified.⁸¹

Comparative evidence also exists to suggest that a rule requiring disclosure would be frequently evaded. Florida, in contrast to other states, has for years ethically *mandated* that lawyers disclose clients' attempts to commit *any* crime.⁸² Efforts to obtain an incorrect verdict through presentation of false evidence would be encompassed by this, yet the rule has never been cited in this connection.⁸³ This suggests that there is simply no effect from a rule requiring disclosure.

⁷⁹ See *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1058, 1074 (Wash. 1993); *Grand Jury Looks at Dupont Actions Investigation Involves Allegedly Withheld Test Data about Benlate Fungicide*, ORLANDO SENTINEL at B5 (October 19, 1995); *In re E.I. du Pont de Nemours & Co.*, 918 F. Supp. 1524 (M.D. Ga. 1995) (fining du Pont \$115 million for withholding information), *reversed*, 99 F.3d 363 (11th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3767 (May 8, 1997) (No. 96-1777).

⁸⁰ See *supra* note 79.

⁸¹ See *supra* note 68.

⁸² FLA. S. CT. ETHICAL RULE 4-1.6(b) (2004) (based on ABA MODEL RULES OF PROFESSIONAL RESPONSIBILITY 1.6(b) (2004) (“**(b) When Lawyer Must Reveal Information.** A lawyer shall reveal such information to the extent the lawyer reasonably believes necessary: (1) to prevent a client from committing a crime; or (2) to prevent a death or substantial bodily harm to another.”) (emphasis in original)).

⁸³ Indeed, cases in Florida apply the statutory privilege, Fla. Stat. § 90.502 (2003), without discussing the more limited ability to conceal provided by the court's ethical rules. See, e.g., *Horning-Keating v. State*, 777 So. 2d 438, 445-46 (Fla. App. 2001) (“To come within the crime-fraud exception to the attorney-client privilege, plaintiffs ‘must allege and produce prima facie

All this provides ample reason for concluding that many lawyers would ignore the rule. Indeed, because general duties to disclose evidence are vaguer and therefore easier to evade than specific disclosure requests in discovery, we can expect violations of general duties to promote truth to be even more widespread.⁸⁴

Even if people honestly attempt to provide harmful facts, they will often fail to do so. Because even lawyers acting in good faith often fail to appreciate the significance of facts for the other side, deciding when a lawyer has acted in bad faith will be very difficult. The uncertainties in this process may well wisely be resolved in favor of a lawyer accused in acting of bad faith, but this necessary generosity further undermines the enforceability of the standard already difficult to enforce, because of the ease of keeping the inculpatory evidence concealed. All this suggests that disobedience to such a rule would be widespread.

evidence that [the client] affirmatively sought the advice of counsel to procure a fraud' . . . The [evidence presented] does not satisfy the plaintiffs' burden of showing probable cause that a fraud was perpetrated or planned and that the attorney-client communications were in furtherance of the fraud.”) (quoting *Jones v. General Motors Corp.*, 24 F. Supp. 2d 1335, 1338-39 (M.D. Fla. 1998)) (alterations by the *Horning-Keating* court). *See also* *State v. Mark Marks, P.A.*, 654 So. 2d 1184, 1187 (Fla. Dist. Ct. App. 1995), *aff'd*, *State v. Mark Marks, P.A.*, 698 So. 2d 533, 538 (Fla. 1997), *on remand*, 758 So. 2d 1131, 1135-38 (Fla. Dist. Ct. App. 2000) (approving dismissal of criminal charges of fraudulent failure to disclose, brought against an attorney for failing to inform insurer of the client’s allegedly fraudulent activities; no discussion of conflict between Florida laws).

⁸⁴ The widespread failure to disclose in a non-adversary context is demonstrated by the recent failures of disclosure within the corporate reporting system. *See generally* Deborah L. Rhode & Paul D. Patton, *Lawyers, Ethics, and Enron*, 8 STAN. J. L. BUS. & FIN. 9 (2002) (discussing the role played by various lawyers in misconduct by Enron managers); Rebecca Blumenstein & Susan Pulliam, *WorldCom Fraud was Widespread*, WALL ST. J., June 10, 2003, at A3 (WorldCom’s lawyers participated in a “breakdown in the ... the company’s corporate governance structure”).

b) The Consequences of Disobedience

If all lawyers ignored an ethical rule to promote truth, we would have the precise situation that we are in now. However, if, as would probably happen, some lawyers follow the rule and some lawyers do not, the results for the system of justice would be even worse. Clients of lawyers who obey the rules of disclosure will systematically suffer from disobedient lawyering on the other side and lose even when they ought to win.⁸⁵ One side will reveal its weak points; the other side will not. Under these circumstances, the judgment will likely favor the side concealing evidence, even though the truth is not on that side.

Empirical evidence supports this conclusion. In experiments in which one attorney had a truth-promoting, "court-centered" role and the other attorney had an adversarial, "client-centered" role, the decision-maker received facts that were consistently biased in favor of the client of the client-centered attorney.⁸⁶ This result occurred even though no false evidence was presented.⁸⁷

Such a system not only rewards concealing evidence, it skews the legal system in favor of the wealthy and powerful. When only some lawyers obey the rule, clients will seek out lawyers who do not follow the rules.⁸⁸ The wealthy have better access to information on lawyers' reputations, which will allow them to hire lawyers whose reputation suggests that they will work

⁸⁵ See *supra* p. 27 (discussing truth as a function of many pieces of evidence).

⁸⁶ E. Allan Lind, *Discovery and Presentation of Evidence in Adversary and Nonadversary Proceedings*, 71 MICH. L. REV. 1129, 1139 (1973).

⁸⁷ *Id.* at 1139; see also generally *infra* pp. 69.

⁸⁸ GOLDMAN, *supra* note 3, at 132. See also *infra* note 111.

with clients to conceal harmful information.⁸⁹ The wealthy will bid up the price of unethical lawyers,⁹⁰ and so have systematically better access to legal advice. Sophisticated clients, wealthy or not, will know that lawyers will present harmful information and therefore will not disclose that information to the lawyer. Less sophisticated clients will not know this, will disclose the information to the lawyer, and will have it disclosed to the court.

The poor, represented by honest public-interest lawyers,⁹¹ and the middle class, with little ability to carry out sophisticated searches for unethical lawyers, will be disadvantaged. Even those advocating moralistic interventions by lawyers admit that “lawyers in elite firms” may lose “professional autonomy most,” thereby making them vulnerable to client importuning.⁹² Thus, a duty to disclose on the part of the lawyer would systematically bias the legal system in favor of the sophisticated and wealthy.⁹³

This, of course, makes rules mandating disclosure harder to tolerate even for those who applaud their ideals. Obviously, individual, honest lawyers are harmed. I agree with Alan

⁸⁹ Geoffrey C. Hazard, Jr., et al., *Why Lawyers Should Be Allowed To Advertise: A Market Analysis of Legal Services*, 58 N.Y.U. L. REV. 1084, 1096 & n.47 (1983). For a discussion of how people with shared unlawful interests can seek each other out, see THOMAS C. SCHELLING, CHOICE AND CONSEQUENCE 211 (1984).

⁹⁰ Cf. Robert Frank, *Can Socially Responsible Firms Survive in a Competitive Environment*, in, CODES OF CONDUCT 86-103 (David M. Messnick & Ann E. Tenbrunsel eds. 1996) (students require higher financial rewards to accept employment that they find ethically repugnant).

⁹¹ Simon, *supra* note 6, at 1110.

⁹² Rob Atkinson, *How the Butler Was Made to Do It: The Perverted Professionalism of The Remains of the Day*, 105 YALE L.J. 177, 203 (1995).

⁹³ See Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking*, 69 N.C.L. REV. 795, 823-26 (1991) (discussing objections of public interest lawyers to mandatory informal discovery).

Goldman's observation that honest people generally suffer an impediment in their money-making ability, and there is no reason to treat honest lawyers more favorably than other honest people.⁹⁴

However, there are two problems with stopping the analysis at this point. First, it is wrong to assume that honesty and obedience to rules are the same thing. Second, Goldman does not realize that the low chance of punishment means that the lawyer and her client will recognize that the lawyer is sacrificing both fairness and the best interests of her client in following the rule.⁹⁵ If not disclosing is different from dishonesty, should we adopt a rule that will benefit only those who do not adhere to it?

c) The Theory of Second Best and the Fallacy of a Little Bit of Success

Proponents of a rule requiring disclosure sometimes argue that the existence of apparently successful inquisitorial system shows that requiring more disclosure will not produce disaster for the American legal system. However, the underlying assumption in this argument is that if each of two systems work, a combination of two systems will work, too. This is simply incorrect. The theory of second best shows that if more than one condition required for optimality is not satisfied, the correction of flaws in some but not all of the conditions will not necessarily improve the outcome.⁹⁶

⁹⁴ *Id.*

⁹⁵ See James J. White, *Machiavelli and the Bar: Ethical Limits on Lying in Negotiation*, 1980 AM. BAR FOUNDATION RESEARCH J. 926, 927 ("[I]f the low probability of punishment means that many lawyers will violate the standard, the standard becomes even more difficult for the honest lawyer to follow, for by doing so he may be forfeiting a significant advantage for his client to others who do not follow the rules.").

⁹⁶ See generally R.G. Lipsey & Kelvin Lancaster, *The General Theory of Second Best*, 24 REV. ECON. STUD. 11 (1956).

In the example of rules of full disclosure, we may assume for the sake of argument that the ideal system is one in which both sides have an obligation to promote truth and justice. Currently, the system gives neither side any special obligation to promote truth and justice. It falls short of the ideal in two respects: the plaintiff's side will not promote truth and justice, and the defendant's side will not promote truth and justice.

The theory of second best tells us that moving from a system in which neither side is promoting truth and justice to a system in which one side is, but the other is not, may make things worse.⁹⁷ The theory of second best does not *prove* that improvements to just one part of the system will make things worse,⁹⁸ but for the reasons discussed in the preceding section a duty to promote the truth seems all too likely to make things worse.

In the adversarial system, a failure to produce facts will affect both sides evenly. An inquisitorial system pays a judge to conduct a separate investigation, so there is one entity under an unmixed duty to seek out the facts. If some lawyers will ignore obligations to produce truth, a mixed system will produce bias in favor of clients who retain attorneys who ignore the rules. The pure adversarial system and the pure inquisitorial system will not produce this problem. Thus, the existence of a successful alternative to the adversary system does not imply that a

⁹⁷ For examples applying the theory of second best to legal problems, see Stephen F. Williams, *Second Best: The Soft Underbelly of Deterrence Theory in Tort*, 106 HARV. L. REV. 932 (1993); Richard S. Markovits, *Monopoly and the Allocative Inefficiency of First-Best-Allocatively-Efficient Tort Law in Our Worse-Than-Second-Best-World: The Whys and Some Therefores*, 46 CASE W. RESERVE L. REV. 316 (1996); William D. Zeller, *Countertrade, the GATT, and the Theory of Second Best*, 11 HASTINGS INT'L & COMP. L. REV. 247 (1988) [hereinafter Markovits, *Monopoly*]; Richard S. Markovits, *Second-Best Theory and the Standard Analysis of Monopoly Rent Seeking: A Generalizable Critique, a "Sociological" Account, and Some Illustrative Stories*, 78 IOWA L. REV. 327 (1993).

⁹⁸ *E.g.*, Williams, *supra* note 97, at 933.

hybrid system that combines the inconsistent characteristics of the adversarial and the inquisitorial systems will be successful.⁹⁹

It may seem paradoxical that attorney dishonesty should be used as a reason for tolerating attorney dishonesty. However, the usual argument for failing to penalize people for doing something because others are doing it is that the discrimination or arbitrariness of selecting out a few outweighs the purpose served by the rule.¹⁰⁰ Here, the injustice is done, not to those refusing to obey the rule, but to those who obey it. The more dishonest an attorney, the more she will favor a rule of mandatory disclosure, because the more advantage she will derive from her disobedience. The more honest an attorney, the more such a rule will cause her and her clients to suffer from her honesty, and the more she will oppose such a rule.

Again, empirical evidence supports this conclusion. The 1983 amendments to Federal Rule of Civil Procedure 11 resulted in the rule's being used disproportionately against plaintiffs, and particularly disproportionately against civil rights plaintiffs.¹⁰¹ Creating an ethical duty to

⁹⁹ Cf. William T. Pizzi & Luca Marafioti, *The New Italian Code of Criminal Procedure: The Difficulties of Building an Adversarial Trial System on a Civil Law Foundation*, 17 YALE J. INT'L L. 1, 35 (1992) ("Italy was not mistaken to graft adversarial procedures onto a civil law system: its efforts merely demonstrate that procedures cannot be adapted easily from one system to another.").

¹⁰⁰ Cf. *Papachristou v. City of Jacksonville*, 384 U.S. 305 (1966) (arbitrary enforcement of petty offenses).

¹⁰¹ STEPHEN BURBANK, *RULE 11 IN TRANSITION: REPORT OF THE THIRD CIRCUIT TASK FORCE ON FEDERAL RULE OF CIVIL PROCEDURE 11*, at 57, 71 (1989) (noting "far higher rate" of imposition of sanctions on attorneys for plaintiffs in civil rights cases than on other plaintiffs); Lawrence C. Marshall, et al., *Public Policy: The Use and Impact of Rule 11*, 86 NW. U.L. REV. 943 (1992) (similar). The pre-1993 version of the rule may have contributed to this by imposing a greater duty on those making an allegation than on those denying one. See FED. R. CIV. P. 11 advisory committee's note to 1993 amendments to subdivisions (b) and (c), para. 6.

promote the truth is likely to yield the same, disproportionate impact. Moreover, a duty to promote the truth enforceable by adverse parties would likely create the same sort of harassment and satellite litigation that the 1983 version of rule 11 caused, with the same sort of discriminatory effect.¹⁰²

d) Evidence from the Real World on the Adversary System

The academic debate on the professional ethics of lawyering neglects the effects that the process of selecting non-disclosing lawyers will have on this truth-producing power of the system.¹⁰³ Indeed, Luban and Simon assert that no one genuinely searching for truth would adopt an adversarial system.¹⁰⁴

¹⁰² See, e.g., FED. R. CIV. P. 11 advisory committee's note to 1993 amendment ("The revision broadens the scope of this [certification] obligation, but places greater constraints on the imposition of sanctions and should reduce the number of motions for sanctions presented to the court."); Lawrence M. Grosberg, *Illusion and Reality in Regulating Lawyer Performance: Rethinking Rule 11*, 32 VILL. L. REV. 575, 647-53 (1987) (discussing emergence of satellite litigation); William W. Schwarzer, *Rule 11 Revisited*, 101 HARV. L. REV. 1013, 1017-18 (1988) (same).

¹⁰³ Alan Goldman recognizes that clients expect loyalty and will prefer unethical lawyers, but worries only about the reduction in income for ethical lawyers, not the effect of the selection of unethical lawyers on the truth-producing power of the system. GOLDMAN, *supra* note 3, at 108, 132. Ronald J. Gilson discusses the effects of client pressure, but focuses on the decline in lawyers' ability to screen out "strategic" suits, not on their ability to avoid the presentation of false evidence. *The Devolution of the Legal Profession: A Demand Side Perspective*, 49 MD. L. REV. 869, 884-85 (1990). See also Bruce Hay, *Civil Discovery: Its Effects and Optimal Scope*, 23 J. LEGAL STUD. 481, 483 (1994); Ricardo G. Cedillo & David Lopez, *Document Destruction in Business Litigation from a Practitioner's Point-Of View: The Ethical Rules vs. Practical Realities*, 20 ST. MARY'S L.J. 637 (1989); JAMIE GORELICK, STEPHEN MARZEN & LAWRENCE SOLUM, *DESTRUCTION OF EVIDENCE* (1989).

