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THE PERRY MASON PERSPECTIVE AND OTHERS: A CRITIQUE OF REDUCTIONIST THINKING ABOUT THE ETHICS OF UNTRUTHFUL PRACTICES BY LAWYERS FOR “INNOCENT” DEFENDANTS

Carl M. Selinger*

Professor Monroe H. Freedman’s writings on the professional responsibilities of lawyers have been widely and deservedly praised for their candor in taking account of the realities of law practice and the genuine legal needs of the public. In particular, his scholarship has finally, and I think permanently, pushed aside the professional platitudes and “you-just-don’t-understands” that have substituted so long for careful analysis in dealing with problems in the representation of criminal defendants. All of us who confront these problems, in classrooms and courtrooms, are deeply in Professor Freedman’s debt.

This article considers a remaining source of difficulty in resolving professional responsibility problems in criminal defense work and, indeed, in litigation generally: a reductionist tendency to assume that what lawyers may ethically do can easily be deduced from what clients may ethically do, and that what practices the rules governing the legal profession should permit can easily be deduced from our conclusions about the practices in which lawyers may be entitled ethically to engage. The context in which I will examine these assumptions is the problem of untruthful conduct in criminal cases. I shall begin by showing how, in dealing with this problem, Professor Freedman’s instincts as an advocate have led him unintentionally to appeal to our reductionist inclinations.1

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1. See text accompanying notes 2-25 infra. Another example of Professor Freedman’s instincts as an advocate affecting his sense of perspective is, I believe, his use of the specters of the severely limited roles that lawyers play in Communist dictatorships to persuade his readers that the adversary system as it now exists in the United States should not be changed. See, e.g., M. FREEDMAN, LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM 2 (1975). Judge Marvin Frankel has more aptly put Professor Freedman’s point as a question: “Can we preserve the heroic lawyer shielding his client against all the world—and not least against the State—while demanding that
Then, I will discuss in detail the ethics of untruthful conduct from the quite different perspectives of innocent defendants, lawyers who believe their clients are innocent, and rulemakers for the legal profession.

I. UNTRUTHFUL PRACTICES FROM THE PERRY MASON PERSPECTIVE

In his book, *Lawyers' Ethics in an Adversary System*, as in his earlier article dealing with "the three hardest questions" in criminal defense work, Professor Freedman attempts to justify two kinds of untruthful practices by defense lawyers: (1) putting a defendant on the stand to testify in the usual way although the defendant has indicated that he is going to commit perjury and the lawyer cannot talk him out of it; and (2) attempting to discredit the testimony of a prosecution witness who the defendant has acknowledged is telling the truth. Professor Freedman argues that the preservation of attorney-client confidentiality requires as a matter of professional responsibility that defense lawyers engage in both of these practices. As I understand it, this argument can be
restated as follows:

The American criminal justice system, and probably most Americans, subscribe to the maxim that to avoid convicting one innocent person it is worth letting ten guilty persons go free. One of the policies underlying attorney-client confidentiality is the protection of the innocent: If an innocent defendant knows that what he tells his lawyer cannot disadvantage him, he will be more likely to reveal information that only appears to be incriminating, but in fact would be exculpatory, or that would be more damaging than necessary if it came out by surprise at trial. Requiring lawyers to disregard what defendants have told them when presenting defendants' testimony and when attacking the credibility of opposing witnesses will help to maintain an understanding that clients will not be disadvantaged in these circumstances by being truthful with their lawyers; and that is an understanding which will benefit some innocent defendants in future cases.

Professor Freedman's conclusions requiring certain untruthful practices appear to rest on a claim that within the scope of the one-to-ten maxim—or one-to-one-hundred, or whatever proportion his readers are prepared to tolerate—the indirect benefits to innocent defendants in future cases, and other indirect benefits in future cases, sufficiently counterbalance the direct harms that these

FORDHAM URB. L.J. 289, 289-92 (1976). Professor Freedman, however, finds the Code in accord with his conclusion on discrediting truthful witnesses. M. FREEDMAN, supra note 1, at 48-49. With regard to this issue, Professor Freedman relies on ABA CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1976) [hereinafter cited as ABA CODE], which provides:

A lawyer shall not intentionally:

Fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules . . . . A lawyer does not violate this Disciplinary Rule, however . . . by avoiding offensive tactics, or by treating with courtesy and consideration all persons involved in the legal process.

Id. (footnotes omitted). In deciding whether a defendant has been adequately represented and has received a fair trial, the courts have disagreed with Professor Freedman on the client-perjury issue. See, e.g., People v. Blye, 233 Cal. App. 2d 143, 43 Cal. Rptr. 231 (5th Dist. 1965); State v. Henderson, 205 Kan. 231, 468 P.2d 136 (1970); State v. Robinson, 290 N.C. 56, 224 S.E.2d 174 (1976). See also Wolfram, Client Perjury, 50 S. CAL. L. REV. 809, 841 n.121 (1977) (citing cases).

7. For an example of such an exculpatory revelation, see M. FREEDMAN, supra note 1, at 4-5.

8. For an example of the surprise introduction of incriminating information which a defendant had withheld from his attorney, see id. at 36.

9. See id. at 48.

10. Guilty defendants who, assured of confidentiality, admit their guilt to their lawyers might be persuaded to plead guilty, or at least not to perjure themselves.
practices would cause in allowing guilty defendants to escape punishment. The confidentiality argument does not require lawyers to be sure of the innocence, or even believe in the innocence, of the defendants on whose behalf the untruthful practices are to be used.

But with his confidentiality argument, Professor Freedman provides us with some practical examples of situations in which lawyers would have to decide whether or not to engage in both the untruthful practices he endorses and certain other untruthful practices that he condemns. What is interesting about these examples is that when Professor Freedman wants us to agree that a practice should be required as a matter of professional responsibility, he encourages us to view it from a point of view that is quite familiar from mystery stories and from our television screens: the Perry Mason perspective of a lawyer representing a client we know is innocent. But when we are to regard a practice as unjustified, he invites us to think of it as being used on behalf of a defendant whose guilt is clear, if not admitted. With regard to letting a client perjure himself, we are given the situation of a defendant who has been falsely accused of robbery and who wishes to testify not only to deny that

Admissions of guilt would also evoke professional restrictions against knowingly presenting the false testimony of nonclient witnesses. See ABA Code, supra note 6, DR 7-102(A)(4); ABA, STANDARDS RELATING TO THE DEFENSE FUNCTION § 7.5, Commentary a (Approved Draft 1971).

11. Professor Freedman contends that if lawyers were to withdraw from cases to avoid letting guilty defendants perjure themselves, the “identical perjured testimony,” M. FREEDMAN, supra note 1, at 33, would be presented anyway, with the assistance of new counsel to whom the defendants would not have admitted their guilt. Id. For an interesting example of a similar chain of events, see F. WINDOLPH, THE COUNTRY LAWYER 44 (1938). However, at least some guilty defendants might choose to refrain from testifying falsely rather than have their lawyers withdraw, or, at trial, seek to withdraw or simply let the defendants tell their stories without examining them. For discussions of the professional propriety of such conduct by lawyers at trial, see ABA, STANDARDS RELATING TO THE DEFENSE FUNCTION § 7.7, Commentary (Approved Draft 1971); M. FREEDMAN, supra note 1, at 53-59; A. KAUFMAN, PROBLEMS IN PROFESSIONAL RESPONSIBILITY 179 (1976). Other guilty defendants might not be sufficiently inventive or psychologically durable to be able to lie continuously to their new lawyers.

In an article published after the present article was completed, Professor Charles Wolfram argues persuasively that client perjury, even without examination by counsel, creates “an unacceptably high risk of acquittals,” Wolfram, supra note 6, at 852-53, and that a mandatory withdrawal requirement would tend to prevent perjury. Id. at 856-58. However, out of a concern that imposing such a requirement in criminal cases might deny defendants their constitutional right to assistance of counsel, Professor Wolfram proposes that lawyers permit defendants to tell their stories, but only after informing the judge and the jury that the story is, to the attorney’s knowledge, without factual basis. Id. at 853.
he perpetrated the crime, but also to contradict the testimony of a prosecution witness who has accurately placed him near the scene of the robbery at about the time it was committed.12

Professor Freedman begins his discussion of discrediting truthful witnesses with the example of a defendant who has admitted to his lawyer that he raped a young woman (who happens to be engaged to a minister). The question for his attorney is whether to attempt to discredit the woman's testimony that she did not consent to having intercourse with the defendant by introducing evidence of her previous sexual relations with other men, evidence which is deemed relevant under the rules of the particular jurisdiction.13 But then Professor Freedman again offers us the example of the robbery defendant who "has been wrongly identified as the criminal, but correctly identified by [a] nervous, elderly woman [witness] who wears eyeglasses, as having been only a block away five minutes before the crime took place."14

In contrast, Professor Freedman does not use the robbery example, or any other example involving an innocent defendant, to illustrate two untruthful defense practices which he concludes are not justified by attorney-client confidentiality: (1) actively participating in the concealment of incriminating evidence;15 and (2) giving a defendant legal advice that, in light of what the defendant has said, the lawyer knows may induce perjured testimony.16

Professor Freedman's example of lawyer concealment is the well-known Ryder case,17 in which, as he describes it, "the attorney removed from his client's safe deposit box a sawed-off shotgun and the money from a bank robbery and put them, for greater safety, into the lawyer's own safe deposit box."18 His principal

12. M. FREEDMAN, supra note 1, at 30-31; Freedman, supra note 3, at 1476-77. In his earlier article, Professor Freedman used an additional example of a defendant who had admitted his guilt to his lawyer. Id. at 1475. This example is omitted from his book.

