


2-3-2015

Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy

W. Bradley Wendel

Cornell Law School, wbw9@cornell.edu

Follow this and additional works at: http://scholarship.law.cornell.edu/clsops_papers

 Part of the [Ethics and Professional Responsibility Commons](#), and the [Legal Profession Commons](#)

Recommended Citation

Wendel, W. Bradley, "Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy" (2015). *Cornell Law Faculty Working Papers*. Paper 116.

http://scholarship.law.cornell.edu/clsops_papers/116

This Article is brought to you for free and open access by the Faculty Scholarship at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Law Faculty Working Papers by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.

Whose Truth? Objective and Subjective Perspectives on Truthfulness in Advocacy

W. Bradley Wendel¹

¹ Professor of Law, Cornell Law School. This paper was originally written for the Second Legal Ethics Schmooze at Fordham Law School. I am grateful to all participants in the Schmooze for helpful discussion and in particular to Ben Zipursky for refusing to let me off the hook for waffling on my position and for suggesting the objective vs. subjective framing. Additional thanks are due to Dana Remus, participants in faculty workshops at Brooklyn and Notre Dame Law Schools, and to the students in Mike Dorf's Legal Scholarship Colloquium at Cornell Law School.

INTRODUCTION

A lawyer confronts many features of the world that are given, inflexible, and must simply be dealt with; at the same time she has latitude for creativity, for the exercise of skill and judgment toward the realization of the client's ends. This is true for lawyers acting in various capacities, including as counselors of clients and transactional planners, but is most clearly one of the structural features of the lawyer's role as an advocate for her client. Recent law graduates learning the craft of advocacy quickly come to understand that, while in law school it was the law that was open-textured, manipulable, and the wellspring of creative lawyering, in practice the facts do not come pre-packaged and accepted as true for the purposes of an appellate court's review, but are highly contingent and the product of the interaction between a lawyer and witnesses, documents, and other sources of information. It is exactly in this respect, however, that the theory of legal ethics is relatively under-developed. David Luban has observed that "[e]very lawyer knows tricks of the trade that can be used to do opponents out of their legal deserts,"² including various types of games that can be played with facts. Many of these tricks have entered the folklore of advocacy techniques – suggestive witness preparation or "coaching" that steers the testimony toward a favorable legal conclusion, aggressive cross-examining of a truthful witness to make the witness seem uncertain or the testimony appear false, and the use of truthful bits of evidence to induce the jury to draw false inferences. Predictably, the use of these tactics by advocates has attracted criticism from those who wonder what any of this has to do with the truth-finding function of the adversarial system of justice.³ Just as predictably, defenders of these practices appeal to individual rights and the American constitutional tradition to evaluate trial lawyers as honorable, not unethical, when playing games with the truth.⁴ While interesting enough, I think this debate has suffered from a lack of

² David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 118 (David Luban, ed., 1983).

³ See, e.g., DEBORAH L. RHODE, *IN THE INTERESTS OF JUSTICE* 96-105 (2000); RUDOLPH J. GERBER, *LAWYERS, COURTS, AND PROFESSIONALISM* 109-16 (1989); Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 *DICK. L. REV.* 563 (1996); A. Kenneth Pye, *The Role of Counsel in the Suppression of Truth*, 1978 *DUKE L.J.* 921; Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 *U. PA. L. REV.* 1031 (1975).

⁴ See, e.g., STEVEN LUBET, *NOTHING BUT THE TRUTH: WHY TRIAL LAWYERS DON'T, CAN'T, AND SHOULDN'T HAVE TO TELL THE WHOLE TRUTH* (2001); Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 *MICH. L. REV.* 1469 (1966).

engagement with foundational normative issues in legal ethics, in particular the problem of the role of law and the legal profession in maintaining political legitimacy.

The deeper debate within theoretical legal ethics is dominated by the issue of role-differentiated morality – that is, the problem of how it can be that someone occupying a social role is permitted to do something that would ordinarily be morally wrongful.⁵ This issue arises because lawyers are said to adhere to a set of principles known as the standard conception of legal ethics.⁶ The standard conception consists of three principles – two of action, and one of evaluation. The principle of *partisanship* states that the lawyer’s duties are owed to the client and not to third parties, society as a whole, the public interest, or anything else. The principle of neutrality directs lawyers not to consider reasons, values, emotions, commitments, or relationships that might tend to conflict with the client’s interests or diminish the lawyer’s vigor in representing the client. Finally, the principle of non-accountability is the evaluative principle, directing observers not to criticize lawyers in moral terms who respect the principles of partisanship and neutrality; any moral blame belongs properly to the client, in respect of her ends and actions. According to the traditional, unmodified version of the standard conception, the interests of clients should have primacy in the lawyer’s ethical worldview.⁷ Because the mere *interests* of clients are beside the point, morally speaking, critics of the standard conception have doubted that lawyers really have a moral permission to engage in conduct that otherwise would be evaluated as wrongful.⁸ The standard conception’s

⁵ See, e.g., ALAN H. GOLDMAN, *THE MORAL FOUNDATIONS OF PROFESSIONAL ETHICS* 3 (1980) (posing the strong conception of role differentiation as the claim that “the occupant of the position [is] permitted or required to ignore or weigh less heavily what would otherwise be morally overriding considerations in the relations into which he enters as a professional”).

⁶ See, e.g., TIM DARE, *THE COUNSEL OF ROGUES? A DEFENCE OF THE STANDARD CONCEPTION OF THE LAWYER’S ROLE* 5-12(2009).

⁷ The default cite for this position is a speech in the English House of Commons by Lord Henry Brougham, defending Queen Caroline on adultery charges:

An advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons . . . is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others.

Quoted in DARE, *supra* note __, at 6; Frankel, *supra* note __, at 1036.

⁸ See, e.g., ARTHUR ISAK APPLBAUM, *ETHICS FOR ADVERSARIES* (1999); DAVID LUBAN, *LAWYERS AND JUSTICE* (1988).

defenders have therefore sought to locate some moral value, such as loyalty, trust, or human dignity, that could serve as the normative foundation for the lawyer-client relationship.⁹

One feature of the debate over the standard conception has proven unsatisfactory to some scholars. The traditional debate seems to have little to do with the institutional setting of the lawyer's role. Lawyers are not just moral agents, although of course they remain moral agents even when acting within a social role. They also play a part in the social practice of governance of citizens through law in a liberal democratic state. The criticism or justification of the actions of lawyers should therefore have something to do with more general considerations within political theory, such as democratic legitimacy, the authority of law, and the duties of citizens with respect to legal institutions. In recent years, legal ethics scholarship has changed its emphasis, to take account of issues in democratic theory and legal philosophy.¹⁰ For example, one might argue that the law is best understood as a means for resolving social conflict and establishing a framework of rights and duties, using fair procedures, that citizens can use to decide how to act under a shared public justification.¹¹ From this theoretical account of the nature of law and the legal system, certain duties of lawyers might follow. If the law represents a settlement of normative conflict, lawyers should not be allowed to re-introduce controversial views about what one ought to do, if there is a legal rule on point resolving disagreement over that issue. Many critics of the standard conception would permit a lawyer to employ clever work-arounds to evade the requirements of a law the lawyer believes to be unjust.¹² If the law has

⁹ See, e.g., David Luban, *Lawyers as Upholders of Human Dignity (When They Aren't Busy Assaulting It)*, in *LEGAL ETHICS AND HUMAN DIGNITY* 66 (2007) [hereinafter "Luban, *Upholders*"] (considering human dignity as the foundational value in the advocacy setting, while remaining skeptical of the standard conception generally); Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 *YALE L.J.* 1060 (1976) (relying on the value of loyalty and an analogy with friendship).

¹⁰ See, e.g., DARE, *supra* note __; W. BRADLEY WENDEL, *LAWYERS AND FIDELITY TO LAW* (2010); DANIEL MARKOVITS, *A MODERN LEGAL ETHICS* (2008); Norman Spaulding, *The Rule of Law in Action: A Defense of Adversary System Values*, 93 *CORNELL L. REV.* 1377 (2008) (reviewing LUBAN, *supra* note __).

¹¹ See SCOTT J. SHAPIRO, *LEGALITY* (2012); MARKOVITS, *supra* note __, at 173-75; DARE, *supra* note __, at 60-63. The word "citizen" as used here is similarly meant to suggest a distinction between ordinary and political morality, the idea being that one remains a "person in the background culture and a citizen in the public forum." Burton Dreben, *On Rawls and Political Liberalism*, in *THE CAMBRIDGE COMPANION TO RAWLS* 317, 325 (Samuel Freeman, ed., 2003). Rights and duties associated with citizenship have to do with the way one acts, and justifies oneself, to others in terms of public reasons.

¹² Deborah Rhode and William Simon have both used as an example a case in which a

moral value as a means of reaching a shared public resolution of contested issues about justice, however, a lawyer would act wrongfully by planning around it. Ethical lawyering means, among other things, responding appropriately to the reasons for action created by the law.¹³ It may require not only refraining from actively evading the law, but also understanding the *content* of legal rules not from the Holmesian bad man perspective of “what can I get away with,” but from the point of view of the law as it would be understood by an impartial member of an interpretive community.¹⁴

The question to be taken up in this essay is, if one believes that being an ethical lawyer has something to do with democratic legitimacy and the authority of law, what practical stance must a lawyer take with respect to facts? By “facts” I mean here not that which has been established conclusively at trial, but bits and pieces of raw data or evidence that bear on questions of fact in dispute, including the accounts of witnesses, documents, observations, and so on.¹⁵ Manipulating facts can be just as effective a means of evading the requirements of law as manipulating the law through too-clever-by-half interpretations. Is one who sees the lawyer’s role through the lens of democratic political theory therefore committed to condemning

lawyer representing an applicant for public benefits could advise the client to engage in a relatively minor deception and thereby avoid a substantial loss in her benefits. The reason they give for the moral permissibility of this deceit is the patent inadequacy of the existing benefits scheme to address the material needs of people with limited incomes. See W. BRADLEY WENDEL, *ETHICS AND LAW: AN INTRODUCTION* 121-25 (2014) (discussing Rhode and Simon’s analysis of this case and other approaches one might take).

¹³ I generally follow those legal philosophers who understand the law as creating reasons for action, i.e. changing the normative situation of those subject to it. See, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 23-69 (1986); JOSEPH RAZ, *THE AUTHORITY OF LAW* 30 (1979); Jules Coleman, *The Architecture of Jurisprudence*, 120 *YALE L.J.* 1 (2011); Andrei Marmor, *An Institutional Conception of Authority*, 39 *PHIL. & PUB. AFF.* 238 (2011).

¹⁴ This, at least, is the principal argument of WENDEL, *supra* note __.

¹⁵ Accordingly, the subject matter of the paper is not really “truth” in any philosophically interesting sense. Joshua Cohen, for example, asks whether a liberal political theory can employ a concept of truth, or whether the constraint of offering public reasons precludes resort to truth. See also Joshua Cohen, *Truth and Public Reason* 37 *PHIL. & PUB. AFF.* 2 (2009). The adversary system of litigation, by its nature, is concerned with smaller-scale questions of truth, not only the proverbial question in criminal trials, “did he do it?”, but more complex questions about the state of mind of an actor (e.g. did the defendant have a *reasonable* belief that his life was in danger) or some evaluative matter (e.g. is this consumer product reasonably safe as designed?). Even at that level of generality, one can ask even more specific questions, such as what practical stance an advocate may (or must) take with respect to the testimony of a witness, an item of physical evidence, and so on. That question is the subject of this paper.

the “tricks of the trade” of the advocate as unethical?¹⁶ The answer to this question depends on the perspective one takes on the relationship between the role of lawyers as advocate and the contribution made by advocacy to legal legitimacy. To speak very generally for now, this relationship can take two forms.¹⁷ It can be: (1) Objective, so that the most important criterion of legal legitimacy *what is the case*, based on both law and facts – i.e. whether the client does or does not have a legal entitlement to do what is in her interests; or (2) subjective, so that the most important criterion for legitimacy is whether the legal system has taken into account the client’s own perspective, the story she has to tell.

Once we are clear on the right perspective to take, it should be possible to specify more particularly what practical attitude lawyers ought to take with respect to facts and, even more specifically, what sorts of tactics and stratagems should be deemed unethical.¹⁸ Should lawyers remain agnostic about their clients’ stories, for example, and refrain from taking active steps to ensure against a result that would be inconsistent with the truth? May lawyers assist their clients in crafting their testimony to make a favorable outcome more likely? What ethical limitations (apart from the requirements contained in rules of procedure) exist on bringing legal contentions with an inadequate factual foundation? Under what conditions, if ever, should lawyers be required to intervene to prevent the distortion of the truth-finding function of the adversary system? While lawyers have discussed many of these questions with reference to specific prohibitions in the law of lawyering on presenting false evidence, there has been very little analysis of the connection between these prescriptions and more general considerations of the authority and legitimacy of law. Thus, what this essay hopes to accomplish is the grounding of particular duties with respect to facts in general theoretical considerations relating to legality and legitimacy.

Almost every scholar who has considered the problem of connecting ethical prescriptions for lawyers with considerations of political legitimacy, including Geoffrey Hazard and Dana Remus,¹⁹ Daniel Markovits,²⁰ William

¹⁶ Benjamin C. Zipursky, *Legal Positivism and the Good Lawyer: A Commentary on W. Bradley Wendel’s Lawyers and Fidelity to Law*, 24 GEO. J. LEGAL ETHICS 1165 (2011).

¹⁷ Zipursky, *supra* note __, at 1180.

¹⁸ To be clear, by “unethical” here I mean in a critical, philosophical, or “ethics beyond the rules” sense. While the discussion may occasionally refer to some aspect of the law governing lawyers, that law is not the primary focus of this paper. There are plenty of things lawyers may do within the rules, or may get away with if they’re clever, which raise issues from the standpoint of philosophical ethics.

¹⁹ See Geoffrey C. Hazard, Jr. & Dana A. Remus, *Advocacy Revalued*, 159 U. PA. L. REV. 751 (2011).

Simon,²¹ and David Luban,²² has come down on the subjective side of the debate, albeit for differing reasons. Hazard and Remus, for example, lean hard on epistemological considerations, arguing that lawyers lack adequate grounds for reaching conclusions about the truth of matters in dispute in litigation,²³ while Luban emphasizes the importance of protecting the dignity of clients by allowing them to tell their own stories, in their own way, without interference by a lawyer.²⁴ The aim of this paper is therefore to defend an unpopular position – the objective perspective – and to argue that lawyers’ ethical duties with respect to facts are constrained by what is the case. Notice that this constraint (“what is the case”) brackets the epistemological question, how does a lawyer know what is the case? As the argument develops, matters of epistemology will be introduced gradually, but for clarity it will begin with the assumption that the lawyer knows some fact to be true. It may be that, as the assumption is relaxed, lawyers will have ethical duties that vary according to the level of certainty they have with respect to the truth of some factual issue. But the baseline duty, in any case, on the objective perspective is to contribute to the resolution of controversies on their legal *and factual* merits. Political legitimacy depends on adhering to ideals of truthfulness in politics. The alternative, subjective perspective on the relationship between legitimacy and advocacy, although emphasizing the extremely important value of human dignity, ultimately leads to a cynical, bullshit (in Harry Frankfurt’s sense²⁵) style of advocacy that undermines its own claim to political legitimacy.

This does not mean that lawyers have a direct obligation to seek the truth. Our adversarial system of litigation presupposes that each party and its advocate will have its own perspective on the truth and be permitted to argue for it, and introduce evidence in support of it, at trial.²⁶ The general theoretical orientation of the adversarial system toward partisan perspectives on the truth has, however, tended to make lawyers forget that they have some responsibility with respect to the truthfulness of litigated matters.²⁷ Following Bernard Williams, I distinguish between *truth* with

²⁰ See MARKOVITS, *supra* note ____.

²¹ See WILLIAM H. SIMON, *THE PRACTICE OF JUSTICE* (1998).

²² See Luban, *Upholders*, *supra* note ____.

²³ See Hazard & Remus, *supra* note ___, at 760-61.

²⁴ See Luban, *Upholders*, *supra* note ___, at 73.

²⁵ See HARRY FRANKFURT, *ON BULLSHIT* (2005) (distinguishing bullshit from lies on the attitude displayed by the speaker toward the facts – lying is an attempt to evade the truth, while bullshitting is indifferent to it).

²⁶ See generally W. Bradley Wendel, *Adversary System of Justice*, in *INTERNATIONAL ENCYCLOPEDIA OF ETHICS* (Hugh LaFollette, ed., 2013).

