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How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team

Albert W. Alschuler*

Some students complain that my classes are abstruse, abstract and recondite. Today I will fix all that. I will give you several practice tips. I will in fact tell you how to *win* the trial of the century. Yet none of what I will tell you is arcane or clandestine lawyers' knowledge. It is all public information, drawn mostly from books on the *New York Times* bestseller list. All of my practice tips come from memoirs of the O.J. Simpson criminal trial. You may, moreover, view every practice tip as posing a challenge in a game of *Scruples*: Once you know how to win the trial of the century, would you do it?

I. BROUGHAM-STYLE ADVOCACY IN THE ABSTRACT

As background for this game of *Scruples*, I want to recall to you a famous statement of Henry Lord Brougham. A trial memoir by one of O.J. Simpson's lawyers, Gerald Uelmen, offers this statement as a praiseworthy description of an advocate's duty.¹ Lord Brougham was, as Uelmen recounts, a lawyer in the trial of the *last* century, a case in 1820 in which King George IV of England sought a divorce from his wife on grounds of adultery. Lord Brougham threatened to defend the Queen by proving the King's own adultery and secret marriage to a Catholic. Proof of this alleged marriage would have required the King to forfeit his crown.

When people criticized Lord Brougham's greymail² and claimed that his threats were ungentlemanly and unpatriotic, he replied:

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

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1. GERALD F. UELMEN, LESSONS FROM THE TRIAL: THE PEOPLE V. O.J. SIMPSON 2-3 (1996). See Gerald F. Uelmen, *Lord Brougham's Bromide: Good Lawyers as Bad Citizens*, 30 LOY. L.A. L. REV. 119 (1996).

2. Thomas Shaffer uses the word "greymail" to describe Brougham's tactics, and Brougham's greymail may have been successful. For one reason or another, the charges against Queen Caroline were not pressed to a conclusion. See THOMAS L. SHAFFER, AMERICAN LEGAL ETHICS: TEXT, READINGS AND DISCUSSION TOPICS 204-06 (1985); G. T. GARRATT, LORD BROUGHAM 153 (1935) ("Brougham's object was to frighten the waverers [in the House of Lords] into getting the [Bill of Pains and Penalties] withdrawn He did not actually play his trump card . . . , but he let his opponents know that he still had it in reserve.").

expedients, and at all hazards and costs to other persons, and among them, to himself, is his first and only duty. In performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of consequences, though it should be his unhappy fate to involve his country in confusion.³

The admiration of O.J. Simpson's lawyers for this statement appears to be shared by virtually all other criminal defense attorneys.⁴ Geoffrey Hazard describes the statement as "the classic vindication of the lawyer's partisan role" and says that "[this] basic narrative has been sustained over two centuries notwithstanding pervasive changes in American society and in the profession itself."⁵ In recent years, however, scholars of the legal profession generally have criticized Brougham's stance and have taken a less single-minded view of an advocate's responsibility.⁶

On one reading, Lord Brougham's statement surely merits applause. As a lawyer defending the Los Angeles police officers accused of beating Rodney King, you might conceivably have foreseen that your victory would lead to the worst race riot in American history, a riot that in fact cost fifty-eight lives and nearly one

3. 2 THE TRIAL OF QUEEN CAROLINE 8 (Joseph Nightingale, ed., London, Albion Press 1821) (quoted in UELMEN, *supra* note 1, at 3).

4. See, e.g., Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1248 n.45 (1993); Stephanie B. Goldberg, *Playing Hardball*, A.B.A. J., July 1, 1987, at 48, 50 (reporting the statement of defense attorney Gerry Spence that a lawyer must go "right up to the line"); Cristina C. Arguedas, *Duties of a Criminal Defense Lawyer*, 30 LOY. L.A. L. REV. 7, 7 (1996) ("There is but one duty, one loyalty. That is to defend the client."); Gerald B. Lefcourt, *Responsibilities of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 59, 61 (1996) ("First and foremost, defense attorneys must zealously and uncompromisingly represent the client."); Greta Van Susteren, *Responsibility of a Criminal Defense Attorney*, 30 LOY. L.A. L. REV. 125, 128 (1996) ("In some ways you must momentarily 'suspend' your personal morality and make a firm commitment to the system of justice. The commitment is to put the government to its test by doing all that you can, consistent with the Constitution, the law, and the codes of professional responsibility to get your client 'off the hook.'").

An eloquent scholarly champion of Brougham-style advocacy is Monroe Freedman. An article of Freedman's that once sparked indignation and that led Warren Burger to initiate professional discipline against the author, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966), is now regarded as a classic and a monument to Freedman's integrity. See also Monroe Freedman, *Personal Responsibility in a Professional System*, 27 CATH. U. L. REV. 191 (1978); MONROE FREEDMAN, UNDERSTANDING LAWYERS' ETHICS (1990); MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM (1975).

5. Geoffrey C. Hazard, Jr., *The Future of Legal Ethics*, 100 YALE L.J. 1239, 1244 (1991).

6. See, e.g., David B. Wilkins, *Making Context Count: Regulating Lawyers After Kaye*, *Scholar*, 66 S. CAL. L. REV. 1145 (1993); David B. Wilkins, *Legal Realism for Lawyers*, 104 HARV. L. REV. 469 (1990); Deborah L. Rhode, *Institutionalizing Ethics*, 44 CASE W. RES. L. REV. 665 (1994); Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589 (1985); William H. Simon, *Ethical Discretion in Lawyering*, 101 HARV. L. REV. 1083 (1988); Fred C. Zacharias, *Reconceptualizing Ethical Roles*, 65 GEO. WASH. L. REV. 169, 170 n.10 (1997); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 WM. & MARY L. REV. 1303 (1995); John J. Flynn, *Professional Ethics and the Lawyer's Duty to Self*, 1976 WASH. U. L.Q. 429; Gerald J. Postema, *Moral Responsibility in Professional Ethics*, 55 N.Y.U. L. REV. 63 (1980); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 HUM. RTS. 1 (1975); William Powers, Jr., *Structural Aspects of the Impact of Law on Moral Duty Within Utilitarianism and Social Contract Theory*, 26 UCLA L. REV. 1263 (1979).

billion dollars in property damage when it happened.⁷ If you had slackened your efforts even slightly in response to this danger, you would have deserved censure.

The authors of the Simpson trial memoirs, however, view Lord Brougham's statement as something more than a declaration that a lawyer must faithfully represent a client without regard to how the outside world might respond. They take the view that a lawyer is obliged to do everything useful on behalf of a client that the law does not forbid. Gerald Uelmen says of himself and his colleagues:

Our purpose was to employ every advantage the law permits to enhance the prospects of our client's acquittal. Our purpose was to utilize every device and stratagem the law allows to weaken and discredit the prosecution's case. The vindication of our client was the beginning, the end, and the substance of our every effort. Anything less would have been a violation of our ethical responsibility to faithfully perform the duties of an attorney-at-law.⁸

Alan Dershowitz adds, "What a defense attorney 'may' do, he *must* do, if it is necessary to defend his client. A zealous defense attorney has a professional obligation to take every legal and ethically permissible step that will serve the client's best interest—even if the attorney finds the step personally distasteful."⁹ Johnnie Cochran declares that as a young lawyer he learned: "Never forget that you are there to represent your client's interests and for no other reason."¹⁰ I confess that my remarks today have a purpose beyond giving you practice tips. I want to consider whether this concept of a defense attorney's duty is sound.

O.J. Simpson's lawyers might have found support for their understanding of an advocate's obligations in Canon 7 of the Code of Professional Responsibility, which declares, "A lawyer shall represent his client zealously within the bounds of law."¹¹ On one reading, Canon 7 implies that a lawyer's zealotry should know no bounds except those imposed by law. As Stephen Pepper declares, "As long as what

7. See Seth Mydans, *After the Riots: Prosecutor Seeks Retrial of Officer in King Beating*, N.Y. TIMES, May 14, 1992, at A20; Neal R. Pierce, *Look Homeward, City of Angels*, 24 NAT'L L. J. 1250 (1992).

8. UELMEN, *supra* note 1, at 2.

9. ALAN M. DERSHOWITZ, REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM 145 (1996). If read as a description of a lawyer's formal obligation, Dershowitz's statement is inaccurate. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1996); see *infra* note 13 and accompanying text (quoting the comment to Rule 1.3).

10. JOHNNIE L. COCHRAN, JR. & TIM RUTTEN, JOURNEY TO JUSTICE 107 (1996) [hereinafter COCHRAN].

11. MODEL CODE OF PROFESSIONAL RESPONSIBILITY Canon 7 (1996). Disciplinary Rule 7-101(A)(1) provides that subject to a number of exceptions "[a] lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules." *But see* MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-10 (1996) ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process and to avoid the infliction of needless harm.").

lawyer and client do is lawful, it is the client who is morally accountable, not the lawyer."¹²

The Model Code, however, no longer provides the basis for professional discipline in most states, and its replacement, the Model Rules of Professional Conduct, is considerably more tepid on the Brougham issue. A comment to the Model Rules declares:

A lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf. However, a lawyer is not bound to press for every advantage that might be realized by a client. A lawyer has professional discretion in determining the means by which a matter should be pursued.¹³

This language seems to make Lord Brougham's position optional but not mandatory.¹⁴ The California Rules of Professional Conduct, which frequently differ from both the Model Code and the Model Rules, do not address the Brougham issue at all.¹⁵

12. Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 614 (maintaining that this view is "traditional").

13. MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.3 cmt. (1996).

14. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 (1996) (requiring a lawyer to "abide by a client's decisions concerning the objectives of representation" but mandating only consultation with the client concerning "the means by which [the objectives] are to be pursued"). A comment to this rule declares:

[A] lawyer is not required to pursue objectives or employ means simply because a client may wish that the lawyer do so In questions of means, the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as the expense to be incurred and concern for third persons who might be adversely affected.

Id. Rule 1.2 cmt.

Many of the lawyers' decisions discussed in this article concern both tactical issues, for which the comment says lawyers are responsible, and issues of fairness to third parties, for which the comment suggests deference to the client. When a client says to his lawyer, "I want you to do everything you can to win this case, and I don't care what harm it brings upon others," one could read this comment as directing the lawyer to "go Brougham." This reading, however, would be difficult to reconcile with the Model Rules' declarations that "a lawyer is not bound to press for every advantage that might be realized by a client," that a lawyer "has professional discretion in determining the means by which a matter should be pursued," and that "a lawyer is not required to . . . employ means simply because a client may wish that the lawyer do so." The comment may not suggest deference to the client on issues of *how much* to take third-party concerns into account. Perhaps it suggests deference only when the client would *restrain* the lawyer's tactics because of the client's "concern for third persons"—when the client says, for example, "I know that it might help us to cross-examine this witness about his embarrassing past, but I believe doing so would be rotten." On this view, either the lawyer or the client might decide to forego tactics likely to harm third parties. On the Brougham issue, the Rules are a muddle. For a suggested revision, see *infra* text accompanying note 118.

15. See CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 3-110(B) (State Bar of California Pub. No. 250-236-3614, Jan. 1997) (demanding simply "competence" in the performance of legal services). The current draft of the American Law Institute's RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 152 cmt. d (Tentative Draft No. 8, 1997) permits a lawyer to cross-examine a truthful witness while declaring that the lawyer is not obliged to do so. It thus rejects the view that everything not forbidden is required.

The Simpson defense team in fact crossed the boundary into illegality from time to time,¹⁶ but that's not very interesting. That's just wrong. The intriguing ethical proposition is the one suggested by an expansive understanding of Lord Brougham—that a dutiful advocate should regard everything not forbidden as required.