13. M. FREEDMAN, supra note 1, at 43-44. This example was used in an earlier symposium on legal ethics. Symposium, Standards of Conduct for Prosecution and Defense Personnel, 5 Am. Crim. L.Q. 8-10 (1966).


15. Id. at 6. With regard to confidentiality, it is possible, however, that an innocent defendant might not reveal to his lawyer evidence which the defendant thought incriminating except in the belief that the lawyer would help him conceal it.

16. Id. at 73-74. For a skeptical view of the difference between permitting client-perjury and inducing it, as related to Professor Freedman's confidentiality argument, see Rotunda, Book Review, 89 Harv. L. Rev. 625, 631 (1976).


18. M. FREEDMAN, supra note 1, at 6.
example of the possibility of inducing perjury by giving legal advice is the Anatomy of a Murder situation, where the lawyer who had received from his client an incriminating story of murder in the first-degree, called an apparently groundless potential defense to the client’s attention.

Although I believe that Professor Freedman’s examples could be quite misleading to readers unfamiliar with criminal defense, I

20. M. FREEDMAN, supra note 1, at 69.
21. It seems to me that Professor Freedman’s examples could be misleading in at least three ways. First, his readers are bound to be more tolerant of untruthful practices that may potentially avoid injustice, than of those that cannot; thus, Professor Freedman has at least inadvertently “stacked the deck” against the practices of concealing incriminating evidence and of possibly inducing perjury, by not indicating that they too could be used on behalf of innocent defendants. An innocent person charged with theft who came into possession of the stolen goods through implausible or dishonest, but not illegal, circumstances might well seek his lawyer’s help in concealing them. In Professor Freedman’s robbery example, one could easily imagine the innocent defendant being vaguely suggestive to his lawyer about having been near the scene of the crime, and then waiting for some indication from the lawyer as to how important it might be to his defense that he deny his presence there.

Second, by suggesting that lawyers know when their clients are innocent, Professor Freedman may lead some readers to believe that the use of untruthful practices could be confined to the protection of the innocent. In reality, however, a lawyer can rarely be certain that he is not helping a guilty defendant escape punishment. According to one law professor who has represented many defendants, “experience shows that a lawyer is hardly better situated than a juror to judge whether a man is guilty or innocent.” Comment by H. Richard Uviller at a symposium on professional responsibility in the practice of criminal law (May 8, 1974), in A.B. CITY NEW YORK, PROFESSIONAL RESPONSIBILITY OF THE LAWYER 57 (1977). However, Maurice Nadjar, the former New York State special prosecutor, has taken a contrary position. Id. Martin Erdman, a veteran legal aid defense lawyer in New York City was once asked by a reporter “if he could be positive after 25 years that he had ever defended an innocent man.” Mr. Erdman replied: “No. That you never know. It is much easier to know guilt than innocence.” Mills, “I Have Nothing to Do with Justice,” LIFE, March 12, 1971, at 57, 66.

Third, the equal prominence that Professor Freedman gives to his robbery and rape examples might create the impression that as many or nearly as many persons charged with criminal offenses are innocent as are guilty. In terms of his confidentiality argument, this impression makes the danger of guilty persons being freed by the use of the untruthful practices he endorses appear less serious than it really is. One strong advocate of defendants’ rights has conceded: “We all know that most people accused of crime did something along the lines of what they are accused of.” Babcock, Problems in Professional Responsibility, 55 Neb. L. Rev. 42, 51 (1975). Other informal estimates go even further. A Texas defense lawyer observes in an interview that “[n]ine out of ten defendants are clearly guilty.” Comment, In Search of the Adversary System—The Cooperative Practices of Private Criminal Defense Attorneys, 50 Tex. L. Rev. 60, 111 (1971). Life’s report on Martin Erdman’s legal aid representation in New York City states: “[I]n perhaps 98% of his cases, the clients
do not intend to dispute his argument that confidentiality requires that lawyers engage in certain untruthful practices on behalf of defendants generally. Instead, I will explore some questions implicit in another possible justification for the use of untruthful practices which is suggested by the intuitively persuasive robbery example: The argument would begin with the contention that innocent defendants are entitled ethically to engage in untruthful behavior to avoid being convicted and punished; then, it would assert that lawyers who believe that their clients are innocent are entitled ethically to engage in untruthful practices on their behalf; finally, the argument would conclude with the claim that the rules of professional responsibility therefore should require lawyers to engage in such practices for defendants generally.

Professor Freedman's repeated use of the robbery example might be taken as an indication that his conclusions rest on a reductionist "innocence argument" of this kind, as well as on his confidentiality argument. Thus, referring apparently to the first appearance of the robbery example in Professor Freedman's earlier article, one writer interpreted it to mean that "Monroe Freedman argues that to achieve an ultimate truth, the acquittal of an innocent person, a lawyer may have to undermine the credibility of a witness he believes to be telling an instrumental truth." How- ever, in his book, Professor Freedman attaches no significance whatever to the innocence or guilt of the defendants in his examples. At the end of his discussion of discrediting truthful witnesses, he compares his rape case with his robbery example and frankly concedes that "the rape case is a much harder one." But that is only because the injury done to the prosecutrix [in the rape case] is far more severe than the more limited humiliation of the public-

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22. I have suggested elsewhere that, notwithstanding the confidentiality argument, any untruthful defense practice is at least ethically problematic where, such as in the rape case, the defendant has admitted to his lawyer all of the elements of the offense charged and no good faith legal defense can be found. Selinger, supra note 1.


spirited and truthful witness in the case of the street robbery. In addition, in the rape case, the lawyer is acting pursuant to a manifestly irrational rule . . . . Irrational or not, however, in those jurisdictions in which the defense of unchastity is still the law, the attorney is bound to provide it on the client’s behalf.25

I am persuaded by this evidence that Professor Freedman does not intend to rely on an innocence argument. Moreover, let me hasten to add that I am not inclined to espouse such an argument either. But in considering it, one is led to reflect on three troublesome ethical questions:

(1) What limits are there to the behavior that a factually innocent defendant26 could ethically engage in to avoid being unjustly convicted and punished?
(2) Are there valid reasons that a lawyer who is convinced that his client is innocent might not be entitled ethically to do, or become involved in the client’s doing, whatever an innocent defendant in the client’s position could ethically do on his own behalf?
(3) If a particular untruthful defense practice could be justified ethically only when a lawyer is convinced that his client is innocent, how should the rules of professional responsibility deal with this practice?

25. *Id.* at 48-49 (footnote omitted).
26. In focusing on “factually” innocent defendants, I intend to include not only defendants who have been mistakenly identified as the perpetrators of the crimes with which they are charged, but also correctly identified defendants whose conduct was so clearly noncriminal in character that no conscientious prosecutor would bring charges if he knew the actual facts. I intend to exclude cases in which innocence turns on “the application of vague legal standards,” Alschuler, The Defense Attorney’s Role in Plea Bargaining, 84 YALE L. J. 1179, 1281 (1975), or involves “the passing of value judgments on the accused’s conduct,” Enker, Perspectives on Plea Bargaining, in The President’s Commission on Law Enforcement and Administration of Justice, The Challenge of Crime in a Free Society, Task Force Report: The Courts 108, 113-14 (1967). Professor Enker uses a similar distinction in arguing that only criminal cases involving factual issues are inappropriate for plea-bargaining. Professor Alschuler, who is opposed to plea-bargaining generally, is especially critical of defense lawyers who freely bargain whenever their clients have only “legal” defenses, however “clear-cut.” Alschuler, *supra* at 1281.