¹⁰⁴ Simon, *supra* note 6, at 1140 & n.124; Luban, *The Adversary System Excuse*, *supra* note 155, at 93-96. Luban asks whether the lawyer seeking evidence would employ two adversary investigators to search out the evidence, but this analogy is flawed: the lawyer is not seeking *all*

Those with actual responsibility for discovering the truth disagree. In a variety of contexts, the adversary system has been found necessary to promoting truth, even in situations where there is no inherent antagonism.

As Luban himself concedes elsewhere, in some respects progress in the sciences is based on an adversarial model.¹⁰⁵ Moreover, students of the history of science support the idea that one's framework determines the facts one perceives,¹⁰⁶ supporting the idea that the adversary system is necessary to minimize the effects of preconceptions about a case.¹⁰⁷ Charles Darwin said, "How odd it is that anyone should not see that all observation must be for or against some view if it is to be of any service."¹⁰⁸

Perhaps the most famous example of an artificial adversary relationship is the Roman Catholic Church, which found it necessary to introduce an adversary system to improve the integrity of its internal processes, even in situations in which there is no fundamental adversary relationship. The Roman Catholic "advocatus diaboli" is created as an advocate in an adversary

the evidence, but only the evidence favorable to his own side. Therefore, he has no need for an adversary approach.

¹⁰⁵ Luban, *The Adversary System Excuse*, *supra* note 155, at 94. Luban does criticize the analogy to Popperian scientific methodology, because scientists do not use procedural rules to exclude probative evidence. *Id.*

¹⁰⁶ *See generally* THOMAS KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* esp. 50-76 (2d ed. 1970).

¹⁰⁷ *See supra* p. 12 & n.28. For the parallels between the history of science and legal systems, see HABERMAS, *BETWEEN FACTS AND NORMS*, *supra* n.5, at 210.

¹⁰⁸ 1 MORE LETTERS OF CHARLES DARWIN 195 (Francis Darwin & A.C. Seward eds., 1903) *quoted in* CHARLES P. CURTIS, *IT'S YOUR LAW* 23 & n.30 (1954). *See also* 1 FRANCIS DARWIN, *THE LIFE AND LETTERS OF CHARLES DARWIN* 149 (London: John Murray 1887) ("He often said that no one could be a good observer unless he was an active theoriser.").

system to deny the saintliness of a candidate for sainthood.¹⁰⁹ The position of the devil's advocate was instituted because the one-sided presentation of information led to erroneous decisions. Apparently the position works well: "Statistical data on [canonizations] clearly show that several processes, apparently very promising at the beginning, had to be abandoned later because of difficulties, raised by the promoter of the faith [the official title of the devil's advocate], which could not be satisfactorily answered. In these cases, the critical and seemingly negative work of the promoter of the faith undoubtedly has a great positive value..."¹¹⁰ Here, the adversary system is almost wholly artificial, but corrects the pressure towards a too-hasty judgment under factual circumstances in which everyone is really on the same side.

Contemporary enforcement agencies have also been concerned to create breathing space for lawyers, and so limit their duties to disclose. In *In re Carter & Johnson*, the SEC declined to impose a duty on lawyers to take extraordinary action to combat fraud, because such a duty would mean that "the more sophisticated members of management would soon realize that there is nothing to gain in consulting outside lawyers."¹¹¹

The SEC's conclusion on this point supports the analysis suggested here in two respects. First, the SEC's desire for "outside lawyers" demonstrates the SEC's belief that many lawyers are too closely associated with clients to disclose information, even when the lawyers may be civilly

¹⁰⁹ M.M. Barry, *Devil's Advocate*, in 4 NEW CATHOLIC ENCYCLOPEDIA 829-830 (1967). See also Robert Gilbert Johnston & Sara Lufrano, *The Adversary System as a Means of Seeking Truth and Justice*, 35 J. MARSHALL L. REV. 147, 147-148 (2002).

¹¹⁰ *Id.* at 830.

¹¹¹ [1981 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 82,847, at 84, 171 (SEC 1981). See also *id.* at 84,167 ("Lawyers who are seen by their clients as being motivated by fears for their personal liability will not be consulted on difficult issues.").

liable under rule 10b-5 for all damages resulting from the failure to disclose. That supports the conclusion suggested here that many lawyers will not disclose information that harms their clients.

Second, the SEC did not require lawyers to resign when their clients ignored the lawyers' advice to disclose, because lawyers restrain the unethical and illegal impulses of clients. As the SEC observed, "Premature resignation serves neither the end of an effective lawyer-client relationship nor, in most cases, the effective administration of the securities laws."¹¹² This suggests the social benefits that can result from the continuation of a lawyer-client relationship in which the parties have confidence in one another.

This approach to the problem of lawyer regulation does not result from the SEC's unreasoning favoritism for lawyers. In fact, where the SEC has created greater enforcement duties for private accountants, it has coupled those enforcement duties with mechanisms to keep clients from firing those parties. The SEC does this by requiring the client company to disclose both that it has changed accountants and the reasons for the change.¹¹³ This negates the

¹¹² *Id.* at 84, 172.

¹¹³ *See generally* Securities Act Release No. 6594, Request for Comments on "Opinion Shopping," [1984-1985 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 84,804 (July 1, 1985) (Concept Release); Disclosure Amendments to Regulation S-K and Forms 8-K and N-SAR Regarding Changes in Accountants and Opinion Shopping, Securities Act Release No. 6719, [1987 Transfer Binder] Fed. Sec. L. Rep. (CCH), ¶ 84, 139 (June 18, 1987) (proposed rules to amend disclosure requirements); Disclosure Amendments to Regulation S-K, Form 8-K, and Schedule 14A Regarding Changes in Accountants and Potential Opinion Shopping Situations, Securities Act Release No. 6766, 6 Fed. Sec. L. Rep. (CCH), ¶ 72,421 (April 7, 1988) (final rules). *See also* Rocky Mountain Hospital & Medical Serv. v. Mariani, 916 P.2d 519 (Colo. 1996) (public policy prohibits firing an accountant for her refusal to falsify information); McCurdy v. Kansas Dep't of Transp., 898 P.2d 650 (Kan. App. 1995) (lawyer could not be fired for refusing to take an assignment in which she had a conflict of interest); Kenneth J. Wilber, *The Ethics of the Adversary System*

"advantage" to the company from switching to an accountant with a permissive attitude to disclosure. Even under these circumstances, the widespread fraud and document destruction committed and abetted by accounting firms demonstrates how unrealistic it is to hope that the incentives to conceal harmful secret information can be easily overcome.¹¹⁴

Moreover, the SEC's decision to require disclosure here recognizes the mechanisms for correction that exist in the securities law context. When a security is issued, the future of the company is open to public view and can be compared with statements made at the time the security was sold. When a lawsuit is settled, or even adjudicated, the underlying circumstances almost invariably remain concealed. This increases the incentive to withhold information.¹¹⁵

Existing attempts to incorporate the interventionist judge into the American system have created difficulties.¹¹⁶ Even Judge Frankel, who favors broad lawyers' duties to promote the truth, believes that making "the trial judge as a participant is likely to impair the adversary process as frequently as he improves it."¹¹⁷ That the SEC, the very body on which Frankel relies for his idea about duties to disclose,¹¹⁸ would reject a duty to disclose in this context reveals the problematic nature of mandatory disclosure. Nor do judges in our system themselves seem

Wrongful Discharge of Attorneys: A Cause of Action to Further Professional Responsibility, 92 DICK. L. REV. 777 (1988).

¹¹⁴ 18 U.S.C. §§ 1519, 1520 add provisions penalizing destruction of audit records.

¹¹⁵ See White, *supra* note 95, at 930.

¹¹⁶ See, e.g., Judith Resnik, *Managerial Judges*, 96 HARV. L. REV. 376 (1982).

¹¹⁷ Frankel, *supra* note 23, at 1045.

¹¹⁸ See Frankel, *supra* note 23, at 1057-58 (citing 17 C.F.R. § 240.10b-5 (1974)).

critical of the effects of advocacy on justice; instead of criticizing the adversary system, they generally call for better advocacy.¹¹⁹ Thus, the existence of inquisitorial systems in other countries provides little support for adopting such a system in the United States, and existing research and the experience of the SEC provide a strong basis for rejecting any claim that lawyers should assume substantial inquisitorial duties in the context of an adversary system.

3. Procedural Justice and the Truth-Finding Ideal

The analysis thus far has shown that a duty to promote truth will not have the effect of promoting truth. The defects of a duty to promote truth become even more clear when we consider that the production of truth before the court is not the sole goal of the legal system.

First, there are important procedural values to be served by the legal system. One is honesty to participants. Honesty to the court conflicts with honesty to the client. The best way to promote truth in court is for the lawyer to lie out of court, by falsely telling the client that information from the client is confidential, so that the client will provide the lawyer information harmful to the client, which the lawyer can then present to the court.

Put in such a stark form, I expect that most will find lying to the client unacceptable even for the promotion of the truth at trial.¹²⁰ But the conflict exists even when it is not present in a

¹¹⁹ David C. Sarnacki, *Effective Trial Advocacy in Federal Court*, 74 Mich. B.J. 644 (1995); Robert R. Merhige, Jr., *Legal Education: Observations and Perceptions from the Bench*, 30 WAKE FOREST L. REV. 369 (1995); Warren E. Burger, *Foreword: Conference on Supreme Court Advocacy*, 33 CATH. U. L. REV. 525 (1984); Lawrence W. Pierce, Essay, *Appellate Advocacy: Some Reflections from the Bench*, 61 FORDHAM L. REV. 829 (1993); Irving R. Kaufman, *Appellate Advocacy in the Federal Courts*, 79 F.R.D. 165, 166 (1978); E. Barrett Prettyman, *Some Observations Concerning Appellate Advocacy*, 39 VA. L. REV. 285, 294 (1953); Abner J. Mikva, Counsel Lack Selectivity in Appellate Advocacy, *Legal Times*, Nov. 15, 1982, at 10.

¹²⁰ GOLDMAN, *supra* note 3, at 110. *But see* LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 174. Monroe Freedman finds it permissible for lawyers not to tell clients that the lawyers will

stark form. Is it immoral not to warn the client, on the grounds that a failure to warn is an implicit deception?¹²¹ One need not have any very extended ideal of loyalty to question whether such a requirement is consistent with everyday morality.¹²² That police must warn arrested suspects¹²³ certainly suggests that a lawyer should inform the client that anything the client says can and will be used against her. Such warnings, while truthful, will substantially reduce the truth-finding power of the attorney's role.¹²⁴ This reduction makes a duty of truth-promotion less attractive.

disclose a client's intent to kill another or a client's concealment of his guilt in a crime for which another is about to be executed, in part because of the overriding value of human life (not the truth-finding ideal) and in part because such a situation is so rare that disclosure is unnecessary. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, *supra* note 1, at 120-23.

¹²¹ Goldman apparently takes this view, because he would allow, perhaps require the lawyer to "inform[] the client in advance that knowledge of guilt may cause him to refrain from such using certain tactics to secure acquittal that he might have otherwise used." GOLDMAN, *supra* note 3, at 136. Freedman also recognizes this as a way of preventing the argument that the lawyer's informing of the client betrays the client's expectations, albeit at the cost of discouraging lawyer-client communications. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, *supra* note 1, at 37-38. Freedman would not inform clients of his willingness to disclose their secrets in the case of the threatened imposition of the death penalty on an innocent person or in the case of clients' conduct that threatens death or serious injury to another. *See supra* n. 115.

¹²² Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976).

¹²³ *Miranda v. Arizona*, 384 U.S. 436, 467-73 (1966). *See also* *United States v. Henry*, 447 U.S. 264 (1980) (deciding that the use of informant who had established a relation of trust with the defendant violated the sixth amendment rights of the defendant).

¹²⁴ Although Goldman acknowledges the similarity to *Miranda*, he ignores the long-term harm to the truth-finding power the attorney's role that such a warning will cause. *See* GOLDMAN, *supra* note 3, at 110.

Second, a procedural system should be seen as fair by those compelled to participate in it. The participants in a legal system prefer an adversary system even over a pure inquisitorial system, and this is especially true of those who lose.¹²⁵ Subjects “were more satisfied overall with the adversary procedure ..., thought they were treated more humanely and with greater dignity under this procedure ..., believed this procedure to be more fair to themselves ..., and thought both sides had more opportunity to present evidence under this procedure.”¹²⁶ Subjects also “trusted the adversary lawyer significantly more ..., believed the adversary attorney made a better presentation of their case ..., and would trust the adversary procedure more than the inquisitorial procedure if they were to be involved again in a similar situation.”¹²⁷

Finally, “subjects were significantly more satisfied with a verdict received in an adversary court ... and trusted the judge more when he presided over an adversary trial.”¹²⁸ Thus, “the adversary system produces greater satisfaction than does the inquisitorial procedure on the most

¹²⁵ THIBAUT & WALKER, *supra* note 43, at 73-74. I have omitted the prob-values from the text here and in the next two notes; all results were statistically significant. Observers shared all these beliefs about the adversary system. *Id.* at 74-76. Although the original study was limited to males, *id.* at 69, the reported preferences from this study are exactly the same as those from studies not limited to males that were collected in the United States, Great Britain, France, and Germany. *Id.* at 78.

¹²⁶ *Id.* at 74.

¹²⁷ *Id.* at 74. Observers shared all these beliefs about the adversary system. *Id.* at 74-76. The greater trust in the attorney in the adversary system provides some empirical support for the idea that an adversary attorney will gain more knowledge about a client’s plans, and therefore the opportunity to forestall illegal or immoral ones.

¹²⁸ *Id.* at 74.

important dimensions. In fact, in most cases, this superiority is shown to be true regardless of the verdict or the subjects' belief about guilt."¹²⁹

Summing up their research, Thibaut and Walker concluded:

It may be that participant subjects contemplating the adjudication at hand and observer subjects contemplating possible involvement in a similar future adjudication prefer to trust their fates to a systemic process that balances the biases of two attorneys (adversary representation) rather than to an essentially individual process that attempts to rule out bias altogether (as in the case with inquisitorial representation). The argument here is that subjects are more willing to trust an adversary *system* than an inquisitorial *attorney* to produce accurate, unbiased judgments.¹³⁰

Other researchers report similar results. Litigants perceive the procedures used as an important ingredient of justice, and fair procedures increase the likelihood of voluntary compliance.¹³¹ The United States' adversary system produces more litigant satisfaction than inquisitorial or mixed systems, especially for those who have lost in court.¹³² Such satisfaction

¹²⁹ *Id.* at 74.

¹³⁰ *Id.* at 77.

¹³¹ *E.g.*, E. Allan Lind et al., *In the Eyes of the Beholder: Tort Litigants' Evaluations of Their Experiences in the Civil Justice System*, 24 J. L. & SOC'Y 953, 985 (1990); THIBAUT & WALKER, *supra* note 43, at 118 (the adversary system was "judged fairest and most trust-worthy both by persons subject to litigation and by those observing the proceedings"). Subjects whose own legal system is inquisitorial nonetheless prefer adversarial resolution. THIBAUT & WALKER, *supra* note 43, at 77-80.

¹³² Joseph E. Schumacher et al., *Procedural Justice Judgments of Alternative Procedures for Resolving Medical Malpractice Claims*, Paper Presented at American Psychological Association Annual Meeting 2-3 (1991) ("First, subjects express a clear preference for adversarial procedures over inquisitorial ones. Second, this preference is strongly influenced by subjective judgments of fairness; the adversarial process is perceived as more fair than the inquisitorial one.").

produces a greater degree of observance of judicial decisions.¹³³ The alienation from one's attorney under a proposed rule of truth-seeking may interfere with the acceptance of the legal system's judgments.¹³⁴ The ability of the legal system to obtain voluntary adherence to its decisions has been recognized as an important goal in a variety of contexts—some have even seen it as a more important goal than accuracy in results.¹³⁵

This preference for the adversary system did not result from the familiarity of citizens of the United States with the adversary system and the consequent expectation that it should be used. The preferences for the adversary system reported from this study was also reported in other studies conducted in the United States, Great Britain, France, and Germany.¹³⁶

These preferences exist even in a case of simple facts and no dishonesty on the part of attorneys. This likely understates the preferences for an adversary system that would exist in real life. In real life, the heavy involvement of the judiciary is more likely to misdirect the focus of

¹³³ Tom R. Tyler et al., *Maintaining Allegiance Toward Political Authorities: The Role of Prior Attitudes and the Use of Fair Procedures*, 33 AM. J. POL. SCI. 629, 645 (1989); Tom R. Tyler & Kenneth Rasinski, *Procedural Justice, Institutional Legitimacy, and the Acceptance of Unpopular U.S. Supreme Court Decisions: A Reply to Gibson*, 25 LAW & SOC'Y REV. 621, 626 (1991).

