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Defending the Guilty: Lawyer Ethics in the Movies

J. Thomas Sullivan*

Tom Horn: You think I killed that boy?

Thomas Burke (*Defense counsel*): That question will never come up between us.

Tom Horn: Why not? It's going to come up in court.

Tom Horn¹

INTRODUCTION: INNOCENCE AND ATTICUS FINCH

Perhaps the most common question that criminal lawyers are called upon to answer involves the moral dilemma, or the perceived moral dilemma, posed by the representation of a client whom counsel *knows* to be guilty.²

*Professor of Law, University of Arkansas at Little Rock School of Law. This essay draws on my earlier article, *Imagining the Criminal Law: When Client and Lawyer Meet in the Movies*, 25 U. ARK. LITTLE ROCK L. REV. 665 (2003). I would like to acknowledge my longtime friendship with Professor Richard Peltz-Steele, now teaching at the University of Massachusetts, who has always encouraged me to think and write about the law and other things that matter.

WARNING: Readers should be warned that the discussion of the films in this article may disclose important aspects of the plots that could, well, "spoil" the movies for those who have not already seen them. Some readers may recognize this warning or disclaimer as similar to that concluding the original WITNESS FOR THE PROSECUTION, a legal cinema classic based on the story by Agatha Christie. (Arthur Hornblower Productions 1957).

1. TOM HORN (Warner Bros. 1980).

2. See Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533 (2000), for a more comprehensive discussion of the portrayal of lawyers in film. In an abstract of the article, Professor Asimow explains:

A survey of about 300 films involving significant lawyer roles reveals that from 1930 to 1970, more than two-thirds of the lawyers were good human beings and competent, ethical professionals. Since 1970, however, just the reverse is true: about two-thirds of the lawyers in film have been bad human beings and/or bad professionals. This Article links the phenomenon of negative lawyer portrayals in film with the sharply declining public perception of the ethics of lawyers. The films accurately reflect the stunning drop in the public's image of the profession. The Article speculates on the causes for this abrupt decline and suggests that negative film portrayals may be cause as well as effect. It draws on insights from cognitive psychology (the cultivation effect) to establish that the public may be learning that lawyers are bad from watching them in the movies.

Quite often, for counsel, knowledge of a client's guilt is itself a complicated matter because guilt is – at least for the lawyer – a legal issue and is established only when all elements of an offense for which the client has been charged have been established by proof beyond a reasonable doubt.³

For many, Attorney Atticus Finch's (Gregory Peck) representation of an innocent African-American accused of rape by a Southern white woman in Depression-era Alabama by the town's most imposing citizen, in *To Kill a Mockingbird*,⁴ represents the consummate portrayal of the lawyer's discharge of his ethical duty to his client.⁵ Tom Robinson (Brock Peters) is falsely accused of rape by Mayella Violet Ewell (Collin Wilcox), the daughter of a lower-class, white bigot, Bob Ewell (James Anderson), who caught her at-

Michael Asimo, *Bad Lawyers in the Movies*, SOCIAL SCIENCE RESEARCH NETWORK (2000), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=159295.

3. *Jackson v. Virginia*, 443 U.S. 307, 309 (1979).

4. *TO KILL A MOCKINGBIRD* (Universal Int'l Pictures 1962).

5. The character of Atticus Finch, typically addressed as he is presented in the book upon which the film was based, Harper Lee's *To Kill a Mockingbird*, has generated considerable scrutiny within the legal profession, serving as the theme of numerous law review articles, including many that are not altogether complementary with respect to the lawyer's character. See HARPER LEE, *TO KILL A MOCKINGBIRD* (Lippincott 1960). One critic discloses the generally favorable view of Finch taken by many scholars:

Atticus Finch. No real-life lawyer has done more for the self-image or public perception of the legal profession than the hero of Harper Lee's novel, *To Kill a Mockingbird*. For nearly four decades, the name of Atticus Finch has been invoked to defend and inspire lawyers, to rebut lawyer jokes, and to justify (and fine-tune) the adversary system. Lawyers are greedy. What about Atticus Finch? Lawyers only serve the rich. Not Atticus Finch. Professionalism is a lost ideal. Remember Atticus Finch. . . . Atticus serves as the ultimate lawyer. His potential justifies all of our failings and imperfections. Be not too hard on lawyers, for when we are at our best we can give you an Atticus Finch.

Steven Lubet, *Classics Revisited: Reconstructing Atticus Finch*, 97 MICH. L. REV. 1339, 1339-40 (1999). Professor Lubet is less than overwhelmed by the Atticus Finch he meets in the novel, however, and he asks:

But what if Atticus is not an icon? What if he was more a man of his time and place than we thought? What if he were not a beacon of enlightenment, but just another working lawyer playing out his narrow, determined role? . . . This review considers the possibility that Atticus Finch was not quite the heroic defender of an innocent man wrongly accused.

Id. at 1340.