Many of the ethical considerations discussed in the remainder of this article would also be relevant to cases involving defendants who would be legally innocent of any criminal responsibility, or at least of some of the charges against them, if vague legal standards were applied correctly. However, to have attempted in this present exploratory effort to deal with situations in which defendants, defense lawyers, and rulemakers would be compelled to make judgments about “legal innocence” would have made an already complicated analysis unmanageable.
II. **Obstructionist Behavior from the Innocent Defendant's Perspective**

In 1963, the *Missouri Bar, Prentice-Hall Survey,*\(^{27}\) which conducted extensive research into the attitudes of the lay public in Missouri, reported that

> there is a shocking lack of confidence among a large number of people concerning the possibility of obtaining a fair trial in our courts. Nearly one-third (32%) of those interviewed expressed a doubt as to whether they would have a better than 50-50 chance of obtaining a just verdict if they were accused of a crime.\(^{28}\)

I have speculated elsewhere about possible causes of this low level of public confidence,\(^{29}\) which I have no reason to believe has improved significantly since the *Missouri Bar, Prentice-Hall Survey.* But what is important for the present discussion is the possibility that some persons accused of crimes of which they are factually innocent might be sufficiently apprehensive about being convicted to be tempted to resort to untruthful behavior, or to other measures such as flight, escape, procuring the false testimony of others, or even bribing or intimidating participants in the adjudicative process. An investigation into the extent to which these acts would be ethically justified can profitably begin by examining the ethical principles reflected in some relevant legal doctrines.

The privilege against self-incrimination, and the concomitant right of at least innocent defendants to remain silent and put the prosecution to its proof,\(^{30}\) represent a judgment by the American legal system that a person who has been falsely accused is not under an obligation simply to come forward with all the relevant evidence in his possession and trust his fate to the perspicacity and integrity of a judge or jury. But what of the innocent defendant who more actively attempts to "obstruct justice"?

In general, the law does not recognize a person's innocence of the underlying charge against him as a defense to a prosecution for

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28. *Id.* at 173.
30. All defendants have the **power** to put the prosecution to its proof, but it is not altogether clear that guilty defendants in ordinary criminal cases have the **right** to do so. For an unconventional view of the self-incrimination privilege as a protection only for innocent defendants, and guilty defendants in cases involving political or religious liberties, see Selinger, *supra* note 1, at 22-29.
obstructionist behavior.\textsuperscript{31} However, the legal doctrines can be viewed as primarily reflecting the problems faced by legal institutions in coping with the acts in question. To that extent, they do not reflect a consideration of other factors which would be relevant in making balanced ethical judgments about the right of innocent persons to engage in such behavior. Thus, to permit a person acquitted of an underlying charge to assert his innocence as a defense to a subsequent prosecution for perjury or concealing evidence would entail either trying to guess whether the person would have been acquitted even if he had not engaged in lying or concealment or, in substance, relitigating the underlying charge. Similarly, the doctrine that innocence does not relieve a person of criminal liability for having escaped from pretrial custody\textsuperscript{32} is attributable primarily to the costs and possible dangers involved in preventing escapes and in apprehending fugitives. In addition, with respect to all of these instances of "obstructing justice," if the law were to

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\item For a recent thoughtful analysis of the cases on perjury prosecutions following acquittals, see State v. De Schepper, 304 Minn. 399, 231 N.W.2d 294 (1975), in which the Minnesota Supreme Court reaffirmed its prior rule that barred a subsequent perjury prosecution only if a conviction for perjury would be 'necessarily' inconsistent with the verdict of acquittal on the substantive charge," \textit{id.} at 407, 231 N.W.2d at 299. The court found that only this much protection is required by the constitutional guarantee against double jeopardy, \textit{id.} at 408, 231 N.W.2d 299-301. Under the "issues necessarily adjudicated" rule, if the defendant in Professor Freedman's robbery example were acquitted, he could nevertheless be prosecuted for perjury because of his denial that he was near the scene of the robbery. In this situation, the jury could have disbelieved his denial and still have found that he did not commit the robbery.

For an analysis of cases holding that innocence of the underlying charge is not a defense in a prosecution for escape, see Annot., 70 A.L.R.2d 1430, 1449-52 (1960). However, under the Federal Fugitive Felon Act, 18 U.S.C. § 1073 (1976), which punishes flight across state lines "to avoid prosecution," id. § 1073(1), for a state crime, the defendant's guilt of the state crime must be proved, at least in cases where there was no state prosecution pending at the time of flight. Lupino v. United States, 268 F.2d 799, 802 (8th Cir. 1959) (no state prosecution pending); Mills v. Reing, 191 F.2d 297, 298 (3d Cir. 1951) (dictum) (unclear if state prosecution pending at time of flight). The Model Penal Code does not punish nonviolent "flight by a person charged with crime" as obstruction of justice, see \textit{Model Penal Code} § 242.1 (Proposed Official Draft 1962). The Model Penal Code Commentary takes the position that, "[i]f, as is very often the case, the arrested person is innocent or cannot be proved guilty of the offense for which he was arrested, it would be unjust and conducive to grave abuse to permit prosecution for an unsuccessful effort to evade the police." \textit{Model Penal Code} § 208.30, Comment 5 at 129 (Tent. Draft No. 8, 1958) (footnote omitted). As authority suggesting a contrary approach, this Commentary cites United States v. Klein, 247 F.2d 908 (2d Cir. 1957), where the court upheld convictions for obstructing the collection of income taxes notwithstanding that the defendants had been acquitted of the substantive tax evasion charges against them.

\item See note 31 supra.
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recognize innocence as a defense—thereby officially acknowledging the imperfections of the criminal justice system—public confidence would be undermined further.

Therefore, to discern how a body of criminal law might view the ethical situation of an innocent defendant who was tempted to engage in obstructionist behavior, we need to examine relevant legal doctrines that deal with conduct which does not have a significant impact on the functioning of legal institutions themselves, and which the law can for that reason assess more objectively in terms of making a balanced ethical judgment. One such doctrine is the Model Penal Code’s “choice of evils” justification for criminal conduct generally:

Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that:

(a) the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged; and

(b) neither the Code nor other law defining the offense provides exceptions or defenses dealing with the specific situation involved; and

(c) a legislative purpose to exclude the justification claimed does not otherwise plainly appear.33

Although under subsection (c) the innocence of a defendant charged with an obstruction of justice offense probably could not serve to invoke the Model Penal Code’s choice of evils justification,34 that doctrine is by no means confined to the commission of


34. Referring to prosecution for perjury following acquittal of the underlying charges, the Commentary to § 208.20 takes the position that “honest testimony under oath must be insisted upon even in the case of persons defending themselves against charges of crime.” MODEL PENAL CODE § 208.20, Comment 2 at 122 (Tent. Draft No. 6, 1975) (footnote omitted). That the Model Penal Code also specifically contemplates the conviction for escape of persons who are innocent of the underlying charges is demonstrated by the discussion accompanying § 242.6, which considers whether nonviolent escapes from arrest should be punished as felonies or misdemeanors: “It seems harsh to make a felon out of an innocent person who flees from arrest.” MODEL PENAL CODE § 242.6, Status of Section at 218 (Proposed Official Draft 1962). The general philosophy evident with respect to perjury and escape might also preclude the application of choice of evils defenses based on innocence to other kinds of obstruction of justice charges, such as “tampering with witnesses,” see id. § 241.6, or “tampering with physical evidence,” see id. § 241.7.
minor offenses to avoid overwhelming harms. Commentary to the Model Penal Code states:

We see no reason why the scope of the defense ought to be limited to cases where the evil sought to be avoided is death or bodily injury or any other specified harm; nor do we see a reason for excluding cases where the actor's conduct portends a particular evil, such as homicide.\(^3\)

The "evil" of being convicted and punished for a crime one did not commit could be more serious than the "evil" threatened in some of the natural disaster or duress situations contemplated by the choice of evils doctrine, and most forms of obstructionist behavior could be less harmful than homicide; thus, the limited utilitarian principle of ethical justification\(^3\) reflected in the choice of evils doctrine would appear to be fully applicable to the conduct of innocent defendants.

In terms of this utilitarian principle, some efforts to avoid unjust conviction and punishment would be relatively easy to assess ethically, while others would be much more difficult; no effort will be made here to identify all of the factors that might be relevant. However, there are several issues in connection with a utilitarian analysis that merit special attention.

First, it is important to recognize that what is at stake in being convicted of a criminal offense is not merely the punishment that might be imposed. The law of criminal procedure labors to avoid convicting innocent people in part because, as Professor Charles Fried explains:

[C]riminal condemnation does not involve only a deprivation of advantage but also the element of moral guilt and an accusation of breach of trust. A man whose house is pulled down to stop the spread of a fire or who is chosen to fight for his country suffers a deprivation which is justified if the risk is fairly apportioned. Moreover, his sacrifice is an act expressive of his relation

\(^{35}\) Model Penal Code § 3.02, Comment 3 at 7 (Tent. Draft No. 8, 1958).