¹³⁴ THIBAUT & WALKER, *supra* note 43, at 66; CHARLES CURTIS, *IT'S YOUR LAW* 21 (1954).

¹³⁵ Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1092 (1991) ("Trials serve purposes beyond the accurate determination of facts. It is probably more important that the results of litigation be accepted than that they be accurate. Accuracy is merely a factor, albeit a rather important factor, in acceptability."). *See also* Charles Nesson, *The Evidence of the Event? On Judicial Proof and the Acceptability of Verdicts*, 98 HARV. L. REV. 1357, 1378 (1985); Charles Nesson, *Agent Orange Meets the Blue Bus*, 66 B.U.L. REV. 521 (1986); Lawrence Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

¹³⁶ THIBAUT & WALKER, *supra* note 43, at 78.

the suit,¹³⁷ and the activity of one's own adversary attorney provides far greater protection against dishonesty or bias by the judiciary or opposing counsel.

4. Conclusion

Much of the attraction of a duty to promote the truth comes from a failure to appreciate how such a duty will work in practice. The proponents of such a duty apply it to a situation in which a lawyer knows the truth but presents information inconsistent with the truth.

That image is misleading in two respects. First, if lawyers are under a duty to promote truth, clients will take steps to insure that lawyers never learn an inconvenient truth. Clients may be abetted in this by lawyers, as Judge Frankel acknowledges.¹³⁸

Second, lawyers and clients will not comply with a rule requiring disclosure. Judge Frankel suggested this in discussing tampering with the evidence,¹³⁹ but did not discuss the resulting skewing of evidence presented to the finder of fact in a case where disclosing and non-disclosing lawyers oppose one another. That skewing will favor dishonest clients and their

¹³⁷ See *infra* p. 37 & note 117.

¹³⁸ Although there are cases in which the lawyer realizes that the "client's position rests upon falsehood," "[m]uch more numerous are the cases in which we manage as counsel to avoid too much knowledge. Unfettered by the clear prohibitions actual 'knowledge' of the truth might impose, lawyers may be effective and exuberant in employing the familiar skills...." Frankel, *supra* note 23, at 1039. See also FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM, *supra* note 1, at 51-58.

¹³⁹ Frankel, *supra* note 23, at 1056 (discovery by itself will not solve all problems, because of "the well-founded fears of tampering with the evidence").

attorneys. Moreover, the clients hiring non-disclosing lawyers are likely to be among the most powerful groups in society.¹⁴⁰

Finally, the harm caused by such a rule would not be limited to the difficulties caused by differential compliance with that rule. The fear of some lawyers' not complying will encourage other lawyers who would otherwise follow the rules not to comply for fear of harming their own clients' legitimate interests.¹⁴¹ As White observes, "[T]he violation of the higher standard would cast all the rules in doubt."¹⁴² He then asks, "What level of violation of the rules can the bar accept without the rules as a whole becoming a mockery?"¹⁴³ The answer is uncertain, but an unenforceable and frequently ignored ethical obligation may create such general contempt for the rules and an ethical decline in other areas.

The justification presented here for refusing to disclose information that would assist the other side does not rest on the distinctive status of lawyers. Rather, it rests on a general principle that those who can reasonably expect that another will withhold information in violation of a moral duty are themselves justified in acting so as to minimize the advantage resulting from that anticipated withholding. These considerations apply quite generally. Indeed, perhaps in

¹⁴⁰ Cf. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 119 ("the burden of such moral discretionary power is likely to fall most heavily upon the poor, the nonconformists, the dissidents, the *déclassé*, for they are most likely to have ends that outrage the moral sensibilities of the bureaucrats and functionaries with whom they must deal").

¹⁴¹ Cf. THOMAS SCHELLING, *THE STRATEGY OF CONFLICT* 90-91 (1960) (discussing how expectations for segregated housing can promote segregated housing, despite the wishes of all residents in an area).

¹⁴² James J. White, *supra* note 95, at 938.

¹⁴³ *Id.*

recognition of the difficulties a contrary rule of disclosure would raise, the general rule in other areas of law allows concealment of information.¹⁴⁴

The issue is akin to that of tolerating the intolerant: we do not owe a duty to adhere to standards that others do not adhere to when we sincerely and reasonably believe adherence to those standards would cause us harm.¹⁴⁵ Although the absence of a general duty of lawyers to provide evidence for the other side is sometimes cited as an example of lawyers' role-differentiated morality,¹⁴⁶ for this reason it does not represent role differentiation at all.¹⁴⁷

¹⁴⁴ See RESTATEMENT (SECOND) OF CONTRACTS § 161 (1979). "A party may, therefore, reasonably expect the other to take normal steps to inform himself and to draw his own conclusions. If the other is indolent, inexperienced, or ignorant, or if his judgment is bad or he lacks access to adequate information, his adversary is not generally expected to compensate for these deficiencies. A buyer of property, for example is not ordinarily expected to disclose circumstances that make the property more valuable than the seller supposes." RESTATEMENT (SECOND) OF CONTRACTS § 161 cmt. d (1979).

To the extent that an assertion is one of opinion only, the recipient is not justified in relying on it unless the recipient...

(b) reasonably believes that, as compared with himself, the person whose opinion is asserted has special skill, judgment or objectivity with respect to the subject matter....

RESTATEMENT (SECOND) OF CONTRACTS § 169 (1979). We do not, for example, expect parties to a negotiation for a house to say that they would be willing to take a good deal less or pay a good deal more. Such a duty would be difficult to enforce. However, we may expect them to disclose relevant, objective information about the house, because of the ease of verifying that information after the sale. *Obde v. Schlemeyer*, 353 P.2d 672 (Wash. 1960). This is why Frankel errs in assuming that disclosure obligations that are effective under the securities laws must necessarily be effective elsewhere. Frankel, *supra* note 23, at 1058. Securities laws are effective because the buyer can compare the description with the reality after the fact; the same is not true in litigation.

¹⁴⁵ See JOHN RAWLS, A THEORY OF JUSTICE 218 (1971). See also JOHN RAWLS, POLITICAL LIBERALISM 2-3 (1993) (one is bound to the fair terms of social cooperation only if others assent to them, too).

¹⁴⁶ See Luban, *The Adversary System Excuse*, *supra* note 155.

Finally, as suggested in the last section of the preceding material, the adversary system's diligent pursuit of truth can harm other values of the system—honesty to clients, satisfaction with the system, and the voluntary adherence to the judgments of the system. These harms provide a further reason for rejecting a duty to produce truth in the place of the current adversary system.

C. Promoting Justice As an Alternative to the Adversary System

The difficulties in adopting increased disclosures for lawyers may suggest that the problem is not how lawyers use the system in working for their clients, but the goal of the adversary system itself. This leads some observers to emphasize a different reformation of the system.¹⁴⁸ These critics suggest that the problem cannot be solved by comparatively narrow restraints on deceptive conduct. Rather, they suggest that the lawyer should compare her activities with the ideal of promoting justice, rather than the ideal of promoting truth. In this view, the deontological restraints relating to truth-telling are replaced by a teleological orientation for justice.¹⁴⁹

In support of this claim, adherents to theories of justice promotion could argue that justice is a more primary goal than truth. Moreover, a justice-based theory of the lawyer's desirable activities can, if applied to only the lawyer's decision to take a case, avoid the skewing of results

¹⁴⁷ Cf. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 155 (“If a lawyer is permitted to puff, bluff, or threaten on occasion, this is not because of the adversary system and the principle of nonaccountability, but because, in such circumstances, anyone would be permitted to do the same.”).

¹⁴⁸ E.g., LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2; GOLDMAN, *supra* note 3.

¹⁴⁹ See BERNARD WILLIAMS, *ETHICS AND THE LIMITS OF PHILOSOPHY* 16-18 (1985).

caused in practice by a rule of truth promotion.¹⁵⁰ As a result, it does not tamper with the ability of the adversary system to promote truth.

The details of the justice-promoting approach vary slightly. David Luban claims that lawyers should assist clients only with just claims. For example, the statute of limitations, meant to prevent the assertion of false or fraudulent claims, should not be asserted to bar valid claims.¹⁵¹

Alan Goldman advocates a view that “would call upon lawyers to exercise independent judgment in refusing to violate moral rights of others even in the pursuit of that to which clients might be legally entitled. It also might call upon them to exceed legal bounds in order to realize moral rights of their clients.”¹⁵²

William H. Simon, another advocate of a justice-based approach, argues, “The lawyer should take those actions that, considering the relevant circumstances of the particular case, seem most likely to promote justice.”¹⁵³

The attractiveness of these approaches depends on contrasting an unjust or indeterminate legal system with a just, shared, and determinate moral code.¹⁵⁴ Goldman, Luban, and Simon

¹⁵⁰ Cf. FREEDMAN, UNDERSTANDING LAWYERS’ ETHICS, *supra* n. 23 at 66-70 (1990) (arguing that lawyers are morally accountable for their choice of clients, but duty bound to use all legally available means to advance the ends of clients chosen).

¹⁵¹ LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 146.

¹⁵² GOLDMAN, *supra* note 3, at 138.

¹⁵³ Simon, *supra* note 6, at 1090.

¹⁵⁴ Simon argues only that a moral code can be determinate, for the same reasons that a legal code can be. Simon, *supra* note 6, at 1121-22. However, this does not demonstrate that the moral code is likely to be more predictable than the legal code. Sometimes, a person’s moral

share an assumption that morality is determinate, albeit difficult to express in general rules.

Thus, Luban talks about the “lawyer ... about to embark on a course of action that is unjustified from the point of view of ordinary morality”¹⁵⁵ and refers to “the common morality that figures into our deliberations.”¹⁵⁶ Likewise, Goldman refers to “our common moral framework.”¹⁵⁷ Simon criticizes those who are “skeptical that judgments applying abstract ideals to particular cases could be anything but arbitrary.”¹⁵⁸

The statements of Goldman, Luban, and Simon invoke common morality, and thereby assume away the problems of disagreements and gray areas. General statements about parallelism in our moral principles do not resolve the issue of whether lawyers should frustrate their clients’ lawful goals. Arguing that lawyers should follow moral principals as opposed to law must depend on the assertion that citizens’ moral principals are better, because more widely shared and determinate, than the legal system. This is ultimately an empirical question about what people believe and how those beliefs compare to the legal system. In a system that is

code will produce a certain answer where the legal code does not; sometimes the reverse will no doubt be true. But even when moral codes are determinate, they may not be shared. Only a shared morality produces a truly attractive alternative to legalistic determination, and it seems unlikely that a shared morality will, in a democratic society, be widely at variance with the legal system.

¹⁵⁵ See David Luban, *The Adversary System Excuse* [hereinafter Luban, *The Adversary System Excuse*], in DAVID LUBAN, *THE GOOD LAWYER* 83, 101 (1984) [hereinafter LUBAN, *THE GOOD LAWYER*].

¹⁵⁶ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 146.

¹⁵⁷ GOLDMAN, *supra* note 3, at 149. These references are reinforced by frequent use of the idea of “moral rights.” *E.g., id.* at 126-30.

¹⁵⁸ Simon, *supra* note 6, at 1090.

largely democratic, it is unlikely that there remains untapped a large area of moral agreement that can be used to supplement or replace adherence to law. Existing law prohibits the lawyers' assisting in the goal through the presentation of false evidence.¹⁵⁹ Under those circumstances, the shared morality of the law favors the goal, the clients wants it, the lawyer is restricted from using many immoral means to achieve it, and the question is whether the lawyer should interpose herself between the client and a lawful goal.

One should not infer from the client's wanting something that the lawyer thinks is unethical that the client is wrong and the lawyer is right. Differences in ethical rules are ubiquitous in a democratic society. As John Rawls observes, "The political culture of a democratic society is always marked by a diversity of opposing and irreconcilable religious, philosophical, and moral doctrines. Some of these are perfectly reasonable"¹⁶⁰ Accepting

¹⁵⁹ MODEL CODE OF PROFESSIONAL CONDUCT DR 7-102(A)(4) (1980) (requiring that the lawyer not "knowingly use perjured testimony or false evidence"); MODEL CODE OF PROFESSIONAL CONDUCT DR 7-102(A)(5) (prohibiting the lawyer from knowingly making a false statement of law or fact); MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.2(d) (1983) (prohibiting the lawyer from assisting in illegal or fraudulent conduct); MODEL RULE OF PROFESSIONAL RESPONSIBILITY 3.3 (1983) (prohibiting the lawyer from making a false statement of material fact or law or offering evidence known to be false); MODEL RULE OF PROFESSIONAL RESPONSIBILITY 4.1 (1983) (prohibiting the lawyer from making a false statement of fact or law even in non-adversarial settings); MODEL RULE OF PROFESSIONAL RESPONSIBILITY 3.3(a)(4) (1983) (duty to correct presentation of false evidence); ABA Comm. On Professional Ethics and Grievances, Formal Opinion 87-353 (1987) (same).

¹⁶⁰ JOHN RAWLS, POLITICAL LIBERALISM 1-2 (1993) [hereinafter, POLITICAL LIBERALISM]. Contrast this with Goldman's view that "even such substantial and fundamental differences in value orientations [as the disagreement between libertarians and egalitarians over the moral status of redistributive taxation] can be resolved, if there is willingness to reason from the background of shared commitments and judgments." GOLDMAN, *supra* note 3, at 17.

this continuing diversity is not the acceptance of dogmatic relativism,¹⁶¹ the view that all moral perceptions are of equal worth, but merely a recognition that we cannot make some citizens' moral views supreme, especially if those views have not been enacted into law.

Because we cannot proceed as if there were a universal moral "brooding omnipresence in the sky,"¹⁶² we must recognize that applying moral limits on lawyers' conduct necessarily means applying, not some general common morality, but the moral limits of particular people.¹⁶³ As a result, overriding the moral decision implicit in the law will not substitute morality for law, but will replace the collective moral judgment implicit in the law with the moral views of lawyer and client. Likewise, overriding a client's decision does not replace a client's judgment with a "moral decision," but replaces the client's moral judgment with the lawyer's moral judgment.

Luban and Goldman do not shrink from this characterization of their work, but they fail to recognize its implications.¹⁶⁴ First, where the lawyer and the client share a moral view that is

¹⁶¹ Goldman argues that tolerance cannot be a supreme value. GOLDMAN, *supra* note 3, at 14. I agree, but showing that tolerance cannot be a supreme value is quite different from showing that someone is immoral if she cooperates in advancing the moral goals of someone with whom she disagrees.

¹⁶² Southern Pac. Co. v. Jensen, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting).

¹⁶³ The argument here parallels that of Rawls in *Political Liberalism*. Rawls does not dogmatically assert that there are not universal values, but only that we must reject such "comprehensive views" in the political sphere. RAWLS, *POLITICAL LIBERALISM*, *supra* note 160, at 150. Similarly, I can concede that there may be a universal comprehensive morality, but argue that the inevitable diversity of views makes it essential that we proceed on the basis of tolerance for other views by not presupposing any comprehensive views.