²⁷ Doctrinally this responsibility is expressed by pleading standards that require an

respect to some belief (“it is true that *P*,” where *P* would be something like “the defendant robbed the victim,” or “the plaintiff was standing *right here* when the accident occurred”) and *truthfulness* as an ideal that may apply to a process or institution of government.²⁸ Legal ethics has tended to be quite preoccupied with issues concerning truth, particularly in the detailed rules governing the introduction of false testimony or evidence.²⁹ This emphasis

attorney to ensure, and certify to the court, that there is an adequate factual basis for a contention. The 1983 amendments to Rule 11 of the Federal Rules of Civil Procedure were intended to remind, underscore, and enforce attorneys’ “responsibility to the judicial system as officers of the court.” 5A CHARLES A. WRIGHT, ET AL., FEDERAL PRACTICE AND PROCEDURE § 1331 (3d. ed. & Supp. 2015). More recently, the Supreme Court has replaced the formerly liberal pleading standard with a requirement that factual contentions be plausible. *See Ashcroft v. Iqbal*, 556 U.S. 662 (2009); *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). Some commentators have suggested that the increasingly intrusive regulation of the conduct of litigation advocates is the result of attorneys refusing to conduct themselves ethically by exercising self-restraint. *See, e.g.*, Judith L. Maute, *Sporting Theory of Justice: Taming Adversary Zeal with a Logical Sanctions Doctrine*, 20 CONN. L. REV. 7(1987); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 MINN. L. REV. 1 (1984).

²⁸ *See generally* BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS (2002); Bernard Williams, *Truth, Politics, and Self-Deception*, in IN THE BEGINNING WAS THE DEED 154(Geoffrey Hawthorn, ed., 2005). Compare RAWLS, *supra* note __, at 62 (“being reasonable is not an epistemological idea . . . [r]ather, it is part of a political ideal of democratic citizenship”).

²⁹ *See, e.g.*, ABA MODEL RULES OF PROF’L CONDUCT, Rule 3.3 [hereinafter, “MODEL RULE xx”]. This rule states clearly that a lawyer may not offer evidence that she knows to be false. However, the rule and its interpretation by courts recognizes duties to interdict false evidence only in cases in which the lawyer *knows* the evidence is false. Knowledge, for the purpose of these duties, is defined as actual, subjective knowledge. *See* MODEL RULE 1.0(f). A long history of judicial interpretation of the rule makes clear that, where the witness is the defendant in a criminal case, knowledge means something approximating Cartesian certainty, and in the absence of the client’s express affirmation of an intent to lie on the stand, courts will be very reluctant to find that the lawyer knew about the client’s contemplated perjury. *See, e.g., United States v. Midgett*, 342 F.3d 321 (4th Cir. 2003). In one leading state court case the defendant told an utterly preposterous story and, when confronted by the lawyer with the story’s inconsistency with the testimony of other witnesses, the client said, “I’ll say what I need to say to help myself out and if I have something untruthful to say I’ll say that. I need to help myself out.” *State v. McDowell*, 681 N.W.2d 500 (Wis. 2004). The lawyer discussed his concern that the client may perjure himself with the trial judge, and the judge permitted the lawyer to call the client as a witness but have him testify in the form of a narrative. The client was convicted, and on appeal the Wisconsin Supreme Court held that the lawyer’s performance at trial was constitutionally ineffective because he revealed to the trial court what he believed to be the client’s intent to commit perjury, and he also put on the client’s testimony in narrative form. The court said that a lawyer may take remedial measures, such as refusing to assist his client in testifying, only where the lawyer knows based on an affirmative statement of intent from the client that the client intends to perjure himself. Courts in civil cases are somewhat more likely to find, based on circumstantial evidence, that a lawyer must have

on truth as a propositional matter has obscured the ethical analysis that should apply to practices, such as evidence gathering, the conduct of civil discovery, witness preparation, and the examination of witnesses at trial. The legitimacy of the civil justice system depends on its being a process of reason-giving, which in turn depends on the reasons having something to do with what actually is the case, as a matter of fact. But “every statement in [a narrative] can be true and it can still tell the wrong story.”³⁰ Truth alone does not supply the normative foundation for the ethics of advocacy; lawyers must also be concerned about telling a story that makes sense in relation to other values embodied in the legal system, such as justice and rights.

The argument begins, in Section II, by giving three examples of the way in which lawyers in the role of advocate can affect the presentation of evidence to a trier of fact. The first two are from civil litigation, and the third from a criminal prosecution. As I have argued elsewhere, criminal defense is a special case, and it is a serious mistake to generalize, from the ethical duties and permissions a criminal defense lawyer has, to conclusions about legal ethics more generally.³¹ The distinctiveness of criminal defense is not due only to the high stakes for the defendant; plenty of civil cases have potentially very serious potential downsides, including loss of liberty (in civil commitment proceedings), deprivation of parental rights, and huge financial penalties. Rather, criminal cases are different because they directly implicate the power of the state to deprive citizens of liberty or even their lives, and therefore require heightened procedural protections for the rights of defendants. The presumption of innocence, the requirement that the prosecution prove its case beyond a reasonable doubt, the right to counsel, the privilege against self-incrimination, and prohibitions on introducing wrongfully obtained evidence are all, fundamentally speaking, about securing the rights of citizens against the state. The defendant’s constitutional rights create ethical duties for the defense lawyer that weigh against the end of truth-seeking that would ordinarily be foundational in an adversarial system of adjudication. The role of the criminal defense lawyer is accordingly characterized by distinctive ethical norms, including the duty to “put the state to its proof” – i.e. to require that the prosecution prove each element of a crime beyond a reasonable doubt. That duty frees the lawyer from what would otherwise be requirements, imposed by rules of professional conduct and procedural law, to refrain from making any

had actual, subjective knowledge of the falsity of some item of evidence. *See, e.g., United States v. Shaffer Equip. Co.*, 11 F.3d 450 (4th Cir. 1993).

³⁰ WILLIAMS, *supra* note __, at 244.

³¹ WENDEL, *supra* note __, at 58.

contention without an adequate factual basis and to take action to prevent or correct false testimony by a client or non-client witness.³² In the third example in Section II, the distinctive ethical role of the criminal defense attorney permits a certain amount of creativity with factual arguments that would not be permissible for an advocate in a civil case. To emphasize: I agree with the defense of the unique ethical obligations of lawyers in criminal defense representation, but I do wish to challenge the tendency to overgeneralize from this special case.

With these examples in mind of lawyers playing games with facts, Section III considers several recent, sophisticated defenses of the subjective perspective on factual truth, which emphasize the lawyer's obligation to tell the client's story, as the client sees it. Each of these explorations of the relationship between truthfulness and legal ethics is concerned, in one way or another, with the question of legitimacy. I follow Rawls in differentiating legitimacy from justice.³³ The reason for this distinction is bound up with the functional account of law which emphasizes the role of democratic procedures in "making decisions when the conflicts and disagreements in political life make unanimity impossible or rarely to be expected."³⁴ Disagreement over the justice of a measure (a would-be right, rule for the allocation of resources, etc.) is what makes government necessary in the first place; if we could all agree on what is permitted or prohibited in a society, there would be no need for law. As a result, the legitimacy of a law must be, to some extent, independent of its content.³⁵ But what can one say about one who represents another with respect to legal rights and duties if the authority of a law is independent of its moral merit, justice, or other substantive characteristics? This question connects the ethical obligations of lawyers with the sources of legal legitimacy and, specifically, raises the question whether truthfulness is a condition of legitimacy. There are reasons (or so several of us have argued) that citizens have an obligation to respect the law despite the lack of a necessary connection between moral merit and authority. Does it then follow that there need be no necessary connection between truthfulness and legitimate authority?

³² See MODEL RULES, *supra* note __, Rule 3.1 (prohibiting lawyers from making any contention that is frivolous – meaning lacking an adequate legal and factual basis – but then stating that a criminal defense lawyer “may nevertheless so defend the proceeding as to require that every element of the case be established”).

³³ See JOHN RAWLS, *Reply to Habermas*, in POLITICAL LIBERALISM 372, 427-30 (paperback ed. 1993); see generally Richard E. Flathman, *Legitimacy*, in A COMPANION TO CONTEMPORARY POLITICAL PHILOSOPHY 678 (Robert E. Goodin, et al., eds., 2d ed., 2012).

³⁴ RAWLS, *supra* note __, at 428.

³⁵ See H.L.A. Hart, *Commands and Authoritative Legal Reasons*, in ESSAYS ON BENTHAM 243, 254-55 (1984).

I argue for a negative answer in Section IV, relying on the connection between lawyers as advocates and the process of reason-giving that is characteristic of legality as a distinctive mode of governance. Political ethics, including legal ethics, must begin with what Rawls calls the burdens of judgment: We must propose fair terms of cooperation with others while acknowledging reasonable pluralism, which is based on the diverse and incompatible sources of human value, as well as conflicting evidence and uncertainty about the facts bearing on the resolution of normative disagreement.³⁶ In so doing we have to be reasonable, but what criteria of reasonableness can we settle on where there is such deep disagreement over values? In my view, the lawyer's ethical role in advocacy is to contribute to a process of giving public reasons in support of workable principles – conceptions of justice – that comprise a resolution of social conflict. These reasons must be based on the sorts of considerations that affected citizens may reasonably be expected to endorse. Stated in this way, however, it is still an open question whether lawyers should take the objective or subjective perspective on truthfulness. Perhaps the process of giving public reasons is necessarily dependent upon stories being told directly by clients, with minimal interference by their representatives. Thus, much of the burden of the argument in Section IV will be to show that this ideal of public reason contains an implicit commitment to truthfulness in political discourse, including the presentation of evidence in litigation, and that this commitment entails the objective perspective.

II. GAMES LAWYERS PLAY.

A. *Coaching Witnesses.*

American lawyers, to a considerably greater extent than is accepted anywhere else in the common law world,³⁷ believe their professional

³⁶ RAWLS, *supra* note __, at 54-58

³⁷ See, e.g., BAR STANDARDS BOARD (U.K.) HANDBOOK, Conduct Rules, Rule C2, rC9.4 (“you must not rehearse, practise with or coach a witness in respect of their evidence”); NEW SOUTH WALES BARRISTERS’ RULES, Rule 68(b) (2014) (“A barrister must not . . . coach a witness by advising what answers the witness should give to questions which might be asked”). *But see* LAWYERS AND CONVEYANCERS ACT (LAWYERS: CONDUCT AND CLIENT CARE) RULES 2008 (NEW ZEALAND), Rule 13.10.8, n.24 (“A lawyer may assist a witness in preparing to give evidence by assisting in the preparation of a brief of evidence, and by pointing out gaps, inconsistencies in the evidence (with that witness’s evidence or the evidence of other witnesses), the inadmissible nature of proposed evidence, or irrelevancies in evidence that the witness is proposing to give.”).

obligations permit, or even require, them to spend time preparing clients and friendly witnesses to testify at trial or in a deposition. The process of preparing witnesses gives lawyers an opportunity to influence the development of their testimony in a way that accords better with the applicable law. Legal ethics teachers used to talk about the “lecture” scene from *Anatomy of a Murder*, but since hardly any students in this generation have seen that movie, it has lost its relevance as an illustration. Thus, I will use two more recent examples, one from a New York personal-injury case and the other from a Texas law firm representing plaintiffs in litigation against manufacturers of products containing asbestos.

In the New York case, two lawyers represented a client who tripped and fell on a sidewalk.³⁸ The client initially told the lawyers that the sidewalk was in front of a church. When the lawyers investigated the site, they discovered no defects in the sidewalk directly in front of the church, i.e. on the same side of the street as the church, but significant cracks in the sidewalk across the street, directly in front of a house. They informed the client that if she testified that she fell on the sidewalk in front of the church, she would have no claim because that sidewalk was in good condition. The client dutifully reported that when she said she fell “in front of the church,” she meant that was walking across the street from the church, on the cracked sidewalk. The lawyers were charged with misconduct including “fail[ing] to ascertain the location of their client's accident in a non-suggestive manner.” They ultimately were disciplined for violation of the catch-all rule of professional conduct proscribing conduct involving dishonesty, fraud, deceit or misrepresentation,³⁹ and the rule against conduct that would adversely reflect on an attorney’s fitness to practice law,⁴⁰ but not the rule on participating in the creation of false evidence.⁴¹

One of the attorneys conceded that “the way [the client] came to allege that she fell where she fell was influenced by the way I explained the law to her.” One may nevertheless imagine a relatively innocuous version of the conversation with the client. Suppose after a brief initial meeting at which the client said she fell on a cracked sidewalk in front of the Bryn Mawr Presbyterian Church on Lockwood Avenue in Yonkers, the attorneys visited the site, noticed that the sidewalk directly in front of the church was in good repair, but the sidewalk across the street was badly cracked. One of the

³⁸ *In re Rios*, 109 A.D.3d 64, 965 N.Y.S.2d 418 (1st Dep’t 2013).

³⁹ NEW YORK RULES OF PROF’L CONDUCT, Rule 8.4(c) [hereinafter, “NEW YORK RULE XX”].

⁴⁰ NEW YORK RULES, *supra* note __, Rule 8.4(h).

⁴¹ NEW YORK RULES, *supra* note __, Rule 3.4(a)(3).

attorneys then called up the client and asked:

When you said you fell “in front of the church,” do you mean on the sidewalk directly in front of the church or were you across the street?

The client then might respond, “Oh right – sorry – I said in front of the church because it was an obvious landmark, but I was actually walking across the street.” Presumably there would be nothing wrong with having that conversation. It certainly would not rise to the level of knowledge of the falsity of the statement made by the client, for the purposes of the rule on witness perjury.⁴² The attorneys in the disciplinary case admitted, however, that they intended to influence the client to tell a story consistent with the liability of the homeowner, not the church. Thus, while they may not have known the client’s story was false, they were at least indifferent to its truth or falsity – they had a story they were determined to get the client to tell, and they influenced her to do so by means of an “explanation of the law” in which they told her she would not have a case unless she testified that she fell across the street from the church.

In the Texas case, a law firm representing plaintiffs in asbestos litigation gave a document to its clients entitled “Preparing for Your Depositions,” to assist them in giving testimony that would help their cases. The plaintiffs had been exposed in the course of their employment as pipefitters, shipyard workers, and the like, many years ago, but due to the long latency period of asbestos-caused diseases, were only now bringing lawsuits. It was entirely possible that they had forgotten many details about their workplaces, since in many cases they had not worked around the asbestos-containing products for decades. The law firm’s witness-preparation memo accordingly included tips such as the following:

How well you know the name of each product and how you were exposed to it will determine whether that defendant will want to offer you a settlement.

Remember to say you saw the NAMES on the BAGS....

It is important to emphasize that you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it.

It is important to maintain that you NEVER saw any labels on asbestos

⁴² Compare NEW YORK RULES, *supra* note ___, Rule 3.3(a).

products that said WARNING or DANGER....

You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!⁴³

Defenders of the law firm argued that the memo could be seen as nothing more than a means to ensure that unsophisticated first-time litigants, who might understandably be intimidated by the process of being deposed and thus prone to uncertainty or memory lapses, would be able to present truthful testimony in a coherent manner.⁴⁴ But think about it for a minute. Consider the prompt in the memo,

Remember to say you saw the NAMES on the BAGS . . . You may be asked how you are able to recall so many product names. The best answer is to say that you recall seeing the names on the containers or on the product itself. The more you thought about it, the more you remembered!

In a products liability action, one of the elements of the plaintiff's prima facie case is to identify the manufacturer of the product. Asbestos fibers, generically, are dangerous, but there is some variation in the danger posed by various asbestos-containing products due to variation in the degree to which the product is "friable" – i.e. capable of releasing asbestos fibers into the air where they can be breathed in.⁴⁵ Even if the danger presented was the same among a category of product (say, pipe insulation or cement) is uniform, products liability law still, in most cases, requires the plaintiff to identify the manufacturer.⁴⁶ Doctrinally, this follows from the cause-in-fact showing that is an element of any tort claim.⁴⁷ While a few decisions have relaxed the requirement of identifying a specific defendant where the product in question is truly fungible, as in the case of some generic drugs,⁴⁸

⁴³ See W. BRADLEY WENDEL, PROFESSIONAL RESPONSIBILITY: EXAMPLES AND EXPLANATIONS (4th ed. 2013) (discussing a problem based on this case, and citing 14 ABA/BNA LAWYERS' MANUAL ON PROF'L CONDUCT 48-54 (1998)).

⁴⁴ See, e.g., William W. Hodes, *The Professional Duty to Horseshed Witnesses—Zealously, Within the Bounds of Law*, 30 TEXAS TECH L. REV. 1343, 1348 (1999).

⁴⁵ See, e.g., *Jackson v. Johns-Manville Sales Corp.*, 750 F.2d 1314, 1336-41 (5th Cir. 1985) (including Appendix describing asbestos litigation in detail).

⁴⁶ See, e.g., PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 183-84 (1986).

⁴⁷ See, e.g., DAVID G. OWEN, PRODUCTS LIABILITY LAW § 1.3, at 40 (2d ed. 2008).

⁴⁸ *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (using share of the relevant

that avenue was not available in the asbestos cases. Thus, the plaintiffs would have been required to testify that they remember that the product they used was manufactured by Owens-Corning, Eagle Picher, or any one of a number of other manufacturers whose products were on the market at the time the plaintiffs were exposed to asbestos.