\(^{36}\) In this article, the terms "utilitarian" and "disutilitarian" are used in the broad sense suggested by Jeremy Bentham's principle of utility, according to which "[i]t is the greatest happiness of the greatest number that is the measure of right and wrong." J. Bentham, A Fragment on Government, in 1 The Works Of Jeremy Bentham 227, 227 (J. Bowring ed. 1962) (emphasis deleted). In determining whether a particular course of action would add to or detract from the average or collective welfare of the community, the actor's interests should, of course, be considered, as well as the interests of all other persons who might be directly or indirectly affected by the action.
of trust and solidarity in justice with the rest of his community. But one condemned of crime is charged with a breach of trust by his fellows and the risk of being incorrectly charged seems different from the risk of being called on to make a sacrifice when it is one's turn to do so. The element of loss of respect makes the burden a peculiarly serious one.\textsuperscript{37}

When a factually innocent person is convicted and punished, society gains nothing to offset this "burden," either by protecting itself from or rehabilitating an offender. Any benefits it might obtain in deterring would-be lawbreakers in the community would be counterbalanced by the potential damage to public confidence from later exposure of the conviction of an innocent person.\textsuperscript{38}

Second, the claim that an action by an innocent defendant is justified in utilitarian terms cannot rationally be defeated simply by pointing out that, while the particular action is certain to cause some harm, whether it will actually have any positive impact in preventing an unjust conviction is purely speculative: The defendant might still be convicted, or, if the defendant is not convicted, that outcome might have occurred even if the defendant had been more forthcoming or truthful.\textsuperscript{39} The question is one of probabilities. As Professor Fried has emphasized in dealing with another problem: "[A] . . . probabilistic approach is just an approach to rational decision in the face of incomplete knowledge."\textsuperscript{40} But it is only the estimated increase in the likelihood of avoiding an unjust conviction—after considering the possibilities that obstructionist behavior might backfire\textsuperscript{41}—that can properly be

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\item \textsuperscript{37} C. Fried, An Anatomy of Values: Problems of Personal and Social Choice 127 (1970).
\item \textsuperscript{38} See Rawls, Two Concepts of Rules, 64 Philosophical Rev. 3, 9-13 (1955).
\item \textsuperscript{39} The common law defense of "necessity" can be invoked only when the evil sought to be avoided is imminent in the sense that the defendant had no lawful alternative means of avoiding it. See W. Lafave & A. Scott, supra note 33, § 50, at 387-88. However, in applying this imminence requirement, it might be important to distinguish between promising and apparently useless alternatives, see id. at 388 n.40, and between independent alternatives and alternatives that, if pursued unsuccessfully, would make the evil more difficult to avoid by any means, see id. at 388 n.41. As enacted in Hawaii, the choice of evils justification requires the showing of "an imminent harm or evil." Hawaii Penal Code, Act 9, § 302(1), 1972 Haw. Sess. Laws 52 (to be codified at Haw. Rev. Stat. § 703-302(1)).
\item \textsuperscript{40} C. Fried, supra note 37, at 214. Professor Fried argues against a bias for expending resources to save persons in present peril rather than to prevent future accidents and thereby save "statistical" lives.
\item \textsuperscript{41} See, e.g., M. Freedman, supra note 1, at 31-32, giving as an example the possibility that exposure at trial of a defendant's perjury could result in a harsher
\end{itemize}
weighed in the utilitarian scales. Recalling Judge Marvin Frankel's observation that "our techniques for trying criminal cases make it more difficult to achieve a full-scale conviction after trial in America than in just about any other country in the world," such an estimated increase will usually not weigh very heavily.

Third, a skeptical approach should be taken in estimating the harm that might be caused to the criminal justice system by any specific instance of obstructionist behavior serving as a "bad example" for defendants, guilty or innocent, who would not be ethically justified in engaging in similar behavior. For example, most acts of untruthfulness, without the complicity of other persons, which are followed by acquittals would probably never be revealed; and, if the innocent defendants were convicted, any indications that they had been untruthful in particular respects would pale into insignificance by the side of the seeming untruthfulness of their (true) protestations of innocence. Thus, there would be few situations in which untruthful behavior by innocent defendants could serve as distinct bad examples. Further, if it is true that perjury, for example, occurs in approximately seventy-five percent of all criminal trials, and the overwhelming majority of defendants are guilty of the underlying charge, the possibility of there being incremental bad example harms to the criminal justice system attributable to perjury by innocent defendants would seem rather insubstantial. This can be contrasted, perhaps, with the harms that might flow from the exposure of such relatively unusual acts of obstruction as the bribery or intimidation of participants in the adjudicative process.

Fourth, we might instinctively feel that acts that are unlawful, for example, perjury or concealing evidence, would be more difficult to justify in utilitarian terms than acts that would be legally permissible if done by an innocent defendant himself, for example, discrediting the testimony of a truthful witness. However, if unlawful acts are more difficult to justify, this would usually be so only be-

sentence if the defendant is convicted. For another example of "backfiring," see Freedman, supra note 3, at 1478.


43. For a general discussion of the significance of possible "bad example" consequences in utilitarian assessments of acts of civil disobedience, see Wasserstrom, The Obligation to Obey the Law, 10 U.C.L.A. L. Rev. 780, 790-92, 795 (1963).

cause of the possible detrimental consequences to the defendant (of being caught) or to others in personal relationships with him.45 From the law enforcement standpoint of convicting the guilty, those acts by a defendant which would probably have the greatest effect on the result of a trial would be the most dangerous, and therefore the most likely to be made unlawful. From the standpoint of an innocent defendant, however, such acts might be the easiest to justify ethically precisely because of their potential impact. On the other hand, conduct that might have little practical effect on a trial, such as impeaching a prosecution witness by bringing up an old criminal conviction for a heinous offense or an offense that would be distasteful in the community, for example, a sodomy conviction, might have exceedingly detrimental consequences in utilitarian terms.

At this point, however, it is important to consider several criticisms of the whole approach of judging the behavior of innocent defendants by applying a choice of evils analysis to each particular case. Even from a utilitarian perspective, it might be argued that opening the door to utilitarian ethical justifications for specific instances of obstructionist behavior could result in quite a disutilitarian breakdown of the trust that the criminal justice system manifests for defendants generally by not taking more repressive steps to prevent or counteract such behavior.46 However, within the criminal justice system, the overwhelming majority of defendants are guilty; therefore, it is difficult to believe that, except as a matter of constitutional compulsion, the system currently displays any more “restraint” than is tolerable in terms of defendants who would be willing to engage in obstructionist behavior without scrupulously assessing its utility.47

A related criticism might focus specifically on violations by innocent defendants of oaths to tell the truth. It can be argued that to admit a utilitarian justification for lying in particular cases would

45. The intimidation, though not the bribery, of participants in the adjudicative process would involve direct harm to those persons as well.

46. This argument would be analogous to Professor Rawls’s utilitarian “practice of promising” argument against recognizing a general utilitarian justification for breaking particular promises. See Rawls, supra note 38, at 14-17. On the other hand, Professor Fried stresses the nonutilitarian ethical significance of trust manifested by society in criminal defendants. C. FRIED, supra note 37, at 130-31.

47. Also, it is possible that some “restraints,” including constitutionally mandated restraints, on further steps by the system to deal with, for example, perjury or the concealment of evidence, might have the effect of “cooling out” defendants with regard to other, more extreme, kinds of obstructionism. See Selinger, supra note 1, at 41-43.
ultimately have the disutilitarian consequence of severely undermining our reliance on the truthfulness of testimony given under oath in criminal cases, and possibly in litigation generally.\textsuperscript{48}

Perhaps the best answer to this argument can be found in the experience of civil law legal systems. As Professor Freedman has emphasized, out of sympathy for the temptations that accused persons may feel to be untruthful, “criminal defendants in most European countries do not testify under oath, but simply ‘tell their stories.’”\textsuperscript{49} However, other witnesses in criminal and civil cases are placed under oath or otherwise subjected to sanctions for testifying falsely,\textsuperscript{50} and, therefore, it is significant that there are two concepts in the civil law tradition with regard to lying in legal proceedings that are quite similar to those involved in a choice of evils analysis.

