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## Disappearing Dilemmas: Judicial Construction of Ethical Choice as Strategic Behavior in the Criminal Defense Context

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# **Disappearing Dilemmas: Judicial Construction of Ethical Choice as Strategic Behavior in the Criminal Defense Context**

Manuel Berrélez, Jamal Greene, and Bryan Leach<sup>†</sup>

## **I. INTRODUCTION**

Imagine the following scenario: A criminal defense attorney represents a man accused of kidnapping and murdering two children in a residential neighborhood. During the course of interviewing key witnesses, the defense attorney becomes convinced that her client was present at the scene of the murder. While her client denies having been present, his alibi changes entirely from one interview to the next. The two main witnesses that the client offers to corroborate his most recent alibi recant, suggesting to the defense attorney that both they and the defendant were actually present at the scene of the crime. Third parties confirm that these two witnesses were indeed together in the vicinity of the crime along with an unidentified male with the same height and build as the defendant. The defendant declines to take the stand at his trial, but he asks his lawyer to make his alibi the centerpiece of his defense and to emphasize the argument during her opening and closing remarks. Sensing that his counsel may harbor misgivings, the defendant adds: "Look, we both know this alibi is the best shot I've got."

How should the defense attorney proceed with respect to this alibi claim? Supposing she declined to present this claim and her client ultimately lost at trial, how should a reviewing court assess her performance? Would her decision not to present the alibi claim constitute ineffective assistance of counsel under current Sixth Amendment jurisprudence? If not, would this be because she actually employed the best tactics possible for freeing her client or rather because she appropriately fulfilled her duty of candor toward the tribunal? Does it matter which way courts tend to construe this choice?

This Note contends that judicial choices in this regard matter a great deal. The prevailing judicial treatment of scenarios such as the one described above

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is to represent the lawyer's decision as a strategic rather than as an ethical choice. In our view, the prevailing treatment too lightly considers the profound ethical dilemmas inherent in criminal defense work. This judicial tendency yields many unfortunate byproducts. Among them, criminal defense attorneys cannot afford to be open about the ethical considerations that go into selecting particular defenses, and judges cannot afford to provide practical guidance regarding when ethical reservations may justify deviating from the traditional zealous advocacy model.

This Note calls for greater intellectual honesty in the treatment of these difficult issues. By openly recognizing the importance of ethical decisionmaking in the criminal defense context, judges and practitioners can help to distinguish in the public mind between those strategic choices that genuinely represent bad lawyering and those choices that actually reflect laudable attempts to inject an ethical dimension into the criminal defense process. To be clear from the outset, we are not proposing that criminal defense lawyers pay closer attention to their ethical instincts at the expense of their client's strategic interests. Rather, we believe that to whatever extent ethical decisionmaking is already occurring, it goes largely unrecognized by a judiciary that insists upon construing all representation decisions as somehow motivated by the strategic best interests of the client.

Our thesis requires that one accept as axiomatic that a criminal defense attorney's doubts concerning the accuracy of her client's proposed assertions may give rise to strong ethical misgivings. Depending on the severity of those misgivings, she may consider several options, such as counseling her client to alter his position, truncating her investigative duties, altering her trial strategy, or privately voicing her concerns to the judge. When such situations arise, two competing sets of values are called into question. On one hand, lawyers owe a duty of loyalty to their clients that requires them to set aside personal mores where doing so is necessary to further clients' best interests. In this respect, lawyers operate as zealous advocates within an adversary system that arguably depends upon two such advocates clashing before an audience of impartial fact finders. On the other hand, lawyers possess a duty of candor to the tribunal and an obligation as officers of the court to promote just outcomes, or at least not to frustrate them knowingly. The tension between these broad commandments recurs throughout the ethics discourse concerning the criminal defense function.

When addressing the challenges facing criminal defense lawyers, the drafters of professional ethical guidelines and authors of ethics advisory opinions have explicitly acknowledged the tension between these values. For instance, the Connecticut Rules of Professional Conduct observe that "conflict[s] may arise between the lawyer's duty to keep the client's revelations

confidential and the duty of candor to the court.”<sup>1</sup> In tackling such thorny issues, ethical guidelines have not always spoken with a consistent voice.<sup>2</sup> Nonetheless, the broad trend within the legal ethics community has been toward affording lawyers greater discretion to make ethically-motivated decisions rather than forcing them to proceed with potentially misleading defenses. This is reflected in the ABA’s recent Advisory Opinions as well as in its revised Model Rules of Professional Conduct, both of which suggest that where an attorney reasonably believes evidence to be false or misleading, her impulse toward candor may guide her decisions.<sup>3</sup>

Whereas ethics authorities provide affirmative guidelines for professional conduct, courts weigh in on the related question of when a lawyer’s decision to distance herself from her client’s defense violates the defendant’s Sixth Amendment right to effective assistance of counsel. By determining the proper scope of this constitutional protection, courts heavily influence the extent to which lawyers engage in the kind of ethically-motivated decisionmaking that would come at the expense of the client’s best interests. Where cases of “known perjury” are concerned, courts now follow the Supreme Court’s guidance in *Nix v. Whiteside*, which insulates lawyers from federal ineffective assistance challenges when they refuse on ethical grounds to suborn a witness’s perjury.<sup>4</sup> When the facts are changed somewhat, however, and the criminal defense attorney harbors a level of suspicion short of actual knowledge, or a client seeks to advance a misleading theory of defense without taking the stand, courts follow no such bright-line rule, instead producing a wide range of fact-specific holdings.<sup>5</sup>

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1. CONN. RULES OF PROF’L CONDUCT R. 3.3 cmt. (1986), *reprinted in* SEC. OF STATE OF THE STATE OF CONN., OFFICIAL 2004 CONNECTICUT PRACTICE BOOK 24 (2004), *available at* <http://www.jud.state.ct.us/Publications/PracticeBook/pb2004part1.pdf> (last visited Nov. 14, 2004).

2. For instance, in the commentary to Professional Rule 3.3 governing candor to the tribunal, the Connecticut Rules of Professional Conduct asserts that “[t]he advocate’s task is to present the client’s case with persuasive force. . . . [A]n advocate does not vouch for the evidence submitted in a cause; the tribunal is responsible for assessing its probative value.” Yet in the same paragraph, the guidelines include the caveat that “performance of that duty while maintaining confidences of the client is qualified by the advocate’s duty of candor to the tribunal.” *Id.* These statements point in different directions, and the paragraph avoids answering the critical question of when a lawyer’s duty of candor obligates her to act based on her own assessment of the evidence.

3. Following the Ethics 2000 amendments, the commentary to Model Rule 3.3 governing candor to the tribunal now reads: “Although [the rule] only prohibits a lawyer from offering evidence the lawyer knows to be false, it permits the lawyer to refuse to offer testimony or other proof that the lawyer reasonably believes is false.” MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. (2003).

4. 475 U.S. 157, 171 (1986) (holding that an attorney’s refusal to help his client present perjured testimony concerning whether the victim had brandished a gun did not violate the Sixth Amendment guarantee of assistance of counsel).

5. *See infra* Part III. *Compare* United States v. Midgett, 342 F.3d 321, 326-27 (4th Cir. 2003) (finding ineffective assistance of counsel where lawyer exercised moral choice to the detriment of his client’s best interests), *with* Jordan v. Warden, No. 1:CV-97-0465, 1998 U.S. Dist. LEXIS 13475, at \*17-29 (M.D. Pa. Aug. 31, 1998) (finding no Sixth Amendment violation on the grounds that counsel’s failure to investigate, interview potential witnesses, and apply evidentiary rules could qualify as a potential trial strategy).

The desirability of allowing lawyers to make private ethical determinations concerning the nature of their legal representation depends in part on the level of certainty that a lawyer possesses. For this reason, we may balk at the prospect of a lawyer refusing to present an argument on the basis of a mere hunch that a defendant's claims are untenable, yet encourage that lawyer to sustain her moral objections when she reasonably believes on the basis of concrete and credible information that her client is attempting to mislead the fact finder.

Unfortunately, however, many courts have sidestepped the difficult challenge of reconciling the lawyer's obligations of candor to the tribunal with her duties to her clients. Instead of deciding under what circumstances (or subject to what proof) ethical considerations warrant a departure from the traditional adversarial model of representation, courts have taken another, easier route—suggesting that a lawyer's choice potentially based on ethics was in fact a strategic decision taken with the client's best interests in mind. For the purposes of this Note, we describe this judicial tactic as "alignment theory" because it defines away an important ethical dilemma by characterizing the client's best interests as conveniently aligned with a lawyer's choices. This approach, whether followed intentionally or simply through judges' blind devotion to the language of strategic choice, obscures the fact that criminal defense attorneys often confront situations in which their own ethical mores point them in directions at odds with the clients' goal of receiving the lightest possible punishment.

This reliance on alignment theory has produced several distorting effects, the most interesting of which is that judges have preserved the necessary space for ethical decisionmaking without having to acknowledge that they are in any way deviating from the zealous advocacy model. Of course, this effect comes at a cost: the judicial reluctance to account openly for this consideration necessitates a series of intellectual exercises that strain the concept of strategic choice to a breaking point. Moreover, for those who believe that the legal profession should expand its conception of effective assistance to incorporate a greater role for moral activism, the continued construction of ethical choice as strategic behavior represents an unwelcome entrenchment of status quo norms. At the very least it is ironic that in an attempt to relax the strictures of the adversary system, courts have chosen to justify their decisions in the very terms that assume that system's propriety and inevitability.

A second implication of the alignment theory has been courts' failure to comment directly on the preferred balance between two sets of fundamental values in the criminal justice system. By avoiding this issue altogether, courts have offered little practical guidance to criminal defense attorneys who must decide how to act when they doubt their clients' claims. Faced with deciding how to represent their clients, lawyers will naturally consider how tightly courts

have defined the boundaries of their moral autonomy under the Sixth Amendment. Given current judicial tendencies, lawyers have strong incentives to defend their earlier techniques of representation by highlighting the strategic merits of their decisions, however implausible these may seem. Such incentives are further reinforced by the fact that those lawyers who have candidly revealed the naked ethical motivations behind their actions are more often sanctioned by courts. The product of these incentives is an inconsistent system characterized by nods and winks, where criminal defense attorneys may adjust their level of representation on the basis of personal moral judgments as long as those decisions are later framed as strategic choices taken in the client's best interests.

After criticizing courts' alignment theories as often unpersuasive, this Note advances two proposals. First, we advocate a more open judicial discourse about the desirable balance between candor to the tribunal and zealous advocacy, particularly in situations in which lawyers fear becoming complicit players in the presentation of misleading defenses. Just as authors of professional responsibility guidelines and ethics advisory opinions have done, courts should articulate clearer standards for how lawyers ought to reconcile competing duties inherent in their roles as criminal defense advocates. Simply by recognizing that any Sixth Amendment inquiry into effectiveness of counsel should take into account not only the strategic merits of a decision but also the ethical constraints facing lawyers, courts would greatly promote the idea that the adversary system must be tempered by certain ethical considerations.

As a secondary matter, we suggest a standards-based approach that courts could use to balance the competing values of zealous advocacy and candor to the tribunal. Notwithstanding criticisms about the potential for lawyers to abuse their discretion as ethical decisionmakers, we argue for a system that affords lawyers the flexibility to alter their representation when their decision is based on a reasonable belief and concrete evidence that their client's defense is untrustworthy. By requiring that attorneys have a testable basis before withholding their unqualified support from a client and by entrusting courts to police this evidentiary standard, such rules would avoid the spectacle of lawyers supplanting the fact finder by imposing their own predeterminations of guilt or innocence.

Critics may worry that such an approach would transform the criminal defense attorney into yet another arm of the state, or allow the attorney to usurp the jury's function of separating truth from fiction. While such objections are understandable, they misconceive the nature of our proposal. The potential for lawyers to act on an ethical misgiving *already* exists within the status quo, and many cases suggest that lawyers are indeed altering their representation based on their discomfort with particular defenses. In other words, lawyers are *already* pre-screening the information received by juries, albeit under the mask

of strategic decisionmaking. Our purpose is not to encourage greater moral activism but to bring the complexity of status quo choices out into the open. Insofar as doing so would in itself preserve a role for ethical decisionmaking in the criminal defense bar, we believe that it will have the positive effects of preserving the core truth-seeking function of the criminal trial and reinforcing the criminal defense lawyer's perception that she is a member of a learned profession rather than a mere hired gun forced to make any argument, no matter how disingenuous.

The remainder of this Note is divided into five Parts. Part II explores how various authorities within the field of legal ethics have commented on the potential tensions between a lawyer's duty of loyalty to her client and her broader obligation to promote just outcomes. In particular, this Part examines how model rules of professional responsibility and national ethics panel opinions have evolved in their treatment of these dilemmas. Part III considers the interplay between a lawyer's ethical decisionmaking and existing case law addressing the Sixth Amendment standard for effective assistance of counsel. By analyzing a series of factual scenarios, this Part discusses more concretely how criminal defense lawyers must often reconcile the competing demands of loyalty to the client and candor to the tribunal. Part III demonstrates how judges have employed alignment strategies to avoid commenting on the proper balance between competing ethical values. Having outlined the basic contours of alignment theory, Part IV critiques the substance of these arguments, highlighting their implications for the broader project of expanding lawyers' moral discretion within the strictures of the adversary system. It then advances a specific proposal that lays the groundwork for greater moral activism while avoiding its excesses.

## II. ETHICAL RULES AND LAWYERS' ROLES

Professional rules of conduct have openly acknowledged that criminal defense attorneys face difficult ethical dilemmas in their everyday work. Indeed, these ethical guidelines often start from the basic premise that lawyers must balance the competing duties of loyalty toward the client and candor toward the tribunal.<sup>6</sup> Perhaps the strongest recognition of this tension can be

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6. For instance, the American Bar Association has long insisted that lawyers act as zealous advocates in pursuit of their clients' best interests. *See* ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION 126 (3d. ed. 1993) [hereinafter ABA STANDARDS] (noting, in commentary to Standard 4-1.2, that the adversary system requires counsel to be "guided constantly by the obligation to pursue the client's interests"); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-9 (1980) (observing that a "lawyer should always act in a manner consistent with the best interests of his client"). Yet the organized bar has also repeatedly emphasized the lawyer's role as an officer of the court. *See* MODEL RULES OF PROF'L CONDUCT pmbl. (2003); MODEL CODE OF PROF'L RESPONSIBILITY EC 7-1, 7-19 (1980); CANONS OF PROF'L ETHICS Canon 22, 32 (1908). *See also* ABA STANDARDS, *supra*, at 126 (describing, in Standard 4-1.2(b), the basic duty of defense counsel as "an officer of the court").

seen in those rules that govern confidential communications and those that address the lawyer's obligation not to offer evidence or testimony that she believes to be false or misleading.<sup>7</sup>

Over time, professional guidelines have gradually placed a higher premium on candor to the tribunal, relaxing the principle of zealous advocacy where it has appeared necessary. The following Part documents the emergence of this trend by analyzing how the most important national guidelines for lawyers' professional conduct have evolved over the course of the twentieth century. Specifically, we will consider the 1908 Canons of Professional Ethics, the 1969 Model Code of Professional Responsibility, the 1983 Model Rules of Professional Conduct, and various ABA ethics panel opinions. These sources, read together, paint a compelling picture of how conventional legal wisdom has shifted on the question of how best to balance the obligations of zealous advocacy and candor to the tribunal.