There is much to be said for this vision of an advocate's duty. Like doctors who treat drug dealers, racists, and presidents without regard to their moral worth, lawyers are said to have an amoral role.¹⁷ For example, a lawyer may properly prepare a securities registration statement for a tobacco company or may draft a will for a client who insists upon disinheriting his daughter for marrying outside the faith.¹⁸

Lord Brougham's position in fact seems less troublesome in one respect than the conventional (although sometimes disputed) claim that advancing the interests of an immoral client can be moral. Brougham did not consider whether a lawyer should represent O.J. Simpson or a tobacco company at all.¹⁹ Even on an expansive reading, his statement maintained only that once a lawyer does undertake a client's representation, the lawyer should not pull her punches—unless of course her client

16. See *infra* text accompanying notes 69-78, 86-97 (describing some of the defense team's discovery violations and its violation of the requirement of nondiscriminatory jury selection). According to Lawrence Schiller, Alan Dershowitz once proposed investigating a juror whom the defense considered unsympathetic, thereby violating Judge Ito's order against such juror investigations. Barry Scheck concurred with Dershowitz. The two lawyers were rebuffed, however, by Johnnie Cochran and Carl Douglas, so that the proscribed investigation did not occur. LAWRENCE SCHILLER & JAMES WILLWERTH, *AMERICAN TRAGEDY: THE UNCENSORED STORY OF THE SIMPSON DEFENSE* 546 (1996) [hereinafter SCHILLER]. One should not assume that tenured law professors like Dershowitz and Scheck have higher ethical standards than full-time advocates like Cochran and Douglas. Perhaps, however, Dershowitz and Scheck were unaware of Judge Ito's order.

17. See Pepper, *supra* note 12; Robert L. Shapiro, *For the Defense*, 30 LOY. L.A. L. REV. 105, 106 (1996) ("Surgeons do not do less than their best when confronted with a person they detest on the operating table; neither do lawyers.").

18. See Pepper, *supra* note 12, at 614.

Charles Fried writes:

In counseling the rich man or the criminal, the lawyer draws his moral justification not by reference to the ultimate exercise of autonomy which the client's right leaves the client (that exercise, I concede, may be bad) but from the good that inheres in the client's having the right, the autonomy, to make this choice [I]ntention is crucial. The lawyer's activity is good because he intends to assist his client in exercising his rights; the lawyer does not intend the ultimate harm the client may do by exercising those rights. The lawyer's role is crucial. It insulates the lawyer from implication in that ultimate effect of the exercise of his client's rights. What the lawyer does intend, it is right to intend.

CHARLES FRIED, *RIGHT AND WRONG* 182-83 (1978). See also Charles Fried, *The Lawyer as Friend: The Moral Foundations of the Lawyer-Client Relation*, 85 YALE L.J. 1060, 1088 (1976) ("[T]here is a vocation and a satisfaction even in helping Shylock obtain his pound of flesh or in bringing about the acquittal of a guilty man.").

19. See Monroe H. Freedman, *The Lawyer's Moral Obligation of Justification*, 74 TEX. L. REV. 111 (1995) (arguing that whether to represent a particular client is a moral decision that, if challenged, requires affirmative justification); FREEDMAN, *UNDERSTANDING LAWYERS' ETHICS*, *supra* note 4, at 49-50, 57, 66-71; Lefcourt, *Responsibilities of a Criminal Defense Attorney*, *supra* note 4, at 61 ("Lawyers are not busses, and they are not obligated to stop at every stop.").

approves.²⁰ The lawyer should instead advance her client's interests as vigorously as the law allows.

In other respects, however, Brougham's ethical position seems less appealing than the view that a lawyer may appropriately draft a will or a stock option for an immoral client. Defenses of the lawyer's amoral role generally assume that the client has requested the lawyer's assistance in taking a morally dubious action. Lord Brougham, however, spoke of tactics authored, not by the client, but by the attorney herself. Brougham praised the lawyer's damaging means rather than the propriety of advancing the client's damaging ends.²¹

Perhaps one can fairly assume that a client like O.J. Simpson, charged with murder, would want his lawyers to take any legally permissible action that seemed likely to decrease the chances of his conviction. Consider the probable reaction of most defendants to a common stratagem that was not employed in the Simpson case²²—requesting delay in the hope that witnesses for the prosecution will grow weary or that, for other reasons, the prosecution's case will fade over time.²³ If this

20. Ethical Consideration 7-9 of the Model Code of Professional Responsibility allows a lawyer to ask her client for permission to forego an action that the lawyer considers unjust even when the action is in the best interest of the client, adding that "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not [the lawyer]." MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-9 (1996). Even the most vigorous champions of Brougham-style advocacy recognize (at least in principle) that lawyers cannot properly assume that clients would approve ethically dubious tactics. Except, perhaps, in cases of unmistakable tacit approval, a lawyer who employs such tactics without consulting her client must accept full responsibility for them. See Fried, *supra* note 18, at 1088 ("[I]t is no part of my argument to hold that a lawyer must assume that the client is not a decent, moral, person . . . and is asking only what is the minimum that he must do to stay within the law. On the contrary, to assume this about anyone is itself a form of immorality because it is a form of disrespect between persons.").

Both the Model Rules and the Model Code note that it is appropriate for lawyers to discuss with clients the moral as well as the legal propriety of their actions. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 2.1 (1996) ("In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors, that may be relevant to the client's situation."); MODEL CODE OF PROFESSIONAL RESPONSIBILITY EC 7-8 (1996) ("In assisting his client to reach a proper decision, it is often desirable for a lawyer to point out those factors which may lead to a decision that is morally just as well as legally permissible.").

21. Drafting a will is certainly appropriate unless the document is bent to a harmful end. Deceiving someone can be harmful even when done in a just cause. Of course the means-ends dichotomy is imprecise. Most human actions have *some* end beyond themselves. For criticism of the Model Rules' reliance on the means-ends distinction, see FREEDMAN, UNDERSTANDING LAWYER'S ETHICS, *supra* note 4, at 60-64.

More important than the means-end distinction is the fact that in devising litigation tactics a lawyer does more than promote her client's autonomy by permitting her to determine the goals of the litigation. Charles Fried compares the duty of an advocate to that of a soldier:

He is personally bound . . . not to fire dum-dum bullets, not to inflict intentional injury on civilians, not to abuse prisoners. These are personal wrongs, wrongs done by his person to the person of the victim. So also, the lawyer must distinguish between wrongs that a reasonably just legal system permits to be worked by its rules and wrongs which the lawyer commits himself.

FRIED, *supra* note 18, at 191-92.

22. See *infra* text accompanying notes 63-64.

23. Current ethical rules do not appear to condemn this stratagem. The Model Rules declare only that "a lawyer shall make reasonable efforts to expedite litigation *consistent with the interests of the client*." MODEL RULES OF PROFESSIONAL CONDUCT Rule 3.2 (1996) (emphasis added). But see *id.* Rule 3.2 cmt. ("Delay should not be indulged merely . . . for the purpose of frustrating an opposing party's attempt to obtain rightful redress or repose.").

tactic seemed likely to be successful, most clients (especially guilty clients) no doubt would cheer it.²⁴ Nevertheless, lawyers bear greater responsibility for authoring harmful or misleading stratagems than they do for implementing the dubious but lawful objectives of clients themselves.

In devising a lawful but unfair or harmful tactic, lawyers sometimes shape as well as respect their clients' objectives. Although they rarely implant a client's desire for acquittal, they do create whatever desire the client has to use the specific stratagem the lawyer has invented. On the assumption that clients truly approve the harmful or misleading tactics that their lawyers employ,²⁵ the lawyers do not simply take their clients as they find them. They make these clients a bit worse. The lawyers' tactics can foster a cynical view of human relations and can reinforce selfish and manipulative attitudes that in some cases have contributed to the clients' legal difficulties.²⁶

As Richard Painter observes of the relationship between corporate lawyers and their clients,

[A]ctions of lawyers and clients are not always easily distinguished. Often, lawyers and clients accomplish objectives together, not separately. They each exercise some independent judgment, but they work together and not always in distinct roles; lawyers do more than render discrete legal advice or advocacy. Lawyers therefore cannot always deny moral responsibility for [joint] conduct.²⁷

Even more clearly, lawyers cannot deny moral responsibility for tactics that they have devised—whether or not they have their clients' tacit or express approval for using them.²⁸

I considered the ethical propriety of strategic delay in Albert W. Alschuler, *The Defense Attorney's Role in Plea Bargaining*, 84 YALE L. J. 1179, 1234-35 (1975). An alert reader will notice that I have now revised my position. In general, this article takes a more critical view of Brougham-style advocacy than I took when I was younger and less wise. If the Simpson trial did not cause my shift in position, at least it prompted me to recognize that the shift had occurred.

24. At least they would if they were free on bond or recognizance pending trial.

25. In reality, clients are often unaware of these tactics.

26. See Edwin H. Greenbaum, *Attorneys' Problems in Making Ethical Decisions*, 52 IND. L.J. 627, 635 (1977).

At the time of the televised Bronco chase and his apparent suicide note, O.J. Simpson appeared to be struggling with his soul. At trial, however, he seemed transformed. He was again a running back; he had glimpsed his goal; and he was prepared to push and run very hard to score. One wonders whether Simpson's lawyers' view of the adversary contest influenced Simpson's own.

27. Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 511 (1994). See MODEL RULES OF PROFESSIONAL CONDUCT Rule 1.2 cmt. (1996) ("[I]n many cases the client-lawyer relationship partakes of a joint undertaking.").

28. George Fisher doubts that the propriety of a lawyer's action is affected by whether the lawyer or her client devises this action. He suggests, for example, that strategic delay is as offensive when a client proposes it as when a lawyer does, and he notes that permitting any tactic only when a client has requested it would penalize

There may be a second reason for considering Lord Brougham's position less appealing than the view that a good lawyer may advance an objective of which the lawyer disapproves. The most compelling justification of the lawyer's neutral or amoral role is that it facilitates access to law.²⁹ As long as the law permits a testator to disinherit his children, it is not his lawyer's function to stand in his way. Instead, the lawyer should provide the services that her client needs to exercise his rights effectively. It seems extravagant, however, to assert that tactics like seeking delay in the hope that witnesses will forget, die, or disappear simply provide access to law.

One might support the "access to law" justification of Brougham-Uelmen position by endorsing a narrow, positivistic concept of law and by declaring that someone has a right to do whatever she will not incur a legal sanction for doing.³⁰ Sometimes, however, the law withholds sanctions for economic or administrative reasons rather than to promote autonomy. For example, defense attorneys are authorized to seek continuances mostly because the attorneys may need additional time to investigate or to prepare for trial. They were not meant to have a strategic power to promote the loss of prosecution evidence. In practice, however, the power to do one thing often includes the power to do the other. Policing the unrevealed motives of lawyers is difficult,³¹ and courts often must give them the benefit of the doubt. In a time-worn phrase, to say that lawyers have the power to delay cases for tactical reasons is not to say that they have the right.³²

Providing access to law offers one possible justification for the Brougham-Uelmen position. The principle of equality coupled with the market for legal services supplies a second. When an action is in fact beneficial to a client, when the client wants it, and when nothing in either the rules of professional responsibility

unimaginative clients. Letter from George Fisher to author (Feb. 9, 1998). I agree that the propriety of conduct is unaffected by who proposes it. Nevertheless, the *responsibility* of a lawyer for harmful conduct is likely to be especially clear when she has devised it. It is difficult for a lawyer to excuse this conduct by saying "I am simply doing it for my client" when the lawyer may have led the client to favor the conduct or may not have consulted the client at all.

29. See Pepper, *supra* note 12.

30. See Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 459 (1897) ("If you want to know the law and nothing else, you must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside it, in the vaguer sanctions of conscience."). For an extended discussion of why this concept of law is unsatisfactory, see Albert W. Alschuler, *The Descending Trail: Holmes' Path of the Law One Hundred Years Later*, 49 FLA. L. REV. 353 (1997).

31. Of course a lawyer may not affirmatively misrepresent her reason for seeking delay. See MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1996) (forbidding a lawyer to "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation"); CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 5-200(B) (State Bar of California Pub. No. 250-236-3614, Jan. 1997). A lawyer, however, usually can assert a truthful reason for delay without mentioning her hope that the prosecutor's case will grow weaker. Ethical rules do not mandate the disclosure of every reason that prompts a lawyer's action or even of a lawyer's primary reason.

32. See Simon, *supra* note 6 (proposing an ethical system grounded on a lawyer's obligation to further the purposes of law, not simply its letter).

or any other law forbids it, you can expect the market to supply it. No lawyer wants her clients to be at a disadvantage because they have made the mistake of coming to her.