The first concept is a “social view of perjury [which] presents that crime as an instance of falsum and is, therefore, predicated upon harm done or jeopardy created by the false statement,”\textsuperscript{51} as contrasted with “[t]he contemporary public administration concept of perjury [as protecting] the administration of justice, by enforcing the state’s claim to ‘truth.’”\textsuperscript{52} The second concept is “perjury in a state of necessity,”\textsuperscript{53} which is defined in the Italian Penal Code, for example, as lying “‘under compulsion of necessity of saving himself or a near relative from a grave and inevitable damage to freedom or honor.’”\textsuperscript{54} Lying by an innocent defendant whose silence would be construed as an admission of guilt\textsuperscript{55} would seem to be a clear instance of such a necessity.\textsuperscript{56}

If civil law legal systems can afford to recognize these two concepts as providing legal grounds for mitigating or even excusing lying,\textsuperscript{57} it seems rather unlikely that a common law system of liti-
gation would be seriously damaged by the admission of a choice of evils ethical justification for violating an oath.

Still another argument against a case-by-case utilitarian approach might consider unjustified all obstructionist behavior by innocent defendants that violated the law. The claim would be that in fairness an innocent defendant could not justify his own law-breaking unless he was also prepared to justify unlawful acts by others, and that most innocent defendants would not be willing to do so because unlawful acts by others would too often have disutilitarian consequences. In his classic article on civil disobedience, Professor Richard Wasserstrom counters this kind of argument by asserting that fairness requires only that a person engaging in an act of disobedience be willing to acknowledge that others would also be justified in breaking the law if their actions were sanctioned by the same ethical principle upon which the disobedient is relying. If Professor Wasserstrom is correct in his analysis, innocent defendants acting on the basis of accurate utilitarian assessments could in fairness violate the law because they would be quite prepared to permit other persons to do so on the basis of similarly accurate utilitarian assessments.

However, it seems to me that the fairness argument might require something more: An innocent defendant must be willing to accord to others a "decisionmaking privilege" comparable to the privilege he is asserting; that is, a privilege of breaking the law on the basis of their own utilitarian judgments, which, though made in good faith and after due reflection, may or may not be correct ones. If that is indeed what fairness requires, the question would then be whether most innocent defendants would be unwilling to generalize in that way, out of a concern that the judgments of others would too often be mistaken.

The question is plainly troublesome for those who would defend unlawful obstructionist behavior. But it is important to remember that our assumption has been that an innocent defendant would be relying only on the limited kind of utilitarian justification reflected in the choice of evils doctrine. This justification, when applied in good faith, would result in many fewer mistaken judg-

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58. Professor Wasserstrom states: "Even if one need not worry about what others will be led to do by one's disobedience, there is surely something amiss if one cannot consistently defend his right to do what one is claiming he is right in doing." Wasserstrom, supra note 43, at 792.

59. Id. at 792-94.
ments than would a general utilitarian justification, because it will operate only when the actor is seeking to "avoid a harm or evil," as distinguished from merely seeking to gain greater benefits for himself or others. It is certainly conceivable that innocent defendants would be willing to generalize applications of this limited justification.

Finally, it might be asserted that what is really wrong with a choice of evils test for obstructionist behavior by innocent defendants is that it does not consider ethical rights, which lose their significance when they are treated as mere interests to be weighed in utilitarian scales. Thus, it might be argued that factually innocent defendants have a right not to be convicted and punished, and that therefore they are entitled to use even disutilitarian means to avoid such an injustice. Furthermore, it might be argued that other blameless persons, such as truthful witnesses, have the right not to be directly and seriously injured by even utilitarian obstructionist behavior.

An attempt to analyze these arguments fully would unduly expand the scope of the present article. However, the basis for finding an entitlement in an innocent defendant to use disutilitarian means would probably be the claim that one's standing in the community as a law-abiding citizen is "so closely related to a conception of one's self" that one should not feel an obligation to "contribute" any appreciable risk of losing this attribute to a utilitarian or any other general scheme of social ethics. It is a difficult question whether a claim of this kind would be acknowledged by persons who were not aware of their own individual interests and so could as easily be the beneficiaries of utilitarian restraint as the victims of unjust criminal charges. Furthermore, it is not incon-

60. MODEL PENAL CODE § 3.02(1) (Proposed Official Draft 1962).
61. C. FRIED, supra note 37, at 205.
62. See id. (footnote omitted):
[T]he form of the argument must be that certain attributes—for instance one's bodily organs, one's talents, the effort one is willing to make, one's disposition and mood—are so closely related to a conception of one's self, that to make them available for trading-off in a scheme of morality would be, as it were, to gain the world and lose one's own soul. Less metaphorically, a rational person in an initial position would feel that to purchase benefits at the risk of having to make a contribution of these most intimate attributes is to purchase benefits at the risk of having to become another person and thus to commit a form of suicide.
63. See J. RAWLSS, A THEORY OF JUSTICE 118-92 (1971) (concept of persons in an "original position").
64. The Model Penal Code recognizes duress as a defense to a criminal charge.
ceivable that in such an impartial forum a line might be drawn, resembling a distinction made by Professor Fried in a different context: a distinction between behavior that was disutilitarian because it ignored "the general claims of the abstract collectivity" and behavior that harmed "a specific victim"—with the impact of the latter behavior on existing and potential interpersonal relationships viewed as extremely serious. Indeed, apprehensions regarding the impact on interpersonal relationships of obstructionist behavior that directly and seriously injures particular blameless persons would also seem to underlie an argument that such persons have a right not to be subjected to injurious acts even when justified by a choice of evils test.

In his "three hardest questions" article, Professor Freedman, with apparent reference to both admittedly guilty and innocent defendants, asserted: "Of course, before the client testifies perjuriously, the lawyer has a duty to attempt to dissuade him on grounds of both law and morality." However, in his book, Professor Freedman says in relation to the robbery example: "In my opinion, the attorney's obligation . . . would be to advise the client that the proposed testimony is unlawful . . . ." In no longer insisting that lawyers try to persuade innocent defendants that their perjury would be immoral, perhaps Professor Freedman now does intend to grant that in at least some circumstances an innocent defendant would be ethically justified in perjuring himself.

under some circumstances in which the choice of evils test would not be satisfied; however, the duress defense requires that the actor have been subjected to the threat of "force against his person," and the Commentary specifies that a threat to reputation is inadequate. MODEL PENAL CODE § 2.09 & Comment 2 at 7 (Tent. Draft No. 10, 1960). On the other hand, Professor Rawls has emphasized that

the parties in the original position would wish to avoid at almost any cost the social conditions that undermine self-respect. . . .

The conception of goodness as rationality allows us to characterize more fully the circumstances that support the first aspect of self-esteem, the sense of our own worth. These are essentially two: (1) having a rational plan of life, and in particular one that satisfies the Aristotelian Principle; and (2) finding our person and deeds appreciated and confirmed by others who are likewise esteemed and their association enjoyed.

J. RAWLS, supra note 63, at 440.

65. Fried, The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relationship, 85 YALE L.J. 1060, 1082 (1976). Professor Fried utilizes this distinction to set the boundaries of behavior by lawyers that can be justified by reference to lawyers' personal relationships with their clients.


67. Freedman, supra note 3, at 1478 (emphasis added).

68. M. FREEDMAN, supra note 1, at 31.
III. OBSTRUCTIONIST BEHAVIOR FROM THE LAWYER'S PERSPECTIVE

Perhaps one reason that Professor Freedman does not attach any significance to our knowledge of the innocence of the defendant in his robbery example is that he does not believe that a consideration of this sort could be of any relevance in deciding whether a defense lawyer is acting ethically in providing a particular kind of legal assistance. In other words, even though defendants who are innocent might be ethically justified, solely by virtue of their innocence, in engaging in some forms of obstructionist behavior under some circumstances, it might also be true that a lawyer would never be justified in assisting such behavior solely by virtue of his belief in a client's innocence, either because of ethical constraints imposed by his status as a lawyer, or because of the possibility that he might be mistaken about his client's innocence.

Returning to the law itself as a source of ethical guidance, there is a general proposition that a person is allowed to protect the interests of another by taking any actions that the other could properly take to protect his own interests. Thus, when you are entitled by principles of self-defense to use reasonable force against an assailant, I am justified under modern legal doctrines in using the same reasonable force to protect you, without fear of either criminal punishment or civil liability in damages. Even the older view which limited this privilege to situations in which there was a special relationship between the actor and the person defended, for example, parent-child or employer-employee, would seem broad enough to encompass the attorney-client relationship. Further, as we have already seen, the Model Penal Code's choice of evils justification for criminal conduct expressly allows a person to act to avoid "a harm or evil to himself or to another."

With regard to one kind of litigation behavior that could be characterized as obstructionist—obtaining out-of-court publicity for

69. Indeed, it is not certain that Professor Freedman is ever prepared to justify untruthful practices by lawyers on the basis of the outcomes to be achieved in the cases in which the practices would be used. It is even less certain that he would justify them on the basis of the facts of particular cases. See text accompanying note 104 infra.