Notably, not all of the manufacturers were still solvent, many having been bankrupted by previous rounds of lawsuits.⁴⁹ The witness preparation memos thus helpfully included a list of still-solvent manufacturers whose products may have been used in the plaintiffs' workplaces. The obvious suggestion for all but the thickest plaintiff was to "remember" having seen those products around which were manufactured by Company X, thereby satisfying the requirement of showing a causal connection between the injury and the product produced by a solvent defendant. As in the sidewalk case, the lawyers supplied a missing piece of the factual puzzle – a crucial bit of evidence the plaintiff would have to show in order to establish an entitlement to damages. Many observers have the intuition that something is wrong with the lawyer filling in gaps in the plaintiff's proof in this way, but interestingly there is no explicit prohibition in the rule of professional conduct on doing exactly that. It is telling that the lawyers in New York were disciplined for violating the catch-all rule on conduct "conduct involving dishonesty, fraud, deceit or misrepresentation,"⁵⁰ and not one of the specific prohibitions on presenting false evidence or falsifying evidence.⁵¹ Without knowledge that the client's initial version of events was actually true, how can the lawyers be deemed to have falsified evidence by suggesting that she make her story more detailed by indicating that she fell on the sidewalk across the street, which is still, in a sense, "in front of" the church? There is no prohibition on "true-ifying" evidence, and maybe the lawyers were merely assisting the client to clarify her story.⁵²

generic-drug market to establish but-for causation).

⁴⁹ See generally Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121 (1983).

⁵⁰ See MODEL RULES, *supra* note __, Rule 8.4(c). The New York version of this rule is substantively identical.

⁵¹ See MODEL RULES, *supra* note __, RULES 3.3(a), 3.4(b). Again, the New York version of the rules impose the same duties.

⁵² See, e.g., *Gaia Envtl., Inc. v. Galbraith*, __ S.W.3d __, 2014 WL 4415221 (Tex. Civ. App. 2014) (holding that criminal prohibition on witness tampering applies only where lawyer seeks to persuade witness to testify falsely, not merely to change testimony); *Resolution Trust Corp. v. Bright*, 6 F.3d 336, 341 (5th Cir.1993) ("It is one thing to ask a witness to swear to facts which are knowingly false. It is another thing, in an arms-length interview with a witness, for an attorney to attempt to persuade her, even aggressively, that her initial version of a certain fact situation is not complete or accurate."). Bill Hodes made a similar argument in defense of the Baron & Budd memo. It would have been improper to

I have long been a critic of the catch-all provisions of Rule 8.4, which sometimes are interpreted to reach conduct addressed in specific terms in other rules. For example, there are specific prohibitions in the rules on attorneys making false statements to third parties and falsely stating or implying that they are disinterested.⁵³ Do these rules apply to the use by lawyers of undercover investigators to develop evidence favorable to a client's case? Consider, for example, the use of discrimination "testers" – for example, actors portraying a black family and a white family who both apply to rent an apartment, to determine whether the landlord is engaging in prohibited housing discrimination. The absence of a specific rule on witness coaching may suggest that lawyers have considerable latitude to intervene in the preparation of cases, by the *expressio unius est exclusio alterius* canon of statutory construction.⁵⁴ On the other hand, the *noscitur a sociis* canon suggests interpretation of ambiguous words (such as "conduct involving dishonesty, fraud, deceit or misrepresentation") in context, by considering what sorts of other words are associated with it.⁵⁵ While the rule on conduct involving dishonesty, deceit, etc., is tacked on to the end of the rules of professional conduct, other rules do prohibit interfering in particular ways with the discovery and presentation of evidence at trial, without necessarily being limited in scope to falsifying evidence.⁵⁶

circulate the memo if the lawyers were knowingly falsifying the witnesses' testimony, but there is no reason to believe they had any knowledge of this effect; thus, in retrospect we cannot conclude that the law firm violated the law by disseminating the memo. *See Hodes, supra* note __, at 1347-49. It is a much closer question, however, when analyzed from the *ex ante* point of view. *Should* a law firm prepare a similar memo to prepare its clients for depositions? At this point Hodes notes a pair of risks: Either a truthful client will forget, under the pressure of being deposed, having clearly seen (and recalling) the manufacturer's name on the product, or a mendacious client will substitute a manufacturer's name from the list of solvent companies in the memo for the name he actually recalls from his employment. Hodes argues that, as between the risk of under-serving one's client as a loyal and committed advocate, and the risk of introducing false testimony, the lawyer ought to err on the side of client service, absent knowledge that the evidence is false. *Id.* at 1355-56. To put it differently, in terms to be explored later in this paper, as long as a lawyer does not cross the lines established by the rules of professional conduct, ethics-beyond-the-rules permits and may even require lawyers to engage in effective witness preparation.

⁵³ *See* MODEL RULES 4.1, 4.3.

⁵⁴ "Inclusion of one thing implies exclusion of the other." *See* WILLIAM N. ESKRIDGE, JR., ET AL., CASES AND MATERIALS ON LEGISLATION 824 (2002); *Tate v. Ogg*, 195 S.E. 496 (Va. 1938) (interpreting statute referring to "any horse, mule, cattle, hog, sheep or goat" as not covering turkeys).

⁵⁵ ESKRIDGE, *supra* note __, at 822.

⁵⁶ *See, e.g.*, MODEL RULES, *supra* note __, Rules 3.4(a) (unlawfully obstructing other parties' access to evidence), 3.4(e) (alluding to irrelevant matters at trial), 3.4(f) (requesting witnesses to refrain from giving relevant information to another party), 3.5(b) (ex parte

As it turns out, the law governing lawyers appears to regard the use of deception as permissible in anti-discrimination cases, but potentially a violation of the rules of professional conduct in other types of cases, without giving any principled distinction between the two.⁵⁷ The point of this discussion, however, is not to analyze the exposure of lawyers to disciplinary sanctions; rather, it is to explore legal ethics “beyond the rules,” as it were, to determine whether lawyers are morally justified when they engaging in actions such as suggestive witness preparation that effectively turns their clients into ventriloquist’s dummies. In keeping with the theme of recent contributions to the theoretical legal ethics debate, this analysis does not proceed in terms of ordinary moral categories such as lying or deception.⁵⁸ Instead, it begins with concepts within political morality, such as legitimacy and the rule of law. Getting the foundation right does not yet answer the question concerning the permissibility of the games lawyers play with evidence, but it gets us closer to a satisfactory answer. As the next example shows, the best way to understand the ethics of advocacy is from the standpoint of the legal rights of *clients* and the relationship between facts and legal rights.

communications with judges or jurors), 4.2 (communicating with represented parties).

⁵⁷ See, e.g., *In re Gatti*, 8 P.3d 966 (Or. 2000) (applying Oregon version of Rule 8.4(c) to actions of undercover investigator); Douglas R. Richmond, *Deceptive Lawyering*, 74 U. CIN. L. REV. 577, 605-06 (2005) (correctly observing that, whatever we think of it as a policy matter, the use of testers is straightforwardly a violation of rule 4.1); David B. Isbell & Lucantonio N. Salvi, *Ethical Responsibility of Lawyers for Deception by Undercover Investigators and Discrimination Testers: An Analysis of the Provisions Prohibiting Misrepresentation Under The Model Rules of Professional Conduct*, 8 GEO. J. LEGAL ETHICS 791 (1995) (giving, to my mind at least, a pretty unconvincing defense of the propriety of using “testers”); William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903 (1993) (arguing for permissibility of deceptive investigative tactics in criminal, but not civil, cases).

⁵⁸ See, e.g., EVELIN SULLIVAN, *THE CONCISE BOOK OF LYING* (2001); SISSELA BOK, *LYING* (1978). The obligatory cite on the morality of lying is of course Kant’s uncompromising view. See IMMANUEL KANT, *GROUNDING FOR THE METAPHYSICS OF MORALS* 402-03 (James W. Ellington trans. 1981), at 15; IMMANUEL KANT, *LECTURES ON ETHICS* 224-27 (Louis Infield trans. 1930). For analysis of the ethics of lying and deception by lawyers, see, e.g., LUBET, *supra* note __; RICHARD ZITRIN & CAROL M. LANGFORD, *THE MORAL COMPASS OF THE AMERICAN LAWYER* 142-82 (1999); Symposium, *Law & Truth: Pre-Modernism, Modernism, and Post-Modernism*, 26 HARV. J. L. & PUB. POL’Y 3 (2003); Stephen Ellmann, *Truth and Consequences*, 69 FORDHAM L. REV. 895 (2000); Richard H. Underwood, *The Professional and the Liar*, 87 KY. L. REV. 919 (1999); John A. Humbach, *The National Association of Honest Lawyers: An Essay on Honesty, “Lawyer Honesty” and Public Trust in the Legal System*, 20 PACE L. REV. 93 (1999); Peter Meijes Tiersma, *The Language of Perjury: “Literal Truth,” Ambiguity, and the False Statement Requirement*, 63 S. CAL. L. REV. 373 (1990); Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 SW. L.J. 1135 (1988).

B. Insufficiently Supported Factual Arguments.

Among its other functions, the legal system assigns rights to citizens that they can employ in their dealings with one another, to ground a special mode of justification that stands apart from mere power and possibility. Suppose someone is harmed and says, “hey, you can’t do that to me.” The person who committed the act may respond, “sure I can – try to stop me!” if he is strong or well-connected enough to get away with it. But this is not a model of relating to one’s fellow citizens that manifests respect for the other as a free and equal person. One source of the moral attractiveness of the law is its capacity to create the possibility of dealing with others under a description not of power but of right.⁵⁹ Suppose someone publishes an offensive newspaper editorial that adherents of a minority religion consider blasphemous. As against the claim, “hey, you can’t do that to me,” the newspaper’s justification would not merely be “you can’t stop me,” but might refer to the legal right of freedom of the press. Of course this may not be a complete explanation; one may have a legal right and it might still be obnoxious to exercise it. The point is merely that, *conceptually* speaking, the law makes it possible to offer a justification that refers to a kind of collective solution to a social problem, and thereby invokes the idea of a legitimate ground for the exercise of power over another.

Legal philosophers sometimes talk as though the most important step in the establishment of legal rights is the action by some authoritative institution, such as a legislature, that invests a general norm, of the form “A may do Φ to B, under conditions C,” with the property of legal validity. In familiar Hartian terminology, a legal system includes a secondary rule, called a rule of recognition, which specifies criteria for determining which primary rules have the status of law.⁶⁰ Lawyers know, however, that there is a crucial intermediate step on the road to establishing that A has a legal right, and that is determining whether conditions C obtain. In the sidewalk case, the lawyers would not have been permitted to tell the client, “you

⁵⁹ As always, taking into account the multifaceted idea of a right as including a privilege, a claim-right, an immunity, and so on. Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917). For example, in the common law of torts a landowner has the “right” to leave her premises as she sees fit, and only warn users of the premises of hidden dangers. *See, e.g.*, W. PAGE KEETON, ET AL., PROSSER AND KEETON ON TORTS § 60 (5th ed. 1984). In Hohfeldian terms, this right of the landowner is best construed as a privilege, correlated with no-right in a user of land to sue if the landowner fails to use reasonable care to make the premises safe. *See* Hohfeld, *supra*, at 747.

⁶⁰ H.L.A. HART, *THE CONCEPT OF LAW* 94 (2d ed. 1994).

should say you fell across the street from the church,” if somehow they knew that the client had fallen on the sidewalk directly in front of the church. The scope of the legal rights and duties is clear; what is unclear, but determinative of the lawyers’ liability for discipline, are the murkier matters of the client’s truthfulness, the lawyers’ awareness of the facts, and the intent of the client and the lawyers. In general, much of the interest and challenge of representing clients in the real world pertains to investigation, discovery, and interpretation of factual evidence bearing on the client’s rights, as opposed to ascertaining the content of the law itself. It is in this connection that the ethical duties of lawyers are connected with the conditions under which we regard law as legitimate.

In a book called *Lawyers and Fidelity to Law*,⁶¹ I argued because the law has the function of resolving social conflict and establishing a framework for cooperation with reference to collectively established norms, it deserves respect by citizens and ought not to be manipulated by lawyers to yield results that are contrary to the social settlement. In a review of that book, Ben Zipursky offered a hypothetical case to see whether, on this functional account, it is also the case that lawyers should have an ethical obligation to refrain from playing their usual lawyer games with facts.⁶² The hypothetical goes like this:

Black lives in a house on Blackacre and White lives in a house on adjacent Whiteacre. Natural Rose Garden is a plot of land that is, roughly speaking, at the border between Blackacre and Whiteacre. Every year for the past several years, Black has snipped the valuable roses on Natural Rose Garden and sold them. White’s newly adult daughter one day looks into the deed and decides that White owns the land on which the rose bushes sit. White sues Black for trespass and restitution and Black counterclaims on the ground that it is his land under his deed and also on adverse possession. Assuming that White’s lawyer and Black’s lawyer might have reasonably good arguments for their respective positions, each has a duty to represent her client well. We can all paint a spectrum of possible real underlying fact patterns here. On some of them, from a God’s eye point of view, White is actually the one entitled to the land and the rose bushes in every sense of the term “entitled.” Yet there is no inconsistency between these being the real facts of the entitlement and Black’s lawyer having a respectable litigation position, which he believes, that Black should prevail; and if he does then he must assert it.

⁶¹ WENDEL, *supra* note ____.

⁶² Zipursky, *supra* note ____, at 1169-70.

To be clear at the outset, I share the evaluation of the vast majorities of lawyers who would conclude that there is no problem whatsoever with Black's lawyer asserting a "respectable litigation position," as long as it has adequate factual support. The objective perspective I am arguing for here is *not* that lawyers may advocate only positions that are the correct ones from the hypothetical God's eye point of view. White may contend that the rose garden is really on her land, but she could be mistaken, and in any event Black may be able to succeed in an adverse possession argument if Black has openly and notoriously asserted title to the rose garden. Applicable procedural law requires the lawyer representing Black to ensure that the factual contentions made in support of Black's position "have evidentiary support or . . . will likely have evidentiary support after a reasonable opportunity for further investigation or discovery."⁶³ If the lawyer has reviewed the deed and discovered an ambiguity in the boundary between Black's and White's land, or if Black's story of having regularly cut roses under a claim of right raises a plausible adverse possession claim, then the lawyer is acting ethically, even if the lawyer believes (and reasonably so) that the claim is not likely to prevail in the end.

This seems like such an obvious conclusion that one may wonder why anyone is talking about this problem at all. The response is that, as I have been contending, specific ethical prescriptions for lawyers need to be grounded in more general democratic political considerations. Why, *as a theoretical matter*, is Black's lawyer straightforwardly permitted to assert a losing claim? That is a harder question, and the answer one gives to that question will have considerable significance for the analysis of cases in which the ethical permissibility of the lawyer's conduct is a closer call. In particular, one who believes that the law is best understood as a settlement of social controversy and a framework for cooperation in a pluralistic society is necessarily drawn to a picture of law as relatively determinate. Scott Shapiro nicely describes what he calls the General Logic of Planning (GLOP): Since the function of law is to rectify the situation of a community facing numerous problems whose solutions are controversial by establishing a social plan to guide and coordinate the actions of community members, it cannot be the case that ascertaining the content of law will require re-engaging with the controversy that the law was meant to settle.⁶⁴ With

⁶³ FED. R. CIV. P. 11(b)(3).

⁶⁴ SHAPIRO, *supra* note __, at 309-11. The reader should cross-reference this passage with Shapiro's explanation of the circumstances of legality, *id.* at 170-73, which is very similar to the functional story set out in *Lawyers and Fidelity to Law*. See WENDEL, *supra* note __, at 89-98.

respect to the legal norms underlying the controversy over the rose garden, it is easy to understand the implications of GLOP for the Black-White dispute. There may be considerable controversy within a community over the respective rights of landowners, non-owners who make use of the land, potential purchasers of the property, and third parties such as lenders who must rely on publicly searchable title documents to determine the extent of their interest in the land of another.⁶⁵ When can a bank or a potential purchaser rely on a deed to convey all the seller's rights in the land, free of any claims of a potential adverse possessor (such as Black in the rose garden case)? One could imagine disagreement over the first-order question of what rights ought to be recognized, but since there is considerable social interest in having a clear and stable framework of property rights to facilitate sales of land and lending to finance land acquisition, the law establishes criteria for recognizing the interests of someone like Black. A party failing to satisfy those criteria has no interest in the rose garden. GLOP requires that these legal norms exclude reference to the considerations that otherwise might give Black more extensive rights.⁶⁶ Otherwise the law would not be capable of fulfilling its social function of underwriting stable expectations by creating a publicly accessible plan.

Shapiro does not talk much about the ethical obligations of lawyers, but I have argued that the standard conception of legal ethics – in which lawyers have an excuse for violating ordinary moral prohibitions on harming others in certain ways – can be defended on a similar functional account. The social plan creates legal entitlements and, since specialized advice is generally necessary for ordinary people to understand the content and significance of their legal entitlements, the role of lawyers can be justified as the only way to make GLOP work in practice. But here is the problem: Ascertaining the existence and content of an entitlement is not just a matter of law, but an application of law to facts. White's Entitlement (*E*), if there is one, to have the exclusive right to cut roses from the garden depends the law governing land transactions and adverse possession (*L*) along with myriad factual details (*F*) about the kind of use Black was making of the land, whether White knew about it, whether it was under a claim of right, and so on. Taking a page from Judge Learned Hand's book,

⁶⁵ See generally Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723 (1986) (critiquing Richard Epstein's libertarian theory of property).