To be sure, the claim that “everybody does it” is a standard rationalization for improper conduct, and a lawyer could not justify such practices as bribing jurors or suborning perjury by showing that other lawyers engage in these practices and that a client, knowing the situation, often would prefer a lawyer who does. In the absence of any obligation imposed by law or by the organized legal profession, however, a lawyer may reasonably be influenced by the idea that her clients should not be denied services that they could obtain elsewhere without difficulty.³³ This consideration need not be decisive, but perhaps a lawyer who takes a less Brougham-like view than others in her community should advise clients of her stance and should inform them of what actions other lawyers would take that she will not.

A concern about equal treatment for one’s clients may have special force for lawyers who are free of market pressures to use morally dubious tactics—that is, for public defenders. When a public defender, free of the economic constraints that influence private attorneys, acts more nobly than they do, her clients may suffer because of their poverty. Furthermore, when clients lack the ability to go elsewhere, a warning by the attorney that her ethical position is distinctive offers no solution.

II. BROUGHAM-STYLE ADVOCACY IN THE SPECIFIC: THREE PRACTICE TIPS

One can articulate plausible rationales for the Brougham-Uelmen position, but the best test of whether one should endorse this position may lie in examining where it leads in particular situations. Many of you will face the issue before long, and if Lord Brougham expresses your concept of professional duty, consider tip number one:

A. *Throw Opposing Counsel Off Their Game*³⁴

1. *Trash Talk*

Early in his book *Journey to Justice*, Johnnie Cochran reports, “From the age of eleven onward, there has been a serenity, a sense of purpose to my life from

33. See Alschuler, *The Defense Attorney's Role in Plea Bargaining*, *supra* note 23, at 1235.

34. You might begin your consideration of the implications of the Brougham thesis right here. Imagine a rule of professional responsibility that declared, “A zealous advocate must do everything the law allows to disconcert, distress, divert, disturb, deflect, deceive, disorder, delude, dupe, and distract his or her opponent and to keep the opponent from presenting his or her case effectively.” One suspects that few members of the ABA House of Delegates would favor this rule, yet endorsing the position that “what a defense attorney ‘may’ do, he *must* do” seems implicitly to approve this rule. If the Brougham-Uelmen thesis is not to be taken literally, moreover, I do not know how to take it. The heart of this thesis appears to be its denial of the need for *any* balancing.

knowing the Lord has a divine plan for me. I do not fight that heavenly design. I only seek to fulfill it as every good Christian must.”³⁵

Later the book reveals more specifically how, as a Christian, Cochran practices law:

Marcia [Clark], I could see, was simply wearing down under the strain of an unsettled personal life. Darden’s temper was wearing thinner. We began to look for ways to exploit that, and one soon presented itself.³⁶

Cochran explains that he and other members of the defense team hoped to goad prosecutors to require O.J. Simpson to try on two bloody gloves, one found at his estate and the other at the crime scene. Cochran writes:

I made a few conversational feints at Darden over the issue to put him on edge. It was one of those days when he clearly seemed rattled. But I knew the one person he couldn’t stand taking anything from was Lee Bailey. Lee and I huddled. “One more push and that young man might just go over the edge,” I suggested.

During a recess in the testimony, Lee walked casually over to Darden and said, “You’ve got the balls of a stud field mouse.”

“What are you on my back for now,” Chris replied with one of his patented snarls.

“If you had any nuts at all,” Bailey sneered, “you’d make O.J. try on that glove. If you don’t have him try on the glove, we will.”

And so [Darden] did. . . . It was one of the worst humiliations I have ever seen a prosecutor suffer in front of a jury. . . . It was, I told my jubilant colleagues back at the office that night, perhaps “the most expensive piece of remedial legal education I’d ever seen.” They all laughed and then laughed again when someone quipped that, all things considered, “Darden has helped the defense more than Shapiro.”³⁷

35. COCHRAN, *supra* note 10, at 35. Cochran’s memoir quotes the Bible at pages 5, 11, 12, 34, 93, 172, 320, and 321. His acknowledgments begin with God and end with his ministers. His photograph on the dust jacket shows a prominent white cross on his lapel. Lest anyone infer that I mean to criticize Cochran’s religion rather than the way in which he practiced it in the O.J. Simpson case, let me mention that I am a Bible-quoting Christian myself.

36. *Id.* at 299.

37. *Id.* at 299-300. For other descriptions of Bailey’s taunt and the glove experiment, see JEFFREY TOOBIN, *THE RUN OF HIS LIFE: THE PEOPLE V. O.J. SIMPSON* 365-69 (1996). SCHILLER, *supra* note 16, at 474-77. Darden’s memoir does not mention any taunting by the defense. In fact, it reports that when Darden requested the court’s permission to conduct the glove experiment, Cochran objected. See CHRISTOPHER DARDEN with JESS WALTER, *IN CONTEMPT* 324 (1996) [hereinafter DARDEN]. Darden’s book also reports that although Marcia Clark approved the glove experiment. *Id.* She snubbed Darden when it failed: “Marcia didn’t talk to me for a few days. For weeks after that, I was left out of major decisions involving the case.” *Id.* at 327. Clark’s memoir denies that she ever approved the glove experiment. See MARCIA CLARK with TERESA CARPENTER, *WITHOUT A DOUBT* 404-08 (1997) [hereinafter CLARK]. Neither Darden’s memoir nor Clark’s attempts to explain the prosecutors’ inexcusable failure to require

Would you do it? If you noticed that your opponent was wearing down under the strain of an unsettled personal life, would you look for ways to exploit it?

Nearly all of the trial memoirs describe a barrage of personal insults and psychological button-pushing. Robert Shapiro comments:

In . . . all my hours at the gym I had never heard more trash-talking than what constantly took place between Cochran and Darden, especially at sidebar conferences.

"You're an embarrassment, you'll never be allowed back in the neighborhood," Johnnie would say to Chris.

"I wouldn't even want to go into your neighborhood," Chris would answer.³⁸

Despite the disapproving tone of Shapiro's remarks, he did not object to pushing an opposing lawyer's buttons himself. He reports, "I felt that [Marcia Clark's] style and obvious personal antagonism toward me would be favorable to us and off-putting to the jury, and I did what I could to elicit those responses from her at every opportunity."³⁹ In the same vein, Johnnie Cochran declares, "Throughout this period, we . . . kept up a quiet psychological struggle with Marcia

Simpson to put on the gloves prior to trial. California courts apparently can require reluctant defendants to submit to such procedures; see *People v. Sequera*, 126 Cal. App. 3d 1, 14, 179 Cal. Rptr. 249, 256 (1981); *People v. Huston*, 210 Cal. App. 3d 192, 202, 258 Cal. Rptr. 393, 397 (1989), the prosecutors also could have tested the gloves' fit at the preliminary hearing. Moreover, neither Darden's memoir nor Clark's explains why, when the glove experiment occurred before the jury, the prosecutors asked Simpson to put on the gloves rather than ask a third party to place the gloves on Simpson's hands. See VINCENT BUGLIOSI, *OUTRAGE: THE FIVE REASONS WHY O.J. SIMPSON GOT AWAY WITH MURDER* 115-16 (1996). Prosecutor Hank Goldberg cites the prosecutor's "ethical obligation to disclose information that could legitimately show someone is innocent" to defend the most notorious trial glitch of the century. He concludes, "I cannot necessarily conclude that the glove demonstration was a mistake." HANK M. GOLDBERG, *THE PROSECUTION RESPONDS: AN O.J. SIMPSON PROSECUTOR REVEALS WHAT REALLY HAPPENED* 209-10 (1996).

One might write a much longer article than this one about how to *lose* the trial of the century. Vincent Bugliosi's critique of the Simpson prosecutors, *supra*, does part of the job, but Bugliosi's quirky suggestions make it uncertain that he would have been more persuasive than Clark and Darden. One cringes, for example, at the thought of how jurors might have responded to being addressed as "you black folks on the jury," BUGLIOSI, *supra*, at 259, to being told that the defendant would "need a road map to get back to the hood." *Id.* at 165. Cf. George Fisher, *Review Essay: The O.J. Simpson Corpus*, 49 STAN. L. REV. 971, 996 (1997) ("I may be crazy, but I think Bugliosi is mad.").

One lesson of the Simpson trial is that the customary career paths of lawyers make it very likely that wealthy defendants will be represented by more capable and experienced lawyers than the state. Many of O.J. Simpson's lawyers including Johnnie Cochran, Robert Shapiro, F. Lee Bailey, and Gerald Uelmen were former prosecutors who had left government service at or before the peak of their careers. See COCHRAN, *supra* note 10, at 155 (suggesting for other reasons that "when [prosecutors] run into the kind of topflight opposition they often face in a big case, they are utterly outclassed").

38. ROBERT L. SHAPIRO & LARKIN WARREN, *THE SEARCH FOR JUSTICE: A DEFENSE ATTORNEY'S BRIEF ON THE O.J. SIMPSON CASE* 246 (1996) [hereinafter SHAPIRO].

39. *Id.* at 156.

Clark and Chris Darden.”⁴⁰ Darden and Clark’s behavior toward the defense was much the same. At one point, with court in session and the jury in place, Darden turned to Cochran and, according to Lawrence Schiller, said “let the older lawyer see his middle finger.”⁴¹

Marcia Clark writes that when Robert Shapiro telephoned her at an early stage of the case, she asked, “Hey, Bob, when’s the real lawyer coming in?” Clark’s memoir continues:

“I’m staying with the case, Marcia,” he said . . . “I’m in it to the end.”

“Stop it, you’re killing me,” I said . . . “Come on, who’s the real lawyer going to be?”⁴²

Johnnie Cochran managed to return Clark’s insult during the trial: “[I]f you people were real lawyers, you’d stick to trying your own case.”⁴³

Prosecutor Hank Goldberg, whose trial memoir describes Peter Neufeld both as “loud and *aggressive* advocate with a pronounced Brooklyn accent”⁴⁴ and as a “loud [and] *pugnacious* defense attorney with a Brooklyn accent,”⁴⁵ reports that he said to Neufeld, “I have worked with all kinds of attorneys over the years, with every type of different personality. You and Barry [Scheck] are the only ones . . . I actually hate.”⁴⁶

Marcia Clark accused Neufeld being “on some other planet.”⁴⁷ She snapped at another defense attorney, “Shut up, Scheck!”⁴⁸ And when F. Lee Bailey produced a glove to show that Mark Fuhrman could have concealed it in his sock, Clark objected that it did not match the gloves in evidence. “Small size,” she said. “I guess it is Mr. Bailey’s.” Clark’s memoir concedes that her remark was improper and that Judge Ito might properly have sanctioned her for it. She reports, however, that “Bailey never got it.” Apparently Bailey thought that Clark’s wisecrack was about the size of his hands rather than, in Clark’s words, a “gibe, uh, below the belt.”⁴⁹

40. COCHRAN, *supra* note 10, at 297. See also SCHILLER, *supra* note 16, at 323 (“On one thing [Johnnie Cochran, Carl Douglas, and Shawn Chapman] all agreed: They could push Chris Darden’s hot button any time they wanted.”); *id.* at 351 (“[Cochran] will push every button he can find on Darden and Clark.”); *id.* at 650 (“If the defense needed a sideshow, they pushed [Darden’s] fabled buttons. The race button. The manhood button.”).

41. SCHILLER, *supra* note 16, at 399.

42. CLARK, *supra* note 37, at 53.

43. SHAPIRO, *supra* note 38, at 246.

44. GOLDBERG, *supra* note 37, at 124 (emphasis added).

45. *Id.* at 151 (emphasis added).

46. *Id.* at 165.

47. SCHILLER, *supra* note 16, at 438.

48. *Id.* at 560; SHAPIRO, *supra* note 38, at 319.

49. CLARK, *supra* note 37, at 358-59. Clark’s book, for which she received an advance of \$4.2 million (the second-largest in publishing history), is easily the most snide, sarcastic, and foul-mouthed of the Simpson trial memoirs.