71. See authorities cited note 70 supra.

72. MODEL PENAL CODE § 3.02(1) (Proposed Official Draft 1962) (emphasis added). The common law defense of "necessity" also comprehends the protection of other persons. See W. LAFAVE & A. SCOTT, supra note 33, § 50.
the cause of a criminal defendant or other litigant—the courts have had to deal with both cases involving statements by the parties themselves and cases involving statements by their lawyers. While there is still considerable uncertainty concerning the degree to which out-of-court statements must jeopardize an impartial trial before they can constitutionally be restrained or punished—that is, whether they must present "a clear and present danger," only "a reasonable likelihood" of interference, or something in between, such as "a serious and imminent threat"—most courts have not distinguished between statements by clients and statements by lawyers.  

In a recent article, Professor Freedman has objected to virtually any prior restraints on either criminal defendants or their lawyers, citing, inter alia, "the attorney's role as the defendant's champion against a 'hostile world.'"  

However, there do appear to be certain special reasons associated with a lawyer's professional status that counsel against permitting him to argue clients' cases in public forums or in the media; these reasons suggest considerations that would also counsel against lawyer involvement in other forms of obstructionist behavior—even on behalf of defendants who were factually innocent. One such reason is found in the dissenting opinion of Mr. Justice Frankfurter in In re Sawyer, where, writing for himself and three others, he stated:

[W]hen a lawyer goes before a public gathering and fiercely charges that the trial in which he is a participant is unfair, that


75. 360 U.S. 622, 647 (1959) (Frankfurter, J., dissenting).
the judge lacks integrity, the circumstances under which he speaks not only sharpen what he says but he imparts to his attack inflaming and warping significance. He says that the very court-room into which he walks to plead his case is a travesty, that the procedures and reviews established to protect his client from such conduct are a sham.76

As applied to situations such as those discussed by Professor Freedman, the suggestion would seem to be that a lawyer, unlike a defendant himself, could not publicly attempt to justify his involvement in obstructionist behavior on the grounds of preventing the factually innocent from being convicted without appreciably adding to the public’s lack of confidence in the criminal justice system.

Nor can the “bad example” consequences of lawyer involvement in obstructionist behavior be minimized as readily as can those kinds of consequences which might result from obstructionist behavior by defendants themselves. In representing defendants whom they did not believe were innocent, most lawyers would presumably be willing in the first instance to refrain from becoming involved in obstructionist behavior and to entrust their clients’ fates to the usually accurate factfinding processes of the criminal justice system.77 However, at least for lawyers in private practice, the pressures of competition for business can also present strong temptations to be able to “do more” for clients; in this context, revelations about the involvement of other lawyers in obstructionist behavior (even, believably, on behalf of the innocent) could have quite detrimental consequences.

This risk leads in turn to another danger, suggested by the Commentary to the ABA’s Standards Relating to Fair Trial and Free Press:

Just as the prosecutor may properly announce the charge against the accused, without stating his own opinion or going into detail as to the evidence, so the Committee believes the attorney for the defense should be entitled to speak for his client in denying those charges. Elaboration, however, seems unnecessary and undesirable at this stage and . . . may well lead to a response from the prosecution that will itself violate the prohibitions and threaten the fairness of the subsequent proceedings.78

76. Id. at 669 (Frankfurter, J., dissenting).
77. Professor Alschuler observes that some defense lawyers assert “an almost mystic faith in the fairness and accuracy of the trial process.” Alschuler, supra note 26, at 1282.
78. ABA, STANDARDS RELATING TO FAIR TRIAL AND FREE PRESS § 1.1, Commentary at 92 (Approved Draft 1968).
Because prosecutors and defense counsel are professional peers engaged in repeated adversarial contests, instances of lawyer involvement in obstructionist behavior would seem much more likely to lead to retaliatory obstructionism by prosecutors in future cases than would the acts of "one-shot" or occasional defendants.

Finally, in In re Sawyer, Justice Frankfurter also stressed that "[a]n attorney actively engaged in the conduct of a trial is not merely another citizen. He is an intimate and trusted and essential part of the machinery of justice, an 'officer of the court' in the most compelling sense." In terms of obstructionist behavior generally, this suggests two claims: (1) that a lawyer who takes an oath to uphold the law must be obligated to respect rules designed to facilitate the adjudication of disputes; and (2) that, more broadly, a lawyer who voluntarily chooses to become a participant in the criminal justice system assumes obligations to (a) conduct himself in accordance with the factfinding processes of that system—processes which assume that the presentation of truthful evidence, and only truthful evidence, will lead to accurate fact determinations, and (b) accept the judgments reached in accordance with those processes.

As regards the first claim, it is important to recognize that the lawyer who participates in only such "victimless" forms of unlawful obstructionist behavior as perjury or concealing evidence, and only on behalf of factually innocent defendants, manifests no unfaithfulness to the substantive law in the sense of laws governing relationships between citizens. He is disregarding neither their aims in terms of controlling his own primary conduct nor their remedial aspects, which are intended to apply solely to actual happenings in the world, not to nonhappenings, however "real" they may appear later in a courtroom on the basis of even truthful evidence. But in other situations, the lawyer's oath, even if viewed as imposing only a minimum obligation to respect the substantive law, could still function as a presumptive limitation both on the kinds of obstructionist practices in which lawyers can engage and on the circumstances in which they can engage in them.

The second claim is analogous to the claim considered in detail by Professor Wasserstrom: that a citizen's participation in a gov-

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80. Id. at 668 (Frankfurter, J., dissenting).
81. See Wasserstrom, supra note 43, at 801.
82. E.g., involvement by lawyers in the intimidation of participants in the adjudicative process.
83. E.g., the obligation to refrain from assisting in the presentation of perjured testimony by a defendant who had admitted his guilt to the lawyer.
ernmental scheme of majority decisionmaking would be meaningless and hypocritical if he would be justified in engaging in conduct proscribed by majority action whenever it was utilitarian to do so.\textsuperscript{84} As I understand his position, Professor Wasserstrom rebutts this claim by arguing that even if such a justification were accepted, the citizen would still have meaningful obligations to refrain from proscribed conduct by virtue of his participation, beyond any moral obligations to refrain in the absence of proscriptive laws, whenever the proscribed acts were neutral or unclear in utilitarian terms.\textsuperscript{85}

Practically applied to a lawyer's involvement in obstructionist behavior, Professor Wasserstrom's analysis suggests the following: Even if no detrimental consequences would follow from obstructionism by a lawyer that would not also follow from obstructionism by innocent defendants themselves, the lawyer's voluntary participation in the criminal justice system, if it is not to amount to hypocrisy, obligates him to follow the rules of the system whenever the choice of evils is a relatively close one, although innocent defendants themselves would not be so obligated.

A lawyer, of course, would rarely have personal knowledge of a defendant's innocence.\textsuperscript{86} Therefore, it is also necessary to consider whether the possibility of being mistaken about his belief in a client's innocence would always preclude a lawyer ethically from becoming involved in obstructionist behavior based upon such a belief.

Returning to the law with respect to protecting other persons from assailants, the modern trend is that an actor will not be liable civilly or criminally for a mistake about another person's right to defend himself unless the mistake was an unreasonable one.\textsuperscript{87} The Model Penal Code, in its choice of evils and defense of others justifications, goes still further. It allows honest mistakes to serve as defenses to any number of criminal charges which require that the defendant have acted "purposely" or "knowingly."\textsuperscript{88} The Commentary on the choice of evils doctrine states: "When the

\textsuperscript{84} Wasserstrom, \textit{supra} note 43, at 799-801.

\textsuperscript{85} \textit{Id.} at 800-01. For the sharply contrasting views of Professor Rawls and Professor Wasserstrom on whether the admission of a general utilitarian justification for breaking promises would make promising a meaningless act, see \textit{id.} at 800 n.20.

\textsuperscript{86} If a lawyer has firsthand knowledge that would qualify him as a witness on a defendant's behalf, he is prohibited from representing the defendant. ABA CODE, \textit{supra} note 6, DR 5-101(B) (1976).

\textsuperscript{87} See W. LAFAYE & A. SCOTT, \textit{supra} note 33, § 54, at 398-99; W. PROSSER, \textit{supra} note 70, § 20, at 113.

\textsuperscript{88} \textbf{MODEL PENAL CODE} § 3.02, Comment 1(c) at 6 (Tent. Draft No. 8, 1958); \textit{id.} § 3.05, Comment 1 at 32; \textit{id.} § 3.09, Comment 2 at 78-79.
actor has made a proper choice of values, his belief in the necessity of his conduct to serve the higher value exculpates—unless the crime involved can be committed recklessly or negligently.”