¹⁶⁴ See GOLDMAN, *supra* note 3, at 142 (the issue is "whether the moral judgments of individual lawyers in specific cases are likely to be more congruent with the proper specification of moral rights than are legal rights"); LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 174 (discussing betrayal of client).

at odds with the law, making moral grounds the basis for overriding political judgments will empower lawyers to put into practice their own moral views, regardless of the law. Second, where the client and the lawyer are at odds with each other, ignoring the client's wishes allows the lawyer to win a moral conflict that cannot reasonably be described as a conflict between morality and the client's wishes, or even between social morality and the client's morality, but rather of one between the client's morality and the lawyer's morality. Neither result is desirable.

1. Immoral Means to Illegal Ends

According to Luban, the law departs from morality in allowing unjust actions, because the law cannot prohibit these injustices without intruding too much into people's lives.¹⁶⁵ Similarly, Goldman says that "moral rights form too fine a grid to be captured by general rules," and law is too "blunt a social instrument" to be "a substitute for good moral sense of citizens, lawyers included."¹⁶⁶ Consequently, their desired approach is not to amend the law, which is necessarily incomplete, but to require lawyers to consider moral factors in their legal work.¹⁶⁷

¹⁶⁵ David Luban, *The Lysistratian Prerogative: A Response to Professor Pepper*, 1986 AMERICAN BAR FOUND. RESEARCH J. 637, 640.

¹⁶⁶ GOLDMAN, *supra* note 3, at 140.

¹⁶⁷ Goldman argues for a strong role differentiation for judges. GOLDMAN, *supra* note 3, at 49. This suggests that Goldman is not strongly committed to the idea of achieving justice in a particular case. If the concern here were for general morality, it might have been argued that his justice-based concerns could have been addressed by judges' power to modify the provisions of the law because of the circumstances of the particular case. The common-law method, with its case-specific approach, might be thought to be especially suited, but even in the civil law countries, there is a strong tradition to this effect, stemming from the writings of Aquinas. See THOMAS AQUINAS, *SUMMA THEOLOGICAE*, Q. 96, art. 6, *reprinted in* AQUINAS, *SELECTED POLITICAL WRITINGS* 141 (A.P. D'Entreves ed. & J.G. Dawson trans., 1974); ARTHUR TAYLOR VON MEHREN & JAMES RUSSELL GORDLEY, *THE CIVIL LAW SYSTEM* 54 (2d ed. 1977) (quoting and translating Jean Portalis, et al., *Discours Preliminaire, in* FRANCE, *LA LEGISLATION CIVILE, COMMERCIALE ET CRIMINELLE DE LA FRANCE* 251, 255 (1827) ("The function of the law (*loi*) is

Recognizing justice as a priority means that justice sometimes takes priority over truth. Thus, Goldman expressly places a strong priority on moral claims: a moral but illegal end sometimes justifies means that are both immoral and illegal. He would have the lawyer submit false income reports required in a divorce case, where correct income reports would show that a welfare recipient had committed criminal fraud by not reporting \$60 a week of income from baby-sitting.¹⁶⁸ Goldman would also allow a lawyer to fabricate evidence necessary for a divorce in a state where both parties want a divorce and the state prohibits divorce without evidence of adultery.¹⁶⁹

Although Luban does not make himself clear on this point, he does suggest that “frustrating the search for truth may be a morally worthy thing to do, and sometimes moral rights are ill-served by legal rights.”¹⁷⁰ Because Luban generally seems to believe that obstructing the truth is ordinarily immoral in itself,¹⁷¹ he, too, apparently believes that moral but illegal ends may justify immoral and perhaps illegal means.

In part this sentiment may result from Goldman’s and Luban’s sympathies for the oppressed. Both Goldman and Luban are concerned about the problem of the rich corporation

to fix, in broad outline, the general maxims of justice (*droit*), to establish principles rich in suggestiveness (*conséquences*) and not to descend into the details of the questions that can arise in each subject.”).

¹⁶⁸ GOLDMAN, *supra* note 3, at 139-40.

¹⁶⁹ GOLDMAN, *supra* note 3, at 139 (“only a fanatic on the subject of obedience to law would find either the lawyer’s or the couple’s action objectionable if they pursued their moral right”).

¹⁷⁰ LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 155.

¹⁷¹ See LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 69 (criticizing lawyers for excluding probative evidence).

arrayed against the poor or middle-class individual.¹⁷² Luban, at least, will allow more adversarial conduct on behalf of the poor or middle class: “lawyers representing individuals in confrontations with powerful organizations can fight dirtier than their adversaries’ lawyers can fight back.”¹⁷³ Simon seemingly agrees.¹⁷⁴

However, morality is as incomplete as Luban and Goldman claim that the law is.¹⁷⁵ In a world of varying perceptions of morality, many of which are reasonable, the law provides a specification of things initially morally ambiguous.¹⁷⁶ As Goldman says, “[T]here would be at least as much disagreement [over questions of moral right] as over questions of legal right.”¹⁷⁷ Very few would claim, for example, that general theories of morality have anything to say about

¹⁷² GOLDMAN, *supra* note 3, at 120-22; LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 156-57.

¹⁷³ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 156-57.

¹⁷⁴ *See* Simon, *supra* note 6, at 1093-94.

¹⁷⁵ Simon argues only that the incompleteness of the law and morality are similar. Simon, *supra* note 6, at 1090-91.

¹⁷⁶ *E.g.*, ARISTOTLE, *NICOMACHEAN ETHICS*, Book V, Chapter 7 (Bekker 1134b18) (distinguishing between the universal principle that all prisoners can be ransomed and the positive law provision determining a matter initially indifferent, setting the ransom at one mina); THOMAS AQUINAS, *SUMMA THEOLOGICA*, Q 91, Art. 3 (a human law is necessary because “the human reason needs to proceed to a more particular determination of certain matters”); Lloyd Weinreb, *Law As Order*, 91 *HARV. L. REV.* 909 (1978). *Cf.* GOLDMAN, *supra* note 3, at 153 (“where [the law and morality] do not clearly conflict, the law ought to prevail in settlement of the dispute”).

¹⁷⁷ GOLDMAN, *supra* note 3, at 145. However, this means that Goldman’s proposed rules will not act effectively to restrain actions by the rich and powerful, who always have better access to lawyers.

whether my lender's security interest in the computer on which I write this would qualify as a security interest in household goods or is instead only a security interest in equipment.¹⁷⁸

A moralistic perspective, in which morality replaces law, ultimately allows each lawyer to decide for herself who qualifies as poor and oppressed. Goldman accepts lying to the court to help a mother on welfare provide for her children.¹⁷⁹ Given this precedent, the tobacco companies (for example) will have little difficulty finding libertarian lawyers who believe that the mother's moral claim is much weaker than the moral claim to the right of free trade between willing buyers and sellers. They will be happy to apply their moral views to use immoral means to avoid the oppression of tobacco companies by evil-doing governments and plaintiffs' personal-injury lawyers, so that the tobacco companies' moral claim amply justifies presenting perjured testimony.

Although the libertarian lawyers may be rare, in a free market it will be to the advantage of tobacco companies and libertarian lawyers to seek one another out, and they will have little difficulty in doing so. Even in the more usual case, attorneys do not restrain their corporate clients. A survey of attorneys in large Chicago firms revealed that three-fourths of them never experienced "a conflict between their personal values and the request of a client."¹⁸⁰ Half of

¹⁷⁸ Compare U.C.C. § 9-109(1) (1994) (consumer goods) with U.C.C. § 9-109(2) (1994) (equipment). See also U.C.C. § 9-109 comment 2 (1994) (discussing borderline cases). The difference is that no filing would be required to perfect a purchase money security interest in consumer goods. U.C.C. § 9-302(10)(d) (1994). See also U.C.C. § 9-102 comment 5 (1994) (cataloguing different rules for different types of property).

¹⁷⁹ GOLDMAN, *supra* note 3, at 139-40.

¹⁸⁰ Robert L. Nelson, *Ideology, Practice, and Professional Autonomy: Social Values and Client Relationships in the Large Law Firm*, 37 STAN. L. REV. 503, 536 (1985).

these conflicts were generated by the ethical rules governing lawyers, not by private ethical concerns of the lawyers.¹⁸¹

Even if we ameliorate Goldman's and Luban's views by requiring claims to be consistent with prevailing law, the justice-based view allows enormous scope for the manipulation of evidence. Suppose the defendant's lawyer decides, based on an assessment of the defendant's credibility, that the defendant did not see the contract critical to the defense of the case. Under the proposed duty to promote the truth, would the defendant's lawyer be justified in withholding evidence that contradicted her ultimate conclusion that her client was telling the truth on the grounds that the evidence could only mislead the jury?¹⁸² Allowing lawyers to conceal evidence that they think contradicts the truth will allow even greater manipulation of the evidence than a truth-promoting standard. Moreover, concealing the evidence rejects our system of justice's reliance on a neutral third party to determine truth.

Goldman's conclusion troubles many lawyers, who may be more sensitive to its implications. Andrew Kaufman writes, "At the risk of confessing to being a 'fanatic,' I would argue that Professor Goldman's solutions are not preferable. . . . [E]xcept in extreme cases, I am dubious about placing moral responsibility on lawyers to make judgments concerning whether a

¹⁸¹ *Id.* at 537. Nelson concludes that there is a high degree of identification of corporate lawyers with their corporate clients. *Id.* at 526-27. Simon agrees. "Casual observation suggests that the private goals of many lawyers run overwhelmingly toward acquiescence in the goals of clients." Simon, *supra* note 6, at 1127.

¹⁸² Frankel may avoid this requirement because his rule 10b-5 standard may require disclosure of information, but those who place a higher priority on justice than on truth will have more difficulty.

particular divorce law is more immoral than the deceit they are being paid to practice.”¹⁸³ That it troubles lawyers suggests that lawyers’ desire for freedom of action does not explain all the professional rules advancing the interests of the client; if it did, lawyers ought to agree with Goldman on this point.¹⁸⁴

Luban’s and Goldman’s conception of duties may be attractive where a law is radically unjust. But such a radically unjust law will be the unusual case in a democratic system.¹⁸⁵ Rules should reflect the usual, not the bizarre case, and leave civil disobedience to the truly rare cases. Current rules limit lawyers’ ability to promote injustice by requiring them to adhere to law; Luban’s and Goldman’s proposal will allow lawyers to promote injustice by allowing them to follow their own version of morality, instead of the law.

¹⁸³ ANDREW KAUFMAN, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY* 780 (3d ed. 1989) (alluding to GOLDMAN, *supra* note 3, at 139). (A fourth edition of this book is written with a co-author, see Andrew Kaufman & David Wilkins, *Problems in Professional Responsibility for a Changing Profession* (4th ed. 2002), but, except for citations to source material, I prefer to use the earlier book to avoid any possible implication that the views presented are those of the co-author). While I tend to agree with Kaufman on this point, the overwhelming anecdotal evidence is that lawyers do create false evidence in such a situation by coaching witnesses. They do this in the full knowledge that the judges know that the evidence is false, but will grant the divorce because the judges disapprove of the law. In one case within my personal knowledge, a person now a sitting federal judge watched her witness depart on the witness stand from the coached testimony, and the judge called counsel into chambers and reprimanded counsel for inadequately preparing the witnesses. See also A.P. HERBERT, *Not a Crime*, in *UNCOMMON LAW* 425, 442 (new ed. 1969).

¹⁸⁴ Cf. LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 58 (arguing that lawyers’ desire to justify ruthless behavior on behalf of clients explains their ethical position); GOLDMAN, *supra* note 3, at 153 (economic motivation undercuts any presumption in favor of a moral proposition derived from a practice’s widespread acceptance within the legal profession).

¹⁸⁵ KAUFMAN, *supra* note 183, at 780.

2. Interference with Client Preferences

The other area of controversy is the morally desirable conduct when lawyer and client differ over the morality of a proposed course of action. If we accepted the idea of a common morality from which the client is departing, the interposition of the lawyer's morality between the client and the client's immoral objects is at least superficially attractive. Accepting the idea of differences in morality makes the question quite different. In achieving a goal allowed by the legal system, what should happen when the moral views of the lawyer and the client differ?

Goldman and Luban have a two-step approach. In the first step, they advocate dialogue between lawyer and client to resolve the conflict.¹⁸⁶ Second, if this does not resolve the conflict, the lawyer should abandon the client,¹⁸⁷ and, according to Luban, perhaps even engage in the "betrayal of a client's projects."¹⁸⁸

Luban and Goldman intend the first step of the process, moral dialogue, as a way of ameliorating the risk of a lawyer's refusal to work for a client. However, dialogue creates an unrecognized risk of substituting the values of the lawyer for those of the client.

¹⁸⁶ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 174; GOLDMAN, *supra* note 3, at 126.

¹⁸⁷ Goldman's argument may be somewhat inconsistent on this point; in his discussion, he refers to the concept of "the moral rights of others" as a restraint on lawyer action, GOLDMAN, *supra* note 3, at 138; later this becomes "the clear moral rights of others," *id.* at 149, which might allow for some deference. Elsewhere, Goldman suggests that "[o]ne can in certain circumstances defer to the moral or factual judgment of others in seeking justice or truth," but it is unclear that he would allow the lawyer to defer to the client. *Id.* at 116.

¹⁸⁸ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 174.

Lawyers' ascendancy over clients makes it difficult or impossible to achieve the ideal of an equal give-and-take in the moral debate.¹⁸⁹ Lawyers, like members of all professions, have social prestige, tend to deal with their clients in impersonal ways, have a special language that aggrandizes the professional's knowledge, and provide services that the client may desperately need.¹⁹⁰ These facts make it easy for any professional to treat clients paternalistically. This effect of professional superiority on moral dialogue will be especially pronounced for lawyers, who are usually far more experienced in presenting views persuasively than are their clients.

Moreover, as part of the effort to achieve legal results for clients, even lawyers with the best of intentions will filter clients' statements according to legal ideas of relevance.¹⁹¹ By encouraging the definition of claims in terms of existing law, this process undercuts the possibility of legal change.¹⁹² Moreover, it filters out values inconsistent with lawyers' values, because the lawyer will be reluctant to risk her reputation advancing claims that her professional colleagues view as inappropriate, even when this is advantageous for her clients.¹⁹³ Thus, in

¹⁸⁹ See Smith, *supra* note 235, at 77-78.

¹⁹⁰ See Richard Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1, 21-22 (1975).

¹⁹¹ Lon Fuller, *The Adversary System* in TALKS ON AMERICAN LAW 39-40 (Harold Berman 2d ed. 1971). See also Lon Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A.J. 1159, 1160 (1958).

¹⁹² This flexibility in the law is one advantage that the common law system may have over the civil law system, which is related to the common law use of adversary proceedings. See *infra* pp. 18.

¹⁹³ Wasserstrom, *supra* note 190, at 17. See also Smith, *supra* note 235, at 76.

exercising their best professional judgment, lawyers may suppress their clients' goals without either lawyer or client really knowing it.¹⁹⁴

Luban and Goldman argue that action by lawyers to enforce their ethical beliefs against society is not problematic because there is no collective decision-making by lawyers.¹⁹⁵ Luban even compares the supposed oligarchy of lawyers to an oligarchy of spouses.¹⁹⁶

Luban's analogy and the similar arguments of Goldman do not fully address the problem. Lawyers as a class, unlike spouses, have interests and beliefs that are not representative of the larger society. Thus, even in the absence of collective decision-making, lawyers acting on those beliefs will restrict potential clients' action in a way that the larger society would recognize as unjust.

Lawyers in practice for any length of time will have seen this phenomenon with respect to clients' ability to obtain a lawyer to bring any sort of malpractice claims, and especially claims of legal malpractice against other lawyers.¹⁹⁷ Goldman argues that attorneys "can distinguish

¹⁹⁴ See generally Lucie White, *The Hearing of Mrs. G.*, 38 BUFF. L. REV. 1, 39 (1980).

¹⁹⁵ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 167-68 (comparing the threatened oligarchy of lawyers to an oligarchy of spouses); GOLDMAN, *supra* note 3, at 145. Elsewhere, Goldman thoughtfully considers the problem that exists where only one lawyer has the ability to deal with the case. GOLDMAN, *supra* note 3 at 128-30.