The Code of Professional Responsibility says that a lawyer does not violate her duty of zealous representation "by treating with courtesy and consideration all persons involved in the legal process."⁵⁰ It also declares that "a lawyer should be courteous to opposing counsel."⁵¹ Neither the Model Rules nor the California Rules of Professional Responsibility contain a similar provision.⁵²

Of course much trash talk has no strategic objective; hard-driving trial lawyers on both sides of the courtroom simply like to talk that way. The put-down is part of their culture. They take it in stride most of the time. It is in fact an art form—a kind of humor. It helps to keep things lively. Paradoxically, it may be a sign of familiarity and friendship. You wouldn't be prissy about it, would you? When the time comes, won't you join the game?⁵³

2. Deception

Deception by the defense was probably more important than baiting and bantering in throwing the prosecution off its stride. Barry Scheck, who almost alone among the Simpson-trial lawyers emerged with generally favorable reviews,⁵⁴ devised what I will call the Kelly-Frye feint.

Here's how this gambit works: You announce that you want a month-long hearing on the scientific reliability and admissibility of DNA evidence. California lawyers call this a Kelly-Frye hearing. You provide lists of expert witnesses whom you propose to call at the hearing. You know that the chance that the court will hold

50. MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 7-101(A)(1) (1996).

51. *Id.* EC 7-38. *See also id.* EC 7-10 ("The duty of a lawyer to represent his client with zeal does not militate against his concurrent obligation to treat with consideration all persons involved in the legal process. . .").

52. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 4.4 (1996) (declaring only that "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay, or burden a third person").

53. So far as I can tell, Gerald Uelman has nothing for which to apologize. He apologizes nevertheless: The heat of battle is no excuse for a lack of civility, and to justify incivility by a childish claim that "they started it" is beneath the dignity of our profession. I am proud of the vigor of the advocacy on both sides of the trial. But I am also ashamed that the lawyers on both sides occasionally engaged in behavior that was more appropriate for a sandbox than for a courtroom . . . Civility is a declining commodity in our public discourse, all the way from the halls of Congress to the radio talk shows. The snarling "put-down" and the cheap shots find their way into every level of conversation. That puts an even greater burden on lawyers and judges to maintain the decorum of our courtrooms. In that respect, we should candidly admit that in the case of *People v. O.J. Simpson*, we all dropped the ball.

UELMAN, *supra* note 1, at 62.

54. Jeffrey Toobin titles his chapter on Scheck, "The Best Trial Lawyer." TOOBIN, *supra* note 37, at 334. *But see id.* at 335, 337 (declaring that "Scheck's goal epitomized the nihilistic function of a defense lawyer" and that "[a]t one level . . . Scheck and Neufeld weren't so different from their more cynical colleagues on the Simpson defense team"). *See also* Dominick Dunne, *If the Gloves Fit . . .*, VANITY FAIR, Aug. 1995, 64 ("Barry Scheck and Peter Neufeld were brilliant"); Fisher, *supra* note 37, at 975 ("[O]f all the lawyers who took the stage in this case, only two—Barry Scheck and Peter Neufeld—seem to have emerged well-liked by almost everybody."). *But see* CLARK, *supra* note 37, at 380 ("Not only did I find Scheck's performance intellectually dishonest, I considered him by far the most obnoxious lawyer in that courtroom.").

the DNA evidence inadmissible is about zero, but you still have good reasons for filing your motion.

First, the motion may help you to double-cross the jury. Johnnie Cochran has told the jurors during their voir dire examination that the defense opposes jury sequestration; if they are locked up, it won't be because O.J. Simpson's lawyers haven't tried to prevent it.⁵⁵ Even before your Kelly-Frye motion, however, defense lawyers have filed a sealed motion to sequester the jury,⁵⁶ and the Kelly-Frye motion enables you to file a second motion for sequestration, arguing that without it, DNA evidence presented at the Kelly-Frye hearing will reach the jurors through the media.⁵⁷

A much more important reason for your motion becomes apparent when you finally spring the trap. While the prosecutors have been preparing for the lengthy Kelly-Frye hearing, you have been preparing for trial. Now, with the prosecutors ready to spend a month or more proving the reliability of DNA evidence and cross-examining the experts you have listed, you withdraw your Kelly-Frye motion. With the jurors waiting, the judge will not delay, and the prosecutors will be forced to trial unprepared.⁵⁸

55. See SCHILLER, *supra* note 16, at 254.

56. See *id.* at 283.

57. See *id.* at 286.

58. See *id.* My description of the Kelly-Frye feint relies largely on Lawrence Schiller's account. I imagine, although I do not know, that Scheck would deny that he employed this tactic. I am inclined to credit Schiller's description.

One reason for hesitancy is Schiller himself. Schiller, a photographer, journalist, and entrepreneur with a colorful and somewhat shady past, proposed O.J. Simpson's bestseller *I Want to Tell You*. After arranging to have his name placed on a list of material witnesses who could visit Simpson in jail, he and Simpson wrote the book. According to Jeffrey Toobin, Schiller made no secret of the fact that he made-up at least some of the statements attributed to Simpson. TOOBIN, *supra* note 37, at 254. Toobin insists, although Schiller denies it, that Schiller defied a court order and aided the defense by leaking portions of the Mark Fuhrman tapes to the press. TOOBIN, *supra* note 37, at 399-400. By his own account, Schiller used an expensive sound studio to prepare more audible and effective copies of the Fuhrman tapes for the defense team. SCHILLER, *supra* note 16, at 555, 579. Schiller also photographed Simpson's post-acquittal victory party, developed the photographs in a lab that he installed in Simpson's garage, and sent them by satellite from Simpson's maid's room to the supermarket tabloid *Star*. Schiller and Simpson split a six-figure fee for the photographs. TOOBIN, *supra* note 37, at 432-33.

Schiller's "uncensored story of the Simpson defense" consists in significant part of the recollections of his friend and Simpson's, Robert Kardashian—a non-practicing lawyer who appears to have been privy to many of the defense team's doings. The book's passages concerning Kardashian sometimes seem self-serving and suspect, but the remainder of the book appears to have the ring of truth. My guess is that Schiller's book will be the most enduring account of the Simpson trial. See Fisher, *supra* note 37, at 977 (reviewing eight books on the Simpson trial and declaring, "[T]he most sagely balanced voice we hear is, astoundingly, Lawrence Schiller's"); Ross Pavis, *Taking Turns With the Truth*, WASHINGTON TIMES, Sept. 21, 1997, at B6 (calling Schiller's the most thorough and objective of fifteen books on the Simpson trial); Jim Newton, *Is This the Definitive Book on the O.J. Case?*, CHICAGO SUN-TIMES, Oct. 20, 1996 (calling Schiller's "the best of a bad breed, the definitive book about the murder investigation and trial of O.J. Simpson—so far"). Although Schiller may not be a particularly reliable source, neither are the defense-team lawyers. For example, these lawyers insisted until almost the end of the trial that no decision had been made about whether the defendant would testify and that he might well do so. Anyone who accepts that tale can equally accept Phillip Vannatter's testimony that O.J. Simpson was no more a suspect than Robert Shapiro when police detectives entered Simpson's estate and found the bloody glove.

When the defense team withdrew its Kelly-Frye motion, Judge Ito said, "Gee, I wish you'd told me this before Christmas. I spent two weeks boning up on this stuff."⁵⁹ Marcia Clark had a more intense reaction. She reports that she had suffered periods of depression years earlier,⁶⁰ and writes:

[O]n hearing the news, I went into shock

It was at that point, I think, that I realized the impossibility of adequately preparing for the trial The stress was getting to me. Most of the time, I felt ill. I suffered from respiratory ailments, head colds, aching joints. And these disturbing new illnesses were compounded by bouts of bone-crushing fatigue. I had enough self-awareness to realize where this was leading me. And I didn't want to go there.

Not again.⁶¹

That's the Kelly-Frye feint. To judge from Clark's memoir, it worked. Would you do it?⁶²

Kelly-Frye maneuvers are of limited interest to the general public. They do not seem the sort of thing that a popular author would fabricate. Schiller, moreover, does not claim that all members of the defense team favored the Kelly-Frye feint; he notes Scheck's concern that "tradition-minded" members of the team might want to litigate the Kelly-Frye motion. SCHILLER, *supra* note 16, at 292, 297. Schiller does report that Scheck described the virtues of his strategy to Robert Blasier in early December, 1994. SCHILLER, *supra* note 16, at 285-86. If Scheck and Blasier were to declare that nothing resembling the detailed conversation reported by Schiller occurred, I would give them the benefit of the doubt. Unless they do, I will continue to believe Schiller.

Schiller's account, moreover, seems to be confirmed in part by Robert Shapiro. CNN reported on the weekend of December 10, 1994, that the defense would withdraw its Kelly-Frye motion, attributing this information to two members of the defense team. Shapiro comments, "I was completely surprised when I heard this; we hadn't filed the motion to waive yet, nor had we told anyone about it." SHAPIRO, *supra* note 38, at 205. One gathers from this passage that the decision to waive had been made but that most of Simpson's lawyers did not want the information revealed. The defense did not withdraw its Kelly-Frye motion until January 4, 1995, one day before the Kelly-Frye hearing was scheduled to begin. See David Margolick, *Simpson Defense Drops DNA Challenge*, N.Y. TIMES, Jan. 5, 1995, at A16.

59. SCHILLER, *supra* note 16, at 314.

60. See CLARK, *supra* note 37, at 161, 170.

61. *Id.* at 243.

62. In much the same spirit, the defense team requested part of every blood sample so that it could do its own testing of this evidence. Although it vigorously pressed its motion at a lengthy "Griffin hearing," it apparently never meant to do any testing. Its primary goal was to force the prosecution to reveal what blood evidence it had. See SCHILLER, *supra* note 16, at 177, 186; TOOBIN, *supra* note 37, at 187. (Schiller's account of the "Griffin feint" differs in some respects from Toobin's, and Schiller's appears to be more accurate. See Andrea Ford & Jim Newton, *Simpson Defense Loses Bid for Share of Blood Samples: Ruling Clears Way For Prosecution to Conduct DNA Tests, But Defense Must Be Given Access to Leftovers*, L. A. TIMES, Aug. 27, 1994, at A1.)

Prosecutors played the same game as the defense attorneys. They apparently renumbered items of blood evidence to confuse and hinder the defense. See SCHILLER, *supra* note 16, at 385. In addition, Hank Goldberg boasts of his own tiny feint:

I decided not to elicit [on direct examination] the evidence [that F.B.I. expert Bill Bodziak had a favorable view of the Los Angeles Police Department's collection of footwear-impression evidence]. . . . I wanted [F. Lee] Bailey to elicit the information first on cross-examination. My plan was to make a motion to preclude the defense from asking questions about crime-scene processing, which I knew

From the beginning in fact, the defense strategy in the Simpson case was to force the case to trial early, before the prosecutors could complete their scientific testing and prepare the case thoroughly.⁶³ The prosecutors apparently feared that asking for any delay would seem a sign of weakness. As Gerald Uelmen reports, "[W]e assumed that prosecutorial arrogance would win out over common sense. It usually does. Prosecutorial 'machismo' is endemic."⁶⁴ And when the trial began, the defense team apparently bluffed the prosecutors into leading with a weak card.

There is an orthodox way to begin a murder trial—proving the murder. Once the jury sees the gory photographs, they know what the case is about. The Simpson prosecutors began, however, with ten days of proof of domestic violence over the course of Simpson's marriage. America's quirky law of evidence kept out the most powerful evidence—the many statements of the battered murder victim herself.⁶⁵

Judge Ito would deny. I thought making the motion might lure the defense into questioning Bill about crime-scene issues

Seemingly, the fish had swallowed the bait

Bailey's attempt to attack the LAPD was foiled

GOLDBERG, *supra* note 37, at 221-22.

63. One strategic virtue of the defense's unsuccessful Griffin motion was that it delayed DNA testing. *See supra* note 62. The Griffin motion and the defense's speedy trial motion effected a pincers movement, ensuring that the prosecution would proceed without its most incriminating evidence until the trial was well underway. *See CLARK, supra* note 37, at 124; UELMEN, *supra* note 1, at 48-50.