Of course, Professor Lubet is considering the Atticus Finch of print, and not the film, and it is not unlikely that Gregory Peck's personal stature and classic facial features might influence the movie audience to engage in less critical speculation about his Atticus than the persona that requires the individual reader to create the physical person described in Harper Lee's written text. See *id.* at 1339; See Lance McMilliam, *Atticus Finch-Christian?*, 77 TENN. L. REV. 739 (2010), for more reading about this lawyer and his world.

tempting to physically seduce Robinson, an African-American.⁶ The Ewells, clearly influenced by the father's racial hatred,⁷ address Mayella's unacceptable sexual appetite by testifying against Robinson at trial.⁸ Finch's cross-examination of both Mayella and her father demonstrates their probable lack of credibility to most viewers.⁹ But Robinson makes a fatal mistake during the prosecuting attorney's (William Windom) cross, explaining that he did chores at Mayella's request because he felt "right sorry for her."¹⁰ His answer prompts the prosecutor's cynical, calculated follow-up question, "You felt *sorry* for her, a white woman?"¹¹ Robinson's honest, but unfortunate, admission turns the jury from a possible acquittal to a likely conviction, when Mayella challenges the all-white jury to stand up for the claimed virtue of a white complainant:

I got somethin' to say. And then I ain't gonna say no more. He took advantage of me. An' if you fine, fancy gentlemen ain't gonna do nothin' about it, then you're just a bunch of lousy, yella, stinkin' cowards, the – the whole bunch of ya, and your fancy airs don't come to nothin'. Your Ma'am'in' and your Miss Mayellarin' – it don't come to nothin', Mr. Finch, not . . . no.¹²

The film's plot parallels in significant ways the actual prosecution of black defendants in the celebrated "Scottsboro Boys" case,¹³ *Powell v. Ala-*

6. TO KILL A MOCKINGBIRD, *supra* note 4.

7. Ewell confronts Finch outside the courtroom after the grand jury has returned an indictment against Tom Robinson and challenges counsel's willingness to represent his client:

Bob Ewell: I'm real sorry they picked you to defend that nigger that raped my Mayella. I don't know why I didn't kill him myself instead of goin' to the sheriff. That would have saved you and the sheriff and the taxpayers lots of trouble

Id.; *To Kill a Mockingbird: Quotes*, IMDB.COM, http://www.imdb.com/title/tt0056592/quotes?ref_ttco ql_trv_4 (last visited July 7, 2014).

8. TO KILL A MOCKINGBIRD, *supra* note 4.

9. *Id.*

10. *Id.*; *To Kill a Mockingbird: Quotes*, *supra*, note 7.

11. TO KILL A MOCKINGBIRD, *supra* note 4.

12. *Id.*; *To Kill a Mockingbird: Quotes*, *supra* note 7.

13. The case has generated extensive comment and coverage, including the recent re-telling of the story in an acclaimed Broadway Musical, *The Scottsboro Boys. About the Boys*, THE SCOTTSBORO BOYS, <http://scottsboremusical.com/index.html> (last visited September 18, 2013). The musical premiered off-Broadway in 2010 then opened on Broadway later that year. It received twelve Tony Award nominations but won none. Wikipedia, *The Scottsboro Boys (musical)*, http://en.wikipedia.org/wiki/The_Scottsboro_Boys_%28musical%29 (as of May 26, 2014, 17:54 GMT). A film based on the story of the Scottsboro Boys, HEAVENS FALL (Strata Productions 2006), stars Timothy Hutton as New York criminal defense attorney Samuel Leibowitz, who represented Scottsboro defendants who had been granted new trials. Douglas O. Linder, *Samuel Leibowitz*, FAMOUS AM. TRIALS: "THE SCOTTSBORO BOYS" TRIALS

bama,¹⁴ and, later, *Norris v. Alabama*,¹⁵ where an all-white jury convicted young black males of raping two white women.¹⁶ In *Powell*, the Supreme Court reversed the convictions of the defendants in one of three groups of the accused tried together, based on the failure to afford them counsel to assist them at their preliminary hearings.¹⁷ In *Norris*, the Court granted relief for other defendants based on evidence of deliberate exclusion of African-Americans from grand and petit jury service, respectively.¹⁸ These real life court successes resonate with the message of Atticus Finch's closing argument. Indeed, his closing argument in the film is an inspiring call for justice and an end to discrimination:

I have nothing but pity in my heart for the chief witness for the State. She is the victim of cruel poverty and ignorance. But my pity does not extend so far as to her putting a man's life at stake, which she has done in an effort to get rid of her own guilt. Now I say "guilt," gentlemen, because it was guilt that motivated her. She's committed no crime – she has merely broken a rigid and time-honored code of our society, a code so severe that whoever breaks it is hounded from our midst as unfit to live with. She must destroy the evidence of her offense. But what was the evidence of her offense? Tom Robinson, a human being. She must put Tom Robinson away from her. Tom Robinson was to her a daily reminder of what she did. Now, what did she do? She tempted a Negro. She was white, and she tempted a Negro. She did something that, in our society, is unspeakable. She kissed a black man. Not an old uncle, but a strong, young Negro man. No code mattered to her before she broke it, but it came crashing down on her afterwards. The witnesses for the State, with the exception of the sheriff of Maycomb County have presented themselves to you gentlemen, to this court in the cynical confidence that their testimony would not be doubted, confident that you gentlemen would go along with

1931-1937, http://law2.umkc.edu/faculty/projects/ftrials/scottsboro/SB_bLieb.html (last visited Sept. 10, 2014).