¹⁹⁶ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 167-68.

¹⁹⁷ See *Plaintiffs Win Right to Sue Lawyers in Malpractice Case*, NEW YORK TIMES, September 11, 1997, at A28 (national edition) (plaintiffs could not find any lawyers in Houston and had to find a lawyer from Kansas to represent them in their suit against a prominent Texas law firm). One difficulty in proving that this exists is that the silent suppression of claims is difficult to document. Only the most credulous, though, will believe that the rise of cases based on racial and sexual discrimination in the 1960s and 1970s was based on more discrimination, rather than the greater willingness of lawyers to bring cases. Thus, one can infer the prior cases were suppressed. No doubt the suppression occurred for a variety of reasons, not just lawyer

between representing unpopular, even morally objectionable clients, and aiding clients, whoever they are, to achieve specific objectives in violation of moral rights of others.”¹⁹⁸ Unfortunately, the example of malpractice makes it difficult to be as optimistic as Goldman that Goldman’s attempt to confer discretion on lawyers will provide morally superior results.¹⁹⁹

As with special duties of truth promotion, the costs of filtering are disproportionately visited on the poor and powerless. First, the poor and powerless are less likely to succeed in presenting their moral vision to lawyers, because they have less influence over their lawyers.²⁰⁰ They do not have the money required to compel lawyers’ attention. They are likely to come from different social backgrounds from lawyers, which means that lawyers will find it harder to understand such clients. They are likely to be less educated and verbal than lawyers, making it harder for them to communicate persuasively their moral views.²⁰¹ For these reasons, lawyers in

obstruction, but lawyer obstruction could certainly be expected to have a role. Other examples of instances in which lawyers may have presented major obstacles to the bringing of a case against respected individuals include sexual harassment and child molestation.

¹⁹⁸ GOLDMAN, *supra* note 3, at 131.

¹⁹⁹ These cases represent instances in which the American view that the attorney may act as a filter appears inferior to the stated British bus-stop or cab rank principle, in which a barrister must accept any case by anyone willing to pay her fee. *See Rondel v. W.*, [1966] 3 All E.R. 657, 665 (C.A. 1966), *aff’d sub nom. Rondel v. Worsley*, [1967] 3 All E.R. 993 (H.L. 1967). However, it is sometimes said that the rule is substantially undercut by the barrister’s clerk’s manipulation of the barrister’s financial demands. JOHN FLOOD, *BARRISTERS’ CLERKS, THE LAW’S MIDDLEMEN* 80 (1983).

²⁰⁰ Nelson, *supra* note 180, at 507; Mark Spiegel, *Lawyers and Professional Autonomy: Reflections on Corporate Lawyering and the Doctrine of Informed Consent*, 9 W. NEW ENG. L. REV. 143-44 (1987).

²⁰¹ *Cf. White*, *supra* note 194, at 55 (discussing the subordinating of speech habits of such witnesses in the formal legal process).

poverty-law practice, despite their unquestioned dedication, fear that they themselves will be the oppressors and dominators of their clients.²⁰² The effect of lawyers' general interposition of their moral objections can certainly be expected to be even greater. Finally, having been rejected by one lawyer, those on the margins of society will often lack the sophistication and access to legal services necessary to make it easy to obtain a second opinion from another lawyer.

When clients' ability to achieve the legally correct goals are frustrated because lawyers interpose obstructions based on the lawyers' own morality, the ability of the legal system to produce the legally correct result is frustrated just as much as it would be had a lawyer failed to offer evidence that undermined her client's claim. Advocates of lawyer activism do not address this problem, except by arguing that lawyer obstruction will occur only in cases of objectives that "blatantly violate moral rights."²⁰³ The tragedy of the disregard of clients is especially great because the poor have far better access to judicial branch of government than they do to the legislature or the executive.²⁰⁴

²⁰² See Paul Tremblay, *Rebellious Lawyering, Regnant Lawyering, and Street-Level Bureaucracy*, 38 HASTINGS L.J. 947, 949 & nn. 6-7 (1992) (citing Anthony Alfieri, *The Antinomies of Poverty Law and a Theory of Dialogic Empowerment*, 16 N.Y.U. REV. L. & SOC. CHANGE 659, 661-665 (1987-88); Lucie White, *Goldberg v. Kelly on the Paradox of Lawyering for the Poor*, 56 BROOK. L. REV. 861 (1990)).

²⁰³ GOLDMAN, *supra* note 3, at 131. See also *id.* at 111-12, 128-31 (discussing possibility that allowing lawyers to veto client action will transfer power to legislate to lawyers). Goldman does advert to the possibility that a lawyer "represents the only legal service or expertise in a particular area," and agrees that that "may then be a relevant consideration as to whether he should substitute his moral conscience for legal guidelines." *Id.* at 130.

²⁰⁴ Cf. David Barnhizer, *The Virtue of Ordered Conflict: A Defense of the Adversary System*, 79 NEB. L. REV. 657, 666-667 (2000) (The adversary system retains more of a sense of legitimacy and fairness than can be said for other branches of government that are seen as irretrievably captured by special interests. Many have therefore sought the force and legitimacy thought to be provided by legal rules and judicial decisions that favor their positions.").

A second problem resulting from lawyers' interposition of their values is that the suppression of the client's perspective harms the system's respect for participatory values.²⁰⁵ Accuracy of result is not the sole goal of procedure.²⁰⁶ Even if a lawyer's suppression of a client's perspective is correct under existing law, that voice can be transformative, altering the results that the legal system would otherwise generate.²⁰⁷ Although many critics of the adversary system emphasize the lawyers' limited duty to the public, the real problem in many lawyer-client relationships is the lawyers' insufficient willingness to serve or listen to the client.²⁰⁸

Assuming the moral dialogue does not warp clients' preferences, the lawyer and client may remain in disagreement. At this point, Luban and Goldman say that the lawyer should leave the case.²⁰⁹ This conclusion is apparently based on the premise that advancing goals inconsistent

²⁰⁵ See HABERMAS, JUSTIFICATION AND APPLICATION, *supra* note 18, at 1-2; HABERMAS, BETWEEN FACTS AND NORMS, *supra* note 18, at 264 (arguing that "the communicative and participatory rights that are constitutive for democratic opinion- and will formation acquire a privileged position").

²⁰⁶ See *Carey v. Piphus*, 435 U.S. 247 (1978) (allowing award of damages for a deprivation of due process even if the result was correct).

²⁰⁷ See White, *supra* note 194, at 51; Understanding.

²⁰⁸ Wasserstrom, *supra* note 190, at 15-16.

²⁰⁹ Luban and Goldman do not consider the possibility that the lawyer can continue in the case while limiting his representation of the client. Such a course is generally permissible. MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.2(c) (2003) ("A lawyer may limit the objectives of the representation if the client consents after consultation."). A fairly common form of such limitation is an exclusion of "objectives or means that the lawyer regards as repugnant or imprudent." *Id.* comment ¶ 4. It is unclear why Luban and Goldman do not address this possibility

Goldman and Luban also do not address the possibility of a limitation on representation imposed by the client on ethical grounds. Such a limitation is implicit in the general principle that lawyers follow client instructions, and MODEL RULE OF PROFESSIONAL RESPONSIBILITY

with one's own morality is morally inconsistent. Perhaps because of the emphasis of Goldman and Luban on our "common morality,"²¹⁰ neither Goldman nor Luban considers the possibility of

1.2(a) & cmt. ¶ 1(2003) requires consultation with the client about the means to be pursued and instructs lawyers to "defer to the client regarding ... concern for third persons who might be adversely affected."

The failure to treat these possibilities may result from an unstated assumption that clients have low ethical standards and that lawyers have (or ought to be treated as having) higher ethical standards, but that assumption is incorrect. In many instances, the client will refuse to permit a lawyer's action on the grounds that the action conflicts with the client's own ethical norms, even though the action promotes the truth and the lawyer believes the action is morally permissible. For example, a client may instruct the lawyer not to pursue a line of cross-examination that would reveal the opposing party's dishonest concealment of assets in a divorce, because the harm to the relationship between the parties would be too great.

As a practicing lawyer, I saw no moral problem complying with such a request, even though it led to a financial result in the trial that was at odds with the truth-producing goal of the system, in that the court awarded the client less than the court would have awarded the client had the court known all the facts. Even after considering the matter more, I believe the result is ethically permissible and perhaps praiseworthy. (The client was wealthy enough so that a financial result bad in absolute terms would nonetheless leave him with ample resources, and the parties had minor children.)

Goldman, who accepts perjury by opposing parties to achieve moral ends not allowed within the adversary system, would apparently believe this is permissible. *See* GOLDMAN, *supra* note 3, at 139 (although there is no legal right in the jurisdiction to a divorce by consent, so that "the principle of legal right would have the lawyer play no part in fabricating evidence or perpetrating a fraud upon the court," "only a fanatic on the subject of obedience to law would find either the lawyer's or the couple's action objectionable if they pursued their moral right"). Luban's position is less clear.

If this result is acceptable to Goldman and Luban, they need to address the apparent inconsistency of this acceptability with their proposal for lawyer control in such situations.

²¹⁰ *See supra* pp. 47-48 & nn. 155-157. However, Goldman at least believes that one may not rationally be able to settle disagreements between moral choices. GOLDMAN, *supra* note 3, at 13. *Cf.* LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 174 (if the lawyer believes the client's projects are immoral or unjust, the lawyer must cease representation or betray the client's projects).

moral tolerance: that there is moral value to advancing the moral ends of other people even when we do not share them.

Individuals practice a large degree of moral tolerance. Many of us have close friendships with people who have different values, even if at times we are bewildered by their beliefs.²¹¹ This may come in part from some uncertainty about our own ethical views, the practical need for toleration in a diverse society, the recognition that most of us do differ in some respects in our ethical judgments, or from an affirmative belief that toleration for other moral views should be a part of one's own moral code.

Moreover, this tolerance can be more than the passive acquiescence in the conduct of people with a different moral code. We may be inclined to assist their actions, even if they violate part of our own moral code. My local bookstore sells books promoting views that it finds repugnant. The ethical code of librarians even imposes a duty on them to make available books advocating positions that they find repugnant.²¹²

To be sure, few of us would be willing to assist someone in murder, even if that person believes that murder is ethical. However, such a hypothetical misrepresents the situation likely to confront lawyers, who are already prohibited from assisting in illegal or fraudulent conduct.²¹³

²¹¹ See JAMES BOSWELL, *LIFE OF SAMUEL JOHNSON LL.D.* 814-15 (1791).

²¹² “Materials should not be excluded because of the origin, background, or views of those contributing to their creation.” Library Bill of Rights, ¶ 1, *reprinted in* e.g., AMERICAN ASSOCIATION OF LAW LIBRARIES, *AALL DIRECTORY AND HANDBOOK 1995-96*, at 364 (1995). “Materials should not be proscribed or removed because of partisan or doctrinal disapproval.” *Id.* ¶ 2. All members of the American Library Association adhere to a code of ethics that includes the Library Bill of Rights. AMERICAN ASSOCIATION OF LAW LIBRARIES, *supra*, at 363.

²¹³ See MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.2(d) (2004).

We *would* be willing to assist in other ends that violate less central ethical beliefs. So long as one accepts (unlike Goldman and perhaps unlike Luban) that one's legal representation should be constrained by lawfulness, the scope for this sort of toleration in legal practice may be high. And, of course, this toleration is only permitted, not required. If a lawyer believes her client is being morally insincere or has a strong disagreement, she can decline representation at the outset.²¹⁴

The example of the library parallels that of the lawyer. In both cases, it is more ethical that a social institution empower people without discrimination than that those who run the institution insure that it is used only to advance views consistent with those who run the institution. Few if any librarians believe that this rule of ethics interferes with their views.²¹⁵ If anything, the argument for moral tolerance in this situation for lawyers is stronger than the argument for moral tolerance by librarians, because lawyers have a state-created monopoly on providing legal assistance, whereas one can always purchase a book on one's own.

Even if one rejects this account of moral tolerance, the Luban and Goldman prescription that the lawyer leave the case seems unjustified by any sort of ethical analysis. If the lawyer leaves the case, then the client will either find equivalent legal talent elsewhere or she will not.

If she does not find the same legal talent, the lawyer will have successfully substituted the lawyer's values for the client's. Goldman suggests that this will be true only in the case of

²¹⁴ See MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.2(c) (2004).

²¹⁵ A brief and highly informal survey turned up no librarians who believed that the enforced availability of views with which they disagreed under the Library Bill of Rights interfered with their own ethical views, and a good deal of surprise at the very question.

objectives that “blatantly violate moral rights.”²¹⁶ However, this conclusion is unsupported. For the reasons suggested above, lawyers can be suspected of having different preferences from the rest of society.

Suppose, though, that there is no mutation or suppression of client voice, and there is no problem caused by the unavailability of another lawyer. In that case, the client is free to go to another lawyer to pursue her goals. Goldman accepts this result, because he acknowledges that a lawyer may warn a client, which means that Goldman’s approach will not prevent a client from achieving his goals.²¹⁷ However, Luban suggests that the lawyer should sabotage the client’s purposes and engage in the “betrayal” of a client’s entirely legal projects.²¹⁸ Presumably, the lawyer would have to conceal her planned betrayal from the client to get the client to sign up in the first place. This sort of treachery would appear to be grossly at odds with any sort of ordinary morality, requiring a very high degree of role differentiation. Luban, of course, generally finds role differentiation objectionable.

For Goldman in all cases and in cases where Luban does not think deceit is justified, what moral purpose is served by forcing the client to go elsewhere to obtain his desired result? From

²¹⁶ GOLDMAN, *supra* note 3, at 131. *See also id.* at 111-12, 128-31 (discussing possibility that allowing lawyers to veto client action will transfer power to legislate to lawyers). Goldman does advert to the possibility that a lawyer “represents the only legal service or expertise in a particular area,” and agrees that that “may then be a relevant consideration as to whether he should substitute his moral conscience for legal guidelines.” *Id.* at 130.

²¹⁷ GOLDMAN, *supra* note 3, at 135; *id.* at 148 (making lawyers' individually accountable for their conduct means that "lawyers cannot singly prevent others from acting by refusing aid"). The conclusion that the client will get help, either from the first lawyer or from another lawyer, is reinforced by Goldman’s willingness to allow the lawyer to “assume innocence in the absence of indubitable knowledge of guilt.” *Id.* at 136.

²¹⁸ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 174.

the perspective of society at large, it is difficult to see why the world in which the client gets a lawyer sympathetic to his arguably immoral end should be preferred to a world in which the client gets a lawyer unsympathetic to his immoral end. On the contrary, it would seem that the unsympathetic lawyer might better restrain the client's arguably immoral conduct.

Luban pays little attention to this issue,²¹⁹ and Goldman argues only that such a result is justified if something bad would otherwise happen to the character of the lawyer involved.²²⁰ Because Goldman does not explain this argument, neither Goldman nor Luban gives us any understanding of what moral values are served.

Another observer, Heidi Li Feldman, suggests that the rules governing lawyers should facilitate the ethical deliberative process and that existing rules on legal ethics discourage ethical deliberations.²²¹ Feldman does not care about results, because she is “[p]rimarily ... interested in the character of the lawyers’ ethical deliberations, rather than whether their actions were ethically

²¹⁹ Luban sometimes seems to be suggesting that his moral approach is one of clarification of terminology and deliberation, rather than one that will alter results: “The point of the exercise, I suppose, is merely to get our moral ideas straight: one less ideology is, after all, one less excuse.” See Luban, *The Adversary System Excuse*, *supra* note 155, at 118.

²²⁰ See GOLDMAN, *supra* note 3, at 141 (the lawyer’s “refusal to violate a perceived moral right or cause serious harm to another is important for maintaining his own personal integrity”). See also *id.* at 132 (“the individual lawyer is maintaining his own autonomy”).