### A. *Canons of Professional Ethics (1908)*

In 1908, the ABA adopted its first formal code of attorney conduct—the Canons of Professional Ethics. Although commentators have criticized the Canons as vague and self-contradictory,<sup>8</sup> they represent an early exploration of the tension between the lawyer's duties to client and court. For example, Canon 15 asserted that “[t]he lawyer owes entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights, and the exertion of his utmost learning and ability.”<sup>9</sup> Somewhat cryptically, however, the same Canon provided that “the great trust of the lawyer is to be performed within and not without the confines of the law” and that “[t]he office of attorney does not permit . . . violation of law or any manner of fraud or chicane.”<sup>10</sup>

Other Canons also recognized the lawyer's role as an officer of the court. For instance, Canon 22 stated that “[t]he conduct of the lawyer before the Court and with other lawyers should be characterized by candor and fairness,” adding that “[i]t is unprofessional and dishonorable to deal other than candidly with the

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7. Compare MODEL RULES OF PROF'L RESPONSIBILITY R. 3.3 (2003) (“Candor Toward the Tribunal”), with *id.* R. 1.6 (“Confidentiality of Information”). See also William H. Erickson, *The Perjurious Defendant: A Proposed Solution to the Defense Lawyer's Conflicting Ethical Obligations to the Court and to His Client*, 59 DEN. L.J. 75, 77-79 (describing the dilemma that attorneys face who know that their clients intend to commit perjury).

8. See Addison M. Bowman, Standards of Conduct for Prosecution and Defense Personnel: An Attorney's Viewpoint, 5 AM. CRIM. L.Q. 28, 28 (1966) (describing the Canons as “so vague, so ambiguous, and so contradictory that . . . almost any position, on a given issue, can reasonably be defended with support from the canons”); James E. Starrs, *Professional Responsibility: Three Basic Propositions*, 5 AM. CRIM. L.Q. 17, 20 (1966) (describing the Canons as “glittering generalities” which “lack a body to kick and a soul to condemn”).

9. CANONS OF PROF'L ETHICS Canon 15 (1908).

10. *Id.*



facts . . . in the presentation of causes.”<sup>11</sup> Consistent with this approach, Canon 29 claimed that in cases involving perjury, a lawyer “owe[s] it to the profession and to the public to bring the matter to the knowledge of the prosecuting authorities.”<sup>12</sup> Similarly, Canon 41 stated that a lawyer “should endeavor to rectify” frauds or deceptions “unjustly imposed upon the court.”<sup>13</sup>

It is worth noting, however, that while these Canons implicitly acknowledged the competing roles of the lawyer as court officer and advocate, none required the lawyer to act in a way inconsistent with the client’s interests. Although Canons 22, 29, and 41 announced their guidelines in aspirational language aimed at encouraging lawyers to act ethically, they ultimately left counsel free to champion her client’s cause at any expense. Moreover, Canon 37 was unequivocal about the lawyer’s role as advocate: “It is the duty of a lawyer to preserve his client’s confidences.”<sup>14</sup> In this first attempt to codify the ethics of lawyering, these provisions, taken as a whole, suggest that the balance struck in these rules favored the principle of zealous advocacy.

In 1953, the ABA Committee on Professional Ethics and Grievances laid doubt to rest by holding that Canon 37 imposed a paramount duty on the lawyer to preserve the client’s confidences, even in instances in which the client was known to have committed perjury.<sup>15</sup> The Committee addressed the lawyer’s duty to disclose perjury in two situations. The first, a civil divorce case, involved a client who informed his lawyer after the court had entered a divorce decree in his favor that he had testified falsely. A truthful statement by the client would have resulted in dismissal against the client. The second case involved a criminal defense lawyer whose convicted client was given a more lenient sentence of probation based upon a mistaken assessment of his criminal record by the judge at the sentencing proceeding. The defense lawyer knew from his client that the judge’s information was incorrect. In addition to considering whether the lawyer had to disclose the truth about his client’s record, the Committee also addressed the lawyer’s obligation to correct her defendant’s misrepresentations before the court.

Recognizing the competing values at stake, the Committee insisted that in interpreting the Canons, it was not abandoning the lawyer’s “loyalty to the court of which he is an officer.” On the contrary, the panel construed the lawyer’s duty to the court in a way that embraced the model of zealous advocacy:

Such loyalty [to the court] does not . . . consist merely in respect for the

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11. *Id.* Canon 22 (1908).

12. *Id.* Canon 29 (1908).

13. *Id.* Canon 41 (1928).

14. Canon 37 was amended in 1937 to elaborate the provision of the original Canon 6 from 1908, which articulated the lawyer’s obligation to represent clients with undivided fidelity and not to divulge their secrets or confidences. *Id.* Canon 37 (1937).

15. ABA Comm. on Prof’l Ethics and Grievances, Formal Op. 287 (1953).

judicial office and candor and frankness to the judge. It involves also the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation undisclosed of the confidences communicated by his clients to the lawyer in his professional capacity.<sup>16</sup>

This opinion made clear that under the Canons, the lawyer's duty of confidentiality trumped any duty of candor to the tribunal.

### B. *Model Code of Professional Responsibility*

The 1908 Canons remained the ABA's official ethics code until 1969, when the ABA replaced them with the Model Code of Professional Responsibility (Model Code),<sup>17</sup> a revised and expanded version of the Canons.<sup>18</sup> Like its predecessor, the Model Code sought to provide "clear, peremptory rules in the critical areas relating most directly to the duty of lawyers to their clients and to the courts."<sup>19</sup> The Model Code departed from the Canons somewhat by expanding the obligation of candor to the tribunal, yet it, too, ultimately reinforced the zealous advocacy model. Four of the Model Code's nine broad statements of ethical norms declared that lawyers should preserve the confidences and secrets of a client,<sup>20</sup> exercise independent professional judgment on behalf of a client,<sup>21</sup> and represent their clients competently<sup>22</sup> and zealously.<sup>23</sup> As Eugene Gaetke has argued, "these obligations, rather than being components of a lawyer's responsibility as officer of the court, assure that the lawyer will act as an informed, devoted, and energetic agent of the client and will elevate the client's interests above those of the judicial system and the public."<sup>24</sup>

Just as the ABA Committee had done in its 1953 panel opinion, the Model Code characterized the lawyer's duty as an officer of the court in a manner that seemed to encompass the lawyer's duty as a zealous advocate. Even more than the ABA Committee Opinion had done, the Model Code assumed away the

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16. *Id.*

17. For purposes of this discussion, we refer to the final version of the Model Code, which was amended for the last time in 1980, unless otherwise noted.

18. MODEL CODE OF PROF'L RESPONSIBILITY pmbl. (1980). The Model Code, revised on numerous occasions until 1980, was eventually adopted either verbatim or with minor modifications in every state. See Jay S. Silver, *Truth, Justice, and the American Way: The Case Against the Client Perjury Rules*, 47 VAND. L. REV. 339, 347 (1994).

19. See Walter P. Armstrong, Jr., *A Century of Legal Ethics*, 64 A.B.A. J. 1063, 1069 (1978) (quoting from the 1965 annual address to the American Bar Association by former ABA President Lewis Powell); see also Erickson, *supra* note 7, at 79.

20. MODEL CODE OF PROF'L RESPONSIBILITY Canon 4 (1980).

21. *Id.* Canon 5.

22. *Id.* Canon 6.

23. *Id.* Canon 7.

24. See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 VAND. L. REV. 39, 50-51 (1989) (describing the Model Code).

tension between candor to the tribunal and the duty of confidentiality.<sup>25</sup> This approach was neatly encapsulated in Ethical Consideration 7-19 of the Code, which suggested that the “[t]he 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.”<sup>26</sup>

In fairness, the Model Code did suggest certain limits on the loyalty requirement, especially when the lawyer knows her client intends to defraud the court. Thus, several ABA Disciplinary Rules and Ethical Considerations flatly prohibited a lawyer from “[k]nowingly us[ing] perjured testimony or false evidence,” “[p]articipat[ing] in the creation or preservation of evidence when he knows or it is obvious that the evidence is false,” and “[c]ounsel[ing] or assist[ing] his client in conduct that the lawyer knows to be illegal or fraudulent.”<sup>27</sup> In 1975, the ABA Committee on Ethics and Professional Responsibility reinforced this position, holding that a lawyer who knows in advance that her client intends to use false or perjured testimony must advise her client that she must take one of two courses of action: “[w]ithdraw at that time in advance of the submission of the perjured testimony or false evidence,” or “[r]eport to the court . . . the falsity of the testimony or evidence, if the client insists on so testifying.”<sup>28</sup> Whereas the Model Code had spoken only in limited terms of the lawyer’s duty to withdraw from representation, the Commission mandated that lawyers disclose the intended perjury to the tribunal if they could not withdraw from representation.

Despite these significant strides in the direction of expanding lawyers’ moral autonomy, the Model Code continued to preserve the lawyer’s role as zealous advocate in much the same way as had the Canons. First, the Model Code permitted, *but did not require*, a lawyer to disclose her client’s intent to testify untruthfully or present false evidence when the lawyer obtained her information directly from the client.<sup>29</sup> Under this rule, a lawyer remained free to place the interests of her client above the interests of the judicial system in achieving just outcomes by deciding not to disclose her client’s intent to

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25. *Id.* at 51.

26. MODEL CODE OF PROF’L RESPONSIBILITY EC 7-19 (1980).

27. *Id.* DR 7-102(A)(4), (6)-(7). *See also id.* DR 2-110 (B)(2) (directing that “[a] lawyer representing a client before a tribunal . . . shall withdraw from employment . . . [if h]e knows or it is obvious that his continued employment will result in violation of a Disciplinary Rule,” such as the use of false evidence); *id.* EC 7-26 (prohibiting a lawyer from presenting evidence that “he knows, or from facts within his knowledge should know . . . is false, fraudulent, or perjured”).

28. ABA Comm. on Ethics and Prof’l Responsibility, Informal Op. 1314 (1975). The Committee further explained that “[i]t is axiomatic that the right of a client to effective counsel in any case . . . does not include the right to compel counsel to knowingly assist or participate in the commission of perjury or the creation or presentation of false evidence.” *Id.*

29. MODEL CODE OF PROF’L RESPONSIBILITY DR 4-101(C)(2), (3) (1980) (“A lawyer *may* reveal . . . [c]onfidences or secrets when permitted under Disciplinary Rules or required by law or court order . . . [and *may* reveal t]he intention of his client to commit a crime and the information necessary to prevent the crime.” (emphasis added)).

deceive the tribunal. Disciplinary Rule 7-102(B)(1) further reinforces the lawyer's discretion to hold client confidences dear by exempting "privileged" communications from the general rule requiring lawyers to disclose when their clients intend to deceive the court.<sup>30</sup> The Model Code thus severely limited attorneys' freedom to allow ethical considerations to influence trial strategy.

Finally, the ABA Committee, based on the privileged communication rule, affirmed its earlier decision under the Canons prohibiting a lawyer from disclosing to the court that her client had committed a fraud upon the court in the past,<sup>31</sup> as distinguished from the client who intends to do so in the future.<sup>32</sup> The Committee held that in cases in which the lawyer finds in the course of the trial that the client has committed perjury or presented false evidence, the lawyer "has the primary duty to protect the confidentiality of any privileged communication from his client."<sup>33</sup> Affirming the supremacy of the model of zealous advocacy, the Committee concluded that the "confidential privilege, in our opinion, must be upheld over any obligation of the lawyer to betray the client's confidence in seeking rectification of any fraud that may have been perpetrated by his client upon a person or tribunal."<sup>34</sup>

The Model Code made clear that the lawyer could not participate in the presentation of testimony or evidence she knew to be false, but it prohibited her from disclosing to the tribunal when such a fraud had already been committed against the court. Although the Model Code failed to give clear guidance to lawyers as to how to proceed,<sup>35</sup> it seems to have required that "client confidences must be maintained, even though the lawyer's silence permits a client to commit perjury with impunity."<sup>36</sup> As in the Canons before it, the model of zealous advocacy triumphed in the Model Code.<sup>37</sup>

30. *Id.* DR 7-102 (B)(1) ("A lawyer who receives information clearly establishing that . . . [h]is client has, in the course of the representation, perpetrated a fraud upon a . . . tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the . . . tribunal, *except when the information is protected as a privileged communication.*" (emphasis added)).

31. ABA Comm. on Ethics and Prof'l Responsibility, Informal Op. 287 (1953).

32. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 1314 (1975).

33. *Id.* The Committee noted that while the lawyer must "afford[] the client proper protection on the basis of any privileged communication," the lawyer also has "the obligation to call upon his client to rectify the fraud; and if the client refuses or is unable to do so, the lawyer may withdraw at that point from further representation of the client." *Id.*

34. *Id.* See also ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 341 (1975) ("The tradition (which is backed by substantial policy considerations) that permits a lawyer to assure a client that information (whether a confidence or a secret) given to him will not be revealed to third parties is so important that it should take precedence, in all but the most serious cases, over the duty imposed by DR 7-102(B).").

35. See Erickson, *supra* note 7, at 79-81.

36. Barry R. Vickrey, *Tell It Only to the Judge: Disclosure of Client Confidences Under the ABA Model Rules of Professional Conduct*, 60 N.D. L. REV. 261, 269 (1984).

37. Accord Harold C. Petrowitz, *Some Thoughts About Current Problems in Legal Ethics and Professional Responsibility*, 1979 DUKE L.J. 1275, 1279 ("The conclusion that must be drawn from [a] review of the tensions created by the lawyer's competing obligations to the client and to the justice

### C. *Model Rules of Professional Conduct*

In 1983, the ABA adopted its third set of ethics guidelines, the Model Rules of Professional Conduct (Model Rules), which substantially expanded the space for lawyers to engage in ethical decisionmaking. As various commentators have noted, part of the ABA's motivation in creating the Model Rules was to emphasize the lawyer's role as an officer of the court.<sup>38</sup> The Model Rules thus retreat from the Model Code's embrace of the zealous advocacy model, most notably by lifting the major restriction on a lawyer's obligation to prevent fraud in court proceedings. Toward this end, Model Rule 3.3 ("Candor to the Tribunal"), as originally written, explicitly required that a lawyer take "reasonable remedial measures" when she knows that a client has committed perjury during a court proceeding, *regardless of her duty of confidentiality*.<sup>39</sup> The comments to the 1983 Model Rules note that such measures include, to the extent necessary, disclosure to the tribunal.<sup>40</sup>

As a 1987 ABA ethics panel opinion correctly noted, this new obligation represented "a reversal of prior opinions of this Committee given under earlier rules of professional conduct."<sup>41</sup> This trend has continued in recent years. For example, more recent amendments to the Model Rules have made disclosure an explicit remedial option within Rule 3.3 itself (as opposed to merely within the comments).<sup>42</sup> Most importantly, the 2003 revised comments for the first time make clear that "[t]his duty is premised on the *lawyer's obligation as an officer of the court* to prevent the fact finder from being misled by false evidence."<sup>43</sup>

As it had before, however, the Commission struggled with the tension between the lawyer's conflicting duties as advocate and officer of the court. While recognizing that the "vitality of the adversary system . . . depends upon the ability of the lawyer to give loyal and zealous service to the client," the

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system unmistakably indicates that the present [Model Code] makes the lawyer's duty to the client his paramount responsibility.").