⁶⁶ In Razian terms they function as exclusionary reasons. See JOSEPH RAZ, *THE MORALITY OF FREEDOM* (1986). As Shapiro puts it, the logic of planning is violated when the interpretation of law "permits moral considerations to determine the existence and content of legal norms, despite the fact that legal norms aim to settle the existence of those moral considerations." SHAPIRO, *supra* note ___, at 311.

one might represent legal entitlements using a formula: $E = F + L$. The social settlement or plan, upon which GLOP is premised, is not a function solely of L , but of $F + L$. I have argued that lawyers act unethically by abusing, manipulating, or planning around the law,⁶⁷ but because the analytic linchpin of this position is the idea of client entitlements, and if it is the case that $E = F + L$, then lawyers act unethically by abusing, manipulating, or planning around factual evidence.

One obvious response – one that I cautiously tried out in *Lawyers and Fidelity to Law* – is that the law creates not only substantive entitlements, such as the right to acquire title to land by adverse possession, but also procedure entitlements, which permit clients (through their agents, lawyers) to assert positions in litigation that are based on something short of the applicable standard of proof, such as “more likely than not” in most civil cases.⁶⁸ The familiar Rule 11 standard requires lawyers only to ascertain that there is evidentiary support for factual contentions, not that the contentions will ultimately be vindicated at trial.⁶⁹ The trouble with that response, as Zipursky pointed out, is that it leads to a regress. According to GLOP (and my view about the function of law), entitlements are supposed to guide action.⁷⁰ Shapiro’s planning theory imagines people disagreeing about whether they ought, all things considered, to be permitted to do something or whether it ought to be prohibited. The rule of law, as a political ideal, requires that legal norms be general, i.e. stated in the form of rules, not simply the resolution of disagreement on a case-by-case basis.⁷¹ But general norms necessarily require judgment to apply to particular cases.⁷² This observation about the indeterminacy of rules already creates some problems for GLOP – problems I attempted to address by relying on an interpretive community to regulate interpretive judgments.⁷³ There might be a sufficient degree of objectivity in judgments concerning the content of law to satisfy GLOP, but all this determinacy might be undone by the

⁶⁷ WENDEL, *supra* note __, at 66-72, 77-85.

⁶⁸ *Id.* at 51.

⁶⁹ FED. R. CIV. P. 11(b)(3); *accord* MODEL RULE 3.1.

⁷⁰ Zipursky, *supra*, at 1170.

⁷¹ SHAPIRO, *supra* note __, at 392-95 (referring to Fuller’s parable of King Rex and the failure of Rex’s attempts to make law).

⁷² See, e.g., SAUL A. KRIPKE, WITTGENSTEIN ON RULES AND PRIVATE LANGUAGE (1982). There is considerable controversy over whether Kripke’s attribution of his argument to Wittgenstein is sound, but that is neither here nor there for the purposes of the observation made above. Kripke’s puzzle about rule-following is a sophisticated demonstration of Hart’s insight that no rule can determine the scope of its own application. See HART, *supra* note __, at 126.

⁷³ WENDEL, *supra* note __, at 196-200.

indeterminacy of facts. Relying on procedural entitlements to present dubious evidence, short of outright perjury, only compounds the problem. The entitlement does not stabilize the social plan at all, but introduces new uncertainty about the existence of legal entitlements, to the extent they depend on some fact being the case.

As applied to legal ethics, the client's legal entitlements set the bounds of the law that constrain the lawyer's ethically permissible actions (under the traditional maxim, "zealous advocacy within the bounds of the law"). I have sought to establish that the law provides exclusionary reasons for action, both for citizens and for lawyers, and thus lawyers have an ethical justification for the actions they take in the course of representing clients. But if my position is that a client has a procedural entitlement equivalent, in essence, to "throw it up against the wall and see if it sticks," the bounds of the law do not provide any real constraint on permissible advocacy. That is, the appeal to procedural entitlements simply collapses what is supposed to be a modified, moderate version of the standard conception of legal ethics into the traditional standard conception, in which a lawyer is ethically licensed to do pretty much whatever he or she can get away with in the course of representing a client.⁷⁴ As Zipursky rightly notes,

the efficacy of substantive law in shaping conduct, shaping responsibility allocation, and envisioning outcomes we are trying to realize as a society is obviously curtailed when individuals manage to defeat legal accountability after the fact, and certainly when they are able to predict their ability to defeat legal accountability.⁷⁵

It nevertheless strikes most lawyers as utterly implausible to deny that lawyers have a legal and an ethical right, and perhaps even a duty, to bring any factual claim that is likely to favor their client's position, as long as it has enough factual support to get over the Rule 11 threshold. Thus, the challenge is to square the circle, and establish the right kind of connection between the democratic foundations of the account of law and legal ethics defended by Dare, Markovits, Shapiro, and myself, and the duties lawyers do have, and ought to have, with respect to facts. I believe it may be possible, and the arguments in Section IV will try to establish this connection, but before taking on this task with respect to civil litigation, a brief detour will be necessary to explain why criminal defense representation is a special case.

⁷⁴ See David Luban, *The Lysistratian Prerogative: A Response to Stephen Pepper*, 1986 AM B. FOUND. RES. J. 637.

⁷⁵ Zipursky, *supra* note __, at 1181.

C. *Arguing for False Inferences.*

One of the central issues in the ethics of criminal defense advocacy is whether it is permissible to construct a narrative out of bits of evidence that are themselves true, but which lead the factfinder to draw an inference that is false. Consider an example from a case handled by John Mitchell, from the famous Subin-Mitchell debate on the criminal defense lawyer's responsibilities.⁷⁶ A person is stopped on suspicion of shoplifting after leaving a store with a Christmas-tree ornament. As the manager is talking to her, someone inside the store calls out "there's a fire!" and the manager has to go back inside. When he comes back out, the alleged shoplifter is still there, standing on the sidewalk. She agrees to be searched and the manager discovers that she has \$10 in her pocket. In the actual case the client admitted to her lawyer (Mitchell) that she intended to steal the item,⁷⁷ so there is no question that any story ending with "therefore, my client could not have intended to steal the ornament" is false. Nevertheless, at trial, the defense lawyer uses these bits of data to argue that the defendant could not possibly have intended to steal the ornament. Why, if she had the intent to steal, would she have been hanging around on the sidewalk after the fire alarm? And why, if she had the money to purchase the ornament, would she have risked stealing it?

Another well-known example comes from an ethics opinion of the Michigan State Bar.⁷⁸ I have embellished it only a little: A man is charged with assault, based on the victim's report that he was hit over the head with a blunt object and robbed at midnight near an automated teller machine. The accused retains an attorney and admits to the attorney that he committed the robbery. In a twist, however, the defendant tells his lawyer that the robbery occurred at 2:00 a.m. The victim apparently was mixed up about the time since, after all, the defendant hit him over the head and stole his watch. As luck would have it, the defendant was playing poker at midnight with a priest, a rabbi, and the president of the local bank, all of whom have an unblemished reputation in the community for honesty and integrity. The attorney's investigator talked to all three poker buddies and they were all

⁷⁶ See John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission,"* 1 GEO. J. LEGAL ETHICS 339 (1987). Mitchell was responding to Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case,* 1 GEO. J. LEGAL ETHICS 125 (1987).

⁷⁷ Mitchell, *supra* note ____, at 344.

⁷⁸ Michigan Ethics Op. CI-1164 (1987).

certain that they were playing poker at midnight with the defendant. The attorney believes that if she introduces the testimony of the three friends, the jury will believe them and conclude that the prosecution has not proved its case beyond a reasonable doubt. Is it ethical to put the friends on the stand to testify, given that the defendant has admitted that he committed the robbery?

Almost every practicing lawyer with whom I have discussed this case believes there would be nothing wrong with putting the friends on the stand, even though the purpose of their testimony is to persuade the jury of something inconsistent with the guilt of the defendant. In fact, it can be hard to get lawyers to see what could possibly be wrong with calling the poker buddies and eliciting their testimony. In ordinary life, however, we could regard it as deceptive to tell a story “made up of truth” that was intended to lead the listener to draw a false inference. Many years ago when I was teaching this case in an ethics seminar I asked the students to give examples of incidents from their own lives in which the speaker used bits of truth to persuade another to draw a false conclusion. They responded with the following stories:

Student A lived just outside the city limits while attending high school in town. His teacher asked him why his paper was not finished on time and he replied, “I was out of town.” He was home the whole time, but his home was “out of town.”

Student B’s mother asked him whether he took out the trash. He responded, “The trash is outside on the sidewalk, mom.” Actually Student B was feeling lazy so he threatened to beat up his little brother if he did not take out the trash.

Student C was asked why she had not attended class yesterday. “I was sick,” she said. She was indeed sick, but two days ago. Yesterday she was sleeping off a hangover.

All of these statements are either evasions of the question or outright lies when considered in the context of the conclusion a reasonable person would draw in the context of the conversation. That is not to say that they would rise to the level of criminal perjury. In *Bronston v. United States*,⁷⁹ the Supreme Court held that the federal perjury statute as not violated by making literally true statements, even if uttered with an intent to deceive.

⁷⁹ 409 U.S. 352 (1973).

The witness in *Bronston* gave the following testimony before a grand jury:

Q: Do you have any bank accounts in Swiss banks, Mr. Bronston?

A: No, sir.

Q: Have you ever?

A: The company had an account there for about six months, in Zurich.⁸⁰

The witness intended to avoid revealing the *present* existence of a *personal* Swiss bank account. The Court of Appeals had held the statement to be a “lie by negative implication,”⁸¹ but the Supreme Court said part of the prosecutor’s job was to be alert to these sorts of verbal games and ask follow-up questions where necessary: “If a witness evades, it is the lawyer’s responsibility to recognize the evasion and to bring the witness back to the mark, to flush out the whole truth with the tools of adversary examination.”⁸² While the Court’s statement might be a true statement about skilful lawyering, it is non-responsive to the argument that the testimony was false. If the purpose behind the perjury statute is to protect the integrity of the adversary system, it should not matter that one of the lawyers failed to notice an evasion by the witness and follow up with a more specific question. The witness lied, period, just as the students in their self-reported examples lied.

To make the point somewhat more theoretically, a conversation is a cooperative enterprise, constituted by the shared expectations and purposes of the participants.⁸³ The literal meaning of utterances is often fleshed out by the participants on the assumption that the speaker is oriented toward some common purpose.⁸⁴ That common purpose need not necessarily be conveying factual information. Joking banter, bickering, and flirting, for example, have purposes different from information-directed conversations. Nevertheless, the norms governing conversation reflects the mutual dependence of the participants on the cooperation of one another in order to achieve a common purpose.⁸⁵ A speaker may therefore be able to exploit the

⁸⁰ 409 U.S. at 354. The federal perjury statute is 18 U.S.C. § 1621.

⁸¹ *United States v. Bronston*, 453 F.2d 555, 559 (2d Cir. 1972).

⁸² *Id.* at 358-59 (mixed metaphors in original).

⁸³ PAUL GRICE, *STUDIES IN THE WAY OF WORDS* 22-57 (1991).

⁸⁴ My favorite illustration of this process at work is Steven Pinker’s observation that when someone reads the directions on a shampoo bottle to “lather, rinse, and repeat,” he or she does not keep going until the bottle is empty.

⁸⁵ GRICE, *supra* note ____, at 29.

expectations of other participants to convey a message that may not literally be untrue, but which has the effect of a literally untrue utterance. The examples given by my students show that manipulating what Paul Grice calls the rules of conversational implicature can be just as much a deception as a literal untruth.

I am well aware – and mostly persuaded – by the standard response given by lawyers to this apparent moral dilemma.⁸⁶ The criminal justice system cannot resort to any means to ascertain the truth. Even if torture were a reliable method of getting at truth, a decent society would not permit the police to put a suspect on the rack to find out the truth about a crime. While torture is an extreme example, other practices suggest that truth is not the only value that matters in the criminal justice system. In the U.S. (as well as in most common law countries) the accused cannot be compelled to take the stand and testify against himself.⁸⁷ The prosecution has the burden of proof, which means the state bears the risk of non-persuasion – if the prosecution does not introduce sufficient evidence of guilt, the defendant is acquitted. The burden of proof is set at a very high threshold, “beyond a reasonable doubt,” which means (roughly) that a jury must believe in the defendant's guilt with the same level of certainty they would require with respect to another extremely important decision. All of these procedural protections, which ensure that the government does not abuse its power, that innocent people are not wrongfully convicted of crimes, and that persons accused of crimes are treated fairly and with dignity, do not exist in a vacuum. Abstract rights require flesh-and-blood people to administer them. Judges and jurors make decisions about the law and the facts, respectively, but defense lawyers are also required in order to assert the defendant's rights. How better in this case to assert the defendant's right to hold the state to its high burden of proof than to introduce evidence inconsistent with guilt?

Suppose for the sake of discussion that the client admitted to her lawyer that she intended to steal the ornament. Of course the lawyer would not be allowed to making a closing argument to the jury that includes the statement, “My client did not intend to steal the goods.” That would be a direct lie. When it comes to telling a story that is inconsistent with the client's statement that she intended to steal the item, however, most criminal defense lawyers would argue that it is *permissible* deception,

⁸⁶ See W. BRADLEY WENDEL, *LAW AND ETHICS: AN INTRODUCTION* (2014).

⁸⁷ For example, this right is guaranteed by the Fifth Amendment to the United States Constitution; Section 11 of the Canadian Charter of Rights and Freedoms; Section 25(d) of the New Zealand Bill of Rights Act of 1990; and at common law in the United Kingdom.

justified as the only way to give practical effect to the defendant's right to have guilt proven beyond a reasonable doubt, with the burden of proof resting squarely on the prosecution. In order to vindicate the defendant's right, her advocate must be able not only to argue that the prosecution's story is untrue, but also to tell a story of her own, inconsistent with the defendant's guilt. Juries are persuaded by stories, not by bland denials of the facts as recounted by the prosecution. A defense lawyer cannot be limited simply to nitpicking the prosecution's case, because isolated bits of evidence do not carry meaning and therefore cannot persuade. Persuasion is a meaning-making process, and meaning is conveyed by assembling events into a coherent story that has direction, or a purpose.

In Mitchell's example, the defense lawyer would practically be talking gibberish if she simply stated to the jury, "The state did not prove its case beyond a reasonable doubt." It would not be much better to assert the facts blandly without arguing for an interpretation of the facts that is inconsistent with the defendant's guilt, such as: "My client had \$10 in her pocket; she didn't run when the manager went back inside." This would be a truthful statement of the evidence, but it would not mean much unless the implications of the evidence were laid out for the jury. The only intelligible way to present that kind of defense would be to connect the dots, as it were, by telling a story: "Now, if my client intended to steal the item, wouldn't she have taken off as soon as the manager went inside to deal with the fire? The fact that she waited for him to return suggests that it was just an innocent mistake. That has to be the right explanation, considering she had enough money in her pocket to pay for the property, too." The implication of that story is false – the client admitted intending to steal the property – but the defense lawyer must be permitted to tell the client's story as a way of asserting the client's right to, as lawyers say, put the state to its proof. As a matter of human psychology, people understand events and persuade each other by telling stories.⁸⁸ Denying the lawyer permission to tell a story inconsistent with guilt would undercut the *client's* right to have her guilt established at trial beyond a reasonable doubt.

To make a somewhat deeper point, which may strike some readers as sophistry, a lawyer might deny that the story told on behalf of the client is false, because truth and falsity in legal narratives is not simply a matter of bland factual reporting – did the client steal the goods or not? Rather, a story told at trial is part of a broader narrative in which the meaning of the

⁸⁸ See ANTHONY AMSTERDAM AND JEROME BRUNER, *MINDING THE LAW* 111-42 (2000); Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 *CARDOZO L. REV.* 519 (1991).

law is elaborated, including such matters as whether it is legitimate to punish this person for this offense. The law's claim to our allegiance depends on its being a way of understanding that "rings true" for its subjects. Narratives not only constitute the reality for the individuals whose stories are told at trial, but they also constitute the very idea of justice. Understood in this way, the conclusion of the defense lawyer's story is not "my client didn't steal the item" but "my client does not deserve punishment." Factual data are parts of the narrative but so are explicit or implicit claims about desert, blame, responsibility, excuse, and other normative notions. A story is believed or not if it makes the right kind of sense of both the facts and the values implicated by an event. "[N]arrative is a mode of discourse that takes directly into account the normative elements on which law is based – the existence of a legitimate, canonical state of things that has been complicated by some human action in some particular context or setting."⁸⁹ Specifically with regard to a criminal trial, the discourse of the participants is the rhetoric of blaming, which is aimed at identifying and restoring the right relationships among members of a community.⁹⁰ The community therefore creates and sustains itself through judgments of blame made on the basis of stories meant to justify punishment or mercy.