64. UELMEN, *supra* note 1, at 49.

65. Shortly before the trial was to begin, the prosecution reported that it intended to introduce Nicole Simpson's diary. During the day that followed, I asked a number of lawyers who knew more evidence law than I did how the diary could survive a hearsay objection. No one offered a better than farfetched theory, and the prosecution announced the next day that it would not attempt to introduce the diary. A statute enacted in response to the Simpson case now permits California courts to receive, in some circumstances, an unavailable declarant's written description of an injurious attack or of a threat of physical injury. *See* CAL. EVID. CODE § 1370 (West 1997); Karleen F. Murphy, Note: *A Hearsay Exception for Physical Abuse*, 27 GOLDEN GATE U.L. REV. 497 (1997).

A murder victim might in fact have written in a diary or told a friend that her husband was threatening to kill her at a specified place in a specified manner, and the victim might in fact have been murdered at that place and in that manner. Because the wife, being dead, could not take an oath and because her husband would be unable to cross-examine her, most American jurisdictions would make her statement inadmissible at the husband's trial.

Marina Angel, writing primarily but not exclusively about inadmissible evidence, observes:

There were seven incidents of O.J. Simpson stalking his former wife during the two-year period before her murder, but the prosecution only introduced one. The jury did not hear about a 1994 incident at a restaurant when he yelled at his former wife when she was with Ronald Goldman. The jury did not hear about the times he threatened her with a gun and pushed her out of a moving car. The jury did not hear what Nicole Brown Simpson wrote or said about O.J. Simpson's threats that he would kill her if she ever left him [T]he jury did not hear that Nicole Brown Simpson called a battered woman's shelter five days before her murder, terrified that her ex-husband was going to kill her.

Marina Angel, *Criminal Law and Women: Giving the Abused Woman Who Kills A Jury of Her Peers Who Appreciate Trifles*, 33 AM. CRIM. L. REV. 229, 295 (1996) (footnotes omitted).

For further description of America's nonsensical law of evidence and its potential impact on homicide prosecutions, see Albert W. Alschuler, *Introduction: Adding a Comparative Perspective to American Criminal Procedure Classes*, ___ W. VA. L. REV. ___ (1998) (quoting at length an apropos news story, Linnet Meyers, *Murder Trial Rules Baffle Victim's Kin: Justice Follows Winding Course*, CHI. TRIB., Oct. 14, 1985, § 2, at 3). *See also* MIRJAN DAMASKA, *EVIDENCE LAW ADRIFT* (1997).

Over the course of the ten days, the jury learned of only one actual beating, a beating that had occurred five and a half years before the murder.⁶⁶

Alan Dershowitz's memoir of the trial gives the defense team credit for the prosecution's bad start:

With both our public statements and our court papers, we lured the prosecution into believing that we feared the spousal discord evidence the most. We knew that Garcetti^[67] was anticipating a tough reelection race and that he would milk the domestic abuse aspect of this case for everything it was worth in order to appeal to women voters

The prosecution fell into our trap and devoted the first ten trial days to a parade of witnesses who recounted the eighteen-year relationship between Simpson and Nicole Brown.⁶⁸

So that, children, is how the great B'rer Rabbit found himself scampering happily through the briar patch, having outwitted B'rer Fox once again. Would you do it?

3. *Surprise!*

Another way to throw your opponent off her game is to withhold discovery until the very last moment—or even a moment or two longer.⁶⁹ Although the defense

66. See DERSHOWITZ, *supra* note 9, at 107. Although the law of evidence kept out the strongest domestic violence evidence, *id.*, there was also much admissible evidence that the prosecution failed to present. See BUGLIOSI, *supra* note 37, at 237.

67. Gil Garcetti, the Los Angeles District Attorney.

68. DERSHOWITZ, *supra* note 9, at 105-06.

69. Moreover, when a judge gives the prosecution more discovery than it is entitled to have and so deprives the defense of an opportunity for ambush, defense attorneys may bemoan the decline of American criminal justice. At the preliminary hearing in the Simpson case, Marcia Clark presented evidence that O.J. Simpson had purchased a large folding stiletto at a cutlery store two weeks before the murders. In a conference with his lawyers, Simpson revealed where the knife could be found; the police had missed it when they searched his bedroom. The defense lawyers secured the appointment of a special master to retrieve the knife and bring it in a sealed envelope to court (but not to the court where the preliminary hearing was underway). When someone sent the sealed envelope to the preliminary hearing judge by mistake, she displayed it in court, thereby "tipping off the prosecution to our strategy." UELMEN, *supra* note 1, at 14. Moreover, Judge Ito later ordered disclosure to the prosecutors of a defense forensic report indicating that the knife probably was not the murder weapon. The defense regarded the judge's discovery order as plainly erroneous. Gerald Uelmen writes:

Once the prosecutors knew that we had the evidence to destroy their claim that the Ross Cutlery knife was the murder weapon, they never presented that claim at the trial. . . .

The lesson of the disappearing knife was a sobering one. . . . There was a significant risk that California's reciprocal discovery law would be twisted to give the prosecution advantages the law never intended, to permit prosecutors to strengthen their case based on evidence they obtained from the defense.

UELLEN, *supra* note 1, at 16-17. The prosecutors did not, however, present any evidence derived from the disclosure of the defense team's evidence. They did not "strengthen their case based on evidence they obtained from the defense." The prosecutors merely declined to present evidence that they now realized invited a false inference. They gave the defense evidence all the force it could legitimately have had as rebuttal evidence by failing to present

team pushed the Simpson case to trial quickly, it held back its own evidence as long as possible. Barry Scheck, for example, persuaded his colleagues that the notes of O.J. Simpson's principal forensic expert, Dr. Henry Lee, revealed too much.⁷⁰ The defense withheld these notes for almost a year. The lawyers did not want to risk the exclusion of Dr. Lee's testimony, however, so they walked a delicate line. They apparently did it perfectly. In the end, Judge Ito spoke to them sternly, promised "significant and substantial monetary sanctions[,]," granted the prosecutors extra time, and allowed Dr. Lee to testify.⁷¹

Barry Scheck earlier had resisted disclosing the defense's display boards, which revealed the defense claim that some of the blood sample drawn from O.J. Simpson was missing.⁷² According to Lawrence Schiller, Carl Douglas, a young member of the defense team, resisted Scheck's strategy. Johnnie Cochran found it necessary to give Douglas a Brougham-like lecture:

"We're sandbagging them. I'll catch hell for this!" Douglas protested.

"It's about the client," Johnnie said.

"I'll get slammed for this tomorrow," Carl complained.

"Carl, it's not about you," Johnnie said evenly. "It's for the client.

You'll have to fall on your sword. Go and do it."⁷³

Imagine yourself a young lawyer proud to be the right-hand man of the lead counsel in the trial of the century. Then imagine that your boss instructs you to withhold discovery and suffer the punishment, telling you smoothly, "It's about the client." Following your boss's directions would go beyond Lord Brougham: You would be breaking the law. But it *is* the trial of the century, and you are not prepared to open your own law office tomorrow. Are you sure you wouldn't do it?

In January as the trial was about to begin, prosecutor Bill Hodgman protested the last-minute addition of thirty-four witnesses to the defense witness list, noting that many of these witnesses should have been disclosed in August.⁷⁴ Two days later, when Johnnie Cochran presented his opening statement, he told the jury about thirteen witnesses who still had not been included on defense witness lists. Hodgman, shaking with anger, protested again.⁷⁵ Later that day, Hodgman was hospitalized with chest pains. He never returned to his active role in the courtroom.

the evidence that it might have rebutted. Judicial errors in disclosing this evidence to the prosecutors were harmless except in the sense that they denied the defense attorneys an opportunity for high theater. Cf. SCHILLER, *supra* note 16, at 124 ("The defense had lost the opportunity to blindside the prosecutors.").

70. See SCHILLER, *supra* note 16, at 525, 574.

71. *Id.* at 577-78.

72. *Id.* at 332.

73. *Id.* at 332-33. See also *id.* at 336.

74. See SCHILLER, *supra* note 16, at 336; CLARK, *supra* note 37, at 272.

75. See SCHILLER, *supra* note 16, at 342-44; CLARK, *supra* note 37, at 272.

Johnnie Cochran denies it,⁷⁶ but two other accounts of the trial report that when he and Carl Douglas learned of the prosecutor's hospitalization, they joked about it.⁷⁷ One lawyer or the other reportedly said, "One down. Two to go."⁷⁸

That was tip number one: Throw opposing counsel off their game. Here is tip number two:

B. Find Ways to Get Information and Misinformation to the Jury Outside the Courtroom

In 1993, Robert Shapiro published an article titled *Using the Media to Your Advantage*,⁷⁹ and in the Simpson case a year later, he tried. The defense succeeded in aborting the grand jury proceedings in the case, forcing a public preliminary hearing. Shapiro's memoir describes this televised preliminary hearing as "in essence, nothing less than a battle for the hearts and minds of the jury pool."⁸⁰ Later, according to Johnnie Cochran,

[W]hile the rest of the team scrambled to keep abreast of the case while preparing for jury selection, Bob confided that he had been preparing a list of films in which "courageous" juries acquit the accused.

"We have to be more concerned with the climate of public opinion," he explained, "so I plan to use my contacts with network and cable executives to get them to program as many of these movies as we can get on before jury selection starts."⁸¹

Throughout the trial, Cochran and other defense lawyers held most of their press conferences at the end of the week. They called their press-conference days "pregnant Fridays" because they were confident that whatever information they released would reach sequestered jurors during weekend conjugal visits.⁸² Of course there is no law against holding press conferences on Fridays. Wouldn't you do it?

The defense lawyers found another occasion to influence the jury when the jurors visited O.J. Simpson's estate. According to Lawrence Schiller:

76. COCHRAN, *supra* note 10, at 287.

77. DARDEN, *supra* note 37, at 229; SCHILLER, *supra* note 16, at 382.

78. SCHILLER, *supra* note 16, at 382.

79. Robert L. Shapiro, *Using the Media to Your Advantage*, THE CHAMPION, Jan.-Feb. 1993, at 7.

80. SHAPIRO, *supra* note 38, at 69 (emphasis added).

81. COCHRAN, *supra* note 10, at 256; see SCHILLER, *supra* note 16, at 161. In *United States v. Northrop Corp.*, 58 U.S. LAW WEEK 2513 (No. CR 89-303-Par, C.D. Cal., Feb. 15, 1990), the court ordered a corporate defendant not to run television advertisements that the corporation had produced to improve its image among prospective jurors.

82. SCHILLER, *supra* note 16, at 573.

Rockingham is now sparkling, the furniture arranged for maximum effect. O.J. wants a fire in each fireplace. A thousand dollars worth of flowers have been ordered. The American flag must fly on the flagpole out front.

A nude portrait of Paula Barbieri vanishes from its spot near the fireplace in O.J. Simpson's bedroom. There will be no pictures of white women in O.J.'s bedroom. A silver-framed picture of O.J. and his mother goes on the bedside table

The white women on the walls have to go, and the black people have to come in. All along the wall on the curving stairway, pictures are taken down

"We've got to have pictures of his family, his *black* family, up there," Cochran says.

Kardashian has photos enlarged at Kinko's, then framed nicely The jurors won't notice that they are color photocopies

Cochran wants something depicting African-American history. "What about that framed poster from my office of the little girl trying to get to school?" he asks.

Johnnie means Norman Rockwell's famous 1963 painting, *The Problem We All Live With*, in which a black grade school girl walks to school surrounded by federal marshals

[After a walk-through of the Rockingham estate just before the jurors tour it, Marcia] Clark is angry. She complains about the fires. [Judge] Ito orders them extinguished To Carl [Douglas'] surprise, Clark doesn't notice the Rockwell reproduction at the top of the stairs.⁸³

83. *Id.* at 371-73. Two other descriptions of the Rockingham picture swap differ in some respects from Schiller's and from each other, but all three accounts are similar. See GOLDBERG, *supra* note 37, at 63-64; CLARK, *supra* note 37, at 302-05.

On November 25, 1996, Johnnie Cochran appeared as a guest on Larry King Live, hosted by Roger Cossack. The following exchange occurred:

Cossack: Larry Schiller wrote in the book that when the jury was taken to O.J. Simpson's home to examine it, your staff was in that house before the jury got there, taking down certain pictures and putting up other pictures. For example, a picture of Martin Luther King which supposedly came right out of your house. Pictures of girlfriends that he may have had, down off the wall, to make it look more like a home than perhaps, a bachelor pad. True or not true?