38. See, e.g., GEOFFREY HAZARD & WILLIAM HODES, *THE LAW OF LAWYERING: A HANDBOOK ON THE MODEL RULES OF PROFESSIONAL CONDUCT* 347-48 (1985); Gaetke, *supra* note 24, at 61; Petrowitz, *supra* note 37, at 1289.

39. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(4) (1983) [hereinafter MODEL RULES 1983].

40. *Id.* R. 3.3. cmt. 10. Indeed, despite Model Rule 1.6, which expresses the duty of confidentiality in broad terms, the language of Rule 3.3, its comments, and the comments to Rule 1.6 clearly require a lawyer to take measures to remedy a client's known perjury. See also ABA Comm. on Prof'l Ethics and Responsibility, Formal Op. 87-353 (1987) (confirming that "the lawyer's responsibility to disclose client perjury to the tribunal under Rule 3.3 supersedes the lawyer's [duty of confidentiality] to the client under Rule 1.6"); James R. McCall, Nix v. Whiteside: *The Lawyer's Role in Response to Perjury*, 13 HASTINGS CONST. L. Q. 443, 470 (1986).

41. ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 87-353 (1987).

42. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2003). Comment 5 affirms this requirement, noting that a lawyer must "refuse to offer evidence that the lawyer knows to be false, *regardless of the client's wishes*." *Id.* R. 3.3 cmt. 5 (emphasis added). In addition, the comments to Rule 1.6 explain that Rule 3.3 "requires disclosure in some circumstances regardless of whether such disclosure is permitted by this Rule." *Id.* R. 1.6 cmt. 15.

43. *Id.* R. 3.3 cmt. 5.

Commission warned of the “corruption of the judicial process” and thus avowed the lawyer’s duty of candor to the tribunal. The Commission held that “the lawyer, as an officer of the court, has a duty to prevent the perjury, and if the perjury has already been committed, to prevent its playing any part in the judgment of the court.”<sup>44</sup> The Commission described its rules as a means of furthering the truth-seeking function of the criminal justice process:

This duty the lawyer owes the court is not inconsistent with . . . the lawyer’s duty to preserve the client’s confidences. For that duty is based on the lawyer’s need for information from the client to obtain for the client all that the law and lawful process provide. Implicit in the promise of confidentiality is its nonapplicability where the client seeks the unlawful end of corrupting the judicial process by false evidence.<sup>45</sup>

In a sense, the Commission came dangerously close to assuming away the very tension it was trying to resolve.

Notwithstanding this reasoning, the revised Model Rules are clear-cut when it comes to known frauds committed upon the court. In sum, Rule 3.3 prohibits a lawyer from making false statements of fact, failing to disclose to the court controlling legal authority known to the lawyer to be adverse to the position of the client, and knowingly offering false evidence.<sup>46</sup>

The Model Rules also recognize that a lawyer may not always know when a client is attempting to mislead the court. In doing so, however, the Model Rules clearly allow the lawyer to act against the client’s wishes in certain circumstances in order to prevent a potential defrauding of the fact finder. For example, Rule 3.3(a)(3) states that a “lawyer may refuse to offer evidence, other than the testimony of the defendant, that the lawyer reasonably believes is false.”<sup>47</sup> Moreover, while Comment 8 to Rule 3.3 affirms that “a lawyer’s reasonable belief that evidence is false does not preclude its presentation to the trier of fact,” it also warns that a “lawyer cannot ignore an obvious

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44. *Id.*

45. *Id.*

46. *Id.* R. 3.3(a)(1)-(3). If the lawyer knows that the client intends to testify falsely or seeks to introduce fraudulent evidence, comments to the Rule advise the lawyer to first try to persuade her client that the evidence should not be offered; if the persuasion is ineffective, the lawyer must then refuse to offer the evidence. *Id.* R. 3.3. cmt. 6. However, lawyers in some jurisdictions may be required to present the accused as a witness or to give a narrative statement if the accused so desires, even in situations where the lawyer knows that the statement is false. *Id.* cmt. 7. Similarly, ABA Formal Opinion 87-353 further explains that if the client wishes to testify but the lawyer refuses to offer the client’s testimony, “the lawyer may have no other choice than to disclose to the court the client’s intention to testify falsely.” ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 87-353 (1987). The Model Rules follow a similar course with respect to situations where the lawyer, having made a good-faith presentation of evidence to the court, subsequently discovers that the evidence is false. *See* MODEL RULES OF PROF’L CONDUCT R. 3.3 cmt. 10 (2003). *See also* ABA Comm. on Ethics and Prof’l Responsibility, Formal Op. 93-376 (“A lawyer [in a civil case] who discovers that her client has lied in responding to discovery requests must take all reasonable steps to rectify the fraud, which may include disclosure to the court. In this context, the normal duty of confidentiality in Rule 1.6 is explicitly superseded by the obligation of candor toward the tribunal in Rule 3.3.”).

47. MODEL RULES OF PROF’L CONDUCT R. 3.3(a)(3) (2003).

falsehood,"<sup>48</sup> which suggests that the lawyer is encouraged to examine closely whether the evidence in question will deceive the court and thereby undermine the fairness of the proceeding.

Although the Model Rules do not clearly resolve the issue of presumed (as opposed to known) perjury or false evidence, they allow space for a lawyer to employ ethical considerations to inform whether to present the evidence in question. Moreover, in creating this space, the revised Model Rules vindicate the lawyer's role as an officer of the court. Thus, while the comments to Model Rule 3.3 acknowledge that the "[t]he disclosure of a client's false testimony can result in grave consequences to the client," they also make explicit that forbidding disclosure forces the lawyer to "cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement."<sup>49</sup> In striking the balance between client loyalty and candor to the tribunal, the Model Rules underscore the importance of the lawyer's obligation to further the truth-seeking process: "Lawyers have a special obligation to protect a tribunal against criminal or fraudulent conduct that undermines the integrity of the adjudicative process."<sup>50</sup>

As the preceding discussion has made clear, ethics authorities have weighed the competing values of the adversarial system differently over time. The developments culminating in the Model Rules support the assertion that the general trend in recent years has been toward encouraging lawyers to actively engage in ethical decisionmaking. The ethical rules have achieved this by explicitly recognizing lawyers' dual roles as officers of the court and zealous advocates in the more traditional sense. Over time, professional rules of conduct have gradually afforded lawyers greater discretion to act upon moral judgments about the propriety of evidence and defenses in the course of fulfilling their duties as officers of the court. In light of this trend, we next consider the relationship between the lawyer's ethical decisionmaking and case law addressing the Sixth Amendment standard for effective assistance of counsel.

### III. INEFFECTIVE ASSISTANCE OF COUNSEL AND "ALIGNMENT THEORY"

At the margins, an attorney's dual obligation to the truth-seeking process and to her client's individual interests implicates the doctrine of ineffective assistance of counsel. While the Sixth Amendment, in its discussion of legal support, guarantees criminal defendants only the right "to have the assistance of counsel" for their defense,<sup>51</sup> that language has been construed as guaranteeing

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48. *Id.* R. 3.3. cmt. 8.

49. *Id.* cmt. 11.

50. *Id.* cmt. 12.

51. U.S. CONST. amend. VI.

more than just a warm body who once passed the state bar. *Strickland v. Washington*,<sup>52</sup> the leading Supreme Court case on ineffective assistance of counsel, establishes the doctrinal framework. To satisfy the Sixth Amendment mandate, “assistance of counsel” must be “reasonably effective.”<sup>53</sup> To the extent that reviewing courts adopt a client-centered definition of “effective” representation, providing greater leeway for morally-centered decisionmaking may raise constitutional objections.<sup>54</sup> Surely lawyers at times face situations in which the Sixth Amendment does not permit an attorney to serve two masters.

While ethics materials have been relatively forthright about the potential intractability of the client versus candor dilemma, courts considering claims of ineffective assistance of counsel have been far more ambivalent. Instead of acknowledging the existence of opposing values and explicitly providing space for criminal defense attorneys to be informed by moral instincts, courts frequently operate under what we describe as an “alignment theory.” Simply put, the alignment theory posits that conflicts between zealous advocacy and candor to the tribunal are not conflicts at all. Instead, looking back on a particular fact pattern, courts may determine that the morally activist lawyer was, true to a client-centered definition of effective advocacy, acting in the best interests of the defendant.

We do not mean to suggest, even in the cases we will consider in this Part, that zealous advocacy and candor never actually demand the same conduct from an attorney, nor that judges are uniformly disingenuous in holding conduct to have potentially been in the client’s best interest. In some cases, to be sure, judges intentionally ignore the moral dimensions of attorney conduct, whether simply to adhere to the language of *Strickland*, to evade a finding of ineffective assistance they feel the doctrine otherwise compels, or to avoid unfavorable appellate review. In other cases, judges may be so attuned to the rhetoric of the adversary system that they unwittingly rely upon it even when it is not the most appropriate rationale for attorney conduct. The alignment theory embraces both situations by positing that when faced with a case in which an attorney’s actions might plausibly be explained either as a moral decision, consistent with the requisites of truth-seeking but potentially in tension with the client’s best interests, or as a tactical decision that may have been in the client’s best interests but just failed to pan out, courts opt for the latter. That is, instead of acknowledging conflict and deferring to the lawyer’s moral judgment, courts downplay conflict and defer to her strategic judgment. Thus courts resolve difficult cases by imagining a hypothetical universe free from tension between zealous advocacy and ethical decisionmaking. Instead of scrutinizing the record

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52. 466 U.S. 668 (1984).

53. *Id.* at 687-88.

54. Assistance of counsel is considered a “fundamental” right that extends to the states via the Fourteenth Amendment. *See Powell v. Alabama*, 287 U.S. 45, 68 (1932).



to make the difficult decision whether that universe is real, courts decide whether it is merely possible. As we intend to show, almost invariably it is.<sup>55</sup>

Crucial to the effective operation of both intentional and unintentional alignment theory is the language of *Strickland*, which makes strategic deference the leitmotif of an inquiry into constitutionally defective assistance of counsel. A court reviewing attorney performance alleged ineffective “must indulge a strong presumption that counsel’s conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action ‘might be considered sound trial strategy.’”<sup>56</sup> Because of *Strickland*’s strong emphasis on preserving a lawyer’s autonomy to craft trial strategy, judges have ample cover to resolve ineffective assistance of counsel cases without ever deciding whether a tension between zealous advocacy and candor to the tribunal exists in any individual case. Instead, they can simply attribute any conduct to trial strategy, no matter how plausible or legitimate. The alignment theory thus allows the expansive contours of strategic deference to swallow a morally solicitous course of conduct without courts ever having to evaluate that course’s propriety.

Discussing cases in which we believe courts to be relying on an alignment theory presents obvious methodological difficulties that we must acknowledge in advance. Because ineffective assistance of counsel challenges are necessarily raised in ex post collateral proceedings,<sup>57</sup> the record we see is always backward-looking. Given the degree of reverence for the adversarial system in American jurisprudence, surely there are cases in which both attorneys and trial courts take the position, ex ante, that loyalty to one’s client must trump candor to the tribunal at all times. In such situations, what appears to be strategy actually may be such, and neither attorneys nor courts are engaging in any form

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55. It is worth mentioning that this reflexive focus on trial strategy reaches well beyond the limits of ineffective assistance of counsel cases. *State v. Davis*, 506 A.2d 86 (Conn. 1986), a Connecticut state constitutional case, applied similar deference to “tactical” decisions by attorneys in a compulsory process case. The defendants, Michael Davis and Sherman Adams, sought to call two alibi witnesses against the advice of their lawyers, but were rebuffed by the trial court. *Id.* at 87. Davis and Adams invoked Article I, section 8 of the Connecticut Constitution, which grants the accused “a right to be heard by himself and by counsel.” *Id.* (quoting CONN. CONST. art. I, § 8). They suggested that the use of the words “by himself” intended to rest ultimate tactical authority in the hands of the defendant alone. *Id.* at 88. Although the claim in *Davis* was not ineffective assistance of counsel, the court’s use of deference to defuse a potential moral conflict was strikingly similar. “It has been generally recognized,” the court said, “that decisions concerning matters of trial strategy and tactics rest with the lawyer, as opposed to decisions concerning such inherently personal rights of fundamental importance to the defendant.” *Id.* at 89. Rather than discussing whether the decision to call these alibis was truly in the clients’ interests, the court managed to put the question in the background. This deference has a long pre-*Strickland* history that is beyond the scope of this Note. See, e.g., *United States v. Long*, 674 F.2d 848, 855 (11th Cir. 1982) (“This Court will not second-guess tactical decisions of counsel in deciding whether to call certain [alibi] witnesses.”).

56. *Strickland*, 466 U.S. at 689 (citation omitted).

57. See *Massaro v. United States*, 538 U.S. 500, 504 (2003) (“[I]n most cases a motion brought under [federal habeas] is preferable to direct appeal for deciding claims of ineffective-assistance.”).

of subterfuge. Acknowledging that it is often impossible to know what exactly is motivating lawyers and judges in an individual case, we ask only for the reader to accept as axiomatic that there are also cases in which lawyers are in fact motivated by moral considerations that courts either will not or cannot recognize. We believe we have identified several specific cases in which this is difficult to deny, and we are confident that the reader will be similarly persuaded.

We will concretize our conception of alignment theory by examining the judicial reasoning in several different ineffective assistance of counsel cases. Subpart A will discuss a paradigm situation that is perhaps the least susceptible to alignment theory: the case of a client who has made clear to his lawyers that he intends to testify falsely. Subpart B will discuss the scenario of an attorney who suspects that evidence other than her client's own testimony may be unreliable. Subpart C considers the dilemma that arises when an attorney must decide whether to advance a theory of defense that she believes to be false. Finally, Subpart D will address certain situations that resist categorization in which lawyers must resolve a tension between zealous advocacy and obligations of candor toward the tribunal.

### A. *Scenario One: Known Client Perjury*

Before outlining those scenarios in which we find that courts systematically rely upon the alignment theory, it is useful to discuss one particular scenario in which they do not: known perjury. Attorneys faced with a client who tells them she will perjure herself on the stand need not—indeed cannot<sup>58</sup>—participate actively in that perjury, even if doing so is plainly in the client's best interest.<sup>59</sup> A court cannot simply assume away a conflict between zealous advocacy and candor when a client has proposed to lie on the stand. Put another way, the alignment theory becomes dysfunctional when the weight of the competing interests—the right to testify and the duty of candor—is so great.

Indeed, in the area of known client perjury, the Supreme Court has foreclosed an alignment strategy entirely. The right to testify in one's defense, though absent from the specific language of the Constitution, has taken on constitutional dimensions. It acquires such force from the language of three separate amendments: the Fifth Amendment right not to testify, the Sixth Amendment right to compulsory process, and the Fourteenth Amendment right to due process.<sup>60</sup> Thus, impairing a defendant's right to take the stand in her

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58. In this respect, attorneys are not immune from the reach of the criminal law. See Michael Stokes Paulsen, *Dead Man's Privilege: Vince Foster and the Demise of Legal Ethics*, 68 *FORDHAM L. REV.* 807, 822, 847 n.132 (1999).