The institutional setting of the case, with the defendant's rights and the requirement that the state prove its case beyond a reasonable doubt, distinguishes it from the case where the student lied to his mother about taking out the trash. It therefore provides the lawyer with a way to redescribe the case as "not lying, but protecting the defendant's rights through legally permissible means." Employing the procedures of a legitimate system to enact a narrative is different, in morally relevant terms, from lying in ordinary life. This vindication of the defense lawyer's role does not permit a lawyer to do anything at all. It is quite clear that lawyers may not participate in introducing false evidence or making false statements to the court. The rules of professional conduct provide, for example, that "[a] lawyer shall not falsify evidence [or] counsel or assist a witness to testify falsely"⁹¹ and "[a] lawyer shall not knowingly make a false statement of fact or law to a tribunal."⁹² In the Michigan case, however, the defendant's lawyer would argue that she is not trying to establish the truth of

⁸⁹ AMSTERDAM AND BRUNER, *supra* note ___, at 141.

⁹⁰ See James Boyd White, *Making Sense of What We Do: The Criminal Law as a System of Meaning*, in HERACLES' BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 207-09 (1985).

⁹¹ MODEL RULES 3.4(b).

⁹² MODEL RULE 3.3(a)(1).

the proposition, “My client did not commit the robbery.” Rather, the lawyer is trying to persuade the jury of the truth of this proposition: “The prosecutor did not prove beyond a reasonable doubt that my client committed the robbery.” The defense lawyer will not state in her closing argument that her client did not commit the robbery, only that the prosecution’s evidence does not suffice to prove the defendant’s guilt beyond a reasonable doubt. The lawyer therefore changes the relevant description of the situation, from lie or deception to “protecting the defendant’s rights.”⁹³

III. THE POLITICAL ETHICS OF LAWYER GAMES.

Lawyers are often accused of being wrongdoers, in moral terms, even though they act properly as judged by the standards of professional ethics – the state disciplinary codes and other aspects of the law governing lawyers. Daniel Markovits puts the point quite starkly by saying that lawyers lie and cheat.⁹⁴ Without necessarily endorsing his claim that these vices are “inscribed in the genetic structure” of the adversary system,⁹⁵ or his idiosyncratic definitions of lying and cheating,⁹⁶ I hope that some readers have the intuition that at least one of the cases in Section II could be described in moral terms as lying or cheating. The core of these moral ideas is obtaining an unfair advantage through trickery or manipulation, and something like telling a half-truth to avoid warranted punishment or manufacturing a story consistent with the defendant’s liability could be seen as an attempt to work around the rules of a practice that has as one of its

⁹³ See APPLBAUM, *supra* note ___, for an analysis of the argument from redescription.

⁹⁴ MARKOVITS, *supra* note ___, at 45-66.

⁹⁵ *Id.* at 26.

⁹⁶ Markovits defines lying as attempting to persuade others of a proposition that one disbelieves. *Id.* at 35. This accords with the definition of lying given by many philosophers. See, e.g., BOK, *supra* note ___, at 13. His definition of cheating, however, is unusual; he identifies it with promoting causes that one believes are undeserving. MARKOVITS, *supra* note ___, at 35. Cheating is generally understood as breaking or evading the rules of a game in a way that results in an unfair advantage for a player. See, e.g., David Luban & Daniel Luban, *Cheating in Baseball*, in *THE CAMBRIDGE COMPANION TO BASEBALL* 185 (Leonard Cassuto & Stephen Partridge, eds., 2011) (giving a wonderful analysis of the formal rules, unwritten code, and “natural law” of baseball). It really has nothing to do with promoting unjust *causes* as such, but with using unjust *means* in the pursuit of a cause. Many of Markovits’s critics have focused on his strained definitions of lying and cheating. See, e.g., David Luban, *Book Review*, 120 *ETHICS* 864 (2010); Monroe H. Freedman & Abbe Smith, *Misunderstanding Lawyers’ Ethics*, 108 *MICH. L. REV.* 925, 929-31 (2010); Ted

Schneyer, *The Promise and Problematics of Legal Ethics from the Lawyer’s Point of View*, 16

YALE J.L. & HUMAN. 45, 63 (2004) (criticizing the same definition of cheating, from an earlier paper that forms the core of the book).

ends the determination of factual truth. Nevertheless, lawyers believe they are justified in doing these things, not only according to the standards of professional ethics but also in moral terms. If an observer called them liars or cheats, lawyers would patiently explain that, not only are these actions permitted or required by professional ethical standards (which are neither here nor there from the point of view of morality), but are morally justified as well. Why? Well, that gets into the heartland of the debate in theoretical legal ethics, and in particular whether the best way to understand the source of lawyers' ethical obligations is in terms of generally applicable moral considerations, such as loyalty to clients and human dignity, or instead values that are more naturally thought of as part of political morality.⁹⁷ It also gets into the specific issue considered here, namely, whether the relationship between truth-related values and legal ethics should be conceived of in objective or subjective terms.

A. *Luban: Human Dignity.*

The first position to be considered in this section is located decisively on the side of ordinary – which is to say, not a special kind of political – morality, and also the subjective approach to the relationship between truth and legal ethics. David Luban has argued that the ethical obligations of lawyers are ultimately derived from the client's human dignity.⁹⁸ The value of dignity, in turn, should not be understood metaphysically, but as a property of how individuals relate to each other and to institutions of collective self-governance. As Luban emphasized in an influential critique of the standard conception, autonomy is a thin and rather unattractive basis for an ethical theory.⁹⁹ Dignity, by contrast, is something that really matters. The difference is that, while autonomy is about what people may *do*, dignity is about who people *are* – it is essentially connected with their subjectivity and thus the ground of their personhood. Autonomy, says Luban, is a “truncated view of humanity and human experience,” which reduces the essence of human personhood to will and the capacity to choose; human dignity, on the other hand, means honoring someone's being, which transcends the choices they make.¹⁰⁰ To fail to treat another with dignity is

⁹⁷ See generally Bernard Williams, *Realism and Moralism in Political Theory*, in *IN THE BEGINNING WAS THE DEED 1* (Geoffrey Hawthorn, ed., 2005); STUART HAMPSHIRE, *INNOCENCE AND EXPERIENCE* (1989).

⁹⁸ Luban, *Upholders*, *supra* note __, at 65.

⁹⁹ David Luban, *The Lysistratian Prerogative*, 1986 AM. B. FOUND. RES. J.

¹⁰⁰ Luban, *Upholders*, *supra* note __, at 76. An extremely interesting aspect of this recent work is its similarity with Charles Fried's theory which has, wrongly in my view, become an easily caricatured punching bag for legal ethics scholars. See Charles Fried, *The*

therefore to treat him or her as a non-person.

Luban adopts Alan Donagan's understanding of what it means for a person, or a legal system, to treat another with dignity: "[O]ne fails to respect [another's] dignity as a human being if on any serious matter one refuses even provisionally to treat his or her testimony about it as being in good faith."¹⁰¹ From this it follows that a lawyer serves as an instrument or technology that enables people to tell their stories.¹⁰² Again we see the familiar pattern of justification – it is a redescription of what seems like lying or cheating as something else. Various forms of trickery with facts may *look* like lying or cheating, but they are actually more appropriately described as “assisting the client in making his her voice heard by a powerful decisionmaker.” On this account, there is a clear answer to the objective vs. subjective question: A lawyer's ethical obligations are not dependent upon what is the case, but turn instead on the story the client wishes to tell. This is an attractive position when several conditions are satisfied: (1) the client's story is truthful, (2) it is one that deserves to be heard by courts or other institutional actors, and (3) the lawyer is doing nothing more than clarifying, amplifying, or otherwise making the client's story more persuasive, while remaining faithful to the underlying factual account given by the client. But the dignity and storytelling-based approach runs into difficulties when one of these conditions is not satisfied. How would a dignity-based approach to ethics handle the sidewalk case, for example, where the lawyers altered the client's story? The client obtained a benefit in the form of a legal right to sue the sidewalk owner, but the lawyer's conduct cannot be defended as an instance of telling *the client's* story. A lawyer would not fail to treat the client with dignity by refraining from altering her testimony, although it might be a failure to treat her story at least provisionally as being in good faith if the lawyer was too quick to assume that the client was not simply confused about the location.

The application of the value of dignity to these cases is important because, in practice, the client's dignity as such may be less important than

Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation, 85 YALE L.J. 1060 (1976). At the axiological level at least, Fried and Luban are saying something very similar – namely that there is a deep and important moral difference between the value of an individual human being and any collective or social value such as justice or aggregate utility.

¹⁰¹ Luban, *Upholders*, *supra* note __, at 68.

¹⁰² There are similarities here with Daniel Markovits's view that the best conception of lawyerly virtue is negative capability, i.e. adopting a non-judgmental attitude toward one's client's story and serving instead as a voice or a mouthpiece. See MARKOVITS, *supra* note __, at 93, and Section B.3, *infra*.

the client's *interests*. In other words, a dignity-based approach begins to resemble the standard conception of legal ethics. Luban appears to slide subtly into the unmodified standard conception when he discusses a case, borrowed from William Simon,¹⁰³ in which the client was arrested while placing a stolen television in the back seat of his car and charged with possession of stolen property. An element of the crime was of course knowing the television was stolen. The lawyer argued to the jury that someone who knew the television to be stolen would have put it in the trunk, rather than driving around with stolen property in plain view in the back seat. The lawyer knew, however, that the defendant did not have a key to the trunk. The fact that the defendant put the television in the back seat actually had nothing to do with his *mens rea*, but it helped make a strong case for acquittal. As Luban rightly notes, most lawyers would justify the conduct here by pointing out that if there is evidence supporting an innocent explanation of the defendant's actions, there is reasonable doubt and the defendant is entitled to an acquittal:

All the lawyer has done is dramatize the reasonable doubt instead of arguing for it in an abstract manner. That seems like an entirely legitimate way to make the case for reasonable doubt. Every litigator knows that it takes a story to beat a story. Arguing abstractly for reasonable doubt will never sake a jury's preconceptions.¹⁰⁴

This argument is quite powerful, but it fits uncomfortably with Luban's general approach. For Luban, the essence of human dignity is subjectivity – having a story of one's own to tell. The defendant's actual story is that he did not have a key to the trunk. The lawyer's embellishment, arguing that the defendant must not have known the television was stolen because otherwise he would have put it in the trunk, is a great story but it is not *the defendant's* story.

Luban ends up falling back on an argument that defense lawyers may be morally permitted to respect human dignity indirectly as well as directly. Direct respect for the value of dignity, as he has defined it, requires being a voice for the client's actual story. Indirect respect, on the other hand, means participating in a process that presumes innocence and sets a high burden that the prosecution must meet to obtain a conviction. "[T]he advocate defends her client's human dignity either directly, by telling his story, or indirectly, by demonstrating that a good faith story of innocence could be

¹⁰³ Luban, *Upholders*, *supra* note __, at 72 (citing SIMON, *supra* note __, at 171-72).

¹⁰⁴ *Id.* at 72-73.

constructed from the evidence."¹⁰⁵ This is a reasonable approach to the relationship between dignity and the procedures of the adversary system, but notice that it offloads a great deal of the normative pressure onto the system. This is something about which Luban has elsewhere been quite skeptical.¹⁰⁶ He is wary of institutional solutions to ethical problems given the frequency with which institutions have enabled serious wrongdoing.¹⁰⁷ In other contexts, such as the case of Manhattan prosecutor Daniel Bibb, who allegedly contrived to lose a case in which he believed the defendant to be innocent, Luban has preferred the option of an individual acting directly on ethical concerns to the alternative of working through procedures and a chain of command.¹⁰⁸ So it is a bit surprising to see the idea of an institutional justification for a lawyer's conduct serving as the analytical bridge between the value of human dignity and the lawyer's permission to tell a false story.

On this institutional approach, the moral significance of representing clients and telling their stories comes not from the lawyer-client relationship, which may appropriately be characterized in ordinary moral terms, but from the way in which the lawyer establishes and maintains the right kind of relationship between the client and the state. The lawyer contributes to a mode of governance that has moral value. This approach to governance does have a connection with human dignity, but it is a type of dignity that has a distinctive role in political ethics. Jeremy Waldron puts it this way:

[L]aw is a mode of governing people that treats them with respect, as though they had a view or perspective of their own to present on the application of [a] norm to their conduct and situation. Applying a norm to a human individual is not like deciding what to do about a rabid animal or a dilapidated house. It involves paying attention to a point of view and respecting the personality of the entity one is dealing with. As such, it embodies a crucial dignitarian idea – respecting the dignity of those who whom the norms are applied as being capable of explaining themselves.¹⁰⁹

¹⁰⁵ *Id.* at 73.

¹⁰⁶ See, e.g., David Luban, *The Adversary System Excuse*, in *THE GOOD LAWYER* 83 (David Luban, ed., 1983).

¹⁰⁷ See David Luban, *The Ethics of Wrongful Obedience*, in LUBAN, *supra* note __, at 237.

¹⁰⁸ See David Luban, *The Conscience of a Prosecutor*, 45 *VAL. U. L. REV.* 1 (2010).

¹⁰⁹ Jeremy Waldron, *The Rule of Law and the Importance of Procedure*, in *GETTING TO THE RULE OF LAW* 3, 15-16 (James E. Fleming, ed., 2011)

Luban would probably not be hostile to understanding the value of dignity in this way, as a property of a relationship between persons and institutions of government. In an excellent chapter on the legal ethics of Lon Fuller,¹¹⁰ he reads Fuller as proposing that the distinctive morality of the “law job” of representing clients can be understood as contributing to the functioning of a system that has as its characteristic end the governance of people through means that respect their dignity.¹¹¹ Echoing Waldron’s elaboration of the relationship between dignity and the legal system, Luban reads Fuller as grounding the rule of law on the moral foundation of “promoting the self-determining agency of the governed,”¹¹² that is, the dignity of citizens.

No one can fully exercise self-determining agency if one of the means to the exercise of agency is the assertion of a legal entitlement, or the employment of legal procedures, that requires a greater degree of expertise in the law than can be expected of an ordinary citizen without specialized training.¹¹³ Consider the rose garden example. White may believe she has a right to exclude Black from cutting roses in her garden, but an effective assertion of that right will quickly enmesh her in the intricacies of deed interpretation and the law of adverse possession. Dignity in the sense of being treated by the state as a person entitled to respect requires that some legal decisionmaker take White’s story seriously in consider whether Black has a right to cut roses. This, in turn, requires that White have a lawyer who takes her story seriously and does not refuse to present it because she, the lawyer, disbelieves it without good reason. One of the conditions for the legitimacy of the decision ultimately rendered, concerning the respective rights of White and Black to harvest the roses, is that both parties have had an opportunity to tell their stories without undue interference. As always, however, a great deal rests on the word “undue,” for lawyers acting on behalf of clients are not permitted to present false evidence,¹¹⁴ falsify evidence or contrive to have others testify falsely,¹¹⁵ or ask witnesses to

¹¹⁰ Although Fuller is mostly remembered as a theorist of the process of adjudication, as one of the founding scholars of the legal process school, and as an important, if sometimes imprecise legal philosopher, he did contribute to an important early document on legal ethics, which stated that lawyers acting as advocates should not “muddy the headwaters of decision.” See Lon L. Fuller & John Randall, *Professional Responsibility: Report of the Joint Conference of the ABA-AALS*, 44 ABA J. 1159, 1161 (1958).

¹¹¹ See David Luban, *Natural Law as Professional Ethics: A Reading of Fuller*, in LUBAN, *supra* note ___, 99, at 110-12 [hereinafter, “Luban, *Natural Law*”].

¹¹² *Id.* at 126.

¹¹³ This is the central insight of Steve Pepper’s classic paper. See Stephen L. Pepper, *The Lawyer’s Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613.

¹¹⁴ MODEL RULES, *supra* note ___, Rule 3.1.

¹¹⁵ *Id.*, Rule 3.4(b).

refrain from giving information.¹¹⁶ In other words, the rules of professional conduct do not envision lawyers as merely storytellers, but as participants in a process that has as one of its ends the search for truth. The subjective perspective remains powerful, however, and the next theoretical perspective on legal ethics goes even farther than Luban does in its insistence that lawyers function as passive conduits for their clients' stories.

B. Markovits: Legitimacy and the Lawyer's Integrity.

Legitimacy and the rule of law are lurking in the background of much of Luban's work, but they are front and center in the complex, sometimes bewildering, and always surprising approach to legal ethics recently defended by Daniel Markovits in his book, *A Modern Legal Ethics*.¹¹⁷ For the purposes of this discussion we can set aside some of the most provocative aspects of his work, including his insistence that lawyers bear a separate obligation of justification in first-personal terms even while being impartially justified when they act as adversary advocates, and his "tragic" conclusion that conditions, particularly professional insularity, no longer exist that would be conducive to developing the lawyerly virtues (and would be so conducive if they did exist). Instead I will concentrate on his exploration of the connection between political legitimacy and the justification for the things lawyers do in the course of representing clients in litigation.

Markovits and I are in complete agreement that the law has "a distinctively political kind of authority" over citizens, which derives from the capacity of the law to sustain a stable framework for collective government, notwithstanding the incompatible interests, and plurality of reasonable moral commitments, of individuals.¹¹⁸ We also agree that politics does not really attempt to resolve disagreement but merely seeks to "establish a provisional, although hopefully renewable, holding pattern."¹¹⁹ We differ, however, at the point where he perceives a significant gap in existing accounts of political legitimacy and the authority of legal institutions. For Markovits, it is not enough for citizens to agree on abstract propositions concerning the processes of government. Rather, citizens must

¹¹⁶ *Id.*, Rule 3.4(f).