Cochran: Absolutely untrue. Absolutely untrue. My role, in this case, was to coordinate the evidence. I was concerned with the evidence. I never went out to that house and looked at any photographs. I had nothing to do with that. O.J. Simpson had a housekeeper or a secretary. I, nor anybody in my office went out there to do anything.

Larry King Live (CNN cable television broadcast, Nov. 25, 1996), available in LEXIS, Scripts File, Transcript No. 96112501V79. Schiller does not report that Cochran or anyone in his office personally made the picture swap—only that Cochran and others helped to arrange it. Cochran is an artful lawyer, and perhaps his account and Schiller's are not flatly inconsistent. Although an unsuspicious viewer might not have noticed it, Cochran did not deny that the picture swap occurred.

If Cochran's account cannot be reconciled with Schiller's, it provides another instance of conflict between Cochran and others about the Simpson case. Most notably, Cochran's book declares that the Los Angeles District

Would you do it? The Model Rules of Professional Conduct declare that a lawyer may not "engage in conduct involving dishonesty, fraud, deceit, or misrepresentation,"⁸⁴ and the California Rules of Professional Conduct say that in presenting a matter to a tribunal a lawyer shall not seek to mislead the jury by artifice or false statement of fact.⁸⁵ Any misrepresentation, however, concerned a circumstance immaterial to the case. And what is the alternative? You wouldn't leave the nude photo of Paula Barbieri on the wall, would you? It's irrelevant and prejudicial—more so than the pictures you're substituting. And leaving blank spaces on the walls would invite suspicion. Besides, it's your client's house. He still owns it. Can't he or his agents still choose new art for the walls? Would replacing the art differ from lending one of your suits to a client before a court appearance—or from suggesting that your client get a haircut and wear long sleeves over his "Born to Raise Hell" tattoo? Besides, doesn't Canon 7 say that whatever is not forbidden is required?

Tip number two was to look for ways to get information and misinformation to the jury outside the courtroom. Here is tip number three:

C. Play the Race Card, Especially in Jury Selection

In *Batson v. Kentucky*,⁸⁶ the Supreme Court told prosecutors not to consider race when picking jurors. In *Georgia v. McCollum*,⁸⁷ the Court gave the same message to defense attorneys. Whom did the Court think it was kidding?

Professional jury consultants for both sides discovered that black women were the group most likely to vote for acquittal.⁸⁸ Moreover, racial divisions in Los Angeles did not stem entirely from differing views of the police. More than any other group, black women discounted the domestic violence evidence. According to one telephone poll, forty percent of black women felt that the use of physical force was appropriate in a marriage.⁸⁹ Moreover, when the prosecutors' jury

Attorney, Gil Garcetti, telephoned him to propose a plea agreement in which Simpson would plead guilty to second-degree murder. COCHRAN, *supra* note 10, at 253-53. Following the book's publication, Garcetti issued a statement that he never initiated any conversation about the case with Cochran, never offered to dispose of the case, and never discussed a possible guilty plea to second-degree murder. Stephanie Simon, *He Chose to Diss More Than Tell*, L.A. TIMES, Sept. 30, 1996, at E1. The conclusion that either Los Angeles' most prominent defense attorney or its chief law enforcement officer is a liar seems inescapable.

84. MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4(c) (1994). *See also id.* Rule 4.1 ("In the course of representing a client a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person.").

85. *See* CALIFORNIA RULES OF PROFESSIONAL CONDUCT Rule 5-200(B) (State Bar of California Pub. No. 250-236-3614, Jan. 1997). *See also* CAL. BUS. & PROF. CODE § 6128 (West 1990) (making it a misdemeanor for a lawyer to engage in "deceit . . . with intent to deceive the court or any party").

86. 476 U.S. 79 (1986).

87. 505 U.S. 42 (1992). *See* *People v. Wheeler*, 22 Cal. 3d 258, 276, 583 P.2d 748, 761, 148 Cal. Rptr. 890, 902 (1978).

88. *See* SCHILLER, *supra* note 16, at 193-94; COCHRAN, *supra* note 10, at 260-61; TOOBIN, *supra* note 37, at 189-94; CLARK, *supra* note 37, at 138-47.

89. TOOBIN, *supra* note 37, at 193.

consultant asked the members of a focus group to rank on a scale of ten the sympathy they felt for various trial figures, the black women all gave O.J. Simpson 9's and 10's. Nicole Simpson scored a 7, a 5, and a 3.⁹⁰ When asked to describe Robert Shapiro with one word, black women used adjectives like smart and clever. Their words for Marcia Clark were shifty, strident, bitch, bitch, and bitch.⁹¹

The lawyers persuaded Judge Ito to submit a 79-page questionnaire with 294 multiple-part questions to prospective jurors. The questionnaire included such questions as, "Have you ever provided a urine sample to be analyzed for any purpose?," "Which tabloids do you read on a regular or occasional basis?," "How many hours per week do you watch sporting activities?," "Do you own any special knives?," "Name the three public figures you admire most," and "Does the fact that O.J. Simpson excelled at football make it unlikely in your mind that he could commit murder?"⁹² (Three-quarters of the people who sat on the jury answered yes to this last question.⁹³)

With this knowledge, defense lawyers were well prepared for the final stages of jury selection. Lawrence Schiller captures the scene:

"We'll be in great shape if we can get four blacks," Johnnie had always said. Now they have six. More black jurors than we ever dreamed of, Shawn [Chapman] says . . .

But Cochran isn't satisfied. "We've got to kick off this one," he says . . . No one can believe he wants to take the risk. If Cochran excuses a juror, that will give the prosecutors another shot. They could lose a black juror over it. But Cochran is leading now.

He rises. "Defense will ask the court to thank and excuse juror number 1187."

Sure enough, Marcia Clark takes out Juror 1164. Quickly Shapiro excuses another . . .

Th[e] . . . exchange has kept things relatively even. Time to quit? Cochran raises his head and checks the group waiting outside the jury box. Throughout the day, deputies have been bringing potential jurors into the courtroom well before their turn to be questioned . . . Now Cochran sees that the jurors-in-waiting are mostly black . . .

"Defense will ask the court to thank and excuse juror number 1040." . . .

Clark and Hodgman huddle awhile, then accept the new panel.

90. *Id.* at 192-93; see SCHILLER, *supra* note 16, at 194.

91. TOOBIN, *supra* note 37, at 193; see CLARK, *supra* note 37, at 145-46.

92. Juror Questionnaire, *People v. Simpson* (copy on file with author). See David Margolick, *302 Queries for Simpson Panelists*, N.Y. TIMES, Oct. 1, 1994, § 1, at 7.

93. *Special Report: The Verdict: What Went Wrong*, NEWSWEEK, Oct. 16, 1995, at 40.

The team can hardly contain itself. The prosecutors have now accepted [a jury] with seven blacks. "We have seven!" Shawn is jubilant. But Cochran won't stop . . . "Fuck it," he growls, "I'm getting that lady off!"

"Johnnie, we have to accept," Carl [Douglas] urges. "This is better than we ever imagined!" . . .

Cochran wins. Luck be a lady tonight . . .

Cochran sends [another juror] home . . .

A black woman steps in to take the empty seat.

Marcia Clark rises. "Your Honor, the people accept the jury as presently constituted."

Now it's time to stop. Eight black jurors. Time to pocket the dice . . .

Cochran turns to Douglas and Chapman with a wide grin. "You guys wanted me to give up when we had six . . . You guys were scared." . . .

Douglas agrees. "You're right, Johnnie. We were ready to wimp out with six. You kept going. And we got eight." . . .

Walking back to the holding cell, Simpson, too, was excited. "If this jury convicts me," he joked to Douglas, "maybe I did do it."⁹⁴

Taking race into account when picking jurors is illegal.⁹⁵ The Supreme Court says so, and Lord Brougham did not tell lawyers to break the law. But legal philosophers since the time of William Blackstone have said that when it is impossible to obey a command, the command is not law.⁹⁶ And when the Supreme Court demands color-blindness in jury selection, it may be demanding the impossible. In a case in which not only your own jury consultants but also every published public opinion poll revealed a striking black-white split on the question of your client's guilt, could you ignore race altogether? Could anyone? Would you try? And when you were picking jurors in the color-conscious way the defense team did, would you have the chutzpah to make the statement to the press that Robert Shapiro did? He accused the prosecution of "an insidious effort to try to get black jurors removed for cause because they are black, because they have black heroes and O.J. Simpson is one of them."⁹⁷

94. SCHILLER, *supra* note 16, at 259-60. See COCHRAN, *supra* note 10, at 262 ("I've never picked a better jury.").

95. Taking gender into account is illegal as well. See *J. E. B. v. Alabama ex rel. T.B.*, 511 U.S. 127 (1994); *People v. Wheeler*, 22 Cal.3d 258, 282 n.29, 583 P.2d 748, 765 n.29, 148 Cal. Rptr. 890, 906 n.29 (1978). But see COCHRAN, *supra* note 10, at 260 ("I had an ideal juror in mind, preferably a woman in her thirties or forties.").

96. See 1 WILLIAM BLACKSTONE, COMMENTARIES * 91 ("Lastly, acts of parliament that are impossible to be performed are of no validity."); LON L. FULLER, THE MORALITY OF LAW 33-94 (rev. ed. 1969). David Dolinko has written, "[O]ne commonplace of moral reasoning is that 'ought' implies 'can'—people cannot be blamed for conduct they could not have avoided." David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063, 1095-96 (1986).

97. See TOOBIN, *supra* note 37, at 198; CLARK, *supra* note 37, at 211.

Those are your practice tips for today, but they give you only a hint of the Rambo lawyering you can learn to do for yourself by reading O.J. Simpson trial memoirs. In these memoirs, you can see one or more leading defense attorneys lobbying the District Attorney as part of a citizens' group without revealing that he represents the defendant,⁹⁸ surreptitiously tape-recording client conferences at the jail,⁹⁹ leaking damaging information about the defendant to the press to discredit other lawyers,¹⁰⁰ feeding misinformation to prosecutors through the media,¹⁰¹ hiring an expert witness who will not in fact be called partly to keep the prosecutors from

98. According to Lawrence Schiller, Johnnie Cochran told the members of his office on July 15, 1994, that he had visited Simpson in jail and that Shawn Chapman and Carl Douglas would be working with him on the case. Four days later, Cochran was a member of a delegation of African-American leaders who met to discuss the Simpson case with District Attorney Gil Garcetti. Cochran, identified only as a prominent African-American attorney, gave statements to the press following this meeting. Three days after the meeting, Cochran made his first court appearance as Simpson's lawyer. See SCHILLER, *supra* note 16, at 152-53. For Cochran's different (and vaguer) account, noting that Garcetti announced his office's decision not seek the death penalty soon after the meeting, see COCHRAN, *supra* note 10, at 241-46.

99. See COCHRAN, *supra* note 10, at 314 ("[O]ne day, Shapiro, Simpson, Bailey, and I were conferring in the lockup before court. One of Bob [Shapiro's] pants pockets gapped markedly, and, when I stared down into it, I saw the red light of a running microcassette recorder."); TOOBIN, *supra* note 37, at 412 (reporting that Shapiro later admitted the surreptitious recording). According to Cochran's account, Shapiro claimed at the time that his recorder must have turned on by mistake. COCHRAN, *supra* note 10, at 314.

100. See, e.g., UELMEN, *supra* note 1, at 59 (indicating that a transcript of Simpson's telephone call to an old girlfriend a few hours before the murders was leaked from Shapiro's office—the transcript was inconsistent with the defense claim that Simpson had settled into a happy, stable relationship with Paula Barbieri and also in tension with Simpson's claim that he had not received Barbieri's break-up message); SCHILLER, *supra* note 16, at 311-13 (indicating that a report that Simpson would not fire Shapiro because he feared what Shapiro would tell the tabloids was supplied by a member of Bailey's staff); TOOBIN, *supra* note 37, at 221-22 (describing the same incident as well as the staff member's defense of the leak: "Fuck him. He's an asshole anyway. And besides, he still owes me money."); SHAPIRO, *supra* note 38, at 203 (denying widespread reports that he leaked to the press a transcript of Simpson's statement to the police and implying that Bailey's investigator did it); SHAPIRO, *supra* note 38, at 306 (accusing Bailey of leaking Simpson's boast that he could "handle Marcia Clark").