59. See *Nix v. Whiteside*, 475 U.S. 157 (1986).

60. See *Rock v. Arkansas*, 483 U.S. 44, 51-53 (1987); see also *United States v. Scott*, 909 F.2d 488 (11th Cir. 1990) (reversing conviction where the lower court forced the defendant to choose between the

own defense risks offending a constitutional imperative. Moreover there are plainly situations in which allowing one's client to lie on the stand comports quite nicely with her best interests. Consider the hypothetical case of a police officer defending against a charge of excessive use of force in apprehending a robbery suspect. Where the word of a law enforcement officer would be rebutted only by the word of the plaintiff, an accused thief, it might well behoove the officer to issue a false statement, particularly in a law-and-order town.<sup>61</sup> Needless to say, it strains credibility for a court to justify the conduct of a defense attorney who refuses to participate in such testimony as strategic decisionmaking in her client's best interests.

In this clear case of conflict between an attorney's moral obligations and her obligations to her client, the Supreme Court has spoken unambiguously: under *Nix v. Whiteside*, the fundamental right to testify does not include the right to testify falsely.<sup>62</sup> *Whiteside* involved a murder defendant who, wishing to establish a claim of self-defense, told his attorney in confidence that although he believed his victim had a gun in his hand, he had not actually seen the gun.<sup>63</sup> Shortly before the trial the defendant, who intended to take the stand in his own defense, further told his attorney, "If I don't say I saw a gun, I'm dead."<sup>64</sup> The attorney informed the defendant that testifying to seeing a gun would be perjury, and that it would be his duty to inform the court of such.<sup>65</sup> The defendant took the stand and, heeding his counsel's advice, testified that he did not see a gun. He was convicted, and later raised an ineffective assistance of counsel claim for his lawyer's refusal to help him prepare perjured testimony. Declaring that "the Constitution prevails over rules of professional ethics," the Court of Appeals for the Eighth Circuit found that counsel had provided ineffective assistance.<sup>66</sup> The Supreme Court reversed.

The *Whiteside* Court relied directly on *Strickland*, decided the previous year. Though the point is easily obscured in its language about deference to

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right to testify and the right to counsel); cf. *Faretta v. California*, 422 U.S. 806, 819 n.15 (1975) (referring to the right to testify in one's own defense as one of several that "though not literally expressed in the [Constitution], are essential to due process of law in a fair adversary process"). The development of an implicit constitutional right to testify is ironic in light of the common law prohibition against defendant testimony, premised on the strong incentive for perjury. See *Rock*, 483 U.S. at 49. But see Akhil Reed Amar, *Foreword: Sixth Amendment First Principles*, 84 GEO. L.J. 641, 698 (1996) ("If the accused . . . is generally empowered to drag a human being, against her will into the courtroom . . ., surely he must also enjoy the lesser-included rights to present other truthful evidence that in no way infringes on another human being's autonomy. These lesser-included rights are plainly presupposed by the Compulsory Process Clause . . .").

61. Cf. *People v. Walker*, 666 P.2d 113, 121-22 (Colo. 1983) (ordering disclosure of complaints charging excessive use of force against police officer, since "[w]hen the only prosecution witnesses are the police officers involved, anything that goes to their credibility may be exculpatory").

62. *Whiteside*, 475 U.S. at 174.

63. *Id.* at 160.

64. *Id.* at 161.

65. *Id.*

66. *Whiteside v. Scurr*, 744 F.2d 1323, 1327 (8th Cir. 1984)

tactical decisionmaking, *Strickland* expressly contemplated a role for ethics in defining reasonable professional assistance.<sup>67</sup> In addition to counsel's basic duties to serve as a loyal advocate, to consult with her client, and to equip herself with sufficient skill and knowledge, *Strickland* recognized a broader duty of reasonable assistance that may derive content by reference to "prevailing norms of practice as reflected in American Bar Association standards and the like . . . ."<sup>68</sup> The *Whiteside* Court accepted this invitation. In holding that a lawyer's duty to her client does not encompass a duty to assist in the presentation of perjured testimony, the Court relied directly on Canons 32 and 37 of the ABA Canons of Professional Ethics,<sup>69</sup> disciplinary rule 7-102 of the Model Code of Professional Responsibility,<sup>70</sup> and Rule 1.2 of the Model Rules of Professional Conduct,<sup>71</sup> as well as state common law and statutory treatment of perjury as a crime.<sup>72</sup>

Thus, after *Whiteside*, lower courts applying *Strickland* to cases of known client perjury could not employ anything like an alignment theory. The Supreme Court had acknowledged the presence of an obvious conflict between candor and zealous advocacy, and it had instructed courts how to proceed.<sup>73</sup> Yet, as the *Whiteside* Court recognized, known client perjury was the easy case:

In some future case challenging attorney conduct in the course of a state-court trial, we may need to define with greater precision the weight to be given to recognized canons of ethics, the standards established by the state in statutes or professional codes, and the Sixth Amendment, in defining the proper scope and limits on that conduct. Here we need not face that question, since virtually all of the sources speak with one voice.<sup>74</sup>

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67. *Strickland* may be read so broadly as to provide a plenary guide to the weighing of ineffective assistance claims. See *Williams v. Taylor*, 529 U.S. 362, 391 (2000) ("[T]he *Strickland* test provides sufficient guidance for resolving virtually all ineffective-assistance-of-counsel claims . . . ."). State courts have almost universally applied the *Strickland* standard under their state constitutions. See Richard Klein, Gideon—A Generation Later: *The Constitutionalization of Ineffective Assistance of Counsel*, 58 MD. L. REV. 1433, 1471 (1999). Hawaii provides a notable exception. See *Briones v. State*, 848 P.2d 966, 977 (Haw. 1993) (calling the federal standard of what constitutes an ineffective action or omission "unduly restrictive").

68. *Strickland*, 466 U.S. at 688.

69. Canon 32 states that no lawyer should "render any service or advice involving disloyalty to the law . . . or deception or betrayal of the public." CANONS OF PROF'L ETHICS Canon 32 (1908). Canon 37, which was added to the Canons in 1928 and later amended in 1937 to more forcefully emphasize the lawyer's duty to preserve client confidences, states with reference to the attorney-client privilege that the "announced intention of a client to commit a crime is not included within the confidences which [the attorney] is bound to respect." CANONS OF PROF'L ETHICS Canon 37 (1937).

70. MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(4) (1980) (prohibiting a lawyer from "knowingly us[ing] perjured testimony or false evidence").

71. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003) ("[A] lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . . .").

72. *Whiteside*, 475 U.S. at 166-69.

73. For a sampling of cases directly applying *Whiteside* to known client perjury, see, for example, *United States v. Henkel*, 799 F.2d 369 (7th Cir. 1986); *Schockley v. Kearney*, No. 95-207-SLR, 1996 U.S. Dist. LEXIS 10939 (Del. July 25, 1996); *Commonwealth v. Mitchell*, No. 9673CF0312, 2000 Mass. Super. LEXIS 486 (Mass. Dist. Ct. Dec. 18, 2000); *People v. DePallo*, 754 N.E.2d 751 (N.Y. 2001); *State v. Layton*, 432 S.E.2d 740 (W.Va. 1993).

74. *Whiteside*, 475 U.S. at 165-66.

Despite the constitutional implications of interference with the right to testify, the *Whiteside* Court was able to resolve the dilemma by relying on canons, codes, ethics rules, and plain old common sense, all of which pointed it towards not requiring attorneys to assist in presenting perjured testimony.<sup>75</sup> The luxury of reinforcement gave it sufficient cover to announce a clear conflict, and then resolve that conflict authoritatively. But the Court has not yet conducted the more searching inquiry it reserved for future cases in which the answer to the dilemma is less clear. It is such cases to which we now turn.

B. *Scenario Two: Suspected False Evidence*

Whatever post-*Whiteside* consensus courts may have developed by responding to a conflict between candor to the tribunal and the strategic interests of perjuring clients disintegrates as the scenario broadens to include other kinds of dishonesty. One such "gray area" is suspicion that evidence the defendant wishes to introduce lacks trustworthiness.

When such evidence is in the form of personal testimony, courts have found that the defendant's constitutional right to testify dictates that a lawyer not refuse to assist in presenting that testimony on suspicion alone, even if such suspicion is reasonable. In *United States v. Midgett*,<sup>76</sup> for example, the court was faced with an ineffective assistance claim against an attorney who refused to aid his client in presenting testimony he believed to be false, though his client never told him that it was false. Paul Midgett, charged with a co-defendant with robbing a man and lighting him on fire, claimed that a mystery third assailant had committed the crime while he sat in a drug-induced sleep in the back of a car.<sup>77</sup> The defense lacked any other corroboration and was specifically refuted by Midgett's co-defendant, who was cooperating with the government.<sup>78</sup> Nevertheless, Midgett persisted in his "third person" defense throughout the preparation of his case.<sup>79</sup> The court found ineffective assistance because "[d]efense counsel's responsibility to his client was not dependent on whether he personally believed Midgett, nor did it depend on the amount of proof supporting or contradicting Midgett's anticipated testimony."<sup>80</sup> In short, "[d]efense counsel's mere belief, albeit a strong one supported by other evidence, was not a sufficient basis to refuse Midgett's need for assistance in

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75. *But see* MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 120 (1990) (suggesting that a lawyer whose client insists on presenting perjured testimony "examine the client in the normal professional manner and . . . argue the client's testimony to the jury in summation to the extent that sound tactics justify doing so").

76. 342 F.3d 321 (4th Cir. 2003).

77. *Id.* at 322.

78. *Id.* at 326.

79. *Id.*

80. *Id.*

presenting his own testimony.”<sup>81</sup>

The *Midgett* court eschewed an alignment theory. It acknowledged a client versus candor dilemma, but found that in light of the constitutional weight attached to the right to testify, the client’s interests should take precedence. What *Midgett* underscores, however, is that courts seem unwilling to recognize any moral equivalence between presenting a perjuring client and presenting other kinds of arguably false evidence. One would assume that courts would generally have an easier time allowing lawyers to be motivated by their moral compasses when a defendant seeks to utilize false or misleading evidence. After all, the constitutional weight on the presentation of witnesses in one’s defense is lighter than that which attaches to the right to testify oneself. The Sixth Amendment right to compulsory process, wherein one might logically ground a constitutional challenge to a lawyer’s or a court’s burdening of this right, has never been held to extend to perjuring witnesses.<sup>82</sup> Indeed, the right is so neutered as not to guarantee defendants the right to make decisions about which witnesses to call on their behalf.<sup>83</sup> By contrast, a perjuring defendant cannot for that reason alone be wholly deprived of the opportunity to take the stand.<sup>84</sup> Thus, for a court to require an attorney to present witness testimony she knows to be false would be a direct departure from *Whiteside* and would lack any constitutional justification.<sup>85</sup>

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81. *Id.* For discussions of the standard of knowledge to be applied to client perjury, compare *United States v. Long*, 857 F.2d 436, 446 (8th Cir. 1988) (remanding for an evidentiary hearing to determine whether a lawyer who suspected his client of perjury and presented the testimony in narrative form had a “firm factual basis”), with *United States v. Omene*, 143 F.3d 1167 (9th Cir. 1998) (refusing to find ineffective assistance even though the attorney who suspected perjury and forced his client to testify in narrative form failed to articulate a firm factual basis for so suspecting). See also *State v. Hischke*, 639 N.W.2d 6 (Iowa 2002) (weighing the costs and benefits of forcing a client to testify only in narrative form when the attorney suspects perjury); *State v. McDowell*, 669 N.W.2d 204 (Wis. 2003) (same).

82. *But see* *Washington v. Texas*, 388 U.S. 14 (1967) (suggesting greater constitutional scrutiny of burdens on the calling of witnesses). The *Washington* Court struck down as arbitrary a Texas statute that barred principals, accomplices, and accessories to the same crime from testifying for each other. The Court reasoned that an a priori determination that such witnesses were unreliable was “absurd.” *Id.* at 22. The Court later relied on *Washington* to suggest that the right to compulsory process was not deprived unless the excluded witness testimony “would have been both material and favorable to [the] defense.” *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867 (1982). As a matter of law, such materiality cannot be established where the attorney knows the testimony to be perjured. See *Strickland v. Washington*, 466 U.S. 668, 695 (1984) (“A defendant has no entitlement to the luck of a lawless decisionmaker . . .”).

83. See *Jones v. Barnes*, 463 U.S. 745 (1983) (reiterating that the attorney decides which issues to raise on appeal); *Virgin Islands v. Weatherwax*, 77 F.3d 1425, 1434 (3d Cir. 1996) (noting that whether to call a witness is widely considered to be a “non-fundamental decision[ ]” and thus properly in the hands of attorneys); see also MODEL RULES OF PROF’L CONDUCT R. 1.2(a) (1999) (listing decisions for which lawyer must defer to client).

84. See *United States v. Teague*, 953 F.2d 1525, 1532-34 (11th Cir. 1992) (“[A] criminal defendant has a *fundamental* constitutional right to testify in his or her own behalf at trial.”); ABA STANDARDS, *supra* note 6, at 200 (stating, in Standard 4-5.2(a), that the decision “whether to testify in his or her own behalf” is reserved to the accused).

85. See *Nix v. Whiteside*, 475 U.S. 157, 166 (8th Cir. 1986) (“[C]ounsel is precluded from . . . in any way assisting the client in presenting false evidence . . .”). For an application of *Whiteside* to known witness perjury, see *Noel v. State*, 26 S.W.3d 123 (Ark. 2000) (refusing to find ineffective

Yet, a mere suspicion that a witness lacks credibility is another matter altogether. *People v. Beals* describes the paradigm situation.<sup>86</sup> In his “drive-by” murder trial, Brian Beals offered the testimony of two of his friends to support his insistence that the actual assailant was an unidentified man who was trying to shoot Beals. Beals’ attorney entered, with the prosecution, two stipulations to prior inconsistent statements made by the witnesses in earlier meetings in his office.<sup>87</sup> In the words of the lower court, the defendant’s attorney “destroy[ed] the credibility of the only witnesses to corroborate defendant’s version of events.”<sup>88</sup> In applying its own version of the *Strickland* test, the Illinois Supreme Court described the attorney’s stipulations “a matter of sound trial strategy.”<sup>89</sup> That is, had the defense attorney not stipulated to the prior inconsistent statements, the State could have introduced them in a more damaging manner, such as calling the defendant’s sister, who was present when the statements were made, as a witness against Beals.<sup>90</sup> Thus, the defendant “failed to overcome ‘the strong presumption that counsel’s conduct [fell] within the wide range of reasonable professional assistance.’”<sup>91</sup>

*Beals* exemplifies the alignment theory at work. That the stipulations might have been a matter of trial strategy we do not dispute. Rather, we note that the opinion does not mention the possibility that stipulating to prior inconsistent statements of one’s witness enhances the truth-seeking function of the criminal justice process. In this case, refusal to stipulate would have amounted to the type of shell game that relates at most tangentially to truth but that we have unfortunately come to expect from the adversarial system. Thus, the Illinois Supreme Court reduces its analysis to a cynical assessment of whether the defense attorney’s conduct might plausibly, through some hypothetical twist of fate, have been in the defendant’s best interests and thus justified under the reasoning of the adversarial process.