¹¹⁷ MARKOVITS, *supra* note __. The article distinguishes the book from one of the leading treatises on the law of lawyering. See CHARLES W. WOLFRAM, *MODERN LEGAL ETHICS* (1986).

¹¹⁸ MARKOVITS, *supra* note __, at 174-75.

¹¹⁹ *Id.* at 177.

also “come to take *ownership* of political outcomes.”¹²⁰ This requires an affective engagement in actual political practice, not only abstract understanding. He really means it when he says political engagement must be *affective*. Politics for Markovits is not merely a technology to coordinate individuals’ pre-political ends and realize the benefits of stability and cooperation; it is, additionally, responsive to an inner need for belonging.¹²¹ The institutions and procedures of the legal system have value in the distinctive register of political morality because they offer the opportunity for citizens to become transformed through engagement. Individuals start off with mere preferences or brute demands, but these interests become reconstituted as rights through participation in the political process. It is worth quoting Markovits’s language here, to show that he contemplates something mysterious and almost metaphysical. He says participatory engagements in the political process “penetrate the ideals and preferences of the parties in ways in which nonparticipants cannot share, so that the parties come, through their engagements with the legal process, to take ownership of the resolutions that the process produces, including even resolutions that they continue to dispute on the merits.”¹²² The transformation is not merely linguistic, although it is true that the discourse of legal rights is semantically distinct from the discourse of interests and demands. The transformation is much deeper, because parties exit the dispute-resolution process oriented differently toward one another – no longer as adversaries but as co-

¹²⁰*Id.* at 176 (emphasis in original); *see also id.* at 180. The idea of ownership and authorship of outcomes is pivotal in Bernard Williams’ treatment of his famous “Jim and the Indians” problem, which Markovits sets out at *id.*, at 111-16. In the problem, an explorer named Jim is offered a choice by a violent guerilla fighter who has captured twenty hostages. If Jim shoots one hostage, the remainder will be freed. *See* Bernard Williams, *A Critique of Utilitarianism*, in UTILITARIANISM: FOR AND AGAINST 75, 98-99 (J.J.C. Smart & Bernard Williams eds. 1973). Williams sought to account for the intuition that killing one innocent captive to save nineteen others may be the right thing to do, but it is not *obviously* right. There is something deeply unsettling about one’s involvement in the death of the innocent captive, for which utilitarianism cannot give an account. *Id.* at 108-09. Even if it is right, all-things-considered, for Jim to shoot the one randomly selected hostage, Jim’s participation in the killing makes it different *for Jim*, and this effect on his integrity must be taken into account by any satisfactory moral theory. The rightness, in terms of the results (nineteen innocent lives spared), is not really responsive to the wrongness, in terms of Jim exercising his agency to kill a person. Jim’s integrity is not a trump card, and maybe in the end he should shoot the one captive, but Williams’s point is that moral theory cannot proceed only by taking results into account. The relationship of agents to outcomes is also an aspect of morality. This perspective is central to Markovits’s theory of legal ethics, as other readers have recognized. *See* Benjamin C. Zipursky, *Integrity and the Incongruities of Justice: A Review of Daniel Markovits’s A Modern Legal Ethics: Adversary Advocacy in a Democratic Age*, 119 YALE L.J. 1948 (2010).

¹²¹ MARKOVITS, *supra* note __, at 181, 187.

¹²² *Id.* at 188-89.

participants in a process that constitutes the disputing individuals with respect to each other as citizens.

Leave aside for now the obvious question whether most citizens in a modern, large-scale, pluralistic democracy really do have a deep, inner need for belonging, or whether they are content to be left more or less alone by the institutions of government. (Or whether clients are not interested in engagement or transformation, but simply want to maximize the realization of their pre-political ends. In the rose garden case, Black may be seeking to transform his brute demand into a claim of right, or he may simply intend to cause enough of a headache for White that she decides it is worth giving Black a license to cut the flowers. Rather than being transformative, the procedures of adversarial litigation may be nothing more than a weapon with which to club others into submission.) However, Markovits's claim is conceptual, not empirical, so it is irrelevant whether the attitudes of our fellow citizens are in fact as described. He argues that legitimacy requires that transformative engagement at least be available to citizens who demand it.¹²³ This is the connection between legitimacy and legal ethics. In order for people to participate in the process of resolving disputes, they need the assistance of experts in the sometimes technical process of dispute resolution. Because the process of dispute resolution has to "penetrate their ideals and preferences" and work a transformation of their attitudes toward other parties to the dispute, however, the interposition of a professional agent cannot create too much of a distance between the parties and the process. The beliefs and interests with which the parties begin the dispute must be fed in, more or less as they hold them, as inputs into the process. The role of a lawyer is thus to serve as a faithful voice or mouthpiece (in the good sense) who will convey the story told by a client to official

¹²³ Addressing the prevalence of settlement, alternative dispute resolution, and large-scale claims resolution facilities (think of something like the procedures adopted to settle claims arising from the BP oil spill or the 9/11 terrorist attacks) within the adversarial system, Markovits hedges a bit on whether transformative engagement is necessary for legitimacy, although it is sufficient. *Id.* at 200-01. The weak version of his claim concerning the relationship between participation and legitimacy is that adversary adjudication may only need to be available in a counterfactual way – as something the parties could resort to if they both sought to reorient their relationship with each other. This seems to get it backwards. If a system of governance is legitimate – that is, has practical authority for citizens – because it is potentially transformative, but if participating in transformative engagement is required only if the parties are already so oriented toward one another that they desire the outcome of that process, then it seems that a situation would never arise in which legitimation is called for. The parties to a dispute who seek transformation already have come to conceive of themselves as citizens in the thick sense that Markovits takes to be the product of transformation.

decisionmakers.¹²⁴ This role brings political legitimacy down from the “wholesale” to the “retail” level as individual citizens with specific disputes submit them to adjudication. Since participation in the process “transforms brute demands into assertions of right,”¹²⁵ the lawyer performs a kind of mediating role between the private language of the client’s “brute demands” and the language of rights which speaks from the perspective of the political community as a whole.

Crucially, in order for the lawyer to perform the mediating role assigned by democratic theory, the lawyer must exercise what Markovits calls negative capability.¹²⁶ This concept, which he borrows from the poet John Keats, suggesting receptiveness to the world and the non-imposition of one’s own preconceptions upon experience – Keats described it as “capable of being in uncertainties, mysteries, doubts, without any irritable reaching after fact and reason.”¹²⁷ A lawyer must not exercise any judgment of her own; she must “efface herself, or at least her personal beliefs about the claims and causes that she argues.”¹²⁸ One might object that the very last thing the world needs is negatively capable lawyers. A depressing parade of legal ethics fiascoes, including the participation of lawyers in the savings and loan crisis and the collapse of Enron,¹²⁹ have been caused by lawyers who remain content with half knowledge and fail to reach after fact and reason. Given Markovits’s commitment to transformative engagement, however, it is essential for him that lawyers not serve as filters or gatekeepers between their clients’ own conception of their interests and the process of dispute resolution that transforms these interests into rights that are constituted by the political community. He therefore represents the purest form of the subjective conception of the relationship between lawyers and truth. Ethical lawyering demands rigorous abstention from passing on the truth of one’s client’s story. The objective point of view – what I have been calling the perspective of what is the case – is, for Markovits, an impediment to legitimacy.

¹²⁴ *Id.* at 165.

¹²⁵ *Id.* at 189.

¹²⁶ *Id.* at 93-95.

¹²⁷ *Id.* at 94.

¹²⁸ *Id.* at 93.

¹²⁹ See, e.g., William H. Simon, *The Kaye Scholer Affair: The Lawyer’s Duty of Candor and the Bar’s Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 (1998) (criticizing lawyers for their role in the collapse of the savings and loan industry in the 1980’s); Susan P. Koniak, *Where Were the Lawyers? Behind the Curtain Wearing Their Magic Caps*, in ACCOUNTABILITY ISSUES: LESSONS LEARNED FROM ENRON’S FALL — SENATE JUDICIARY COMMITTEE HEARING (Feb. 6, 2002) (pointing out role played by lawyers in the financial accounting scandals of 2002).

Moreover, many of the cases we have been discussing involve conduct that is the antithesis of negative capability, yet it is what practicing lawyers believe is required of them. The witness preparation memos in the asbestos litigation, for example, is anything but “being in uncertainties, Mysteries, [and] doubts, without any irritabile reaching after fact & reason”¹³⁰ – it is, in fact, removing the possibility of apparent uncertainty from a witness’s testimony (“you had NO IDEA ASBESTOS WAS DANGEROUS when you were working around it”) and taking a quite confident stance regarding the identity of the manufacturers. Similarly, the lawyers in the sidewalk case are not effacing themselves and maintaining no identity of their own, allowing the “ordinarily mute” perspective of the client to have a voice.¹³¹ A better description would be that the lawyers have drowned out their client’s voice with their own professional identity as zealous pursuers of what they believe their client’s ends to be – i.e. making some money in a personal injury lawsuit. The best description of their representation is not negative capability but imputing the ends of the legal system to their client, something for which lawyers are frequently and justly criticized.¹³² Although contra Markovits, I find negative capability to be an unappealing ideal for lawyers, a bit more of it might be just the thing for lawyers who represent clients in litigation.

C. Hazard & Remus: Autonomy, Skepticism, and Legitimacy.

Whatever one thinks about negative capability as a virtue for lawyers, it is clear that Markovits’s vision of legal ethics gives no direct responsibility to lawyers to ensure the justice of outcomes. Legitimacy, yes, but not justice. Like Rawls, who insisted against Habermas that justice is the first virtue of political institutions,¹³³ many theoretical legal ethics scholars contend that justice should be the foundation of the normative structure of the lawyer’s professional ethical role. William Simon, for example, criticizes the standard conception of legal ethics for focusing on the hazy ideal of long-run justice, and relying on invisible-hand mechanisms for its achievement, while ignoring the involvement of lawyers in immediate,

¹³⁰ MARKOVITS, *supra* note __, at 94.

¹³¹ *Id.* at 95.

¹³² See, e.g., Katherine R. Kruse, *Beyond Cardboard Clients in Legal Ethics*, 23 GEO. J. LEGAL ETHICS 103 (2010); William H. Simon, *The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 1978 WIS. L. REV. 29.

¹³³ See Rawls, *supra* note __; but see Dreeben, *supra* note __, at 317 (arguing that *Political Liberalism* is more concerned with legitimacy than justice).

palpable injustices.¹³⁴ Lawyers, at best, contribute only indirectly to justice, and for Simon this is a reason to reject the standard conception. But legitimacy continues to have considerable attraction as the foundational value in legal ethics, and it forms the basis for a defense of the standard conception by Geoffrey Hazard and Dana Remus.

One of the distinctive features of the Hazard/Remus approach is its reliance on epistemological skepticism. “The assumption that lawyers, judges, and jurors can access the objective truth of a litigated legal dispute is incorrect and unwarranted,” they write.¹³⁵ This commitment draws a sharp contrast between their position and those of Simon, Judge Marvin Frankel, and Harry Subin,¹³⁶ who are all quite explicitly anti-skeptics. If one believes it is possible to have “access to ultimate truth,” as Hazard and Remus put it,¹³⁷ then one could demand, as a normative matter, that lawyers accept some responsibility for the justice of outcomes. If truth is unknowable by the parties’ lawyers, however, then by the Kantian ought-implies-can principle,¹³⁸ there can be no obligation to seek justice. (At least this is true if there is some necessary relationship between truth and justice, which surely there is; on any plausible account of legal justice, it depends on criteria such as desert and reciprocity,¹³⁹ which depend, in turn, on what is factually true in the natural world concerning the relationships between people.) This is indeed the tack they take, but as they develop ethical principles for lawyers against the background of skepticism about truth, they are concerned not to allow lawyers to become cynical about their role. The foil for their argument seems to be a proponent of the unmodified standard conception, a lawyer who believes that, since truth and justice do not constrain ethically permissible advocacy, then anything goes. Hazard and Remus do not want the first principle of legal ethics to be undiluted zealous advocacy, and they begin by anchoring the lawyer’s ethical role in considerations of political legitimacy,¹⁴⁰ so the issue to be explored is what

¹³⁴ SIMON, *supra* note __, at 53, 62-68.

¹³⁵ Hazard & Remus, *supra* note __, at 760.

¹³⁶ See SIMON, *supra* note __; Frankel, *supra* note __, at 1036; Subin, *supra* note __. Frankel’s argument is interesting, in that it relies not on knowledge of the truth, but on an attempt to show that, whatever the truth may be, the way we go about ascertaining it using adversarial procedures in the courtroom is bound to lead to something other than the truth. Frankel, *supra* note __, at 1038-39.

¹³⁷ Hazard & Remus, *supra* note __, at 754.

¹³⁸ See John Martin Fischer, *Free Will and Moral Responsibility*, in THE OXFORD HANDBOOK OF ETHICAL THEORY at 321, 343-49 (David Copp., ed., 2006).

¹³⁹ See, e.g., DAVID SCHMITZ, ELEMENTS OF JUSTICE (2006); George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972).

¹⁴⁰ Hazard & Remus, *supra* note __, at 754.

conception of legitimacy they rely upon that is not dependent upon truth.

Their starting point is the recognition of the simultaneous existence of two features of a political community – namely, uncertainty (or conflict) and the need for a decision to be made about what should be done.¹⁴¹ The theme of their response to this dilemma is that political ethics generally, and legal ethics specifically, should be understood as a matter of doing something, not theorizing.¹⁴² It is a reflective, but necessarily also a practical activity of mediating between the interests of the individual and the community.¹⁴³ It is also an activity situated within a temporally and spatially bound community. In the classical tradition, the practice through which need of a community for action notwithstanding conflict is pursued is *rhetoric*. Thus, an appealing solution to any community's problems involving uncertainty, conflict, and the need for a decision can be found in the rhetorical practice of adversarial advocacy.¹⁴⁴ They do not say this explicitly, but the implicit contrast suggested by their reliance on rhetoric instead of theoretical reasoning is between a practice aimed at doing something and a practice aimed at forming true beliefs. The implication seems to be that the concept of truth has little role to play in rhetoric:

The assumption that lawyers, judges, and jurors can access the objective truth of a litigated legal dispute is incorrect and unwarranted. As an initial matter, and as Aristotle explains, uncertainty inheres in any context of “practical knowledge” – any context of human affairs.¹⁴⁵

The disharmony that can be expected in any diverse political community threatens the conditions under which truth can serve as the basis for political action.¹⁴⁶ A legal system, and the ethics of actors within it, must be “rigidly constrained by limitations on law's access to truth.”¹⁴⁷

Hazard and Remus are well aware of the criticism that has been leveled

¹⁴¹ *Id.* at 758-59. Shapiro would refer to this situation as being in the “circumstances of legality.” SHAPIRO, *supra* note __, at 170-73.

¹⁴² *Cf.* Luban, *Natural Law*, *supra* note __ (understanding the subject matter of legal philosophy to be an activity – governing – not the content of laws).

¹⁴³ Hazard & Remus, *supra* note __, at 757-59.

¹⁴⁴ *Id.* at 759 (“Many accounts of modern advocacy fail to recognize or account for the fact that the two defining features of rhetoric's ancient context – uncertainty and social necessity for decision – are equally salient in our contemporary legal system.”).

¹⁴⁵ *Id.* at 760.

¹⁴⁶ *Id.* at 760-61, 765-66.

¹⁴⁷ GEOFFREY C. HAZARD, JR. & ANGELO DONDI, *LEGAL ETHICS: A COMPARATIVE STUDY 7* (2004).

at rhetoric since ancient times, which is that it is nothing more than the practice of making the true seem false and the false seem true.¹⁴⁸ To this they reply, on the authority of Aristotle, that there is an ethics of rhetoric – there are good and bad uses to which the rhetorician’s art can be employed. They are correct to see this as a distinctive political ethical practice, not something with a precise analogue in ordinary moral life. The lawyer, as a rhetorician, is constrained by the idea of “procedural truth,” which is a kind of synthesis of the competing positions put forward by the parties.¹⁴⁹ Procedural truth is necessarily approximate,¹⁵⁰ and is very likely based on a degree of certainty that is much lower than what would be required to certify a belief as true, as a matter of theoretical rationality.¹⁵¹ Objective truth is inaccessible. Approximate, procedural truth is the best we can do in a world characterized by uncertainty and conflict, and a good enough basis for governing a fractious society.