101. See SCHILLER, *supra* note 16, at 527 (describing use of the media to convince prosecutors that Simpson would testify when he clearly would not); *id.* at 209 (quoting Cochran's unqualified statement, "He is going to testify," after Simpson had done poorly at a brief practice session and Cochran had been "on the fence" in office discussions about whether he should testify); *id.* at 597 ("Johnnie had put Simpson's name on the witness list for the last week of their case, just to confuse the prosecutors. O.J. liked that. The defense wanted to occupy the other side with useless tasks. It was working. Take a look at Chris Darden, Johnnie said."). As late as August 28, 1995, Alan Dershowitz declared on television that the defense team had not decided whether Simpson should testify and that Dershowitz had not made up his own mind about the issue. *Larry King Live* (CNN cable television broadcast, Aug. 28, 1995), available in LEXIS, Scripts File, Transcript No. 1524-2. At about the same time, Dershowitz was saying privately that if Simpson testified, every one of his lawyers should be disbarred. SCHILLER, *supra* note 16, at 598.

hiring her,¹⁰² keeping an apparently sure-fire basis for a mistrial in reserve in case things begin to look bad,¹⁰³ and more.¹⁰⁴

The Simpson trial memoirs do not make the prosecutors look much better. Christopher Darden conducted the grand jury investigation of A.C. Cowlings, O.J. Simpson's driver during the live-on-television Bronco chase. Although the grand jury did not indict Cowlings, Darden's book recites much of the evidence that the grand jury heard about him from such dubious figures as porn star Jennifer Peace.¹⁰⁵ California's rule of grand jury secrecy probably made Darden's disclosure illegal.¹⁰⁶

102. Before she joined the Simpson defense team, Dr. Lenore Walker was known as a zealous champion of abused women and as the discoverer of "battered woman syndrome." Alan Dershowitz describes her hiring by the defense as a "preemptive step." DERSHOWITZ, *supra* note 9, at 102. One need not infer from Dershowitz's language that the defense had no thought of using Dr. Walker's testimony. Indeed, Johnnie Cochran told the jury during his opening statement that the defense would call her. Walker, however, never testified, and the words "preemptive step" do suggest that one reason for hiring Walker was to keep the Simpson prosecutors from doing so.

Robert Shapiro may have hired Dershowitz himself partly as a preemptive step—to keep him from commenting about the Simpson case on television. Before Dershowitz joined the defense team, his television comments implied a belief in Simpson's guilt and suggested that Simpson's lawyers might offer a mental-impairment defense—a defense that Dershowitz called "the juice excuse." See CLARK, *supra* note 37, at 128; TOOBIN, *supra* note 37, at 129-30. According to Jeffrey Toobin:

Dershowitz's comments irritated Shapiro He told a friend, "How can we shut that guy up?" After a pause, he said, half jokingly, "I guess we'll have to hire him." And the day after Dershowitz appeared on *Charlie Rose*, Robert Shapiro called Alan Dershowitz and invited him to join the defense team.

TOOBIN, *supra* note 37, at 130.

103. Captain Margaret York of the Los Angeles Police Department, Judge Lance Ito's wife, had supervised Officer Mark Fuhrman, a key prosecution witness. She swore that she did not recall "the nature of any interactions between then-Officer Fuhrman and me, or of any other contacts I may have had with him." Her assurances may have influenced both the defense and the prosecution not to object to Judge Ito's service in the Simpson case. The defense, however, developed evidence that Captain York's interaction with Officer Fuhrman would have been extremely difficult to forget. SCHILLER, *supra* note 16, at 269-71, 535-36. Lawrence Schiller comments, "For nine months the knowledge that York might have lied in her declaration had been the defense's hidden weapon. They could have used it themselves to cause a mistrial if they had seen a conviction coming." *Id.* at 559.

Schiller quotes Christopher Darden's astonishing comment to Judge Ito when the Fuhrman tapes' discussion of Captain York made the relationship between the two officers apparent: "'For a year now, these defense attorneys have been holding over your head the issue of Captain York. It is extortion. It has been a year-long extortion to get you to allow as much racist and irrelevant and inflammatory incidents into trial as possible.'" *Id.* at 564. Schiller says that the "defense had never used its knowledge of the York-Fuhrman connection in any way" but that Judge Ito might have realized that York's sworn declaration was vulnerable. Schiller comments, "Darden couldn't have known it for sure, but he was half right." *Id.* at 564.

104. For discussion of other ethically dubious actions in the Simpson case, see Fisher, *supra* note 37, at 980-97; Kevin Cole & Fred C. Zacharias, *The Agony of Victory and the Ethics of Lawyer Speech*, 69 S. CAL. L. REV. 1627 (1996).

105. See DARDEN, *supra* note 37, at 149-59.

106. California law expressly prohibits the disclosure of grand jury testimony by jurors. See CAL. PENAL CODE § 924.1 (West 1998); McClatchy Newspapers v. Superior Court, 44 Cal. 3d 1162, 751 P.2d 1329, 245 Cal. Rptr. 774 (1988). No California authority clearly imposes the same obligation on prosecutors, but courts in other states have concluded that the prosecutors' common law obligation not to disclose grand jury proceedings persists even when the prosecutors, unlike the grand jurors, are not required to take an oath of secrecy. See *State v. Kemp*, 9 A.2d 63 (Conn. 1939); Lori K. Weems, Comment, *Secrecy in Texas Grand Jury Proceedings: The Accused's Right to Prosecutorial Silence*, 46 BAYLOR L. REV. 431 (1994). Indeed, no state appears to have abrogated the prosecutor's duty to preserve the secrecy of grand jury testimony. *Id.* at 444. The California Supreme Court has held, however, that when a District Attorney is otherwise obliged to disclose evidence, she cannot avoid disclosure

Darden's book, which complains that police officers observe a code of silence,¹⁰⁷ reveals that prosecutors do too. Years before the Simpson case, Darden was assigned to the District Attorney's gang unit. He recalls:

[O]ne of the deputies assigned to the unit came into my office after interviewing a gang member. The gangster had apparently snitched on his homies—but anonymously—and the case was falling apart. She needed him to testify if she was going to win at trial.

"What did he say?" I asked.

"He won't do it," she said. "I did everything I could, but he just won't do it."

"Well, he still has to walk the streets out there."

She shook her head. "I was so pissed, I told one of his homeboys that he was the one who snitched them off."

My mouth fell open. I couldn't believe it. She had signed some guy's death warrant after we had promised him anonymity.¹⁰⁸

Darden does not indicate that he requested the prosecutor's indictment, reported her to the state bar, or even complained to her supervisor. His memoir still does not reveal her name.¹⁰⁹

Darden's closing argument in the Simpson case included the following passage:

I read the Constitution. I'm a lawyer. I am a student of the Constitution.
I know what it means and what it doesn't mean

simply by presenting this evidence to a grand jury. *Shepherd v. Superior Court*, 17 Cal.3d 107, 122, 550 P.2d 161, 169, 130 Cal. Rptr. 257, 265 (1976).

107. DARDEN, *supra* note 37, at 104.

108. *Id.* at 89-90.

109. The Model Rules of Professional Conduct and Model Code of Professional Responsibility require lawyers to report substantial ethical violations by other lawyers. *See* MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.3(a) (1996); MODEL CODE OF PROFESSIONAL RESPONSIBILITY DR 1-103 (1996). California is one of three jurisdictions that impose no comparable reporting requirement. *See* ABA/BNA LAWYER'S MANUAL ON PROFESSIONAL CONDUCT 101:201-2 (1994). *See generally* Gerard E. Lynch, *The Lawyer as Informer*, 1986 DUKE L.J. 491; E. Wayne Thode, *The Duty of Lawyers and Judges to Report Other Lawyers' Breaches of the Standards of the Legal Profession*, 1976 UTAH L. REV. 95.

If a prosecutor's betrayal of a confidential informant could be shown to have caused the informant's death, a homicide prosecution would seem justified. Even without a fatal result, the betrayal would appear to be criminal in California if the informant were under 18. *See* CAL. PENAL CODE, § 273a (West 1997) (defining child endangerment as willfully causing or permitting a child to be placed in a situation in which his or her person or health is endangered—and treating the crime as a felony when the child risks death or great bodily harm). Similarly, in other jurisdictions, the prosecutor's action might violate a reckless endangerment statute. Even if this action were not criminal, it probably would violate Rule 8.4 of the Model Rules of Professional Responsibility, which declares that "it is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation [or to] engage in conduct that is prejudicial to the administration of justice." MODEL RULES OF PROFESSIONAL CONDUCT Rule 8.4 (c) & (d) (1997).

I . . . looked back at the Constitution last night, I sent my clerk to go get it for me, and I looked through the Constitution, and you know what I saw?

I saw some stuff in the Constitution about Ron and about Nicole, and [it said] they had the right to life. It said that they had a right to the pursuit of happiness. It said that Nicole didn't have to stay with him if she didn't want to stay with him. That is what the Constitution said.¹¹⁰

As I hope you know, the language that Darden quoted about the right to life and the pursuit of happiness appears in the Declaration of Independence rather than the Constitution. The prosecutor's flunking history grade makes one doubt very much that he sent his clerk to the library so that he could spend the night before his closing argument reviewing the wisdom of James Madison. Should we excuse minor falsehoods like this one? Are they permissible rhetorical flourishes?

III. THE CAUSES, CONSEQUENCES, AND CURES OF BROUGHAM-STYLE ADVOCACY

An expert witness in the Simpson case defined the term narcissistic personality as "someone who has an exaggerated or a grandiose view of their own importance, who need[s] a constant kind of reinforcement, who overreact[s] to any kind of slight criticism, and [who is] incapable of developing empathy with other people."¹¹¹ At that, F. Lee Bailey whispered to Gerald Uelmen, "Sounds like everyone at this table."¹¹² High-powered trial practice often attracts driven, self-centered people, and trial practice may make them more driven and self-centered.

The Simpson trial memoirs depict Bailey as a lush.¹¹³ One of them describes Marcia Clark's twenty-year battle with bulimia, her former interest in Scientology, and her alienation from parents with whom she has refused to speak for years.¹¹⁴ This book also tells the remarkable story of the double life that Johnnie Cochran led

110. Transcript, *People v. Simpson*, Superior Court for the County of Los Angeles, No. BA097211, Sept. 29, 1995.

111. TOOBIN, *supra* note 37, at 225-26.

112. *Id.*; see UELMEN, *supra* note 1, at 47.

113. See TOOBIN, *supra* note 37, at 210 ("[H]is heavily lidded eyes . . . bore the toll of decades of drink and overwork."); *id.* at 212 ("[T]he abuse of alcohol has been a leitmotif of Bailey's professional life."); *id.* at 225 ("Nature has favored Bailey with a glorious voice, which summons a stream of Dewar's tumbling down a pebbly brook. His hands tremble a good deal, but with one in his pocket and the other on the lectern, Bailey can still command a moment."); GOLDBERG, *supra* note 37, at 90 ("Bailey always had a thermos in court from which he periodically sipped. On one occasion, I joked with Bailey as to what was in the thermos. He just smiled."); CLARK, *supra* note 37, at 348 ("At sidebar, his hands trembled so badly that he could barely read the papers he was holding. If the problem was alcohol, as rumor had it, then his memory couldn't be all that great."); DARDEN, *supra* note 37, at 285 ("That was the F. Lee Bailey I had come to know. Flea. A foul-mouthed, arrogant SOB, nothing but an attack dog—waiting—ignoring the rest of the trial, taking sips from a tiny thermos. Some days he wouldn't appear in court at all and we'd get telephone tips from people letting us know where he'd hung out the night before, in case we wanted to check it out.").

114. See TOOBIN, *supra* note 37, at 303-07.

for a decade—persuading his mistress that he was divorcing his wife, persuading his wife that he was leaving his mistress, spending time at both of their households on many of the same evenings, and fathering children by both women.¹¹⁵ This living arrangement probably tested and honed even Cochran's advocacy skills.