²²¹ Heidi Li Feldman, *Can Good Lawyers Be Good Ethical Deliberators?*, 69 S. CAL. L. REV. 885 (1996).

correct,”²²² and because a “skilled technocratic lawyer can create defensible legal arguments for almost any position, not in spite of black letter codes, but with their aid.”²²³

Thus, all three critiques of the contemporary system seem to have adopted, intentionally or by default, rules that have as their primary effect the consideration of moral factors by attorneys. None of these critiques specifies why this goal is so important, and there are many reasons for rejecting this goal.

First, it is paternalistic to regulate attorneys on the basis of some, unspecified harm that will happen to attorneys’ character. Attorneys remain free to decline cases if they fear that their character will be harmed or for any other reason. To reject an attorney’s decision on this point seems wholly unjustified by the conclusory statements given by Luban, Goldman, and Feldman.

Second, the function of the legal system is not to provide a basis for moral introspection by attorneys, but reasonably economical justice for those dragged into the legal system, more or less involuntarily. The attorney’s ethical deliberation comes at the expense of the client. The cost may be small for a client with a new attorney and plenty of money to search for other attorneys, but clients with fewer resources or a satisfactory relationship with a lawyer will be

²²² *Id.* at 929.

²²³ Feldman, *supra* note 221, at 898. Others, of course, will disagree. *See, e.g.*, Martha Nussbaum, *Skepticism about Practical Reason in Literature and the Law*, 107 HARV. L. REV. 714, 730 (1994). Moreover, Feldman’s argument that deliberation itself is what is important seems inconsistent with her suggestion that “virtue is teleological—meant to serve a particular end or perform a certain function.” Feldman, *supra* note 221, at 910. From the context, in which Feldman compares the virtue of a knife in cutting to ethical deliberation, it is clear that Feldman thinks that ethical deliberation is a virtue. *Id.* In that case, it must have a purpose—but Feldman does not specify what that is.

forced to find a new lawyer and educate her about the client's life or business, at great expense to the client.²²⁴

Third, an approach that emphasizes attorney "ethics" instead of adherence to law enhances the freedom of action of lawyers. This allows lawyers more latitude to manipulate the legal system for their clients and for their own ends and gives sophisticated clients more access to these manipulative lawyers.

Finally, an approach that relies on the ethics of lawyers gives lawyers more latitude to impose their ethical preferences on clients. This disadvantages any group that does not share lawyers' social characteristics, and it especially disadvantages groups that are not in a position to debate ethics on equal terms with lawyers.

3. Conclusion

The absence of a detailed, shared morality means that the conflict that must be considered is not between the client's morality and society's morality, but between the client's morality and the lawyer's morality. The lawyer's acting as a check on the client's desires will favor the preferences of lawyers, an elite subgroup of society, over those of clients. To justify this conclusion, Goldman and Luban posit a situation in which the lawyer's failure to adhere to the lawyer's own morality would lead to radical injustice. However, in a democratic society, an elite subgroup's values are less likely to represent collective moral values than are the whole society's laws.

While Goldman and Luban advocate dialogue between lawyer and client, the lawyer's ascendancy over the client and professional training in argument make it almost impossible to

²²⁴ KAUFMAN, *supra* note 183, at 31-32.
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imagine a dialogue between lawyer and client as equals. Because of this, the lawyer can easily skew client preferences.

If the lawyer does not skew client preferences and the lawyer and the client remain at odds in their moral views, the client will simply seek another lawyer. At times, this search may be unsuccessful. Goldman and Luban view this as a case of a successful thwarting of a client's immoral goals; I am less sanguine. Most of the time, this search will be successful. In this case, there will be no improvement in the results of the legal system, and perhaps even a loss when clients seek out lawyers who share their views and so cannot provide a moral review of the client's desires.²²⁵

D. Incentives for Justice Within the Adversary System

The concern of Goldman, Luban, and Feldman for the moral character of lawyers may come from a belief that lawyers' work is pervasively immoral, and that only moral monsters could carry out the functions of lawyers. Indeed, the prevailing image of the lawyers' work in the philosophical literature is of the lawyer as the presenter of immoral or downright dishonest claims.

That view rests on mistaken assumptions about how legal practice works. Morally monstrous claims will seldom succeed, partly because the legal system is largely consonant with

²²⁵ Simon does suggest that where an ethically dubious "practice is widely available to people other than the client in question, considerations of horizontal equity may favor making it available to this client as well." Simon, *supra* note 6, at 1129.

common principles of morality. Legally bizarre claims will fail for the same reason; that a lawyer *could* advance them does not mean that a lawyer will.²²⁶

Instead of a conflict between good and evil, legal disputes often take the form of the adjustment of inchoate claims between the parties. The issue, especially in civil cases, is often better characterized as one, not of right and wrong, but of how much. For example, in a tort case it may be undisputed that a party should pay damages; the question will be how much. In a contract case, the words of the contract are undisputed; the question will be whether a party has satisfied (for example) the requirement that she use her best efforts and whether, if she has not, the other parties' response to this failure is permissible under the contract. Even when the damages are stipulated, and the only issue is liability, so that the case is in principle resolved without compromise, there may be a great deal to be said for both sides.

The legal system provides an orderly process for gathering the factual information to resolve these disputes. The reason such a large portion of these disputes is resolved through negotiation is that the process is essentially a consensual one, albeit ultimately backed by the coercive power of the state.

In such a process, it is not accurate to say that one party has to be charged with representing an immoral position, even if the two parties have identical and comprehensive moral views. Can we assert, when two parties negotiate a salary or the price of a home, that the position of at least one of the parties must be wrong? If it is not morally wrong for someone to

²²⁶ As another author has explained, "clients do not stand to benefit from outlandish legal positions." Molot, *supra* n. 62 at 969.

ask to be paid more money or to pay less money, can we assume so readily that one side in a legal dispute has to be regarded as being morally wrong?

This is even less true in a pluralistic society, when the parties cannot be charged with having the same moral code. In that case, both may be acting morally according to their own views. Thus, although an outsider to any lawsuit may believe one of the parties is morally wrong, it is simply not possible to conclude that at least one side in a lawsuit is acting in a morally wrong fashion according to her own standards.

Moreover, that two lawyers oppose each other does not mean that one thinks she is advancing a morally wrong claim. Clients tend to find lawyers who genuinely do believe in them, and lawyers tend to prefer clients in whom they believe.²²⁷ Thus, although Wasserstrom observes that the charge of dissimulation can be advanced against lawyers more easily than against other professionals,²²⁸ this problem is largely hypothetical. As Brandeis observed, “As a practical matter, I think the lawyer is not often harassed by this problem, partly because he is apt to believe at the time in most of the cases that he actually tries, and partly because he either abandons or settles a large number of those he does not believe in.”²²⁹

Because bystanders over-estimate the degree of duplicity required to be a lawyer, they tend to miss the ways in which the legal system encourages ethical conduct. The major outlines of the legal system—people must do what they promise to do and pay for the damage they

²²⁷ This effect is much less pronounced in the British system. *See supra* note 197.

²²⁸ Wasserstrom, *supra* note 190, at 14.

²²⁹ Louis D. Brandeis, *The Opportunity in the Law*, 39 AM. L. REV. 561 (1905). *See also* Nelson, *supra* note 180, at 526-27.

cause—are completely in accord with everyday morality. In a democracy, a departure from common morality will be rarer the more radical the departure is.²³⁰ Because the lawyer seeks to achieve goals in the framework of the legal system, very rarely will the ends the lawyer seeks be radically unjust.

It is sometimes argued that the legislature establishes general rules that are unjust in particular, such as the statute of frauds or the statute of limitations.²³¹ However, these rules often seem unjust because they establish a bright-line rule, and those on the wrong side of the rule lose out entirely, even when they almost satisfy the requirements. Against this, the bright-line rule provides advantages of certainty and predictability that maximize justice. Failing to enforce them as bright-line rules destroys this benefit by requiring clients to persuade a lawyer that the application of the rule is ethically justified. In the case of the statute of frauds, the opposing ethical claim to a remedy on the contract despite failing to satisfy the law's procedural requirements for the validity of the contract cannot be very strong. Moreover, the law provides alternative ways of recovery in case of reliance by the party who cannot show a contract or benefit to the party who denies the existence of a contract, minimizing the injustice.²³² In the case of the statute of limitations, a lawyer's denying a client the applicability of the statute will

²³⁰ Of course, in instances where reciprocity exists, groups of people may tacitly or expressly adopt regimes differing from those in the larger community and enforce them through social sanctions. See ROBERT C. ELLICKSON, *ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES* (1991).

²³¹ See Luban, *The Adversary System Excuse*, *supra* note 155, at 88-89 (citing DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 152 (1973)).

²³² In all the examples discussed in the text, if there is a conferral of benefits pursuant to the invalid contract, the party can recover the value of the benefits conferred. *E.g.* RESTATEMENT

continue uncertainty over litigation for all people, even though lawsuits will not be filed in the vast majority of cases.

The need to present a case in a persuasive way forces the lawyer to confront the ethical views of the larger community. Lawyers are unique among the professions in that much of their work will be judged by those outside the profession, whether jurors, who are complete non-professionals, or judges, who have gone through professional education and experience, but who are largely removed from the financial self-interest of the profession. Despite Goldman's argument for strong role differentiation for judges,²³³ judges and juries generally like to do what is just, and precedent allows them to do so. To be successful as an advocate, one must have the skill of persuading judges and juries why the result one wants is just. The constant thinking in terms of applied justice that is required of a practicing lawyer tends to promote practical morality among lawyers. Those lawyers who lack an understanding of common ethical standards will simply be unsuccessful. Lawyers' awareness of this may help explain why, as Richard Wasserstrom observes, criticisms of the lawyer's role tend to be made by those outside the profession and rejected by those inside the profession.²³⁴

(SECOND) OF CONTRACTS §§ 370, 375, 376 (1979). *See also id.* § 139 (enforcing promises based on reliance, despite the statute of frauds).

j²³³ GOLDMAN, *supra* note 3, at 49.

²³⁴ Richard Wasserstrom, *Lawyers As Professionals: Some Moral Issues*, 5 HUMAN RIGHTS 1 (1975). *See also* GOLDMAN, *supra* note 3, at 101-02 ("no experience in legal practice"); Luban, *Lysistrata*, *supra* note 165, at 637 (unnumbered footnote) (Luban does not have a law degree). Wasserstrom's observation is still largely accurate, *see* M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 LAW & PHIL. 67, 70 & n.9 (1990), but some critics do have law degrees and practice to a limited extent while serving as professors, *see* Menkel-Meadow, *supra* n.4, at 6 (discussing her participation in three lawsuits as client and lawyer, in which she adhered to a fully adversary model).

Lawyers' need to maintain good client relations also contributes to the process of justice. Lawyers restrain clients' demands to a standard of reasonableness, if only to increase the chance of success.²³⁵ Where a judge cannot compromise between two positions, as may be the case where specific performance is sought, an unreasonable proposal can easily be rejected. Even in cases for damages, an extreme demand may preclude settlement and undercut credibility before judge and jury. Clients may not be careful critics of lawyering, but they can tell if the result at trial is worse than a rejected settlement. The lawyer whose conduct precludes settlement or who counsels clients to reject offers that turn out to be better than what the client receives at trial will lose clients. Lawyers do not do this perfectly,²³⁶ but their professional training and experience allow them to develop the skill, and the structure of the adversary system gives them far more incentive for developing it than academics or those in other professions. These incentives counteract the harmful effects of lawyers' role.

In other respects, criticisms of lawyers' roles seem to depend on a particular view of the legal system that may be flawed practically or a matter of contention normatively. Richard Wasserstrom writes that lawyers "will be encouraged to be competitive rather than cooperative; aggressive rather than accommodating; ruthless rather than compassionate; and pragmatic rather than principled."²³⁷

²³⁵ M.B.E. Smith, *Should Lawyers Listen to Philosophers About Legal Ethics?*, 9 LAW & PHIL. 67, 76 (1990); Robert N. Saylor, *Rambo Litigation: Why Hardball Tactics Don't Work*, A.B.A.J. 79 (March 1988).

²³⁶ CURTIS, *supra* note 134 at page 42, at 25; *see also supra* pp. 18-26.

²³⁷ Wasserstrom, *supra* note 190, at 13.

As a practical matter, the lawyer who has only the traits Wasserstrom describes will have mixed success at best. At times, competition is rewarded. However, managing a case successfully also requires considerable cooperation with the opposing side. A lawyer who cannot cooperate will run up fees and lose clients.²³⁸ Clinical studies show that overbearing behavior in trial is harmful to lawyers' success.²³⁹ The aggressive lawyer who cannot see the strength of another side's case will refuse to settle weak cases and lose clients.

Wasserstrom's conclusion that lawyering encourages pragmatism is likely correct. Wasserstrom fails to explain why he thinks that is bad. Lawyers exist to serve clients. The lawyer who spends her client's money vindicating a principle rather than seeking a pragmatic solution is subject to legitimate criticism.

Because Luban uses Lincoln as an example,²⁴⁰ it may be appropriate to turn to his life to indicate the evolution of the form of arguments lawyers make. "In his earliest venture before the [Illinois Supreme Court], he based his case on the hairsplitting technicalities of which young

²³⁸ Advocates who do not have clients, such as academics, are not constrained by them and may behave in the way Wasserstrom suggests.

²³⁹ Lance Stockwell & David C. Schneider, *Factors That Persuade Jurors*, 27 U. TOLEDO L. REV. 99, 108 (1995).

²⁴⁰ LUBAN, *LAWYERS AND JUSTICE*, *supra* note 2, at 174 ("“You must remember that some things legally right are not morally right. We shall not take your case”” (quoting WILLIAM H. HERNDON & JESSE W. WEIK, *HERNDON'S LINCOLN* 345 n.* (Chicago, Belford, Clarke & Co. 1889) (1888) (quoting letter written to William H. Herndon by eyewitness, recounting Lincoln's words)). *See also* FREDERICK TREVOR HILL, *LINCOLN THE LAWYER* 239-40 (1912) (turning down a legal claim, because of the problems it would cause and advising the potential claimant to turn his energies in another direction); *THE LIVING LINCOLN* 143-45 (notes of July 1, 1850) (urging people not to stir up litigation, especially over land titles).

lawyers are so often fond.”²⁴¹ As he grew more experienced, his arguments “less and less frequently depended on such technicalities.”²⁴²

This was not because Lincoln, as a mature lawyer or before, took only those cases that were consistent with his moral views. Despite his career as an opponent of the extension of slavery, Lincoln at least once represented a slave owner who had brought slaves into Illinois from Kentucky, and argued in favor of keeping people enslaved in the free state of Illinois because they were merely being used in transit.²⁴³ Lincoln’s biographer, David Herbert Donald, argues that neither this case nor others in which Lincoln upheld the rights of those seeking freedom “should be taken as an indication of Lincoln’s views on slavery; his business was law, not morality.”²⁴⁴

Thus, despite Lincoln’s place in “the pantheon” of moral lawyers²⁴⁵ he did not follow his client’s moral views, even in matters of supreme importance. That his legal career evolved towards making arguments that emphasized justice suggests that the legal system itself contains mechanisms to promote moral values in legal argumentation. In any system that America is likely to adopt, those mechanisms will be more powerful in achieving both truth and justice than

²⁴¹ DAVID HERBERT DONALD, LINCOLN 99 (1995).

²⁴² Donald, *supra* note 241, at 200.

²⁴³ Donald, *supra* note 241, at 103. Lincoln lost the argument. *Id.*

²⁴⁴ *Id.* at 104. *See also id.* at 149 (“Like any other lawyer, he resorted to technicalities in order to save his clients....”); *id.* at 157 (Lincoln “had no consistent legal philosophy that he sought to push”; “[h]e sometimes argued for the railroads and sometimes represented their opponents”; “[h]e was, as Herndon said accurately but with undeserved censure, ‘purely and entirely a case lawyer.’”).