The focus on procedural truth risks obscuring the central role that the community plays in the ethics of rhetoric. As James Boyd White shows, classical theorists of rhetoric are not pragmatists; there is a right way and a wrong way to seek to persuade another.¹⁵² In Sophocles’s play *Philoctetes*, Odysseus’s attempt at deceiving Philoctetes into giving the bow of Heracles to the Achaeans for their use in the conquest of Troy fails and leads to even more intransigence on Philoctetes’s part. White draws two lessons from the play. First, if attaining one’s ends requires the cooperation of others, then the only means of realizing those ends is to recognize the freedom and autonomy of others.¹⁵³ Freedom and autonomy are aspects of human dignity, which is the foundational value in the ethics of advocacy defended

¹⁴⁸ Hazard & Remus, *supra* note __, at 766-67. See, e.g., Plato, *Gorgias*, in THE COLLECTED DIALOGUES (Edith Hamilton & Huntington Cairns, eds., 1961) (W.D. Woodhead, trans.). In the *Gorgias*, Socrates leads the teacher of rhetoric to concede that rhetoric aims at producing beliefs, not knowledge, that it does not aim at instructing about right and wrong, and that if the community were in need of expert assistance from, say, doctors, engineers, or shipbuilders, it would not call upon the assistance of a rhetorician. *Id.* at 454d-456a. Gorgias insists that there are rightful and wrongful uses of rhetoric, just as someone who has become a skilled fighter should not go around beating people up for no reason. *Id.* at 456d-457b. But he waffles when asked whether the subject matter of rhetoric is always justice, so that a rhetorician can never make a wrongful use of the art. *Id.* at 460e-461a.

¹⁴⁹ Hazard & Remus, *supra* note __, at 770.

¹⁵⁰ *Id.* at 771.

¹⁵¹ See KEVIN M. CLERMONT, STANDARDS OF DECISION IN LAW (2013).

¹⁵² See James Boyd White, *Heracles’ Bow: Persuasion and Community in Sophocles’ Philoctetes*, in HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW 3 (1985).

¹⁵³ *Id.* at 23.

by Luban and Markovits, but they are talking about the dignity of the client. Sophocles, on White's reading of his play, is foregrounding the dignity of the person to be persuaded, and reminding us that deception is also a violation of dignity, just as surely as failing to take one's client's story seriously. White's second point is more general, far subtler, and centrally important to the argument of this paper: The conditions for pure means-ends rationality do not exist, because "social action requires community and . . . community can never be compelled."¹⁵⁴ Practical rationality, which Hazard and Remus rightly argue is characteristic of the legal process, is intrinsically communal; as I like to say, it proceeds from the standpoint of the first-person plural.¹⁵⁵ Interpreting and applying the law is a process of reconstructing what *we* have decided, as a political community, ought to be done about some social problem. That means respecting the freedom and equality of others who will be affected by some action purportedly under the justification of legality. The ethics of advocacy must be founded on the needs of the community, which include the implicit demand that all citizens make to be treated with respect. Rhetoric that merely aims at persuasion through flattery (as Socrates stigmatizes the arguments of the rhetorician in *Gorgias*) treats others as means to an end, and is therefore unethical.¹⁵⁶

The implication of this critique of rhetoric is that the Hazard/Remus argument proves too much. They are right to emphasize the uncertainties involved in political action. The parties have their own point of view, and lawyers, as their representatives, have only partial access to the truth that is independent of the parties' points of view. They also concede that an advocate is not free to engage in the kind of cheap emotive appeals criticized by Socrates in *Gorgias* (which Stephen Colbert would call "truthiness") or engage in deception like Odysseus's scheme in *Philoctetes*; rather, the lawyer is "constrained by requirements that the narrative be based on a plausible version of the evidence and that it be informed by relevant substantive and procedural law," as well as by prohibitions in the law governing lawyers on the use of perjured testimony and false evidence.¹⁵⁷ Hazard and Remus also emphasize the meaning-making function of litigation, something very much rooted in classical understandings of rhetoric. The end of the litigation process is the

¹⁵⁴ *Id.* at 25.

¹⁵⁵ WENDEL, *supra* note __, at 130.

¹⁵⁶ See James Boyd White, *The Ethics of Argument: Plato's Gorgias and the Modern Lawyer*, 50 U. CHI. L. REV. 849, 870 (1983). I realize that the persons-as-ends version of Kant's Categorical Imperative is an anachronistic principle to impute to Plato, but the usage here is White's and I find it illuminating in part because it is startling.

¹⁵⁷ Hazard & Remus, *supra* note __, at 769.

construction of “truths that are persuasive enough to facilitate judgment.”¹⁵⁸ It would seem to be that if objective truth is unknowable by anyone with only limited access to it, then a trial process is sure to consist of “untrustworthy arts of persuasion, by which [each lawyer] seeks to make his own case, even if it is the weaker one, appear to be stronger.”¹⁵⁹ How can anything that results from this process be regarded as “persuasive enough to facilitate judgment”?

One answer is that, as rhetoricians, Hazard and Remus are committed to a conception of ethical advocacy that does not violate the expectation of other members of the community that they not be deceived or manipulated. While this may be an empirical question, it seems plausible that most citizens are aware of the inaccessibility of objective truth to the parties and their lawyers, and are therefore tolerant of a system of pleading and procedure that permits lawyers to take positions based on something short of certainty. It does not follow, however, that active manipulation of the factual record (as in the sidewalk case) or indifference to the truth of testimony or documents offered as evidence, are consistent with the community’s ends.

A different answer may be along the lines suggested by Markovits, namely, that the adversarial process must answer to the demand that it legitimate the application of law to the citizens affected by it. Citizens who are subject to the law may substantially accept the epistemological premises of the Hazard/Remus account. People may be perfectly well aware that no participant in the trial process has access to objective truth, and that the best we can expect is an approximation. At the same time, however, they do expect that the result of the trial process be something having to do with justice and the rule of law. Someone ought to be able to learn of the outcome of a legal proceeding, know a bit about the position of the parties in the dispute, and come away with the conclusion, “that makes sense.”¹⁶⁰ Not necessarily, “I agree,” but at least, “I see how that is a plausible resolution of the dispute, given the facts and the law.” In other words, the outcome has to be something that is intelligible as a contribution to a narrative about our community’s standards. The role of lawyers, on this

¹⁵⁸ *Id.* at 772.

¹⁵⁹ James Boyd White, *Rhetoric and Law: The Arts of Cultural and Communal Life*, in *HERACLES’ BOW: ESSAYS ON THE RHETORIC AND POETICS OF THE LAW* 28, 32 (1985).

¹⁶⁰ See WILLIAMS, *supra* note __, at 234-35 (using “makes sense” in this way, as a normative operator). The reason for picking up Williams’s somewhat elusive notion of “making sense” is that it explicitly runs together fact and value in a way that is useful for the analysis of legal decision-making.

approach, would be to contribute to a process which results in a determination that rings true as a matter of the craft of legal reasoning. White describes an ideal pattern of justification of a legal decision, and while here is talking about an appellate judge, this passage suggests the way in which the craft of judging constrains the ethics of lawyering:

The ideal judge would show that he had listened to the side he voted against and that he had felt the pull of the arguments both ways. The law that was made that way would comprise two opposing voices, those of the parties, in a work made by another, by the judge who had listened to both and had faced the conflict between them in an honest way.¹⁶¹

The ethical principle for lawyers that can be derived from this account of the judicial process is this: The ability of a judge, or a legal system, to face social conflict in an honest way depends on the facts of the dispute being presented to decision-makers in a fundamentally honest way. That does not mean lawyers should aim directly at the truth, but it does mean there are reasons to disfavor the traditional, unmodified version of the standard conception, in which the value of truthfulness does not serve as a constraint on advocacy (beyond the rules prohibiting the use of false evidence). The unknowability of “ultimate truth,” in the sense of that which would be determined at trial after the presentation of evidence, does not relieve participants in a political process from an obligation to treat others non-manipulatively. The arguments in the final section of this paper seek to show that the demand for legal legitimacy limits the permissibility of the game-playing with facts that lawyers believe to be permitted under the standard conception of legal ethics.

IV. TRUTHFULNESS AND LEGITIMACY.

The moral foundation of the law is the respect that is owed by all to their fellow citizens, whom they regard as free and equal. This liberal conception of value and of political ethics is the underpinning of the recent philosophical reconstruction of the standard conception of legal ethics – let’s call it the modified standard conception. The role of lawyer, according to Dare, Markovits, and others,¹⁶² can only be understood as part of an institutional response to the social problem that people disagree with one another, subscribe to a plurality of sometimes conflicting conceptions of human value, and are uncertain about empirical facts that bear on the

¹⁶¹ White, *supra* note __, at 47.

¹⁶² See DARE, *supra* note __; MARKOVITS, *supra* note __; WENDEL, *supra* note __; Norman W. Spaulding, *Reinterpreting Professional Identity*, 74 U. Colo. L. Rev. 1 (2003).

resolution of many matters, yet nevertheless still need to live in a stable, peaceful community with others. This institutional response in the United States has generally been understood in terms of a political tradition that emphasizes limitations on government power, decentralization of state power, and the importance of individual rights, which exists paradoxically in tension with pervasive demand for governmental responses to social problems such as discrimination, accidental injuries, environmental degradation, and economic dislocation.¹⁶³ The older, unmodified standard conception of legal ethics is therefore interpreted to “endorse zealous advocacy of client’s causes, short of dishonesty, but without regard to the interests of justice in the particular case or broader societal concerns.”¹⁶⁴

The relationship between the value of truthfulness and the unmodified standard conception of legal ethics is thus one of skepticism or mistrust. Lawyers, as the representatives of individual citizens (or entities comprised of individuals), take on the point of view of the citizen, not the government or society as a whole. One reason they must be partisan is that lawyers do not have access to the truth of the matter, where “truth” here refers to both empirical knowledge about the natural world and knowledge about right conduct or justice.¹⁶⁵ Another is that regimes of *ex parte* justice, where a litigant must appear before an official tribunal and give evidence concerning facts in dispute, have historically been subject to abuse.¹⁶⁶ Permitting the parties to have their own lawyers, with duties of loyalty and confidentiality owed solely to the client, is a means to protect the rights of individual litigants from abuse by the state or other citizens.¹⁶⁷ These attitudes toward truthfulness fit uncomfortably with the *modified* standard conception, however, which emphasizes the role of law, the legal system, and lawyers in contributing to a settlement of social controversy. If the unmodified standard conception describes a world of “adversarial legalism” where the

¹⁶³ See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* 41-51 (2001); cf. GEOFFREY C. HAZARD, JR., *ETHICS IN THE PRACTICE OF LAW* 120-21 (1975) (“the key elements of the adversary system . . . evolved as legal controls on government absolutism in seventeenth-century England”).

¹⁶⁴ KAGAN, *supra* note __, at 55.

¹⁶⁵ See, e.g., MONROE H. FREEDMAN, *LAWYERS’ ETHICS IN AN ADVERSARY SYSTEM* 51-57 (1975). Knowledge of justice is what Socrates says in the *Gorgias* is the subject of the art of dialectic, not rhetoric. See Plato, *supra* note __, at 465b-d.

¹⁶⁶ HAZARD & DONDI, *supra* note __, at 89; MONROE FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS’ ETHICS* § 2.03, at 18-20 (4th ed. 2010).

¹⁶⁷ Although they are now decades old, the contributions of Charles Fried and Stephen Pepper, relying on loyalty and autonomy, respectively, as the normative foundation for the lawyer’s role, have withstood the test of time. See Fried, *supra* note __; Pepper, *supra* note __; see also WENDEL, *ETHICS AND LAW*, *supra* note __, at 37-42 (giving a sympathetic reconstruction of Fried’s argument in response to the prevailing caricatured versions).

parties are pitted against one another, represented by zealous advocates, how does the modified standard conception imagine lawyers should act with respect to evidence and factual truth?

At least one version of the modified standard conception relies upon at least a moderate degree of determinacy in law.¹⁶⁸ Indeed, the law must be moderately determinate, or it could not fulfill its social function of standing in for the positions of the individuals who disagree or are in doubt as to what should be done. If clever lawyers could, under the guise of interpreting and applying legal rules in the course of advising their clients, re-introduce the contested positions the law was meant to resolve, the coordination and settlement function of the law would collapse. The modified standard conception opposes aggressive or abusive legal interpretation – what Tim Dare calls “hyper-zealous” representation.¹⁶⁹ But that problem also extends to aggressive or abusive practices with respect to facts. Consider the conduct of the lawyers in the Texas asbestos case. One issue that may be in dispute in society is, what should be the extent of liability of various product manufacturers who marketed a defective product which caused occupational illnesses with long latency period, with the result that many people injured by exposure to these products cannot establish one element of a tort claim – factual causation – to a preponderance of evidence. Considerations of fairness and corrective justice may limit liability to those manufacturers whose products a tort plaintiff can identify. Why should Owens-Corning have to compensate someone injured by products marketed by Eagle Picher? In fact, with the exception of occasional outlier cases like *Sindell*,¹⁷⁰ the tort system has generally refused to relax the requirement of showing causation in these so-called indeterminate defendant cases.¹⁷¹ One could imagine a contrary view as a matter of justice, but that is the point – reasonable people could disagree about what should be done about this particular social problem. Common law and legislation has provided a resolution of this controversy, and limited the entitlement of injured

¹⁶⁸ WENDEL, FIDELITY, *supra* note ___, at 176-77, 182-83.

¹⁶⁹ DARE, *supra* note ___, at 76-86.

¹⁷⁰ *Sindell v. Abbott Labs.*, 607 P.2d 924 (Cal. 1980) (using share of the relevant generic-drug market to establish but-for causation).

¹⁷¹ It is clear from cases rejecting the *Sindell* approach that the market-share system it adopts for apportioning liability among manufacturers applies only in circumstances in which the market share of a defendant’s product is a fairly reliable proxy for the number of injury-causing events that could be established if the plaintiffs had perfect recollection of the identity of the manufacturers. *See, e.g., Hamilton v. Beretta U.S.A. Corp.*, 750 N.E.2d 1055 (N.Y. 2001) (refusing to use market share apportionment to circumvent causation problem in litigation against firearms manufacturers, because there is too much factual variation in each case of firearms-related injury).

claimants to those cases in which they can identify the manufacturer of the product that caused their injury.

As noted above, however, a legal entitlement, *E*, does not depend solely on the law, *L*, but may require a prior determination of the relevant facts, *F*. The combination of *L* + *F* (client can identify manufacturer) produces a different entitlement, as compared with *L* + *F** (client cannot identify manufacturer). On the functional account underlying the modified standard conception, lawyers must have some obligation to avoid manipulation of the facts in such a way that changes the entitlement of clients relative to the baseline established by the legal process. But this way of thinking about it appears to run immediately into a regress problem. Lawyers representing clients in litigation are themselves part of the legal process that produces client entitlements, so how can we say what the content of *E* is prior to the completion of the adversarial litigation process? The answer is that this regress is only apparent. A lawyer can know, prior even to agreeing to represent a client, the content of *E*, based on assumptions about the facts that can be fairly easily verified. For example, a lawyer may see that the client may recover, provided that *F* obtains, where *F* = “the client can identify the manufacturer.” The fact that a society is characterized by conflict about justice, which is the starting point for both the Markovits and Hazard/Remus positions, says nothing about whether a lawyer should be permitted to “refresh” the “recollection” of clients regarding the manufacturer’s identity. The social conflict has been resolved, and the decision made to limit the entitlement to a tort recovery to those clients who can single out the defendant, at least to a more-likely-than-not level of certainty. There may be determinacy with respect to a fact/law combination, just as there is with respect to law, at least in many cases.

In contrast with rhetorical theorists who emphasize the meaning-making function of the trial process,¹⁷² this account sounds narrow, dry, even banal. Surely there is more going on in adversarial litigation than the simple determination of what is the case, factually speaking, and then the application of law to those facts. If Markovits is right, and the role of adversarial advocacy is to legitimate the application of law, and legitimacy involves making sense of the relationship between the outcome and the constitutive values of the legal system, then the relationship between the ethics of advocacy and truth is not so straightforward. Commenting on Hayden White’s philosophy of history based on the classical rhetorical tradition, Bernard Williams asks,

¹⁷² See, e.g., ROBERT P. BURNS, *A THEORY OF THE TRIAL* (1999).

if a narrative is said to make sense of some (extended) period of the past, and this means that it makes the right or correct sense of it, to what extent is this . . . a matter of truth and truthfulness? White's answer to *this* question is "Very little."¹⁷³

Williams goes on to caution readers, however, not to make too much of White's stance on historical truth – it is not the case, even for a rhetorician like White, that all interpretations of a past event are equally arbitrary.¹⁷⁴ While making sense of large-scale historical and cultural phenomena is largely a matter of interpretation, but part of that process – the smaller-scale part, if you like – consists of filling in the factual details, and this part has "a relatively unproblematic connection with the truth."¹⁷⁵ Moreover, White's reliance on the rhetorical tradition to ground his philosophy of history overlooks the importance of community to classical rhetoric. One might ask of a historian, "Would you buy an interpretation from this person?" and, as Williams rightly notes, history is different from propaganda or fiction.¹⁷⁶ Any rhetorician must be responsive to the needs of her audience. The audience of a historian is interested in making sense of the past, but the audience of a judicial decision or a jury trial is looking, yes, to make sense of the community's commitment to justice and rights, and to know the content of its constitutive values, but also to know how those normative commitments make a difference to what citizens owe to each other in light of what is the case, factually speaking.