A similar dynamic can be identified in the case of *Garrett v. Dormire*.<sup>92</sup> Alexander Garrett was convicted of first-degree murder, assault, and armed criminal action for fatally shooting his girlfriend, Peggy Bracken, on April 14, 1987.<sup>93</sup> At Garrett’s second trial, the State introduced the testimony of Henry Miller, a former jailmate of Garrett’s, who testified that Garrett had confessed

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assistance when lawyer refused to present witness who had indicated a willingness to lie). See also *United States v. Witherspoon*, 557 A.2d 587 (D.C. Cir. 1989) (discussing whether lawyer who unsuccessfully attempted to withdraw from representation due to ethical concerns over witnesses had a legitimate conflict with defendant).

86. 643 N.E.2d 789 (Ill. 1994).

87. *Id.* at 793.

88. 618 N.E.2d 273, 277 (Ill. App. Ct. 1992).

89. 643 N.E.2d at 793.

90. *Id.* at 794.

91. *Id.*

92. 237 F.3d 946 (8th Cir. 2001).

93. *Id.* at 947.

to the murder and the assault to him in jail.<sup>94</sup> He further testified that Garrett told him that he Garrett plead not guilty because the police had not found the murder weapon.<sup>95</sup> Although Garrett's attorney attempted to impeach Miller on cross-examination, she did not introduce certain witnesses who Garrett claimed would have established that Miller held a grudge against him.<sup>96</sup> Garrett raised an ineffective assistance of counsel claim in his state and federal habeas petitions.

The substance of the alleged grudge was, *inter alia*, that Miller was jealous of Garrett's drawing abilities.<sup>97</sup> His attorney testified at a post-conviction hearing that she did not call the witnesses because "she did not believe the jury would find it credible that Mr. Miller would testify against someone in a homicide case because of jealousy over drawing ability."<sup>98</sup> The state court found no ineffective assistance because "counsel's decision not to interview or call any inmate witnesses was a matter of trial strategy," and the federal habeas court agreed.<sup>99</sup>

The alignment theory operates more at the level of justification than at the level of rationale. That is, it concerns itself more with how a decision has been justified *ex ante* than why the decision was actually made. Trial strategy may well have dictated that Garrett's attorney not call witnesses to the stand who would make implausible and impeachable statements to the jury. Yet again it is noteworthy that the court need not mention the possibility that Garrett's attorney herself doubted the veracity of the witnesses. Unlike the situation of client perjury, the credibility of the witnesses was not itself an issue for the court. Treating witness credibility as an issue in itself would have raised the specter of an attorney's moral decision not to present suspicious testimony conflicting with the best interests of her client. Instead, the only issue was whether the attorney was reasonable in believing that the jury would not find the witnesses credible. If so, *Strickland* deference applies, and acts as a broad umbrella protecting the attorney's decisions from moral scrutiny.

Looking back upon the cases we have discussed thus far, an intriguing pattern emerges. In those cases where courts have been called upon to review an attorney's decision not to present suspected false evidence, they have tended to employ alignment theory. By contrast, in cases where courts have been asked to review an attorney's decision not to present suspected perjuring clients, they

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94. *Id.* at 948.

95. *Id.*

96. *Id.* at 948-49.

97. *Id.* at 949.

98. *Id.*

99. *Id.* at 949-50. For similar holdings, see, for example, *Jacobs v. McDaniel*, 5 Fed. Appx. 582, 583 (9th Cir. 2001) (mem.) (stating that the decision not to call non-credible witness was a "sound tactical decision"); *Tunstall v. Hopkins*, 151 F. Supp. 2d 1049, 1059 (N.D. Iowa 2001) (holding that the decision not to introduce perjured deposition testimony was justified because it could not be impeached on the stand).



have proven more willing to acknowledge ethical dilemmas. One possible explanation for this pattern may be that a court's willingness to resort to alignment theory depends on the extent to which the attorney conduct in question falls within the usual scope of an attorney's discretion. If instead such conduct infringes directly upon the defendant's right to testify, courts are more attentive to the tension introduced.

*People v. Toma*<sup>100</sup> presents an interesting application of this nuance. Adil Toma testified through an interpreter and raised an ineffective assistance of counsel claim because, *inter alia*, his lawyer failed to ask him sufficient questions to spin his story into one that did comport with the physical evidence in the record.<sup>101</sup> Although *Toma* involved defendant testimony, the court, true to an alignment theory, treated the lawyer's decision as a tactical decision in the best interests of the defendant.<sup>102</sup> The court relegated to a footnote (footnote sixteen) the possibility that "failure to nail down the details of the defendant's story . . . was the only way that counsel could aid defendant in presenting his story within counsel's ethical obligation not to knowingly offer evidence that counsel knows to be false."<sup>103</sup> Grounding its holding more firmly in an attorney's ethical obligations would have forced the court to acknowledge a potential inconsistency between the lawyer's moral inclinations and the interests of his client. Instead, over a vigorous but lone dissent that challenged the view that the lawyer was plausibly assisting his client's defense,<sup>104</sup> the majority framed the facts to suggest that he was strategically acting in the defendant's interests.

The question of whether the attorney in *Toma* was employing reasonable trial strategy was the easiest debate for the dissent and the majority to have, but it was by no means the only one possible. The two opinions could instead have debated whether, per footnote sixteen, the attorney's decision to restrict his client's testimonial options was an appropriate resolution of the client versus candor dilemma. That is, the court could have treated the decision more like a client perjury situation than a false evidence situation. One potential explanation is that *Toma* most directly implicated a lawyer's line of questioning rather than the question of whether to allow testimony in the first place. Because the constitutional right to testify was not front and center as much as in *Whiteside* and *Midgett*, the court had sufficient cover to avoid the ethical issue and retreat to an alignment theory. Decisions concerning what questions to ask

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100. 613 N.W.2d 694 (Mich. 2000).

101. *Id.* at 704.

102. *Id.* at 705 ("[I]t would have been dangerously inept of [counsel] to intentionally provide defendant with the opportunity to offer more details . . .").

103. *Id.* at 704 n.16. As the dissent points out, counsel did not testify that he knew the story to be false. *Id.* at 708 (Kelly, J., dissenting). The use of the word "knows" in the majority opinion allows the court to use the cover of *Whiteside*.

104. *Id.* at 707 (Kelly, J., dissenting).

a witness or which witnesses to present are invariably in the attorney's hands. Therefore, such decisions may be easier for courts to place under the rubric of trial strategy than decisions over whether to allow a potentially perjuring defendant testify conventionally. In short, it appears that the closer a decision to the traditional defense attorney function, the more seductive is the lure of alignment theory.

### C. *Scenario Three: Unreliable Defense Theory*

The *Toma* case evokes a related but distinct species of dishonest lawyering, the presentation of an unreliable defense. The scenario reaches the core of the criminal defense function. The reader may be aware of the 1959 Otto Preminger film *Anatomy of a Murder*, in which Jimmy Stewart plays an artful defense attorney who, in one memorable scene, interviews a client who killed a man for raping his wife. The client, played by Ben Gazzara, believes that the killing was justifiable revenge. Disabusing him, Stewart explains, "What you need is a legal peg so the jury can hang up their sympathy in your behalf, you follow me? What's your legal excuse?" Gazzara replies, "Maybe I was mad." Stewart shakes him off. "I mean, I must have been crazy." Silence. Gazzara continues, "Am I getting warmer?". As Stewart leaves the room, he tells Gazzara to "see if you can remember how crazy you were."<sup>105</sup> The difficulty much of the legal community has in appreciating the moral dilemma this tactic introduces is evidenced by a survey of lawyers and judges at the 1999 annual conference of the Eleventh Circuit Court of Appeals. Asked whether Stewart's character "crossed the line," more than half of the 189 respondents said no.<sup>106</sup> Because defense theories are so commonly conceived as quintessentially strategic, no matter how illegitimate, a lawyer's refusal to present or even investigate an unreliable defense on moral grounds is a prime candidate for the use of an alignment theory.

As with the presentation of false evidence in general, a defendant has no constitutional right to present non-meritorious defenses.<sup>107</sup> But short of the known perjury situation, the Supreme Court has never recognized an attorney's discretion to refuse to offer non-frivolous arguments on ethical grounds. That is, the Court has given no firm command as to how a reviewing court should

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105. *ANATOMY OF A MURDER* (Columbia Pictures 1959).

106. Jonathan Ringel, *Did Stewart as Lawyer 'Cross the Line?'*, FULTON COUNTY DAILY REP., May 13, 1999, at 7.

107. See *McCoy v. Court of Appeals*, 486 U.S. 429, 436 (1988) ("Neither paid nor appointed counsel may deliberately mislead the court with respect to either the facts or the law, or consume the time and the energies of the court or the opposing party by advancing frivolous arguments."); *Whiteside*, 475 U.S. at 166. *But cf.* *Anders v. California*, 386 U.S. 738 (1967) (striking down a California rule that allowed a court-appointed appellate attorney to withdraw through summary procedure when she believes an indigent's appeal is frivolous). A revised California rule allowing the attorney wishing to withdraw to submit a merits brief for judicial review was upheld in *Smith v. Robbins*, 528 U.S. 259 (2000).

respond were Jimmy Stewart's character to refuse to argue or investigate an insanity defense based on his strong suspicion that Gazarra's character was obscuring the truth. *Strickland* itself set the constitutional standard for reasonableness within the context of a claim for under-investigation: "[S]trategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments support the limitations . . . ."<sup>108</sup> Moreover, reasonable investigation may be influenced by the statements of the defendant: "[W]hen a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful, counsel's failure to pursue those investigations may not later be challenged as unreasonable."<sup>109</sup>

Presumably, where a defendant's statements and actions create suspicion that a particular lead is fabricated or dishonest, the *Strickland* test would not support a finding of ineffective assistance. But the use of the words "fruitless or even harmful" suggests that the test contemplates an inquiry not into the credibility of the lead but into its exculpatory value. That is, the question is not whether a particular defense theory is true but whether it is likely to persuade a fact finder. These are different inquiries, though in practice they may produce the same result: greater discretion for the lawyer. A credibility test gives moral discretion and an "exculpatory value" test gives strategic discretion. Returning to our *Anatomy of a Murder* hypothetical, if Jimmy Stewart's character were to decide not to pursue an insanity defense, he would be immunized against Sixth Amendment challenge. He would not, however, be immunized because the defense was contrary to truth; rather, he would be immunized because the defense was (hypothetically) impeachable and thus (hypothetically) poor strategy.

In large measure, actual judicial approaches to an attorney's refusal to pursue suspicious defenses have toed a similar line. Consider *Jordan v. Warden*, in which the defendant claimed ineffective assistance of counsel in his murder trial because his attorneys allegedly failed to adequately investigate and interview alibi witnesses after the defendant admitted his presence at the murder.<sup>110</sup> *Jordan* admitted to law enforcement officers on eight separate

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108. *Strickland v. Washington*, 466 U.S. 668, 690-91 (1984); see also *Jones v. Barnes*, 463 U.S. 745, 754 (1983) ("[A defendant] has no constitutional right to compel appointed counsel to press nonfrivolous points requested by the client . . . ."). But see *Wiggins v. Smith*, 539 U.S. 510, 526 (2003) (finding ineffective assistance where failure to investigate a meritorious defense "resulted from inattention, not reasoned strategic judgment"); *State v. McDowell*, 669 N.W.2d 204, 228 (Wis. 2003) ("While a trial attorney has considerable latitude to select one trial strategy from among many alternatives, he or she must not abandon a sound strategy based merely 'upon a whim.'" (citation omitted)).

109. *Strickland*, 466 U.S. at 691.

110. *Jordan v. Warden*, No. 1:CV-97-0465, 1998 U.S. Dist. LEXIS 13475 (M.D. Pa. Aug. 31, 1998).

occasions that he had been present during the murder, and told the same to his attorneys.<sup>111</sup> Given these admissions, the court found that not investigating a laundry list of proposed theories premised on the defendant's non-presence at the murder scene "was consistent with the defense's theory of the case."<sup>112</sup> Jordan alleged furthermore that his attorney was unreasonable in failing to investigate a theory that the victim was not strangled by a camera strap. Given that Jordan told defense counsel that the camera strap was the murder weapon, the court found that "such testimony would go against the strategy that Petitioner had decided on."<sup>113</sup> Apparently that strategy was "the truth." Most fascinating is the court's response to defense counsel's unwillingness to call to the stand three alibi witnesses, all of whom he "knew to be unreliable and, therefore, not worth interviewing."<sup>114</sup> In light of the "numerous incriminating statements Jordan had given," the "strategy" of not presenting an alibi defense was called "perfectly reasonable" because the witnesses would have been easy to impeach on the witness stand.<sup>115</sup>

The alignment theory has little to say about whether an alibi defense actually represents sound trial strategy when the defendant has admitted his presence at the crime scene to police. It may well be that defense counsel's investigatory decisions inured to the defendant's benefit. What is striking is the scant attention the court paid to the moral probity of investigating false leads. The *Jordan* court mentions ethical obligations once, almost parenthetically, to note that knowing use of false testimony is prohibited under *Whiteside*.<sup>116</sup> The court seems to take great pains to suggest that the dispositive element of an ineffective assistance of counsel defense is whether the conduct was strategically appropriate. Little space is devoted to the argument, which would potentially be appropriate under *Strickland*, *Whiteside*, and a phalanx of ethics materials, that morally motivated conduct may nonetheless have been appropriate even if it represented poor trial strategy.

This judicial move is anything but rare.<sup>117</sup> In *Williams v. Kemp*, for example, the court rejected a claim that the defense attorney was ineffective for

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111. *Id.* at \*22.

112. *Id.* at \*23.

113. *Id.* at \*24.

114. *Id.* at \*25.

115. *Id.* at \*23, \*28.

116. *Id.* at \*26.

117. See, e.g., *Card v. Dugger*, 911 F.2d 1494, 1504 (11th Cir. 1990) (deeming counsel's refusal to interview a witness who would testify to defendant's innocence when defendant had admitted the alleged crimes reasonable, but nonetheless expressly rejecting the lower court's stipulation of an ethical dilemma); *Couch v. Trickey*, 892 F.2d 1338, 1344 (8th Cir. 1989) (rejecting an ineffective assistance claim where counsel refused to argue that defendant's intoxication represented a psychotic mental illness on the ground that "[r]efraining from asserting or investigating an invalid defense [is] reasonable"); *Stead v. United States*, 67 F. Supp. 2d 1064, 1075 (D.S.D. 1999) (calling counsel's refusal to use an intoxication defense when the defendant denied being intoxicated a "strategic decision . . . well within the range of professional reasonable judgment").

failing to hire expert witnesses to challenge the blood stains on the defendant's boots and the handwriting on a threatening note the victim had received.<sup>118</sup> Alas, Williams had admitted to the police that he had been present for the murder and had had physical contact with the victim, and he had admitted to his lawyer that he wrote the note.<sup>119</sup> Yet, the court calls the defense attorney's failure to challenge the blood evidence no more than a "decision not to pursue alternative defense theories" and thus "tactical" in nature.<sup>120</sup>

This use of the alignment theory is particularly striking in light of the court's use of an entirely different rationale to reject the claim for not challenging the handwriting: It "fulfilled his ethical obligation to refrain from producing false or misleading evidence."<sup>121</sup> Instead of resorting reflexively to *Strickland*, the judge recognized a tension between candor to the tribunal and zealous advocacy and, it is instructive to note, cited to *Whiteside*, using the signal "*cf.*," short for the Latin word "confer," meaning "compare."<sup>122</sup> Making this comparison is exactly what we argue judges do not do frequently enough. It is, of course, perfectly sensible for a judge to be reluctant to refer to a refusal to employ a handwriting expert when there is no evidence before the court to contradict the expert's testimony as ethical lawyering rather than reasonable trial strategy. It is also true, however, that refraining from introducing expert testimony to refute blood evidence when such evidence is entirely consistent with the admissions of the defendant could similarly be described as fulfilling an ethical obligation. Where an attorney's decision is plausibly described as trial strategy, courts are not in the habit of discussing the attorney's concurrent ethical obligations. As we will discuss in Part IV, *infra*, this sin of omission is problematic whether or not the decision is reasonable trial strategy in fact.