However, the notion of a defense lawyer becoming involved in obstructionist behavior on the basis of a well-founded belief in the innocence of a defendant is troublesome on several counts. First, it is hard to imagine many cases being maintained against persons who could give their lawyers strong evidence of their innocence. The ABA Code of Professional Responsibility states that prosecutors have a professional obligation “to seek justice, not merely to convict,” and imposes a “probable cause” requirement for instituting criminal charges. Further, as Professor Freedman has pointed out: “[C]onscientious prosecutors do not put the destructive engine of the criminal process into motion unless they are satisfied beyond a reasonable doubt that the accused is guilty.”

Another difficulty in working with a reasonable belief standard is suggested by the two-step approach to choice of evils determinations advanced in the Model Penal Code Commentary. Used in

89. Id. § 3.02, Comment 1(c) at 6. Actors in certain close relationships with the persons they are seeking to protect may in some circumstances be absolved of any criminal responsibility for their negligence or recklessness. MODEL PENAL CODE § 3.08 (Proposed Official Draft 1962). The drafters of the Model Penal Code were, of course, concerned with aligning punishments with degrees of fault and with determining whether the imposition of any punishments could serve a deterrent function in particular circumstances. See MODEL PENAL CODE § 3.09, Comment 2 (Tent. Draft No. 8, 1958). It seems clear that a reasonable-belief-in-innocence standard could deter at least some obstructionist practices by lawyers on behalf of guilty defendants.

90. ABA CODE, supra note 6, EC 7-13 (1976) (footnote omitted).

91. Id. DR 7-103(A).

92. M. FREEDMAN, supra note 1, at 85. Cf. ABA, STANDARDS RELATING TO THE PROSECUTION FUNCTION § 3.9(b)(i) (Approved Draft 1971) (reasonable doubt factor prosecutor may consider in exercising discretion not to prosecute). For a fascinating account of the policy adopted by Chief Justice Warren when he served as a county prosecutor, concerning treatment of defendants whom the public defender told him he believed were innocent, see Alschuler, supra note 26, at 1219-20. From his interviews, Professor Alschuler reports that most prosecutors say that “a prosecutor should not proceed unless he is satisfied of the defendant’s guilt.” Alschuler, The Prosecutor’s Role in Plea Bargaining, 36 U. CHI. L. REV. 50, 64 n.42 (1968). However, “some prosecutors qualify this conclusion . . . by [recognizing] a responsibility to be sure they have charged the right man.” Id. On the question of whether a prosecutor should feel obligated to withhold charges on the basis of his own doubts about a person’s guilt, compare Uviller, The Virtuous Prosecutor in Quest of an Ethical Standard: Guidance from the ABA, 71 MICH. L. REV. 1145, 1155-59 (1973) with M. FREEDMAN, supra note 1, at 84-88.

93. See text accompanying note 89 supra.
conjunction with a reasonable belief standard, this two-step approach would seem to require that a lawyer determine initially whether his involvement in obstructionist behavior would be justified in choice of evils terms on the assumption that the defendant is innocent. This approach would then require him to make an independent determination of the likelihood that the defendant is innocent.

This two-step approach, however, does not make sense analytically when the only basis for obstructionist behavior would be the defendant’s factual innocence. In this context, the consequences of obstructionist behavior if the defendant were actually guilty would be clearly disutilitarian, and perhaps quite seriously so if the behavior succeeded in allowing the defendant to escape punishment. Therefore, unless it were obvious that obstructionism would be a much lesser evil if the defendant were innocent, lawyer involvement would be justified only on the basis of a very high probability that the defendant was innocent rather than guilty—and seemingly a higher probability than is suggested by a reasonable belief standard.

Here we must confront a paradox, insofar as we are talking about a lawyer relying on evidence of innocence that would be admissible at trial. While the presence of a considerable amount of such evidence would enhance the probability of a defendant’s innocence, and for that reason tend to justify lawyer involvement in obstructionist behavior, its potential availability at trial would also serve to minimize any increase in the likelihood of avoiding an unjust conviction which would be attributable to obstructionism. Consequently, it would be more difficult for even the defendant himself to justify such behavior.

Far more complex and perhaps insoluble problems arise with regard to justifying lawyer involvement in obstructionist behavior if factually innocent defendants are viewed as being entitled to engage even in disutilitarian conduct that does not injure particular blameless persons. For example, could a lawyer ethically help a defendant, whom he reasonably believed was innocent and who had a strong case, by bribing a juror to “be absolutely sure” of avoiding a conviction? As a morally responsible person himself, the lawyer surely would be justified in refraining on utilitarian grounds from providing such assistance. But would he also be warranted ethically in reaching a contrary conclusion on the grounds of vindicating his client’s right, if the client is innocent, not to be un-
justly convicted? My own feeling is that having relieved an innocent defendant himself of the Hobson's choice of acting unethically or risking his standing as a law-abiding citizen, impartial ethical decisionmakers would not go further to sanction acts of assistance by others, such as lawyers, which would have additional disutilitarian consequences; this would be so even on behalf of a defendant whose innocence was unmistakable, and particularly in a situation in which there was any appreciable doubt about the defendant's innocence.

But, in any event, at least from the choice of evils perspective, there seem to be a number of valid reasons why a lawyer who believes that a client is innocent might not be ethically justified in becoming involved with even those forms of obstructionist behavior that an innocent defendant in the client's position could justifiably undertake on his own. Therefore, a lawyer probably would only very rarely be justified solely by virtue of his belief in a client's innocence in engaging in any of the untruthful practices discussed by Professor Freedman. But, "only very rarely" is not the same as "never."

IV. UNTRUTHFUL PRACTICES FROM THE RULEMAKER'S PERSPECTIVE

Let us focus now on the untruthful defense practices discussed by Professor Freedman. And let us assume that in ethical terms the particular examples he used were critical: that presenting a defendant's perjured testimony or discrediting the testimony of truthful prosecution witnesses could be justified only on the basis of an attorney's belief in his client's factual innocence; and, that even concealing incriminating evidence or possibly inducing perjury could occasionally be justified on that basis. How then should the rules of professional responsibility deal with these practices?

At the outset, it must be emphasized that determining whether a rule of professional responsibility is ethically sound involves much more than simply asking whether the text of the rule accurately distinguishes between proper conduct by lawyers and unjustified forms of behavior. In assessing the consequences of

94. Professor Fried has emphasized the ethical value of a lawyer making "his client's interests his own insofar as this is necessary to preserve and foster the client's autonomy within the law." Fried, supra note 65, at 1073. But bribing a juror would, of course, not be within the law.
adopting a particular rule, we also need to know (1) whether the rule would give fair notice to lawyers regarding the behavior that is prohibited; (2) whether the rule could be administered in an evenhanded way; (3) what the actual impact of the rule would be in terms of encouraging or discouraging various actions by lawyers; and (4) what effects the rule would have on lawyer-client relationships and on public attitudes toward the legal profession and the legal system itself.

Imagine, for example, a "rule" of professional responsibility dealing with a particular untruthful practice that took into account all of the ethical considerations identified in parts II and III of this article—or even a rule resembling the Model Penal Code's choice of evils doctrine, applied "second hand" to lawyers rather than (as usually) "first hand" to primary actors or to defendants who engage in obstructionist behavior. In theory, a rule of this sort would very accurately distinguish between circumstances in which the untruthful practice was justified and those in which it was not. In practice, however, its application would involve such extremely complex analyses of so many possibly relevant factors that it could not be administered predictably or evenhandedly. Therefore, we need to look for rules to govern untruthful practices that are more clear-cut, even at some cost in terms of ethical accuracy.

One answer might be to adopt rules that would allow untruthful practices whenever a lawyer believes that his client is innocent. Rules of this kind could, of course, be qualified both subjectively (e.g., "firmly believes," "is convinced") and objectively (e.g., "reasonably believes"); but, as we have already seen, they would still be disturbingly overinclusive in the sense of sanctioning untruthful practices in a great many situations in which they would be ethically unjustified. Moreover, by acknowledging that untruthful practices might be necessary to keep innocent persons from being unjustly convicted, such rules would also tend to undermine public confidence in the criminal justice system.

Furthermore, introducing the idea that a lawyer's professional responsibilities could vary depending upon the lawyer's personal beliefs about a client's guilt or innocence would obviously mark a dramatic departure from the time-honored principle expressed in Baron Bramwell's dictum that "[a] client is entitled to say to his

95. "Primary actors" in this context are those who do things outside the context of adjudication and then claim a choice of evils justification for those things, such as breaking and entering a store to get equipment to fight a natural disaster.
counsel, I want your advocacy, not your judgment."\(^{96}\) Of course, the rest of Baron Bramwell's client's statement, "I prefer that of the Court,"\(^{97}\) renders it inapplicable, strictly speaking, to untruthful practices. Nevertheless, the general understanding that no defendant who protests his innocence ever has to persuade his own lawyer as a condition to receiving assistance probably provides a good deal of security in our society as a whole;\(^{98}\) and, it is an understanding that might not survive many conspicuous exceptions in the rules governing the profession.