²⁴⁵ Atkinson, *supra* note 92, at 199 n.113.

relying on the unmonitored contributions of lawyers towards those ends within the adversary system.

IV. CONFIDENTIALITY, ROLE DIFFERENTIATION, AND THE ADVERSARY SYSTEM

The preceding analysis has shown that adopting broader duties to disclose within the adversary system will have perverse results and shown that the adversary system has some often-neglected incentives for just behavior. It has not addressed at length the claim that the attorney-client privilege is suspect because it is “role-differentiated,” that is, is immoral because it differs from the standards of behavior for others.²⁴⁶

A complete treatment of the issue of role-differentiation would go beyond this paper’s focus on the adversary system. Nonetheless, attorney-client confidentiality is closely tied to the adversary system, and the claim that the attorney-client privilege is role differentiated and therefore ethically suspect is a staple of the debates over professional ethics. Therefore, it is appropriate to addressing it separately here.²⁴⁷

²⁴⁶ See *supra* pp. 45-46 & nn. 146-147 (raising the issue of role differentiation).

²⁴⁷ The analysis here addresses on the lawyers’ activities within the adversary system. This does not address the moral general issue of confidentiality beyond addressing the point of role-differentiation, although other authors do this. Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976); Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 8 (1951). Thus, this argument does not address the morality of the lawyer’s role in preparing a will for a parent wishing to disinherit a child. Moreover, the adversary system provides its greatest incentives for conduct that conforms with justice in public argument. Other areas have little or no incentive.

Where confidentiality exists, it is sometimes argued that the lawyers' role is differentiated from that of ordinary people.²⁴⁸ "Role differentiation" is used to describe situations in which a person does something that would ordinarily be considered immoral, but becomes moral because of the particular role that the person performing the action occupies.²⁴⁹

At first, the attorney-client privilege seems a clear example of role differentiation, because it prohibits the disclosure of past crimes revealed by the client in confidence,²⁵⁰ which most citizens would be permitted to reveal. It also provides only a limited ability to disclose future crimes.²⁵¹ This section of the paper will show, first, that the attorney-client privilege in litigation is required by the same analysis that shows the advantages of the adversary system generally, and second, that the attorney-client relationship is similar to other relationships in which concealment of information is expected or required.

A. The Attorney-Client Privilege's Relation to the Adversary System

Where the attorney-client privilege is asserted in connection with adversary litigation, the arguments against a general duty of disclosure apply equally well to sustain the privilege. That is, a duty to disclose will undermine the truth-finding value of the adversary system and the

²⁴⁸ Presumably, this claim is extended only to claims where the lawyers' ability to keep client secrets is protected by the attorney-client privilege. Otherwise, the lawyers' legal obligations are similar to those of other agents, who are not to gossip about their principals' affairs.

²⁴⁹ See, e.g., LUBAN, *THE GOOD LAWYER*, *supra* note 155, at 1 (role morality is the theme for essays about the professional idea).

²⁵⁰ MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.6 (2004). See also MODEL CODE OF PROFESSIONAL CONDUCT DR 4-101 (1980).

²⁵¹ MODEL RULE OF PROFESSIONAL RESPONSIBILITY 1.6(b) (2004).

advantages it is for the parties' satisfaction with the legal system.²⁵² Moreover, such a rule is likely to be disobeyed, because a breach of the duty will be difficult to detect, and the likely partial adherence to the rule will disadvantage those already disadvantaged by the legal system.²⁵³ Finally, taking such a rule seriously will require deceiving the parties to a case about their lawyers' duties, which itself undermines justice.²⁵⁴

Courts recognize that maintaining a functioning adversary system requires protecting principles of confidentiality.²⁵⁵ Most obviously, without the incentive of control over the evidence discovered, parties would make fewer efforts to discover evidence, to the detriment of the truth-finding process. More subtly, as *Hickman* observes, each side's being constantly forced to inform the opposing side of its latest information would disrupt the trial-preparation process.²⁵⁶

B. The Attorney-Client Privilege and Other Socially Accepted Privileges

The support given to the attorney-client privilege from a consideration of the needs of an adversary system is also defensible on other grounds. Contrary to what one might infer from some critics of the privilege, society accepts similar instances of role differentiation in other contexts.

²⁵² See *supra* pp. 16-19.

²⁵³ See *supra* pp. 19-38.

²⁵⁴ See *supra* pp. 38-43.

²⁵⁵ See *Hickman v. Taylor*, 329 U.S. 495, 512-13 (1947). See also *id.* at 516 (Jackson, J., concurring).

²⁵⁶ *Hickman v. Taylor*, 329 U.S. 495, 512-13 (1947).

One of the most dramatic examples of the attorney-client privilege was the so-called Lake Pleasant bodies case, in which two lawyers concealed their knowledge of the location of the bodies of two people killed by their client.²⁵⁷ This case caused outrage at the lawyers' failure to disclose the information.²⁵⁸

In a comparatively recent case, a suspect in the murder of three young boys was taped while confessing to a priest.²⁵⁹ In neither this case nor the Lake Pleasant case did the holder of the confidential information present false evidence. In both cases, the suppression of the evidence would cause harm. Here, however, the outrage was at the taping and not at the priest's concealment of information that would allow a multiple murderer to go free.²⁶⁰

In many respects, the lawyer is less role differentiated than the priest. Lawyers cannot present false evidence to a court and, under the Model Rules adopted in most states, must correct

²⁵⁷ See *People v. Belge*, 50 A.D. 2d 1088 (N.Y. App. 1975), *aff'd* 41 NY2d 60 (1976); . For discussion of the bodies case, *see, e.g.*, Feldman, *supra* note 221, at 889-904; Chamberlain, *Legal Ethics*, 25 BUFF. L. REV. 211 (1975).

²⁵⁸ Bryce Nelson, *Ethical Dilemma: Should Lawyers Turn in Clients?*, *Los Angeles Times*, July 2, 1974, at 1, col. 1, *reprinted in* ANDREW L. KAUFMAN & DAVID B. WILKINS, *PROBLEMS IN PROFESSIONAL RESPONSIBILITY FOR A CHANGING PROFESSION* 199 (4th ed. 2002).

²⁵⁹ See JOHN T. NOONAN, JR., & RICHARD W. PAINTER, *PROFESSIONAL AND PERSONAL RESPONSIBILITIES OF THE LAWYER* 524-36 (1997) (collecting materials relating to the case); *Mockaitis v. Harclerod*, 104 F.3d 1522 (9th Cir. 1997) (granting the confessor's request for an injunction).

²⁶⁰ See Celestine Bohlen, *Vatican Wants Tape of Jail Confession Destroyed*, *N.Y. TIMES*, May 26, 1996, at A26.

such false evidence if offered.²⁶¹ By contrast, we do not permit, much less require, that priests inform the courts when a party asserts a position inconsistent with his confession.²⁶²

We may find the priest-penitent privilege acceptable because we believe that a penitent would be mistreated if something he said in confidence were used against him and because we believe that if the privilege did not exist, communications would be cut off, leaving society no better off. Much the same arguments apply to lawyers dealing with past conduct, at least so as to require a far more persuasive justification for a regime of truth-promotion than it seems possible to advance.

If, on the other hand, the priest-penitent privilege is based on a cost-benefit analysis, determining whether the lawyer-client confidentiality should continue would require comparing the costs and benefits of several privileges. Lawyers provide several social advantages in the judicial process. By virtue of the existing ethical rules, they restrain clients from presenting false evidence.²⁶³ Lawyers also provide the parties with representation by people who have less emotional involvement in the issues.²⁶⁴ Lawyers may also use confidentiality and the client's trust to persuade a client not to undertake a wrongful course of action that would harm others.²⁶⁵ If we want lawyers to serve as intermediaries in the parties' relations with one another and the

²⁶¹ MODEL RULES OF PROFESSIONAL RESPONSIBILITY 3.3 (2004).

²⁶² See John J. Montone III, Comment, *In Search of Forgiveness: State v. Szemple and the Priest-Penitent Privilege in New Jersey*, 48 RUTGERS L. REV. 263 (1995).

²⁶³ See MODEL RULES OF PROFESSIONAL RESPONSIBILITY 1.2 (d), 3.3 (2004).

²⁶⁴ Wasserstrom, *supra* note 190, at 17. This suggests that the lawyer as lawbook rationale is not a complete explanation of the lawyer's function.

²⁶⁵ See KAUFMAN, *supra* note 183, at 778.

court, it may be a necessary to allow the client to choose the intermediaries and to allow a certain realm of confidentiality in which the client can treat the lawyer as the client's own self.

It could be argued that because the lawyer is part of a legal system that has justice as its goal, using the attorney-client privilege to exclude a confession is more incongruous than the use of the priest-penitent privilege to achieve the same result. However, this argument is not available to those who oppose role differentiation, because it argues that the lawyers' moral responsibilities ought to be different—in this case, greater—because of the role that the lawyer occupies in society.

Moreover, role differentiation in a particular case will often undercut the goal said to be advanced by the rule requiring role differentiation. For example, the goal behind the doctor-patient privilege is to promote health by encouraging a patient to seek needed medical treatment. However, when a hospital was not allowed to inform one spouse that his wife is HIV-positive, thereby jeopardizing the health of the HIV-negative spouse, the case attracted no comment.²⁶⁶

Interestingly, failure to disclose a life-threatening condition is something that has occurred in medical work, as well as in legal work. In the famous *Spaulding* case, the plaintiff had unbeknownst to him, a life threatening condition, which neither the defendants' examining

²⁶⁶ N.O.L. v. District of Columbia, 674 A.2d 498, 499 (D.C. App. 1995).

physician nor their attorney disclosed.²⁶⁷ The failure of the lawyer to disclose the information attracted negative comment, but the conduct of the physician largely escaped notice.²⁶⁸

A somewhat analogous situation occurred in psychiatry, in which a Nazi sought psychiatric treatment to avoid “feeling guilt for beating up enemies of the Nazis, particularly Jews.”²⁶⁹ It was suggested that a therapist could take the case with the goal of curing the Nazi so that he would not want to be violently aggressive.²⁷⁰ Sigmund Freud and Bruno Bettelheim rejected this approach, because of the dishonesty involved.²⁷¹ Such a dilemma will rarely await a lawyer, because of the need for the lawyer to advance her claim through the legal system.²⁷² It might be wisest to leave such an extreme case to civil disobedience, instead of giving lawyers a general license to lie to their clients.²⁷³

My purpose in discussing these cases is not to claim that lawyers should always have confidentiality, merely to make the point that rules of confidentiality are widely accepted for some non-lawyers. As compared with these non-lawyers, the lawyer’s role is not differentiated.

²⁶⁷ Spaulding v. Zimmerman, 116 N.W.2d 704 (Minn. 1962). In that case, neither defense counsel nor the defense physician disclosed to the plaintiff the imminent risk of death caused by an aortal aneurysm that plaintiff’s physician did not detect. *Id.* at 710.

²⁶⁸ Interestingly, Luban cites this as a case of a failure of the lawyer, and not as a joint failure of the lawyer and physician. Luban, *The Adversary System Excuse*, *supra* note 155, at 115.

²⁶⁹ BRUNO BETTELHEIM & ALVIN A. ROSENFELD, *THE ART OF THE OBVIOUS* 216 (1993).

²⁷⁰ *Id.*

²⁷¹ *Id.* Cf. BETTELHEIM & ROSENFELD, *supra* note 269, at 235 (discussing the difficulties in establishing a patient’s trust for the therapist).

²⁷² *But see* Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943).

Moreover, the adversary system does provide benefits to society. Thus, although some have seen the attorney-client privilege as explicable merely in terms of attorneys' selfish interest,²⁷⁴ this is simply incorrect.

C. Some Distinctions

There are a variety of justifications for the attorney-client privilege. We have discussed the adversary system here.

This justification by itself provides no reason for the privilege to apply in negotiations or other non-adversary situations.²⁷⁵ It might be thought that this justification was not significant, because of a variety of other justifications for the attorney-client privilege have broader results.

A brief consideration of these other approaches suggests, however, sufficient weaknesses with them that a justification based on the adversary system is an important component of the overall justification for the attorney-client privilege.

One of these other justifications relies upon the relationship between the lawyer and the client. For example, Charles Fried's lawyer-as-friend approach analogizes the lawyer-client to a relationship, friendship, that has an independent justification.²⁷⁶ Charles Curtis describes

²⁷³ KAUFMAN, *supra* note 183, at 780.

²⁷⁴ See Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998).

²⁷⁵ To some extent, the rules reflect this. MODEL RULE OF PROFESSIONAL RESPONSIBILITY 3.3(d) (2004) requires the lawyer for the represented party to inform the tribunal of all relevant facts to permit the tribunal to make "an informed decision." The comment says, "The judge has an affirmative responsibility to accord the absent party just consideration. The lawyer for the represented party has the correlative duty to make relevant disclosures." For consideration of the extension of this approach, see KAUFMAN, *supra* note 183, 178-79.)

²⁷⁶ Charles Fried, *The Lawyer As Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060 (1976).

lawyering as an intimate relation, like other relationships, such as marriage, in which one would lie for another.²⁷⁷

Unfortunately, justifications based on relationships tend to be circular. We tend to ascribe properties to a relationship based on what it is, rather than re-evaluating the relationship as a whole, so describing attorney-client privilege as a form of friendship begs the question. Real friendship has a justification that pre-exists the legal system.²⁷⁸ Moreover, an analogy between the lawyer and friend does not advance the argument for confidentiality, because the "law entitles friends, as such, to awesomely little protection against the inquisitiveness of the State."²⁷⁹

A third justification for the attorney-client privilege is to minimize the difference in truth-revealing between someone who consults an attorney and someone who does not.²⁸⁰ This standard reflects the "lawyer as lawbook analysis," sometimes also ascribed to the desire to preserve client autonomy.²⁸¹

The difficulty with this analysis is that, unless it is qualified by limiting it to cases in which the client wants a legally or morally permissible goal, it lacks any social or moral

²⁷⁷ Charles Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 8 (1951).

²⁷⁸ ALAN GOLDMAN, THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS 96 (1982).

²⁷⁹ GOLDMAN, *supra* note 3, at 154-44; Sanford Levinson, *Testimonial Privileges and the Preferences of Friendship*, 1984 DUKE L.J. 631, 640.

²⁸⁰ "Minimize," rather than "eliminate," because ethics rules require attorneys not to do things for clients that a dishonest client could do for herself and other ethics rules permit attorneys to reveal dishonesty that a dishonest client would not.

²⁸¹ Stephen Pepper, *Why Confidentiality?*, 23 L. & SOCIAL INQUIRY 331, 334 (1998).

justification. Just because an attorney can evade the law does not mean that it is right for him to do so. But if the attorney has no right to it, surely the client cannot either.

The same reasoning may be clearer in an analogous context. Consider the analogous doctor-patient privilege: If we cast this privilege in terms of autonomy, we would say that the purpose of the privilege is to allow the patient to do that which he cannot do without the medical information of the physician. Is the physician thereby allowed to advise the patient on especially effective techniques for poisoning?

Even where the privilege in such a case allows the entity consulting with the lawyer to comply with the law, it is not always the case that this will be a social gain. For example, suppose a corporation consults with a lawyer on its duty to comply with the immigration laws. The lawyer advises the client that the corporation will violate the law by using undocumented aliens, but that the corporation will comply with the law by hiring independent contractors that employ undocumented aliens. The corporation acts accordingly. It has complied with the law, but there is no advantage to society from its having done so.

The need to obtain legal advice in an increasingly complex body of laws, commonly cited as a justification for a broad attorney-client privilege,²⁸² in fact may undermine the privilege. If legal advice is essential, it will be obtained with or without the privilege, so the privilege fails the Wigmorean principle that the privilege be necessary for the existence of the communication protected by the privilege. Although the argument made here was made by the government and rejected by the Supreme Court in *Upjohn Co. v. United States*,²⁸³ there seems to be little in

²⁸² E.g., *Upjohn Co. v. United States*, 449 U.S. 383, 392-93 (1981).