Our examination into judicial rationales leads us to a second potential explanation for the disparity between the rationale for refusing to challenge the handwriting and the rationale for refusing to challenge the blood on the boot. For the defendant to deny that he was present at the murder scene *sounds like* an alibi defense—it involves evidence about which a third party provides the most effective testimony. For him to deny that he wrote the note *sounds like* perjury—whether the defendant wrote the note is best gleaned from his own testimony. Even though both attorney decisions could be defended on moral grounds, the theory of the defense is a time-honored, indivisible, and discretionary part of the criminal defense function.<sup>123</sup> The presentation of perjured testimony, on the other hand, is directly frowned upon by a Supreme

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118. 846 F.2d 1276 (11th Cir. 1988).

119. *Id.* at 1279, 1281.

120. *Id.* at 1281.

121. *Id.* (citing *Whiteside*, 475 U.S. at 164-76.).

122. *See id.*

123. *See, e.g., supra* note 106 and accompanying text.

Court opinion.<sup>124</sup>

D. *Scenario Four: Other Morally Activist Attorney Decisions*

Certain attorney decisions that may be characterized as morally activist do not fit neatly into the aforementioned categories of refusal to participate in perjured testimony or to present other false evidence or defenses. In *Vorgvongsa v. State*, for example, the Rhode Island Supreme Court considered whether an attorney's refusal to impeach a state witness with prior inconsistent statements constituted ineffective assistance.<sup>125</sup> The witness was a guest at an ill-fated party that ended with the murder—outside the apartment—of another guest who had called the defendant's friend a "chicken" for refusing to drink cognac.<sup>126</sup> The witness had testified at a co-defendant's earlier trial that she had seen people whom she could not identify chase the victim out of the apartment in which the party was held, but left this piece out of her testimony at Vorgvongsa's trial.<sup>127</sup> The court credited defense counsel's explanation that he had not impeached the witness because his theory of the case was that the defendant was in fact guilty of the altercation in the apartment but did not participate in the murder. Having this witness remain credible as to events inside the apartment would raise doubts in the minds of jurors that the shooting could have occurred outside the apartment with no witnesses.<sup>128</sup> Thus, counsel made "a reasonable tactical decision."<sup>129</sup>

Whether or not this is true, it is worth noting that the witness's testimony corroborated that of others that the defendant was brandishing a gun and attempting to shoot the victim inside the apartment,<sup>130</sup> and she testified that she saw other guests push the victim out of the apartment to aid his escape.<sup>131</sup>

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124. This dichotomy is starkly on display in the bizarre case of *People v. LaVearn*, 528 N.W.2d 721 (Mich. 1995). Counsel was charged with ineffective assistance for pursuing a misidentification defense in a first-degree murder case where a successful intoxication defense would have reduced the charge to second-degree murder. The court rejected the Sixth Amendment challenge on the grounds that counsel was avoiding "the ethical problems that would have arisen had the defendant testified that he lacked the intention to kill." *Id.* at 725 (relying on *Whiteside*). Yet implicit in the defendant's claim is that he actually committed a killing. (It seems implausible that the defendant killed no one but nonetheless wanted to argue intoxication because he thought the truth would get him wrongly convicted of first-degree murder.) Given this admission, a misidentification defense would presumably have presented an even bigger ethical dilemma than intoxication, a fact nowhere mentioned in the opinion. Thus the *LaVearn* court saw an ethical problem in the false defendant testimony necessary for an intoxication defense, but not in the impeachment of third parties necessary for an even "more" false misidentification defense theory.

125. 785 A.2d 542 (R.I. 2001).

126. *Id.* at 545.

127. *Id.* at 549.

128. *Id.*

129. *Id.*

130. See *In re Vorgvongsa*, No. 98-4502, 1999 R.I. Super. LEXIS 151, at \*5-6 (R.I. Super. Ct. Oct. 20, 1999).

131. *Vorgvongsa*, 785 A.2d at 549.

While one cannot know for sure, it seems clear from the language of the opinion in both the Supreme Court and the lower Superior Court that whether or not the defense attorney actually considered the witness's credibility an asset, the witness also happened to be in fact credible.<sup>132</sup> The ethical propriety of impeaching a credible witness is worthy of considerable discussion among practicing attorneys, but alignment theory's constant drumbeat of strategic deference ensures that this discussion remains in the background.

Similarly, in *United States v. Eisen*, the defendant accused his attorney of ineffective assistance for not attempting to blame the charged crimes on co-defendants.<sup>133</sup> Judge Newman wrote for a Second Circuit panel that "[a]n effort to blame the other defendants might have provoked retaliation in the same vein."<sup>134</sup> No further discussion was necessary, and none occurred. If Eisen's lawyer had wanted to argue that he was guided by his moral compass, it would have been foolish for him to do so, and so the world will never know.

*McClure v. Thompson* offers a still more striking example of alignment theory at work, this time in the client confidentiality context.<sup>135</sup> In *McClure*, a defense attorney faced charges of ineffective assistance after anonymously revealing to police the whereabouts of two missing children allegedly kidnapped and killed by the defendant. The defendant, Robert A. McClure, was accused of murdering a woman in her home and kidnapping her two children.<sup>136</sup> In the attorney's own notes, he wrote that after meeting with McClure, he "was extremely agitated over the fact that these children might still be alive."<sup>137</sup> After getting McClure to reveal to him where the children (or their bodies) might be, he received a phone call from McClure that evening telling him that "Satan" killed the mother and that "Jesus saved the kids."<sup>138</sup> According to testimony of a state law enforcement official, the attorney decided to tell the Sheriff's department the whereabouts of the children—who, it turns out, had in fact been killed—despite warnings of sanctions.<sup>139</sup> Indeed, the attorney even testified in a deposition that, when he disclosed the location of the bodies, he was concerned more with the welfare of the children than that of his client.<sup>140</sup>

In his habeas petition, McClure alleged ineffectiveness in counsel's breach of his duty of confidentiality and in his conflicting interest in the victims'

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132. See *id.* at 549 (noting the consistency between past and present statements); *In re Vorgvongsa*, 1999 R.I. Super. LEXIS at \*6.

133. 974 F.2d 246, 266 (2d Cir. 1992).

134. *Id.*

135. 323 F.3d 1233 (9th Cir. 2003).

136. *Id.* at 1235.

137. *Id.* at 1236.

138. *Id.* at 1237.

139. *Id.*

140. *Id.* at 1238.

welfare.<sup>141</sup> As to the duty of confidentiality, the court held on disputed facts that McClure's attorney did not adequately consult with him in making the decision, but that the district court did not err in its finding that the breach was permissible under an exception in the Model Rules for preventing acts that could result in "imminent death or substantial bodily harm."<sup>142</sup> Compared to the alignment theory cases mentioned so far, *McClure's* confidentiality analysis sounds refreshing. The court recognized a direct conflict between zealous advocacy and moral obligations, weighed the competing interests, and made a decision.

But then one reaches *McClure's* conflict of interest analysis. In rejecting McClure's claim of a "fatal conflict of interest," the court relied primarily on the attorney's claim that "the disclosure could have avoided two additional aggravated murder charges and was the best strategic decision for petitioner under the circumstances."<sup>143</sup> If open admissions by an attorney that his moral concerns over the lives of two children trumped his concerns for his client's interests was not sufficient for a court to admit a conflict between zealous advocacy and candor—and offer a prescription for its resolution—then it is not clear what would be.

The more enveloped an attorney's decision within the traditional defense function—calling witnesses, making strategic decisions, making opening and closing statements—the more reluctant courts are about acknowledging the possibility of a client-candor dilemma. The general rule is not without some exceptions, to be sure.<sup>144</sup> But these counter-examples serve only to emphasize the inconsistency in this area. One court remarked that "it took a decision of the United States Supreme Court to declare what in an ideal world would be self-evident—that a criminal defense lawyer who refused to tolerate perjury by his client was not guilty of constitutionally deficient performance."<sup>145</sup> Courts are still waiting for guidance in other areas that involve morally activist decisionmaking by attorneys. Wed to the adversarial model, courts seem to find the most comfort in deference to strategic decisionmaking, refraining by and large from discussions of moral decisionmaking. In this way, they avoid evaluating attorney responses to the conflict between zealous advocacy and

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141. *Id.* at 1241.

142. *Id.* at 1245-47 (quoting MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(1) (1983)).

143. *Id.* at 1248.

144. See, e.g., *Shockley v. Kearney*, No. 95-207-SLR, 1996 U.S. Dist. LEXIS 10939 (D. Del. July 25, 1996) (finding no ineffective assistance where an attorney did not, owing to ethical concerns, give a closing argument corroborating defendant's perjury); *People v. Berroa*, 782 N.E.2d 1148 (N.Y. 2002) (finding ineffective assistance where a defense attorney acted on ethical concerns and stipulated to information that would impeach favorable testimony by defense witnesses); cf. *State v. Fritz*, 569 N.W.2d 48 (Wisc. 1997) (finding ineffective assistance where defense counsel advised client to lie on the stand rather than plead guilty). In all of these cases, the courts expressly acknowledged a tension between ethical courses of action by attorneys and the interests of those attorneys' clients.

145. *Fritz*, 569 N.W.2d at 52.



candor to the tribunal in the numerous situations outside of the known perjury context in which that conflict must somehow be resolved. We next consider what this employment of the alignment theory means for modern American criminal justice.

#### IV. IMPLICATIONS OF ALIGNMENT THEORY

As we have seen, courts reviewing Sixth Amendment claims for ineffective assistance of counsel have often construed attorney behavior in a manner that downplays potential incongruities between lawyers' ethical impulses and their strategic preferences. That such incongruities exist can be inferred from circumstantial evidence, as we explain in greater detail in Section IV.A. In Section IV.B, we analyze the consequences of judges' continued reliance on alignment theory. By eschewing frank discussions of the competing demands placed on criminal defense counsel, judges perpetuate a system in which attorneys exercise moral discretion *sub rosa* and without sufficient formal guidance. Section IV.C suggests practical ways of exchanging our current adherence to alignment theory for a brand of judicial analysis that more explicitly takes into account the ethical constraints affecting client-representation decisions. Section IV.D responds to the most potent criticisms of our proposal, emphasizing that our primary goal is to render more transparent decisionmaking processes that are already in operation.

##### A. *In Defense of Methodology*

Critics of the alignment theory hypothesis will no doubt question how we can know that the lawyers in the foregoing cases were not in fact motivated by strategic rather than ethical considerations. After all, the mere fact that one can read into a situation the possibility of a moral dilemma does not mean that ethical concerns actually animated the lawyer in any particular case. While this is undeniable, the difficulty of deciphering a lawyer's intentions after the fact makes it all the more surprising that courts have, with such confidence and consistency, credited the strategic motivations offered by actors while simultaneously avoiding discussion of possible ethical considerations. The dual values of candor to the tribunal and loyalty to the client necessarily conflict under certain circumstances, some of which we have described above.<sup>146</sup> Some theory is therefore needed to explain why courts have so consistently acknowledged the ethical dilemma presented in the known perjury context yet

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146. As the Connecticut Rules of Professional Conduct recognize, "[i]n the nature of law practice . . . conflicting responsibilities [of the lawyer] are encountered. Virtually all difficult ethical problems arise from the conflict between a lawyer's responsibilities to clients, to the legal system, and to the lawyer's own interest in remaining an upright person while earning a satisfactory living." CONN. RULES OF PROF'L CONDUCT pmb1. (2003), *reprinted in* SEC. OF STATE OF THE STATE OF CONN., *supra* note 1, at 2.

failed to comment upon the potential ethical implications of an attorney's decision to present unreliable evidence or advance a specious defense theory. We contend that the strongest explanation for this phenomenon is that courts (as well as lawyers in response to courts) have systematically bypassed opportunities to comment openly on this conflict of values. Rather than extend the logic of *Whiteside* to cover situations involving other kinds of untrustworthy defenses, jurists have often opted for the safer alternative of alignment theory.

Lending credence to this hypothesis is the fact that courts often cannot identify plausible strategic explanations to account for certain actions taken by criminal defense attorneys. Many of the cases we have already highlighted well illustrate how purely tactical explanations are insufficient to account for lawyers' conduct. In *McClure*, for instance, construing the lawyer's disclosure of the kidnapping victims' whereabouts as a measured tactical choice taken with the client's best interests in mind stretched the notion of the loyalty principle to a breaking point. In that case, the principles of attorney-client confidentiality and duty to client were directly at odds with the lawyer's broader obligations, both to the children and to the tribunal handling the case. The mere fact that the court could imagine a counterfactual scenario in which the lawyer's having made a different decision might have worked out worse for the client does not change the fact that disclosing such information in all likelihood hurt, rather than helped, McClure.

Likewise, where omissions have been concerned, a lawyer's decision not to call particular witnesses (as in *Jordan*) or raise particular evidentiary objections (as in *Williams*) could be understood as a strategic form of damage control. Logically, however, there must be a point at which stipulation to the key facts in a murder trial becomes indefensible as a trial strategy. Without the further suggestion that ethical considerations helped to explain a lawyer's conduct, the fear of impeachment alone seems insufficient to justify such monumental concessions as the fact that the defendant was at the scene of the murder, or that an item in the defendant's possession was the murder weapon! In both of these cases, clients had already made highly incriminating statements to their lawyers. Yet, instead of considering how admissions of this nature might have altered the defense attorneys' role with respect to the criminal proceeding as a whole, courts bent over backwards to rationalize attorney decisions that on their face seemed to undermine the defendants' claims of innocence. These examples, as well as others cited in Part III, provide reliable indicators that judges employ the language of strategic choice to mask the unspoken reality that ethical considerations affect the manner in which criminal defense attorneys represent their clients.

*B. The Consequences of Alignment Theory*

Perhaps the most immediate consequence of courts' reliance on alignment theory is that it produces less persuasive doctrine in the area of ineffective assistance of counsel. Assuming that the reasoning of judicial opinions affects public perceptions of the courts' fairness toward criminal defendants, the routine recitation of transparently flimsy tactical arguments, coupled with the decision not to cite important ethical factors at play, potentially signals a disturbing lack of solicitude for defendants' basic constitutional rights.