The account of legitimation given here is liberal and democratic. As such, it has a definite relationship to truthfulness. Liberalism is mistrustful of state power, but it would be a serious mistake to believe that ethical constraints on playing games with the truth are liable to lead to aggrandizement of state power. Williams reminds us of one of the teachings of the Enlightenment tradition, that the promotion of historical truth "uniquely discourages some famous enemies of it, such as a state or religious monopoly."¹⁷⁷ The capacity of the law and the legal system to serve as an effective check on state power may depend on it being generally

¹⁷³ WILLIAMS, *supra* note ___, at 244.

¹⁷⁴ *Id.* at 245.

¹⁷⁵ *Id.* at 249. As examples of large-scale exercises in historical interpretation, Williams cites the project that has been going in since the late eighteenth century in the United States and France of each nation "trying to give an account of itself" and the task in the second half of the twentieth century in Germany, of "losing a past without forgetting it." *Id.* at 263.

¹⁷⁶ *Id.* at 251.

¹⁷⁷ *Id.* at 265.

perceived as having a fairly secure connection with the truth. The legitimation argument given in this paper is not, however, primarily based on the law serving as a constraint on power. Rather, the underlying ethical ideal is that of the freedom and equality of citizens. Where there is uncertainty and disagreement, the law provides a means to settle on what should be done, in terms that can reasonably be accepted by those affected by it. Commenting on the inherent circularity in Rawls's ideal of reasonableness, Burton Dreben suggested that one way out of the circle would be to analogize public reason to the considerations relied upon by a judge deciding a litigated dispute:

What is involved in being reasonable and rational is very difficult to lay out . . . but you'll see what they come to in practice. . . [T]o truly understand what Rawls is teaching, you have to understand the way the best appellate judges work. . . [W]hat [appellate judges] are always engaged in, when they are at their best, is what Rawls means by public reason. Constantly what you are confronted with in our system is how basic ideas, basic concepts such as freedom and equality, are to be turned into conceptions, how they really are to be applied and developed into workable principles. To be a serious political philosopher, one should understand the development of the common law and what a great judge does; that is the heart of the subject.¹⁷⁸

The law can provide this type of reasoned justification if it bears some relationship with what is the case. The practice of adversarial litigation must be truthful in order to legitimate. Go back to the example of the pedestrian who tripped on the sidewalk. Recall that the sidewalk was not defective directly in front of the church, but in front of the house across the street from the church there were sizeable cracks and holes. The lawyers, however, coached their client to say that she had fallen on the sidewalk in front of the house, even though she had initially reported falling in front of the church. The outcome of the litigation may be a judgment against the homeowner requiring a payment of, say, \$25,000 to the pedestrian. Imagine, counterfactually (because in reality the case would likely settle and the damages be paid by a third-party insurer), that the homeowner refused to pay and the local sheriff came to haul away \$25,000 worth of assets to satisfy the judgment. If the homeowner said something like, "What the hell are you doing?", the sheriff might simply say, "I have a gun, you can't stop me," but would much more likely appeal to the notion of a *right* to seize the property. "You lost a case, fair and square, after the jury heard all the

¹⁷⁸ Dreben, *supra* note __, at 339-40.

testimony – pay up.” The idea of public reason, and of the law as an exclusionary reason that functions to permit coexistence in a society characterized by disagreement, is that the person to whom such a justification is addressed can appreciate its force and agree that it provides a reason to do what the law requires. Now imagine two different versions of the factual story underlying the justification for seizing the homeowner’s property:

1. The plaintiff *in fact* fell on the sidewalk in front of your house.
2. It was very important to the plaintiff that she tell a story in court in which she fell on the sidewalk in front of your house.

This is a bit silly, but hopefully it is clear that when understanding law in terms of public reason-giving, it makes a difference whether the reasons purport to be backed by truth, as opposed to merely someone’s say-so. The subjective perspective of the plaintiff, who has a story *she really wants to tell*, is neither here nor there from the point of view of whether a judgment rendered against the homeowner is based on adequate reason. Subjectivists like Markovits may respond that legitimation is not a matter only of a story being told, but also of being *received* – that is, treated with the appropriate attitude of being considered in good faith by official decision-makers. Following Luban’s suggestion, the legal system must treat its subjects with dignity, and it fails to do so by treating their stories as unworthy of at least provisional belief. From this it follows that a lawyer’s ethical duties are to ensure that her client’s point of view receives due consideration. While there is a great deal to admire in this position, it nevertheless seems incomplete. Perhaps the client’s story being considered in good faith is a necessary condition for legitimacy, but not a sufficient one without some assurance being offered, to those whose interests are affected by legal decisions, that the coercive use of force in the state is responsive to factual truth.

Sharpening the point a bit, Justification #2 verges close to being bullshit, in the sense of the word explored by Harry Frankfurt. A lie actually manifests respect for the truth, because lying is parasitic on truthful practices. One must have the truth somewhere in view to be a liar.¹⁷⁹ A bullshitter, however, displays only contempt and disrespect, both for truth and for the person to whom bullshit is directed, because bullshit is utterly indifferent to the truth. A theme of Frankfurt’s study is that bullshit may be

¹⁷⁹ FRANKFURT, *supra* note __, at 60-61.

more corrosive of truthful practices than lying. Liars are concerned about the truth so they can avoid it; bullshitters don't care. Over time, allowing bullshit to pervade a practice or institution may reinforce an attitude of indifference to truth. To this critique, Markovits and others who favor a subjective perspective on truth would presumably deny that it is bullshit for someone to say, "this is *my* truth." Recall that Markovits's signal virtue for lawyers is negative capability. An ethical lawyer is supposed to be an empty vessel, into which her client's story is poured. Only by performing this role can the lawyer contribute to the legitimation of political authority at the level of individual citizens because, for Markovits, legitimation depends on an affective engagement with the process of adjudication. The pedestrian in the sidewalk example needs to participate in a process in which both parties to the dispute can have their preferences altered and this, he thinks, requires a credulous attitude toward the truthfulness of her factual assertions.

Setting aside the observation that the lawyers in the sidewalk case did not exercise negative capability, but in fact positively altered their client's story, there is a curious asymmetry in Markovits's reliance on transformative engagement. It is of vital importance that the client's story is heard, without prejudice or interference by the lawyer. The lawyer must efface her own perspective on the client's story. But the perspective of the other party, the homeowner, is also effaced, underscoring that, for Markovits, legitimation has little to do with truthfulness, and everything to do with telling one's client's story. (Luban, Hazard and Remus, and Simon also incline in this direction.) It is a bullshitter's approach to legitimation because it is utterly indifferent to truth. Of course, all these scholars have a reason for favoring an account of ethical lawyering that is indifferent to truth – Markovits, his concern for the first-personal perspective of both the client and the lawyer; Hazard and Remus, because no party or partisan advocate has access to ultimate truth; Simon owing to the subordination of factual truth to justice. But nowhere in any of these ethical theories is there an acknowledgement of the requirement that affected, non-client parties be able to endorse the reasons given by the lawyer in justification of her actions. The idea of a legal entitlement, which underlies a moderate version of the standard conception of legal ethics, incorporates both legal norms (derived from cases, statutes, etc.) and propositions about what is true in the natural world. With respect to both aspects of an entitlement, a legal reasoner (a lawyer or a judge) may have varying degrees of confidence. Lawyers familiarly couch their advice regarding legal outcomes with estimates concerning the likelihood that a judge will accept their

argument.¹⁸⁰ It is fallacious to infer from the prevalence of close calls on legal arguments to the conclusion that there is no such thing as an utterly unsupported, completely meritless position.¹⁸¹ A similar type of confidence assessment may be made with respect to facts. But here is the important thing: If adversary advocacy is to serve as a process of public reason-giving, it has to have more to say about factual truth than simply, “my client says *P*,” coupled with an attitude of skepticism about ultimate truth.

Whether skeptics about ultimate truth or committed to the view that clients deserve a non-judgmental spokesperson, the subjectivist theorists considered here all rely on considerations of political legitimacy, yet they under-value the role of truthfulness in legitimate political institutions. To this critique they might respond that truthfulness cannot be an aspect of legitimation in a pluralistic society in which reasonableness, as a political ideal, is weighted with the burdens of judgment.¹⁸² The burdens of judgment, leading to reasonable disagreement among members of society, include not only pluralism about value, but also uncertainty about the empirical evidence bearing on the resolution of disagreement.¹⁸³ In response, and to conclude this discussion, it may be helpful to specify what is required by the ethical duty of truthfulness in advocacy.

First, in the ordinary case, a lawyer is permitted to advance a position that has some evidentiary support, even if the lawyer believes (and even reasonably so) that the client will not prevail in the end. The reason for this is that responsibility for effectuating the social settlement of disagreement is distributed among the participants in the process of adversarial adjudication.¹⁸⁴ Experienced lawyers know that things are not always as

¹⁸⁰ See WENDEL, FIDELITY, *supra* note __, at 185-86.

¹⁸¹ Consider, for example, the frivolous tax protester arguments frequently filed in federal court asserting, among other merits positions, that the Sixteenth Amendment was not validly adopted, wages are not “income,” individuals are not “persons” subject to taxation, the income tax is invalid as a direct tax, and the term “income” is unconstitutionally vague. See, e.g., *Lonsdale v. United States*, 919 F.2d 1440 (10th Cir. 1990) (providing a convenient summary of many wacky tax-protester arguments).

¹⁸² RAWLS, *supra* note __, at 51-62.

¹⁸³ *Id.* at 56.

¹⁸⁴ See Zipursky, *supra* note __, at 1180 (“The law-making process generates laws out of a constellation of goals and citizen opinions; the adversarial system is designed as a two-sided process for applying these laws to individual facts. . . The justifiability of the system turns principally on the view that this fragmentation of lawyer roles. . . , in combination with the adversarial nature of the process, tends to be sound in the following respect: It tends to generate resolutions that effectuate the distribution of underlying rights and duties and liabilities that the substantive law has laid down.”).

they seem.¹⁸⁵ Going back to the problem of the rose garden, Black may have told her lawyer that she has openly snipped the flowers, but the lawyer may subsequently learn that this is a lie or a mistake, and that in fact Black has never done anything openly and notoriously that is inconsistent with White's claim to title. As long as the lawyer conducted a reasonable investigation before filing the lawsuit, she has done nothing wrong, either legally (under applicable procedural law) or ethically. The process of investigation, discovery, motions practice, and trial will eventually force parties to clarify their positions, "put up or shut up" with evidence supporting their claims, and uncover any inconsistencies in the evidence that might require the parties to revise their positions. The arguments here are intended to be consistent with the general structure of decentralized, party-controlled litigation that is characteristic of the American civil justice system.¹⁸⁶ One aspect of this system is the existence of procedural entitlements to assert claims that have adequate factual foundation, but are somewhere short of being conclusively established. There is a good reason for this: A liberal pleading system, including relatively undemanding duties of pre-filing investigation by attorneys, lowers access barriers to bringing a lawsuit to vindicate one's legal rights.¹⁸⁷ Derived as they are from the structure and procedures of a legal system, the ethical obligations of lawyers reflect our society's preference for handling many grievances through the mechanism of the adversary system of justice.¹⁸⁸

Second, the objective perspective on the relationship between facts and legitimacy should not be taken to imply some kind of unattainable God's-eye point of view. There may be genuine uncertainty about a matter of fact, e.g. whether the plaintiffs in the Texas case were exposed to asbestos fibers from the product of a still-solvent manufacturer, or a mixed question of law and fact such as whether Black gained title to White's rose garden through adverse possession. It is quite clear as a matter of the positive law governing lawyers that there would be no duty in such a case to refrain from presenting a claim or defense based on partial evidence. It should also be

¹⁸⁵ See, e.g., *Eastway Const. Corp. v. City of New York*, 637 F. Supp. 558 (E.D.N.Y. 1986) (Weinstein, J.), *modified and remanded*, 821 F.2d 121 (2d Cir. 1986).

¹⁸⁶ I have argued elsewhere that theoretical legal ethics should employ a reflective equilibrium methodology. See WENDEL, *ETHICS AND LAW*, *supra* note __, at 22-23. Considered judgments about how particular cases do not have absolute priority over theoretical considerations, but it would tell against an ethical theory if it were difficult to reconcile with the way most participants in a practice understand their duties, at least as long as the practice is generally regarded as morally acceptable.

¹⁸⁷ See WRIGHT, *supra* note __, § 1331.

¹⁸⁸ See ROBERT A. KAGAN, *ADVERSARIAL LEGALISM: THE AMERICAN WAY OF LAW* (2001).

clear, however, that a lawyer does not act unethically in these circumstances (again, as a matter of critical morality, not positive law) by vigorously representing a client and seeking to establish a claim to the relevant standard of proof. As noted above,¹⁸⁹ the standard of proof in criminal cases underwrites an ethical permission to construct a narrative out of bits and pieces of factually true evidence that the lawyer knows is false. By calling the ethical stance advocated in this paper an objective perspective, my intention is only to delink the lawyer's ethical obligation from the client's interests or story, connecting them instead with testimony and other evidence that bears on what is the case, factually speaking. In this way, it simply carries through the critique of the standard conception as applied to law. As two influential distinctions – that drawn by David Luban's, between High Realism and Low Realism, and by Tim Dare, between mere zeal vs. hyper zeal – show, there is a difference between what one can get the legal system to yield as an outcome and what one ought to get from the legal system as a matter of right.¹⁹⁰ The benchmark for the ethical permissibility of a lawyer's actions, in a representative capacity on behalf of a client, is whether it is a good faith effort to obtain or protect the client's legal entitlement. This differs from the unmodified standard conception, which uses the client's interests as the ethical benchmark, with the proviso that no unlawful means can be used in pursuing the client's interests. All this paper is intended to do is clarify that, if one accepts the democratic political foundations of the approach to legal ethics put forward by the supporters of the modified standard conception, then lawyers should take up the same stance toward facts as they do with respect to law.

Finally, one might ask why there is an ethical analysis at all, beyond ascertaining whether the rules permit the use of some piece of factual material. The rules of procedure and the law governing lawyers create entitlements, and I have argued that lawyers have a sufficient ethical justification when they act to vindicate a client's legal entitlement. Why should, say, Model Rule 3.3(a), which permits a lawyer to introduce evidence she reasonably believes (but does not know) to be false, be treated differently from the statute of limitations, the attorney-client privilege, and other legal doctrines often analyzed by legal ethics scholars?¹⁹¹ The response is that substantive and procedural entitlements are treated in

¹⁸⁹ See *infra* note ___ - ___, and accompanying text.

¹⁹⁰ See WENDEL, *ETHICS AND LAW*, *supra* note ___, at 189-91 (summarizing positions in Luban, *supra* note ___; DARE, *supra* note ___); see also David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 468 (1990) (showing how legal realism threatens to destabilize legal ethics).

¹⁹¹ See, e.g., HAZARD & DONDI, *supra* note ___, at 175-76.

exactly the same way, but what a lawyer (legally and morally) permissibly may do for a client is limited by the bounds of the law. As the Luban/Dare critique of legal realism shows, this constraint on permissible advocacy is given by what the law actually permits or requires, not by any advantage a lawyer may happen to be able to maintain, using legal processes. The same critique carries through to what might be called realism about facts. The subjectivist theorists – the target of this paper – are in the same position as the Low Realists or hyper-zealous advocates criticized by Luban and Dare. With respect to law, the unmodified standard conception of legal ethics requires lawyers to advocate any position that will not subject them to legal sanctions, and which is in the interests of their client. But the modified version of the standard conception directs lawyers to respect the rights and duties actually established by law, not what they may happen to be able to manipulate the legal system into yielding. The little schema, $E = L + F$, is meant to remind lawyers that entitlements have factual and legal components, and if one believes that the ethical permissibility of advocacy has something to do with a legitimate legal process that establishes entitlements, then these considerations of legitimacy also require a similar attitude toward factual evidence.

CONCLUSION

As a matter of the political ethics of the lawyer's role, in order to act with justification, notwithstanding the ordinary moral evaluation of the lawyer's actions as lying or cheating, an advocate must advance a plausible story regarding her client's entitlement. This entitlement has legal and factual components, and the lawyer must have at least some reason to believe that they have adequate support. This seems like such a moderate position, but it is actually against the grain of both legal ethics theory and the tacit ethical norms of practicing lawyers, which emphasize the partiality of the lawyer's duties. It is true that lawyers traditionally have understood themselves as zealous advocates, but it is sometimes forgotten that this maxim ends with the qualification, ". . . within the bounds of the law."¹⁹² When it comes to the legal norms governing the situation of clients, many scholars have come to accept that the law is not equivalent to what one can get away with; rather, there is sufficient determinacy in the law, in many cases, to permit ethical criticism of lawyers to be grounded in their apparent abuse or manipulation of the law. This paper seeks only to extend this analysis modestly, to suggest a critical stance that one can also take toward lawyers manipulating factual evidence. In many cases, of course, there is

¹⁹² For a historical overview and critique of the zealous advocacy principle, see WENDEL, FIDELITY, *supra* note __, at 77-81.

sufficient uncertainty or ambiguity to justify an advocate in taking a position that may turn out not to be “ultimate truth,” in the sense of what is established at trial. But the possibility of ambiguity should not be used to support a robustly subjective position regarding factual evidence. Relying exclusively on the client’s version of the truth, as the subjective position recommends, risks losing the connection with the political values that support the legal system and the lawyer’s ethical role.