Many of you no doubt want to tell me that the O.J. Simpson trial was atypical. It was. Many of you probably want to point to other verdicts as proof that our system of justice can work well. It can. Many of you probably want to insist that the public should not judge an entire profession by the conduct of the Simpson defense team. I agree. But if you want to say that the Simpson trial tells us nothing about the legal system because the trial was atypical, you may have missed something: Nothing like this trial could have happened in any other advanced legal system in the world.¹¹⁶ I believe that the defense team representation I have described was the product not only of the lawyers' personal choices but also of structural forces within our profession.

The rhetoric of the adversary system and the rhetoric of the market have a great deal in common; both insist that you can do good by pursuing selfish ends. The invisible hand will yield both truth in the courtroom and the maximum satisfaction of human wants in the marketplace. Yet it was the market and the adversary system that generated the lawyers' conduct I have described.

Most lawyers do not practice law the way that Johnnie Cochran does, and most of them do just fine financially. But most of them do not do as well as Johnnie Cochran. As I said at the outset, when a service is in demand and no effective regulation blocks it, the market is likely to supply it. Consider this final question in our game of *Scruples*: Whom you would hire after killing two people and dripping blood everywhere—that is, if you could afford Johnnie Cochran's fees? You can call the race to Cochran, Bailey, Scheck, Dershowitz, and Shapiro the race to the top or the race to the bottom depending on whether you are standing on your head.

I do not propose to abandon either the adversary system or the market, but I do want to moderate the excesses of both. There are three ways to do it. First, I think that we need impartial arbiters more, not less, in the trial and pretrial processes. Without transforming Petaluma into Paris, we can look to European legal systems as models for reform and can strengthen the responsibility of judges to structure trials, restrain the adversary gamesmanship of lawyers, and ensure that the facts are fully developed.¹¹⁷ Second, we can revise our rules of professional responsibility to reject more emphatically the view of criminal defense attorneys and others that

115. *Id.* at 177-78. For Cochran's less colorful version, see COCHRAN, *supra* note 10, at 111-14.

116. See, e.g., Myron Moskovitz, *The O.J. Inquisition: A United States Encounter with Continental Criminal Justice*, 28 VAND. J. TRANSNAT'L L. 1121, 1140 (1995); William T. Pizzi, *Discovering Who We Are: An English Perspective on the Simpson Trial*, 67 U. COLO. L. REV. 1027 (1996).

117. See, e.g., Gordon Van Kessel, *Adversary Excesses in the American Criminal Trial*, 67 NOTRE DAME L. REV. 403 (1992); John H. Langbein, *Land Without Plea Bargaining: How the Germans Do It*, 78 MICH. L. REV. 204 (1979); Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U. CHI. L. REV. 931, 980-1011 (1983).

everything not forbidden is required. The rules might include something like the following language: "A lawyer is not obliged to do everything helpful to a client that ethical rules and other legal provisions allow. Instead, he or she should exercise a sound, independent judgment concerning the propriety of the means that he or she employs on a client's behalf. A lawyer's duty of faithful representation does not justify his or her departure from ordinary social norms of civility and fair dealing."¹¹⁸

Third and most importantly, a system of justice must depend in substantial part on norms that cannot be captured in either procedural rules or rules of professional conduct.¹¹⁹ Law cannot do it all, and as Lord Moulton, a peer of the realm whose legal career came a bit after Lord Brougham's, declared, "True civilization is measured by the extent of Obedience to the Unenforceable."¹²⁰

Some scholars now disparage the old-fashioned claim that the practice of law is a profession and not just a profit-maximizing business. They see this claim as pretentious and as a cover for cartelization.¹²¹ Nevertheless, the complex of values expressed by this traditional view of the profession has sometimes moderated the adversary system and the market. When generally accepted, this concept of professionalism can make Simpson trials less likely.¹²²

118. It might be desirable to add to this language a further provision: "When a lawyer declines to employ a lawful means that might significantly benefit a client and that he or she has reason to believe other lawyers would employ, he or she should advise the client of this conclusion." See *supra* text accompanying note 33.

Note that the final sentence of the rule proposed in text refers only to the duty of faithful representation, not to a lawyer's obligation to preserve a client's confidences. A lawyer should preserve her client's confidences even when one might offer a plausible claim that doing so departs "from ordinary social norms of civility and fair dealing." See Albert W. Alschuler, *The Preservation of a Client's Confidences: One Value Among Many or a Categorical Imperative?*, 52 U. COLO. L. REV. 349 (1981); Albert W. Alschuler, *The Search for Truth Continued, The Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67 (1982).

Fred Zacharias observes that "only by framing rules to counteract lawyers' natural partisanship can [professional] codes hope to encourage lawyers to exercise self-restraint" and that "codes can be strengthened to counteract lawyers' tendency to surrender their independence." Zacharias, *supra* note 6, at 1357, 1377.

119. The purpose of the addition to professional rules suggested above is to emphasize this fact to lawyers. As Robert P. Lawry observes, "Part of the problem is the notion of 'rules' of ethics. It is a decidedly un-Aristotelian idea. It belies judgments made in complex situations by professional lawyers, who are trying to accommodate a variety of conflicting values in their everyday practice." Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral Tradition of Lawyering*, 100 DICK. L. REV. 563, 581 (1996). See also *id.* at 581 ("Aristotle knew . . . [that] good decisions depend on experience, judgment, a lived tradition, embedded ideals, and character."); *id.* at 565 ("[O]ur consciences are our own. Our advocacy can be hired. Not our consciences."); Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L. J. 1545, 1610 (1995) (declaring that ethical rules cannot adequately address the most challenging moral questions of lawyering and urging the cultivation of "professional practical wisdom" by practitioners, law school teachers, and the organized bar).

120. Moulton is quoted in HENRY DRINKER, *LEGAL ETHICS* 2 (1953).

121. See, e.g., RICHARD L. ABEL, *AMERICAN LAWYERS* (1989); Richard Posner, *The Material Basis of Jurisprudence*, 69 IND. L.J. 1 (1993).

122. An unrestricted market may provide the most effective means of satisfying the desires of the consumers of legal services. At the core of traditional concepts of professionalism, however, is the idea that those interests are not the only ones lawyers should serve. See Zacharias, *supra* note 6, at 1311 ("Central to the focus on commercialism is the belief that the free market does not order lawyers' behavior in a satisfactory way."). For a

This traditional view seems to be fading. Anthony Kronman writes of a "crisis of morale" in the legal profession, a "spiritual crisis . . . brought about by the demise of an older set of values."¹²³ Others have sounded similar themes,¹²⁴ and Carl Bogus in fact declares, "The legal profession is dead or dying. It is rotting away into an occupation. On this, those assembled at the bedside concur . . ."¹²⁵ Last year, 83 percent of the partners in the nation's 125 largest law firms offered their opinion that the legal profession had changed for the worse.¹²⁶

Complaints about commercialization of the profession are not new,¹²⁷ and the tiny minority of law firm partners who declined to join the majority's jeremiad may have been correct. Robert Gordon, however, has reviewed many nineteenth-century vocational addresses—remarks about the legal profession at bar gatherings, law school commencements, building dedications, and memorial services for members of the bench and bar. Gordon reports that speakers on these ceremonial occasions often quoted Lord Brougham—"invariably," Gordon says, "with disapproval."¹²⁸ In 1844, David Dudley Field wrote of Brougham's statement that "a more revolting doctrine scarcely ever fell from any man's lips."¹²⁹ Difficult though it may be to establish through rhetoric and opinion polls that the day-to-day practice of law has changed, the O.J. Simpson trial memoirs do not sound much like Abraham Lincoln, Louis Brandeis, or another lawyer whose 63 years of practice have allowed me to witness humane lawyering at its best, my father.

Repairing the legal profession's frayed cultural norms is not easy. There is no recipe, and you can't just pass a law. Moreover, what is wrong with the profession

thoughtful defense of traditional, nonmarket concepts of the legal professional, see Carl M. Selinger, *The Public's Interest in Preserving the Dignity and Unity of the Legal Profession*, 32 WAKE FOREST L. REV. 861 (1997).

123. ANTHONY KRONMAN, *THE LOST LAWYER: FAILING IDEALS OF THE LEGAL PROFESSION* 2 (1993).

124. See, e.g., MARY ANN GLENDON, *A NATION UNDER LAWYERS: HOW THE CRISIS IN THE LEGAL PROFESSION IS TRANSFORMING AMERICAN SOCIETY* (1994); SOL M. LINOWITZ & MARTIN MAYER, *THE BETRAYED PROFESSION: LAWYERING IN THE END OF THE TWENTIETH CENTURY* (1994); Marvin E. Aspen, *The Search for Renewed Civility in Litigation*, 28 VAL. U. L. REV. 513, 514 (1994) (noting "the erosion of professionalism in attorney relationships"); John C. Buchanan, *The Demise of Legal Professionalism: Accepting Responsibility and Implementing Change*, 28 VAL. U. L. REV. 563 (1994); Peter M. Brown, *Narcissism, Manners, and Morals: Can Grace and Collegiality Be Salvaged?*, 13 LITIG., Winter 1987, at 17; Harold G. Clarke, *The Rewards of Professionalism*, PROF. LAW., Aug. 1991, at 1; Eugene A. Cook, *Professionalism and the Practice of Law*, 23 TEX. TECH. L. REV. 955 (1992).

125. Carl T. Bogus, *The Death of an Honorable Profession*, 71 IND. L.J. 911, 911 (1996).

126. Chris Klein, *Big-Firm Partners: Profession Sinking*, NAT'L L.J., May 26, 1997, at A1.

127. See Marc Galanter, *Predators and Parasites: Lawyer-Bashing and Civil Justice*, 28 GA. L. REV. 633, 670 (1994). But see Rayman L. Solomon, *Five Crises or One: The Concept of Legal Professionalism, 1925-1960*, in *LAWYERS' IDEALS/LAWYERS' PRACTICES: TRANSFORMATION IN THE AMERICAN LEGAL PROFESSION* at 144, 173 (Robert L. Nelson et al. eds., 1992) ("What is unique about the present is that concern over commercialism has become a crisis.").

128. Robert W. Gordon, *Law as a Vocation: Holmes and the Lawyer's Path*, in *THE PATH OF THE LAW IN THE TWENTIETH CENTURY* (Steven J. Burton, ed., forthcoming 1998).

129. See David D. Field, *The Study and Practice of the Law*, in *THE GOLDEN AGE OF AMERICAN LAW* 30, 33 (Charles Haar, ed., 1965). For descriptions of the views of other nineteenth century professional leaders, see Rhode, *supra* note 6, at 603; Zacharias, *supra* note 6, at 1315-16.

is also what is wrong with America—a sense that most of the people around us are looking out for themselves and that we will be suckers unless we become a little bit like them.

The task of reweaving norms of civility, trust, and fair dealing must be done in small steps, primarily by setting the right example.¹³⁰ The weaker these norms, the more Simpson trials we will have. And the more Simpson trials we have, the less people will like us¹³¹ and the less we will like ourselves.¹³²

130. See Lawry, *supra* note 119, at 564 ("What I can do, and what most of us can do, is take on one small job at a time.").

131. An ABA-Gallup poll taken about five months after the Simpson trial had begun found that the public's disrespect for criminal defense attorneys had risen from 26% to 41% and that the public's disrespect for the criminal justice system had risen from 28% to 45%. See Steven Keeva, *Storm Warnings: After Months of Courtroom Maneuvering in the O.J. Simpson Case, the Public is Ready to Indict the Entire Criminal Justice System*, A.B.A. J., June 1995, at 77. See also Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice, and "The Search for Truth" in Criminal Cases*, 69 S. CAL. L. REV. 1267, 1273 (1996) ("In our view, the American criminal justice system seems to be teetering on the brink of completely losing the public's trust.").

132. See GLENDON, *supra* note 124, at 87 (noting that in the six years from 1984 to 1990, the percentage of lawyers in private practice who described themselves as "very satisfied" declined 20%); Lawry, *supra* note 119, at 586 ("In 1980 the *National Law Journal* reported . . . that . . . lawyers were seeing mental health professionals in record numbers. Three reasons were given: (1) overwork; (2) forced aggressive behavior; and (3) constant deceptive practice.") (citing Paulette Cooper, *Lawyers Succumb to Stress*, NAT'L L.J., Dec. 1, 1980, at 1).