Furthermore, continued reliance on alignment theory undermines public confidence in the criminal defense bar. As many commentators have observed, courts' willingness to construe virtually any decision as the product of tactical choice renders ineffective assistance of counsel challenges little more than a weak formalism.<sup>147</sup> It is important to distinguish, however, between cases where courts have accepted weak tactical arguments because there is an extremely low threshold in terms of the quality of the criminal defense bar, and those cases where relaxed standards of advocacy derive from ethically motivated conduct on the part of lawyers. Assuming the latter occurs with some frequency but courts are not in the habit of explaining the nature of the ethical dilemma underpinning attorneys' decisions, one might more readily draw the inference that the criminal defense bar is simply inadequate. Were courts instead more forthright about the circumstances surrounding lawyers' conduct, one might reach a different conclusion—that defense lawyers are occasionally compelled to scale back the intensity of their representation for the sake of complying with professional ethical obligations. Thus, courts' use of alignment logic may unfairly compound negative public perceptions of criminal defense lawyers. Even if we assume that the criminal defense bar is somehow defective, the failure to specify why defense attorneys make ostensibly ineffective representation decisions frustrates efforts to gauge the extent of the problem.

Each consequence of alignment theory that we have identified becomes even less defensible in cases where judges intentionally rely upon the theory. The judge who employs alignment theory out of unexamined path dependence is surely part of the problem, but for her our observations amount to little more than a (loud) alarm bell. On the other hand, a judge who knows that a flimsy tactical argument is masking a moral concern, but persists in reciting a strategic rationale, engages in her own brand of deception. Whatever we think of lawyers, we expect more of our jurists.

The mere fact that courts turn to alignment theory to resolve Sixth Amendment challenges does not necessarily imply that they are hostile to the

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147. See, e.g., Deborah L. Rhode, *What Does It Mean to Practice Law "In the Interests of Justice" in the Twenty-First Century?*, 70 *FORDHAM L. REV.* 1543, 1551 (2002) (decrying the pitiful standards imposed by effective assistance of counsel law).

notion that lawyers should behave as ethical actors, even in situations in which this comes at the expense of their clients' best interests. On the contrary, alignment theory may represent courts' attempts to create greater space for ethical decisionmaking while working within the confines of an effective assistance doctrine that is already strategically oriented. If this is the case, it is deeply ironic that courts seek reform not by calling for ethical counterbalances to the principle of zealous advocacy, but rather by construing or repackaging ethical decisions as tactical ones. In paving the way for criminal defense attorneys to depart more freely from the adversary system of justice, courts borrow from the language of that very system that they seek to transcend.

To the extent that alignment theory ultimately broadens the scope of attorneys' ethical discretion, it represents a useful legal fiction. Yet this comes at the significant cost of further entrenching societal perceptions that the adversary system is the most desirable model of criminal justice. Those committed to alternative visions of the ideal role of the lawyer within the criminal justice system will regard courts' use of alignment theory as an unwanted legitimization of status quo norms. Even those generally in support of the adversary system may prefer courts to construct an expanded conception of effective assistance that openly acknowledges the importance of ethical lawyering and on that basis prescribes relaxing the principle of zealous advocacy. For this contingent, the real problem with a system that affords lawyers autonomy under the rubric of deference to tactical decisionmaking is that it fails to enunciate adequately the norm that ethical decisionmaking is desirable within the legal profession.

Finally, the systematic repackaging of ethical behavior as strategic choice by courts and lawyers alike reinforces the most cynical conception of what it means to be a criminal defense attorney within our adversarial system. For those lawyers with particularly strong ethical convictions, the prospect of raising an alibi defense that they know to be false will seem so far beyond the pale that they will gladly invest the necessary energy to shroud their actions in the language of strategic choice when the matter arises on appeal. For many others, however, the current doctrine will stifle their impulses of candor toward the tribunal, guiding them instead to view the criminal justice system as a game where all tactics are fair play as long as they help produce the desired verdict. Alignment theory perpetuates the latter phenomenon both by raising the time and energy costs associated with making an ethically motivated representation decision and by depriving attorneys of judicially sanctioned illustrations of such ethically motivated behavior.

### *C. Towards an Ethical Discourse*

The most important remedy for the above concerns would be for courts to acknowledge more consistently the ethical obligations that criminal defense

attorneys face when deciding how to respond to clients who present untrustworthy defenses. This amounts to an invitation for judges, when reviewing these situations, to engage in more extensive fact finding concerning the real reasons behind defense attorneys' representation decisions. In light of current norms of legal practice, defense attorneys may initially be reluctant to recite the ethical considerations that actually motivated their decisions to withhold a particular piece of evidence or otherwise adjust their defense approach. To help resolve this first-mover problem, judges should emphasize that their assessment of what constitutes effective representation within the meaning of the Sixth Amendment will take into account prevailing norms of professional conduct, just as *Strickland* prescribes. Citing Model Rule of Professional Conduct 3.3, courts should clearly signal to counsel both through published opinions and also during ineffective assistance of counsel hearings that lawyers may alter the nature of their representation in response to reasonable and well-founded ethical concerns about misleading the fact finder.

In order to demonstrate how this would work in practice, consider once more our opening hypothetical about the criminal defense attorney faced with deciding whether to offer an alibi defense that she strongly suspects is false. We begin by highlighting two possible decisions that our proposal does *not* affect. First, had the client insisted on taking the stand to lie about his whereabouts on the night in question, the attorney could clearly have declined to facilitate that act, citing *Whiteside* when the quality of her representation was challenged on appeal. Second, had she instead opted to decline representation altogether, her actions would not have come before a reviewing court in an ineffective assistance of counsel proceeding—rather she would only have needed to satisfy state standards for withdrawal. These rules may well have been patterned after Model Rule 1.16(3)(b)(2), which specifies that counsel may withdraw if, among other things, “the client persists in a course of action involving the lawyer’s services that the lawyer *reasonably believes* is criminal or fraudulent.”<sup>148</sup>

The decisions that our proposal *does* affect are those in which attorneys are asked to present dishonest or misleading claims or defenses. Our suggested doctrine of ineffective assistance of counsel would uphold a lawyer’s representation decisions even when these decisions may not have maximized her client’s narrow strategic goals, *provided that* the lawyer could demonstrate on appeal that (1) she reasonably believed in good faith that another course of action would have perpetrated a fraud on the court, and (2) she had a sound factual basis for this belief. Anticipating the need to make such showings in an ineffective assistance of counsel hearing, lawyers would almost always adhere

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148. MODEL RULES OF PROF’L CONDUCT Rule 1.16(3)(b)(2) (2003) (emphasis added). The Model Rules have been adopted, with variations, in more than three dozen states and the District of Columbia. Several other states are considering adopting them. Silver, *supra* note 18, at 349.

to the model of zealous advocacy, deviating only where absolutely necessary to preserve the integrity of the proceeding.

In each instance, reviewing judges would be responsible for scrutinizing the evidence that lawyers cite as the basis for their challenged decision. In addition to considering the attorney's explanation, a reviewing judge could evaluate the evidence withheld below or compare the outcome of one defendant's trial to a co-defendant's trial, where counsel in that case pursued a different defense theory. Clearly, under the reasonable belief and sound factual basis standards, an attorney's simple dislike for a client or mere suspicion that a client is not being forthright would be rejected as bases for deviating from the zealous advocacy model. In such scenarios, the attorney's conduct would be deemed to have violated the defendant's Sixth Amendment rights, resulting in a retrial (assuming *Strickland's* prejudice standard is also satisfied).<sup>149</sup> Furthermore, attorneys would still be expected to have pursued the most zealous form of advocacy that was consistent with her obligation of candor to the tribunal. In other words, even when a lawyer senses that her client may be guilty, she would still be obligated to present all facts and arguments that she does not reasonably suspect are false.

While the precise legal standard could always be calibrated to ensure even fewer deviations from the zealous advocacy model, we have settled upon the reasonableness and sound factual basis standards because this language mirrors that contained in the ABA's Model Rules. According to Model Rule 3.3(a)(3), "A lawyer may refuse to offer evidence, other than the testimony of the defendant, that the lawyer *reasonably believes* is false."<sup>150</sup> As we have seen, the ABA's standards for permitting counsel to withdraw from representation use a similar "reasonable belief" standard. If lawyers may withdraw entirely from a case on the basis of reasonable suspicion of fraud, then *a fortiori* they should be allowed to refrain from presenting a particular piece of evidence or pursuing a specific defense theory when they harbor the same degree of concern. As with any common-law standard, the content of the reasonableness test will be worked out by judges reviewing attorney conduct, often in habeas proceedings, on a case-by-case basis.

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149. See *Strickland v. Washington*, 466 U.S. 668, 687 (1984) (defining prejudicial error as that which is "so serious as to deprive the defendant of a fair trial, a trial whose result is reliable").

150. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2003) (emphasis added). In fact, some courts have already applied similar evidentiary standards when reviewing attorney representation decisions. See *supra* note 81. We recognize that the situation involving a criminal defendant who wishes to testify poses a special problem to our proposal because of the defendant's constitutionally protected right to testify. Here, we are in agreement with the Model Rules:

Because of the special protections historically provided criminal defendants . . . a lawyer [may not] refuse to offer the testimony of such a client where the lawyer reasonably believes but does not know that the testimony will be false. Unless the lawyer knows the testimony will be false, the lawyer must honor the client's decision to testify.

MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 9 (2003).

Over time, lawyers may respond to a broadened conception of effective assistance by more forthrightly describing the ethical considerations that led them to choose a particular course of action, even when this involved a tradeoff in terms of the affected client's interest. Rather than contorting morally square decisions to fit into the round hole of effective trial strategy, lawyers could more freely declare the moral basis for their choice, confident that as long as they could demonstrate a good-faith basis for that belief, their choice would be honored by the reviewing judge as consistent with the lawyer's duties under the circumstances.

Such a development would yield several major advantages. First, greater willingness to identify the potential ethical motivations behind defense attorneys' decisions would prompt more extensive debate within the legal community about how to strike the appropriate balance between the values of candor to the tribunal and loyalty toward the client. By highlighting the many junctures at which our criminal justice system asks lawyers to serve competing masters, we may heighten appreciation for the difficult tradeoffs that defense attorneys often must face. While there can be no easy resolution of these dilemmas, courts should follow the example set by drafters of model rules of professional conduct in at least attempting to reach workable compromises in a principled fashion, taking into account public and professional input.

Second, a move away from alignment theory would offer practicing lawyers clearer guidance as to how far they may exercise moral discretion without running afoul of the loyalty principle, at least as embodied in the Sixth Amendment effective assistance of counsel guarantee. Under the status quo, individual lawyers must first determine how to balance their ethical impulses with their duties to their clients and then decide how best to repackage their decision in strategic terms. A more forthright judicial approach in this area would not only offer criminal defense attorneys greater initial guidance in responding to difficult dilemmas, but would also save unnecessary expenditures of time and energy after the fact by allowing lawyers to present the real reasons for their choices without fear of reproach. The truth, as they say, is easier to remember.

Finally, a more overt ethical discourse would reinforce our highest aspirations for the criminal justice process. Rather than craft ethical rules under the assumption that all lawyers are apt to abuse their discretion, we should design the system to enable well-intentioned lawyers to make ethical decisions. In practice, this would reinforce lawyers' perceptions that they belong to a learned profession rather than simply a business<sup>151</sup> and encourage them to assess more honestly the ethical dilemmas they confront. A system designed

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151. But see Russell G. Pearce, *The Professionalism Paradigm Shift: Why Discarding Professional Ideology Will Improve the Conduct and Reputation of the Bar*, 70 N.Y.U. L. REV. 1229 (1995) (arguing that acknowledging that the practice of law is a business will help to improve lawyering).

otherwise would offer no incentive for lawyers to cite ethical motivations in circumstances in which their conduct became subject to judicial review. Without frequent reinforcements of the notion that ethical instincts may properly guide lawyers' decisions, we fear that lawyers' ethical instincts are more likely to atrophy, to the detriment of the profession as a whole.

### D. *Responding to Critics*

Not surprisingly, the suggestion that criminal defense attorneys should be permitted to alter their representation of clients on the basis of ethical misgivings raises several criticisms. The most serious of these are that lawyers may seize upon ethical justifications as a means of denying high-quality representation to disfavored clients either deliberately or due to subconscious biases; that lawyers will prejudge the guilt or innocence of their clients, thereby short-circuiting the jury's role as fact finder; and that clients will no longer feel comfortable sharing information with their attorneys for fear that this may somehow deny them the best defense possible. By addressing each of these concerns in turn, we hope to bolster support for our critique of alignment theory.

#### 1. *Attorney-Client Bias Criticism*

One important concern may be that lawyers would use the rules governing candor to the tribunal to effectuate their social prejudices or moral judgments about a client's character. Thus, a lawyer might refuse to present a client's legitimate defense because she thinks the client is a bad person, yet find sufficient flexibility in the rules to justify that decision as an "ethical" one.<sup>152</sup> As Professor Jay Silver warns, "[empirical] tendencies suggest a race- and class-based double standard in the application of the client perjury rules."<sup>153</sup> In some cases, such double standards could emerge even without deliberate discrimination on the part of lawyers. For instance, a lawyer who harbors subconscious prejudices with respect to certain racial groups may genuinely doubt information that minority clients provide without realizing the extent to which those doubts are based on unfounded assumptions and biases rather than

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152. See, e.g., Janine Sisak, *Confidentiality, Counseling, and Care: When Others Need to Know What Clients Need to Disclose*, 65 *FORDHAM L. REV.* 2747, 2763 (1997) (advising lawyers to be "skeptical" about making a moral decision "according to her moral preference, and then imposing it on the client in a paternalistic manner"). See also Serena Stier, *Legal Ethics: The Integrity Thesis*, 52 *OHIO ST. L.J.* 551, 567 (1991) ("It is not [the lawyer's] job . . . to breach the bounds of their clients' moral integrity and, directly or indirectly, impose the lawyers' moral preferences on their clients.").

153. Silver, *supra* note 16, at 359. Silver goes on to contend that permitting ethical decisionmaking, at least with respect to perceived client perjury, "engender[s] racial, cultural, and class-based discrimination, miscommunication, and distrust," because such decisions will disproportionately be invoked by the "largely white, middle-class American criminal trial bar against indigent, minority criminal defendants." *Id.* at 425.



objective evidence.<sup>154</sup>

The potential for a lawyer to shield, by reference to the ethical rules, her refusal to credit the claims of clients of a certain ethnic or cultural background is obviously troubling. Yet our proposal is unlikely to increase the risk of such behavior. Currently, attorneys succeed in defending a wide range of representation decisions under the banner of strategic choice. These cases surely include situations in which attorneys manage to obscure their own illegitimate biases by citing a barely plausible strategic rationale for their representation decisions. Because courts are in the habit of accepting even the flimsiest of strategic explanations, this conduct goes essentially unchecked. Our proposal to separate out cases in which ostensibly strategic decisions were actually motivated by ethical concerns would not increase the risk of bias over and above the status quo. If anything, the very fact that courts would be more committed to scrutinizing the true reasons behind a given representation decision would reduce the risk that lawyers would elect to weaken their representation, because they would anticipate more difficulty in escaping scrutiny on appeal.