The way in which the rules have traditionally sought to maintain the public understanding to which I have just referred has been to require lawyers to do for all defendants whose cases they accept whatever they would be ethically justified to do for defendants they believed were innocent. This approach was articulated in Canon 5 of the ABA's now superseded Canons of Professional Ethics:

> It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound, by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.\(^{99}\)

I have suggested elsewhere that it might not be necessary or desirable to require lawyers to do everything for admittedly guilty defendants that they are required to do for other defendants.\(^{100}\) But whether or not that conclusion is correct, the extension of a "what's-good-for-defendants-you-believe-are-innocent-must-be-available-to-all-defendants" approach to untruthful defense practices would, I think, be wholly unwarranted in utilitarian terms. As we have seen, even the basic presupposition of that approach—that legal representation and other not untruthful defense practices would always, or at least usually, be ethically justified when engaged in

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97. Id.
98. Presumably, this understanding also avoids a stampede of defendants to the doors of attorneys who might gain a reputation for being rather easy to persuade.
99. ABA CANONS OF PROFESSIONAL ETHICS No. 5. The Canons of Professional Ethics were adopted in 1908 and were amended and supplemented from time to time. They were superseded by the ABA Code of Professional Responsibility in 1970. See Preface to ABA CODE, supra note 6.
100. See Selinger, supra note 1.
by a lawyer on behalf of a defendant who was in fact innocent—
does not hold for practices that are untruthful.

Thus, assuming that untruthful practices could be justified
only by an attorney’s belief in his client’s innocence, if lawyers’
beliefs are not to be determinative of their professional respon-
sibilities, we are left with the alternative of adopting rules that
would prohibit untruthful practices on behalf of any defendants.
This approach would, of course, raise the disturbing prospect of
lawyers occasionally being disciplined—though one would hope not
severely—for engaging in untruthful practices that were ethically
justified. However, it is an approach that would not appear to be
irrational with respect to behavior that would only very rarely be
justified, and then only on the basis of the subtest kinds of judg-
m ents.

Indeed, from an ethical standpoint, the risk that a lawyer
might be disciplined professionally for engaging in untruthful prac-
tices would tend to assure that such practices would not be entered
into except on the basis of the lawyer’s deepest convictions about a
defendant’s innocence, and his soberest judgments about other
ethically relevant factors. But the fact that untruthful practices
would have to be undertaken in the face of a risk of discipline
could also make them somewhat easier for lawyers to justify ethi-
cally: “bad example” harms would be minimized; and, a lawyer
who contemplated going ahead notwithstanding the risk would
have less hesitation in acknowledging that other lawyers were
equally entitled to make their own decisions about engaging in un-
truthful practices.101

Is the possibility of a lawyer justifiably disobeying rules of pro-
fessional responsibility foreclosed by the oaths to uphold profes-
sional standards that all attorneys are required to take upon enter-
ing the bar? My personal view is that disobedience is not foreclosed
—not only because, as Professor Wasserstrom bluntly puts it, “it is
sometimes right even to break one’s own promises”102—but also
because it seems to me that taking an oath that is imposed as a con-
dition to availing oneself of a wide range of occupational choices
in a society amounts to taking an oath under what could be charac-
terized as coercion.

The subject of lawyers engaging in civil disobedience with re-

also note 105 infra.

spect to rules of professional responsibility is certainly not one that has received much attention in the literature of "legal ethics."

In his discussion of lawyers inducing perjury, Professor Freedman probably comes closer than any other commentator to recognizing the possibility of justified disobedience, and even then he is ambivalent:

Frequently, the lawyer who helps the client to save a losing case by contributing a crucial fact is acting from a personal sense of justice: the criminal defense lawyer who knows that prison is a horror and who believes that no human being should be subjected to such inhumanity; the negligence lawyer who resents the arbitrary rules that prevent a seriously injured and impoverished individual from recovering from an insurance company; the prosecutor who does not want to see a vicious criminal once again turned loose upon innocent citizens because of a technical defense; or the tax attorney who resents an arbitrary and unfair system that leaves Peter with his wealth while mulcting Paul. I have sometimes referred to that attitude (with some ambivalence) as the Robin Hood principle. We are our clients' "champions against a hostile world", and the desire to see justice done, despite some inconvenient fact, may be an overwhelming one. But Robin Hood, as romantic a figure as he may have been, was an outlaw. Those lawyers who choose that role, even in the occasional case under the compulsion of a strong sense of the justness of the client's cause, must do so on their own moral responsibility and at their own risk, and without the sanction of generalized standards of professional responsibility.

Given the nature of Professor Freedman's examples, his ambivalence is understandable, and I would share it. Unlike innocent defendants obstructing justice on their own behalf, the lawyers in some of Professor Freedman's examples are not clearly relying on a limited choice of evils principle; and, unlike lawyers engaging in untruthful practices on behalf of defendants they believe are innocent, none of Professor Freedman's "Robin Hoods" is remaining faithful to the substantive law. To justify their conduct, we might have to be satisfied that their oaths either were not binding or were overcome by other ethical considerations; that they were not

103. For an illuminating recent discussion of professional ethics in relation to stages of personal moral development that is suggestive of the possibility of justified disobedience, see Flynn, Professional Ethics and the Lawyer's Duty to Self, 1976 WASH. U.L.Q. 429.

104. M. FREEDMAN, supra note 1, at 75-76.
being hypocritical with regard to their participation as professionals in the processes of the law; and, also, that in fairness they would be prepared to see other lawyers decide to violate professional prohibitions free of either choice of evils or faithfulness-to-the-law constraints. We might not be satisfied on this last score unless the Robin Hoods were willing and able to impose on themselves some significant alternative constraint, and it is rather difficult to see what the constraint might be.\textsuperscript{105}

V. CONCLUSION

As Professor Freedman seems to realize, and as I believe I have demonstrated, his position that lawyers should be required to engage in certain untruthful practices on behalf of defendants generally does not receive any appreciable support from the fact that such practices could occasionally be used to help innocent defendants. His conclusions must stand or fall in terms of his confidentiality argument.\textsuperscript{106}

More broadly, however, I have tried to show that questions about the ethics of particular kinds of conduct in litigation cannot

\textsuperscript{105} With reference to civil disobedience in the form of unlawful political demonstrations, Professor Fried has suggested that the demonstrators' willingness "to pay the penalty prescribed for that course of conduct" Fried, supra note 101, at 1269, would serve as such an alternative constraint—as well as a limitation on "bad example" harms. Id. However, in most instances, Professor Freedman's Robin Hoods could not voluntarily submit to professional discipline without jeopardizing the outcomes they had sought to achieve. For example, under the Federal Rules of Civil Procedure, a party may be relieved of a judgment for "fraud . . . misrepresentation, or other misconduct of an adverse party." FED. R. CIV. P. 60(b). Thus, when the lawyer submitted himself to discipline and revealed the facts, the other party to the dispute could seek to have the original outcome overturned. A major exception, of course, would be criminal cases in which the defendant had been acquitted; these cases cannot constitutionally be reopened. But if the defense lawyer admitted that he had induced the defendant to lie (and if the defendant's lie amounted to anything more than saying he didn't commit the crime), the defendant might well be prosecuted for perjury, an offense which could carry as severe a penalty as the substantive offense originally charged. Moreover, voluntary withdrawal from law practice, at least for a time, would seem to be too subtle a step to serve as a well-understood constraint. This is because a withdrawal that is not accompanied by any statement of the reason might not be understood by other lawyers as self-discipline at all; and, a withdrawal accompanied by an extremely vague statement, to avoid jeopardizing the outcome achieved, would not be perceived clearly by other lawyers as a constraint on any particular kind or degree of disobedience.

\textsuperscript{106} "Whether confidentiality is essential to, or regularly achieves, client divulgence of dark secrets may be doubted, but in the absence of more concrete evidence courts are left to uninformed speculation regarding the utility of the protection and the magnitude of the costs that it imposes." Wolfram, supra note 6, at 838.
be answered in the abstract, or by easy deductions. We need to know who is confronted with an ethical choice, what ethical obligations he has already assumed, what knowledge he has, and what consequences are likely to follow from the various alternatives open to him, before we can even begin to suggest reasonable answers. Parties themselves may be justified in engaging in behavior that lawyers should ethically shun; and, lawyers may be entitled to pursue practices that should be flatly prohibited by persons who draft rules of professional responsibility.