²⁸³ 449 U.S. 383, 393 n.2 (1981).

principle to justify that rejection.²⁸⁴ This is especially true in circumstances such as *Upjohn*, in which the corporation sought to conceal documents reflecting communications between a corporate attorney and lower-level corporate employees,²⁸⁵ and the ability to conceal the information allows for considerable coaching of witnesses to alter the facts that another investigator later finds.²⁸⁶ Such concealment is especially a problem in the case of corporate wrongdoing, where the extension of the privilege to all corporate employees means that many or all of the fact-witnesses will be clients.

It is perhaps not surprising that the strongest arguments in favor of the attorney-client privilege can be made in the area of adversary litigation. This is in fact the original function of the attorney-client privilege, which was confined to the case in which the attorney was retained, and only subsequently extended “to include communications made, first during any other

²⁸⁴ See Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 29 (1998).

²⁸⁵ 449 U.S. at 388.

²⁸⁶ The ability of the lawyer to coach witnesses, protected by the privilege, undermines the Court’s statement,

Application of the attorney-client privilege to communications such as those involved here, however, puts the adversary in no worse position than if the communications had never taken place. The privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney.

449 U.S. at 395. In *Upjohn* itself, much of the information was submitted to the attorney in writing, *id.* at 388, making inapplicable *Hickman*’s strong prohibitions against requiring attorneys to supply their recollections of witnesses’ testimony, *see* 329 U.S. at 508-09. This also limited the ability of the attorney to coach the witnesses before collecting evidence. The broad language of the Court’s opinion, of course, will not require these limitations to be present in future cases in which the privilege is available.

litigation; next, in contemplation of litigation; next, during a controversy but not yet looking to litigation; and, lastly, in any consultation for legal advice, wholly irrespective of litigation or even of controversy.”²⁸⁷

The “attorney-client privilege” may be, to use Wittgenstein's simile, like a rope the strength of which comes not from one strand that extends the length of the rope, but from many strands that overlap.²⁸⁸ The varying degrees of justification overlap, but some are much stronger than others. Questions about the desirability of the privilege in some contexts, such as when attorneys help clients with their future conduct, should not undermine the applicability in contexts where the purposes behind the privilege are more fully met.

V. ALTERNATIVES TO EXTENDED DUTIES TO DISCLOSE

Declining to create an ethical duty for lawyers does not leave the system remediless. First, lawyers can already consider their client's deceptive conduct and refuse to represent a client or, having accepted a client, may refuse to present evidence they reasonably believe evidence to be false.²⁸⁹ These rules protect lawyers' interests in avoiding the abuse of their services.

²⁸⁷ 8 JOHN HENRY WIGMORE, EVIDENCE, § 2290 (McNaughton rev. 1961). Cf. EDWARD J. IMWINKELRIED, THE NEW WIGMORE: A TREATISE ON EVIDENCE: EVIDENTIARY PRIVILEGES §§ 2.3 - 2.4 (2002) (generally recounting the Wigmorean analysis); *Hickman v. Taylor*, 329 U.S. 495, 510 n.9 (1947) (discussing the British interpretation of attorney-client privilege to cover pre-trial preparation materials).

²⁸⁸ LUDWIG WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, ¶ 67 (G.E.M Anscombe trans. 3d ed. 1958).

²⁸⁹ MODEL RULE OF PROFESSIONAL RESPONSIBILITY 3.3(c) (1983). Cf. MODEL CODE OF PROFESSIONAL CONDUCT DR 7-102(A)(4) (1980) (lawyer may refuse to offer evidence that the lawyer knows to be false).

Second, existing discovery rules provide some avenues for allowing that narrow the chance that the concealment of evidence will succeed. By limiting the incentives for deception, these rules decrease its likelihood. These rules apply equally to lawyers and clients, removing some of the incentive to hire unethical lawyers that a duty that applied only to lawyers would create. These rules are under-enforced, but it seems unlikely that adding a new layer of ethical rules would address the problem more effectively than enforcement of existing rules. Judges need to overcome their frequently expressed reluctance to intervene in discovery²⁹⁰ and their reluctance to award compensatory sanctions when discovery abuse is found.²⁹¹

If the rules for discovery are insufficient, they can be changed by adding inquisitorial investigations to the system without imposing conflicting duties on existing attorneys. The rules already allow for this: courts can appoint amicus curiae and expert witnesses.²⁹² If that is insufficient, the legislature can arrange for inquisitorial investigations generally or prosecutors.

²⁹⁰ E.g., Wayne D. Brazil, *Civil Discovery*, 1980 AM. BAR FOUND. RESEARCH J. 217, 266. See also Wayne D. Brazil, *Ethical Perspectives on Discovery Reform*, 3 REV. LITIG. 51, 62-87 (1982-1983) (discussing the origins of attorneys' willingness to engage in discovery abuse).

²⁹¹ Nesson, *supra* note 69 at 796-97 ("Nor are judges disposed to press intimations of unethical conduct when the alleged impropriety has not caused any lasting harm. The judge who is overseeing the discovery process (or, more likely, the magistrate) will likely tell the victim's lawyer, 'You've got the evidence. Now get on with it.');" Barbara J. Gorham, Note, *Fisons: Will It Tame the Beast of Discovery Abuse?*, 69 WASH. L. REV. 765, 786 (1994); John W. Heiderscheit, *Rule 37 Discovery Sanctions in the Ninth Circuit: The Collapse of the Deterrence Goal*, 68 OR. L. REV. 57, 77 (1989); 26 U.S.F. L. REV. 189, 190 ("[B]ecause discovery abuse is mostly rational, deliberate, economically motivated behavior, efforts to eliminate such behavior must focus on the incentives that lead lawyers and their clients to engage in it."). See also *Shepherd v. American Broadcasting Co.*, 62 F.3d 1469 (D.C. Cir. 1995) (requiring proof of discovery abuse by "clear and convincing" evidence).

²⁹² FED. R. EVID. 706.

All such remedies avoid the dueling loyalties that a proposal to give lawyers a duty to promote truth would create.

Third, procedures to prevent the initial corruption of evidence can co-exist with the adversary system as we know it. With respect to documentary evidence, evidence of regular document destruction programs should not be concealed from jurors, even if the document destruction was not directed to the particular case.

Steps can be taken to minimize the contribution of lawyers to the inevitable reconstruction and mutation of witnesses' memory.²⁹³ The British system prohibits its trial attorneys coaching or rehearsing a witness²⁹⁴ and helps enforce this by barring barristers from interviewing most witnesses in a criminal case²⁹⁵ and from interviewing witnesses in civil cases before the solicitor has prepared a proof from that witness and requiring that the interview take place in the presence of the solicitor or her representative.²⁹⁶

The principle behind this is that “if we are to run a system of oral testimony in an adversarial process, we need to insure so far as is possible that the given testimony is the testimony of the witness and not the result of the advocate’s interrogation of the witness in

²⁹³ See FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, *supra* note 1, at 59-77 (discussing the role of lawyers in interviewing and counseling clients). See also Frankel, *supra* note 23, at 1054 (advocating “freezing” evidence to prevent further tampering).

²⁹⁴ Code of Conduct of the Bar of England and Wales 607.3.

²⁹⁵ Code of Conduct of the Bar of England and Wales 607.1.

²⁹⁶ *Id.*; Code of Conduct of the Bar of England and Wales 607.2. However, Freedman suggests that this simply allows the solicitor to contaminate the client without the barrister’s knowledge, and that the division of labor between the two branches of the profession allows each side to avoid moral responsibility for the ultimate result of perjury. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM*, *supra* note 1, at 109.

circumstances in which the witness is liable to seek to adopt the advocate's perception of the events rather than his own recollection of those events."²⁹⁷

The German system also has been said by some to minimize the possibility of lawyer contamination of witnesses.²⁹⁸ However, even on the best of facts, the inquisitorial system will not achieve all that is claimed for it. Although the in-court questioning of witnesses is done by the judge, reducing the problem of harassing witnesses (but increasing the problem that the witnesses will provide evidence that simply reinforces the judge's existing prejudices), the out-of-court contamination of witnesses and documents can proceed unchecked. Indeed, although we think the coaching witnesses in the *Anatomy of a Murder* situation²⁹⁹ exemplifies the adversary system, Gogol described a similar coaching in a civil law system over 100 years earlier in *Dead Souls*.³⁰⁰

²⁹⁷ *Ethics Forum and Debate: Rules of Conduct for Counsel and Judges: A Panel Discussion on English and American Practices*, 7 GEO. J. LEG. ETHICS 865, 869 (1994). However, Monroe Freedman suggests that this simply allows the solicitor to contaminate the client without the barrister's knowledge, and that the division of labor between the two branches of the profession allow each side to avoid moral responsibility for the ultimate result of perjury. FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM, *supra* note 11, at 109. An additional reason for not rehearsing stories is that the rehearsal gives even a well-meaning lawyer more opportunity to impose her view on her client. *See White, supra* note 194, at 39.

²⁹⁸ LUBAN, LAWYERS AND JUSTICE, *supra* note 2, at 96-97.

²⁹⁹ *See supra* note 69.

³⁰⁰ NIKOLAI GOGOL, DEAD SOULS 358-61 (Richard Pevear & Larissa Volkhonsky trans., 1996) (1842). In this episode of *Dead Souls*, Chichikov has forged and put into probate a will, a plan that may be frustrated by the failure of the forged will to revoke the genuine, prior will, which has just turned up. *Id.* at 359. Chichikov goes to see a lawyer known for evading the many suspicions against him. *Id.* at 359-60. After negotiating compensation, *id.* at 360, the lawyer says,

Third, we can provide protection for lawyers from the demands of clients. Some courts have provided similar protection for lawyers,³⁰¹ suggesting that they may advance the duty of the lawyer to inform.³⁰² Of course, even such a duty to inform may discourage clients from hiring lawyers in the first place; avoiding accountants is not a practical alternative for those seeking money in the securities markets, and accountants receive some protection from firing.³⁰³

VI. CONCLUSION

Various critiques of lawyering suggest modifying the current system, in which the goal of the lawyer is to represent the client, by adopting a goal of truth or justice. These arguments for

“If I may, instead of starting a long case, you probably did not examine the will very well: there’s probably some sort of little addition. Take it home for a while. Though, of course, it’s prohibited to take such things home, still, if you ask certain officials nicely ... I, for my part, will exercise my concern.”

“I see,” thought Chichikov, and he said: “In fact, I really don’t remember very well whether there was a little addition or not”—as if he had not written the will himself.

Id. (ellipses in the original). The lawyer continues by giving advice on the advantages of relying solely on documentary evidence and on the benefits of confusing the case. *Id.* at 360-62.

³⁰¹ General Dynamics Corp. v. Superior Court, 876 P.2d 487, 497-98, 501 (Cal. 1994) (allowing the action); GTE Prods. Corp. v. Stewart, 653 N.E.2d 161, 166-67 (Mass. 1995); Chandra R. Coblenz, *Note, The Impact of General Dynamics Corp. v. Superior Court on the Evolving Tort of Retaliatory Discharge for In-House Attorneys*, 52 WASH. & LEE L. REV. 991, 1011 (1995). *Contra* Balla v. Gambro, Inc., 145 Ill.2d 492, 501, 164 Ill.Dec. 892, 584 N.E.2d 104 (1991)

³⁰² See Jeffrey P. Kerrane, *Will Tarasoff Liability be Extended to Attorneys in Light of New California Evidence Code Section 956.5?*, 35 SANTA CLARA L. REV. 825 (1995).

³⁰³ See Rocky Mountain Hospital & Medical Serv. v. Mariani, 916 P.2d 519 (Colo. 1996) (sustaining public policy objection to firing based on a rule requiring accountants not to falsify information); Richard W. Painter & Jennifer E. Duggan, *Lawyers Disclosure of Corporate Fraud: Establishing a Firm Foundation*, 50 SMU L. REV. 225-276 (1996).

improving the adversary system are flawed because they ignore the incentives that lawyers and clients have for ignoring changed rules. Because of this, individual lawyers and clients will choose not to follow these substitutions, and as a result, the changes would harm their ostensible goal, producing truth or producing justice. Moreover, these changes would disadvantage the least powerful members of society, by requiring clients to survive the gate-keeping activities of lawyers. Their only arguably positive effect is to increase lawyer deliberation on ethical issues.

If the purpose of discussion is to change behavior to make the world a better place, rather than merely to label conduct as ethical or unethical, these critiques of the adversary system are unsound.³⁰⁴ Moreover, the critique based on the failings of the adversary system is at odds with a critique of lawyers as elitists who dominate clients and treat them paternalistically.³⁰⁵

The dilemma posed by the adversary system is that it requires its participants to behave in a fashion that would be unacceptable for an individual for the system to achieve a just result. Bernard Williams has suggested that the moral problem for lawyers and politicians is one of

³⁰⁴ Cf. Richard S. Markovits, *Monopoly and the Allocative Inefficiency of First-Best-Allocatively-Efficient Tort Law in Our Worse-Than-Second-Best-World: The Whys and Some Therefores*, 46 CASE W. RESERVE L. REV. 316, 319 (1996) (“This article seeks not just to understand the world but to change it....”) (paraphrasing Karl Marx, *Theses on Feuerbach*, No. 11, in FREDERICK ENGELS, LUDWIG FEUERBACH appx. (London: 1889), reprinted in KARL MARX, WRITINGS OF THE YOUNG MARX ON PHILOSOPHY AND SOCIETY 403 (Lloyd D. Easton & Kurt H. Guddat eds. & trans., 1967) (“The Philosophers up to now have only *interpreted* the world in various ways; the point is to change it.”)).

³⁰⁵ See Wasserstrom, *supra* note 190, at 1 (making both criticisms).

“dirty hands.” This is the problem of the person, wanting to achieve something good, who has to do something bad in order to achieve the good.³⁰⁶

The moral problem of lawyers is actually more profound than that. In the case of dirty hands, a person wants to achieve the good, but must use deplorable means. Lawyers’ goal is often to achieve their clients’ selfish ends instead of the good, and only through the genius of the system are these bad desires made to serve social ends.

To put the best face on it, the adversary system and its checks and balances adopt the Madisonian “policy of supplying, by opposite and rival interests, the defect of better motives.”³⁰⁷ Unfortunately for lawyers, the same analysis suggests a less flattering description of the lawyers in the adversary system, Mephistopheles’ self-description in Goethe’s *Faust* as “a part of that power which always wills evil and always works good.”³⁰⁸

However, the comparison with Mephistopheles is not entirely apt. Lawyers’ power to do evil is much more limited than Mephistopheles’. The system itself, by providing judges and jurors with the capacity to consider justice in their decisions, not only forces lawyers to argue cases in terms of justice, it provides lawyers with an incentive to cultivate a sense of justice. As a result, despite the moral hazards of differentiated conduct, lawyers are probably neither much better nor much worse than their fellow citizens.

³⁰⁶ See Bernard Williams, *Politics and Moral Character*, in PUBLIC AND PRIVATE MORALITY 66, 71 (Stuart Hampshire ed., 1978). See also BERNARD WILLIAMS, MORALITY: AN INTRODUCTION TO ETHICS 93 (1972).

³⁰⁷ THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).

³⁰⁸ JOHANN WOLFGANG VON GOETHE, FAUST, Pt. 1, ll. 1335-36 (1808) (“Ein Teil von jener Kraft/Die stets das Böse will und stets das Gute schafft.”), reprinted *ine.g.*, 3 JOHANN WOLFGANG VON GOETHE, WERKE 1, 47 (Christian Verner Verlag 1949).

The ultimate conclusion on the adversary system and the lawyers in it, then, must be Madisonian: “It may be a reflection of human nature that such devices should be necessary to control the abuses of Government. But what is Government itself, but the greatest of all reflections on human nature?”³⁰⁹

³⁰⁹ THE FEDERALIST No. 51, at 322 (James Madison) (Clinton Rossiter ed., 1961).