Moreover, our proposal relies on the ability of reviewing judges to prevent attorneys from abusing the system by citing ethical justifications for behavior that was in fact motivated by bias. Our standard is a demanding one, and does not condone explanations on the order of, "He wasn't looking me in the eye," as justifications for altering representation. Rather, like the current inquiry into "known" client perjury, it requires a fact-based inquiry into a lawyer's reasons for making particular decisions within her discretion. Any criticism that centers on the inability of judges to apply rigorous doctrinal standards strikes at the very legitimacy of judicial decisionmaking.<sup>155</sup> Because we believe that judges regularly apply doctrinal standards such as the one we propose, we ultimately reject this criticism.

## 2. *Supplanting the Fact Finder Criticism*

A second criticism of our proposal may be that it invites lawyers to prejudge the guilt or innocence of clients, transforming defense counsel into just another arm of the state. As Professor Silver argues, client perjury rules "conceal at the center of our criminal trials a summary inquisition into the

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154. See Marjorie Silver, *Emotional Competence, Multicultural Lawyering, and Race*, 3 FLA. COASTAL L.J. 219 (2002) (discussing the prevalence of subconscious racial bias in the criminal justice system). We focus on race rather than on other aspects of identity such as gender and sexual orientation because race is far more salient in the criminal defense context.

155. Professor Jay Silver's observation that defense attorneys have disproportionately invoked client-perjury rules when representing black defendants does not speak to the actual outcomes of these cases. It is not unreasonable to suppose therefore that the courts presiding over these claims weeded out many of those arguments that were actually pretexts for racial discrimination.

truthfulness of the accused's testimony"<sup>156</sup> and deprive the fact finder "of the opportunity to learn directly about the defendant's credibility and her version of the facts."<sup>157</sup>

By introducing subjective decisionmaking at this stage, the lawyer may effectively supplant the role of the fact finder, jeopardizing her client's right to a fair trial with due process.<sup>158</sup> Of further concern is the fact that lawyers are often exposed during the investigation phase to substantial amounts of "hearsay, inflammatory remarks, conjecture, and otherwise unreliable information."<sup>159</sup> For the same reasons that we assiduously exclude such information from the jury's consideration, we may be reluctant to encourage a lawyer to use it as the basis for decisions about the veracity of a client's defense. Because the task of predicting the accuracy of a particular claim or defense strategy is daunting, lawyers should perhaps leave such determinations to the jury. In the words of Professor Silver, too great an emphasis on candor to the tribunal "indirectly undermine[s] the very truth-finding function of the trial process they purportedly serve"<sup>160</sup> by "upset[ting] the balance of responsibilities and powers allocated among the prosecutor, defense attorney, judge, and jury in adversarial criminal proceedings."<sup>161</sup>

As a preliminary matter, this criticism assumes that attorneys will on the basis of their own moral intuitions seek to deny their clients an opportunity to testify or otherwise provide them with no outlet for presenting a favorable case. This criticism, however, fundamentally misapprehends the scope of our proposal. It has not been our position that lawyers should on the basis of a reasonable suspicion be empowered to stop their clients from exercising their constitutional right to testify. Rather, our focus has been on the lawyer's discretion in deciding which pieces of evidence to present or which defense theories to pursue, decisions traditionally within the scope of the defense function. Therefore, in assessing the strength of this criticism, it is important to recognize that we are discussing lawyers who have decided to continue representing their clients and who have merely asserted the right to select the manner in which they will do so subject to certain ethical constraints.

Of course, one may still argue that juries should be presented with every piece of potentially exculpatory evidence and that any pre-screening in which a

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156. Silver, *supra* note 18, at 425.

157. *Id.* at 357. See also Alfredo Garcia, *The Right to Counsel Under Siege: Requiem for an Endangered Right?*, 29 AM. CRIM. L. REV. 35, 100 (1991) (quoting Justice Blackmun's concurrence in *Whiteside* to claim that "attorneys who 'adopt the role of judge and jury to determine the facts. . . pose a danger of depriving their clients of the zealous and loyal advocacy required by the Sixth Amendment'").

158. See e.g., Silver, *supra* note 18, at 354-403; see also Garcia, *supra* note 157, at 98 (suggesting that permitting lawyers to employ ethical considerations in the representation of their clients potentially "reduce[s] the scope of the right to counsel").

159. Silver, *supra* note 18, at 386.

160. *Id.* at 354.

161. *Id.* at 406.

lawyer engages is illegitimate. Yet if one accepts the central hypothesis of alignment theory, one must also concede that lawyers routinely screen information from juries in the present system. The principal innovation introduced by our proposal is just that lawyers should more openly acknowledge the extent to which they have withheld certain information or declined to pursue certain defense theories. For this reason, much of the sting associated with Silver's critique fades away.

More fundamentally, it strikes us that on balance the truth-seeking function of criminal trials is enhanced by broadening the scope of ethical decisionmaking. The alternative to a system in which lawyers may decline to present untrustworthy information to the fact finder is one where the entire truth-seeking function of the proceeding may be frustrated by the presentation of misinformation.<sup>162</sup> In the final analysis, our confidence that a jury can decipher truth from falsehood rests on the assumption that lawyers are making good-faith presentations. If we regard the jury as a decision-making device, it is only as reliable as its informational inputs. By allowing lawyers to present faulty information under the banner of loyalty to the client, we frustrate the fact finder's core purpose of reaching an accurate verdict. Because jurors recognize that lawyers are advocates, they may expect presentations of evidence to be incomplete and slanted in one side's favor. While we may expect jurors to be effective evaluators of *evidence*, however, it strains the limits of their competence to expect them to decide whether the lawyers are outright lying to them. Insofar as this takes place, the jury's task of deciphering the truth becomes substantially more difficult and may be frustrated entirely.

On this critical point, Professor Silver provides only a weak response. He suggests that "[p]ermitting counsel to call a criminal defendant whom she believes will testify untruthfully may, in the end, actually advance the adversarial search for truth. A defendant's confused, conflicting, fantastic, or incomplete testimony or suspicious demeanor frequently represents, in the minds of jurors, the clearest proof that the defendant's version of the case is untruthful."<sup>163</sup> Silver's argument carries less force in the wide range of circumstances in which the client has not chosen to take the stand. Moreover, it places an extraordinary amount of pressure on juries to suppose that they can take well-crafted evidence that is false and entirely decode it, arriving at the correct conclusion in a high percentage of cases. Finally, where falsehoods are indeed accompanied by truths, lawyers operating within our paradigm could distinguish between the two, declining to present the former while vigorously

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162. As the commentary to Rule 3.3 of the Connecticut Rules of Professional Conduct states: "The alternative [to a rule favoring candor to the tribunal] is that the lawyer cooperate in deceiving the court, thereby subverting the truth-finding process which the adversary system is designed to implement." CONN. RULES OF PROF'L CONDUCT R. 3.3. cmt. (2003), *reprinted in* SEC. OF STATE OF STATE OF CONN., *supra* note 1, at 24.

163. Silver, *supra* note 18, at 355.

asserting the latter.

In response to specific concerns about hearsay and other prejudicial information arising out of a lawyer's investigative efforts, it is worth recalling that this information may have an undeniable probative value. Indeed, this is reflected by the fact that judges have long considered such information in the sentencing phase of criminal proceedings. To prevent lawyers from relying on such information before trial would therefore seem to undermine the truth-seeking process. Furthermore, courts assessing the reasonable basis for lawyers' hesitancy of representation could consider the nature of the evidence relied upon. Where this appears to be unreliable hearsay uncorroborated by any other evidence, lawyers would less likely be allowed to escape their duties as a zealous advocate.

At the heart of this dispute over the responsibilities of lawyers versus jurors may lie an important philosophical schism. If one agrees with the long-held doctrine that defendants have no right "to the luck of a lawless decisionmaker,"<sup>164</sup> one must contemplate a truth-seeking role for every participant in the adversary process. Seen in this light, the "balance of responsibilities and powers" is at least as upset by the countless defendants who escape punishment because of their untruthful testimony, for whom retrial or the raising of post-acquittal issues is barred by double jeopardy. Greater solicitude for candor only mitigates their good fortune.<sup>165</sup> By keeping squarely in mind that the adversary system is not a game but rather a device for uncovering truths, adjustments to the system may be regarded not as unfair penalties but as necessary correctives that promote truth-seeking, the larger purpose of the criminal trial.

### 3. *Chilling Attorney-Client Communication Criticism*

A third criticism of our proposal is that by encouraging attorneys to give voice to ethical misgivings, we may damage an already delicate relationship between criminal defendants and their lawyers. As the theory holds, a client is less likely to be forthcoming in his interactions with an attorney who seems unwilling to give voice to claims she believes lacks credibility or, as in *McClure*, seems willing to reveal client confidences in the service of other ends. Where the relationship is already marred by the suspicions raised by race and class disparities between lawyers and clients,<sup>166</sup> encouraging lawyers to dust off their ethical compasses may exacerbate the problem.

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164. *Strickland*, 466 U.S. at 695.

165. Moreover, we note that concerns over lawyers supplanting the fact-finding function of the jury are no less assuaged under a "reasonable doubt" standard or in *Whiteside's* "known" perjury scenario. Thus, unless one is willing to take the Monroe Freedman position, *see supra* note 75, which we are not, this concern proves too much.

166. *See Silver, supra* note 154.

Before addressing this criticism, it is worth commenting on its scope. The critique contemplates a class of criminal defendants who, all other things being equal, would trust their attorneys enough to reveal certain confidences but who turn fatally suspicious due to a change in the standards and rhetoric of appellate review of ineffective assistance of counsel claims. It is undisputed that lawyers who are presently encouraged to represent ethical misgivings as strategic choices are doing a good job of fooling this class of clients. For this criticism to be plausible, therefore, we must suppose that our proposed change would suddenly alert clients to the possibility that lawyers they would otherwise have trusted may be running their claims through a “new,” more rigorous ethical test. We contend that the class of individuals for whom this information would be material is vanishingly small.

Moreover, the class of individuals would need to be sensitive and/or sophisticated enough to respond to the cues of appellate judges, cues that presently have the effect of encouraging gamesmanship on the part of lawyers. Of course, it is difficult to evaluate how such an eccentric class of persons responds to the language of the adversary system under the status quo. Does a system that (by the critique’s hypothesis) encourages lawyers either to present unreliable claims or to lie about whether such claims are unreliable lead clients in the class just described to reveal truthful information to their lawyers? This proposition is questionable at best. If the information they are revealing to their lawyers is *not* truthful, is it a bad outcome if our proposal encourages them to keep that information to themselves? Again, this is far from clear. Whatever force this criticism might have in theory, it stems from a highly dubious empirical premise, and indeed one that is best tested by implementing our proposal.

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In calling for a more open recognition of the ethical dimensions of the criminal defense function, we share the concern of those who hold that attorneys must not be permitted to impose their own value judgments or short-circuit the jury function by arbitrarily declining to pursue the best legal strategies on behalf of their more disfavored clients. Fortunately, our proposed restructuring of the doctrine of ineffective assistance of counsel would not promote such undesirable outcomes. By requiring that lawyers have a reasonable and well-supported belief in the risk of fraud before altering their style of representation, in keeping with the standards employed within codes of professional ethics, and by insisting that reviewing courts rigorously police this standard, we are confident that lawyers would be successfully deterred from engaging in such reprehensible behavior. Whatever objections one may raise against moral activism within the criminal-defense bar generally, these are not exacerbated by a proposal that merely emphasizes the need for greater transparency. By acknowledging the extent to which ethical considerations

already guide representation decisions, the public and the legal profession could more effectively debate the proper balance between zealous advocacy and candor to the tribunal. Finally, to whatever extent such transparency might entrench a role for ethical lawyering, we accept this result and assert that it is proper for courts to recognize certain ethical limits on the adversarial game of justice.

### V. CONCLUSION

Emerson never explained the distinction between a foolish consistency and a wise one,<sup>167</sup> but it is no doubt the difference between blind and considered devotion. That we maintain our adversary system of justice for legitimate reasons we do not dispute. The system promotes a relationship of trust between the accused and his advocate that can have tremendous dignitary value. The adversary system is intentioned with a common law and philosophical tradition that finds voice in the Fifth, Sixth, Seventh, and Fourteenth Amendments: No matter whether individuals are guilty or innocent, they all deserve their day in court. No less important than the expressive value of the adversarial system, however, is its truth-seeking value. While it may be that no criminal investigation ever would be conducted by paying two people to advocate the leading theories as best they could, the trust relationship between a defendant and his attorney is so crucial in part because the accused cannot be expected to tell the truth to a lawyer who will not scorch the Earth in his interests. This undeniable aspect of the adversarial function introduces an irony: The adversary system both aids the search for truth and undermines it. A considered devotion to the system depends intimately on our confronting this tension.

The dilemma manifests itself whenever an attorney must decide whether to persist with testimony, evidence, or a defense she believes unreliable. We have argued that while ethics authorities, in the form of model codes, ABA statements, and panel opinions, have evolved towards allowing greater space for a lawyer faced with this choice to be guided by moral deliberation, many courts considering claims of ineffective assistance of counsel, whether willfully or not, have engaged in a form of subterfuge. They have effectively given space for attorneys to allow morality to inform their decisionmaking but, outside the context of known client perjury, they have justified this space as permissible trial strategy. The effect is that courts blindly construe attorney decisions potentially motivated by moral considerations, in tension with the interests of their client, as tactical decisions consistent with those interests. In so doing, judges have weighed down the trend towards a justice system more acute to

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167. See RALPH WALDO EMERSON, *Self-Reliance* (1841), reprinted in 2 THE WORKS OF RALPH WALDO EMERSON 47, 58 (Edward W. Emerson ed., 1883) ("A foolish consistency is the hobgoblin of little minds . . .").

plain dealing and just outcomes with the adversary system's rhetoric of obfuscation and guile. We suggest that this judicial tendency, what we call the "alignment theory," frustrates an admirable trend and gives little guidance to the morally activist attorney. Instead, courts should openly acknowledge the conflicts lawyers face and apply to lawyers' decisions a "reasonable belief" standard robust enough to cover the full panoply of morally informed decisionmaking.

Admittedly, we have deliberately avoided discussing the history of the ineffective assistance of counsel doctrine and how the morally activist lawyer fared under the "farce and mockery" standard of old.<sup>168</sup> We have not performed a controlled study of the effect of *Whiteside* on judicial treatment of morally attentive lawyering. Neither have we assessed current trends in judicial responses to the many ethical issues that confront attorneys in civil cases. All of these areas remain ripe for future research. The modest claim we do advance derives from our view that, simply stated, judicial language matters. It provides guidance to attorneys and their clients and vindicates the expressive value of the criminal justice process. Courts send the murkiest of messages when they downplay the defense lawyer's most fundamental dilemma, the unavoidable reality that sometimes the truth hurts.

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168. Before courts in the 1970s began to utilize a "reasonable competence" standard for analyzing ineffective assistance of counsel claims, *see, e.g.*, *United States v. Easter*, 539 F.2d 663 (8th Cir. 1976), appellate courts faced with such claims asked whether the attorney's performance rendered the trial a "farce and mockery of justice." *See United States v. Wight*, 176 F.2d 376, 379 (2d Cir. 1949) ("A lack of effective assistance of counsel must be of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice."); *see also Diggs v. Welch*, 148 F.2d 667, 669 (D.C. Cir. 1945).