14. 287 U.S. 45 (1932).

15. 294 U.S. 587 (1935).

16. *Powell*, 287 U.S. at 49-50.

17. *Id.* at 73.

18. 294 U.S. at 596-99. Concern for racial discriminatory imposition of death sentences did not die with the Court's decision in *Norris*, of course. See, e.g., Bryan Stevenson, *Illegal Racial Discrimination in Jury Discrimination: A Continuing Legacy*, EQUAL JUSTICE INITIATIVE (Aug. 2010), <http://www.eji.org/files/EJI%20Race%20and%20Jury%20Report.pdf>. It remains a continuing source of controversy compromising the integrity of the use of the death penalty in the prosecution of minority defendants, particularly in the Southern states that are typically the most pro-capital punishment of American jurisdictions. See, e.g., *id.* The report documents the prevalence of death sentences imposed by all-white or nearly all-white juries in capital trials. *Id.*

them on the assumption . . . the evil assumption that all Negroes lie, all Negroes are basically immoral beings, all Negro men are not to be trusted around our women. An assumption that one associates with minds of their caliber, and which is, in itself, gentlemen, a lie, which I do not need to point out to you. And so, a quiet, humble, respectable Negro, who has had the unmitigated TEMERITY to feel sorry for a white woman, has had to put his word against TWO white people's! The defendant is not guilty – but somebody in this courtroom is. *Now, gentlemen, in this country, our courts are the great levelers. In our courts, all men are created equal. I'm no idealist to believe firmly in the integrity of our courts and of our jury system – that's no ideal to me. That is a living, working reality! Now I am confident that you gentlemen will review, without passion, the evidence that you have heard, come to a decision and restore this man to his family. In the name of GOD, do your duty. In the name of God, believe . . . Tom Robinson.*¹⁹

Unfortunately for his innocent client, Atticus Finch's beautifully scripted and delivered closing argument fails to persuade the jury, which likely turned on Tom Robinson because of his expression of pity for Mayella Ewell, his accuser.²⁰



Atticus Finch (Gregory Peck) argues Tom Robinson's innocence in closing argument. TO KILL A MOCKINGBIRD (Universal Int'l Pictures 1962).

Part of the power of the character of Atticus Finch in *To Kill a Mockingbird* is inextricably linked to Tom Robinson's innocence. Film audiences,

19. TO KILL A MOCKINGBIRD, *supra* note 4; *To Kill a Mockingbird: Quotes*, *supra* note 7 (emphasis added). Horton Foote earned the Academy Award for screenwriting for his script for the film. *To Kill a Mockingbird: Awards*, http://www.imdb.com/title/tt0056592/awards?ref_=tt_awd (last visited June 8, 2014).

20. TO KILL A MOCKINGBIRD, *supra* note 4.

as well as readers of the novel on which the film is based, are undoubtedly moved by his passionate defense of his client. Perhaps overwhelmed by the moral force in Finch's closing argument, viewers likely fail to consider his naïve or complicit acceptance of Sheriff Tate's report that Robinson had been killed by deputies when he tried to escape from custody while being transferred back to jail following trial.²¹ Clearly, Finch's plea would have had little impact had Mayella's demeanor in making her accusation been more credible, or had the evidence offered corroborative support. Instead, the evidence suggested that her father had, in fact, beaten her when he discovered her in the act of attempting to seduce Tom Robinson.²² She then felt compelled by cultural custom to accuse Robinson of rape to excuse her own culpability, which Finch explained in his closing argument.²³

The character of Atticus Finch that inspires so many is so easily unquestioned because of his noble defense of an innocent defendant, accused and convicted on the basis of racial prejudice. But in film, as in real life, defense counsel's character is often shaped by the fact that the accused is either guilty or the accused's guilt or innocence is subject to significant doubt. Counsel is obligated to perform ethically despite the very real possibility that an aggressive defense will result in a guilty defendant's acquittal and the prospect that he will commit other crimes – perhaps violent crimes, such as rape or murder – in the future. That is the scenario that generates the most common question posed to lawyers, including those who do not practice criminal law: how can a defense attorney morally and ethically represent a guilty client? In film, as in practice, defense lawyers represent clients whose guilt may be in question, may be irrelevant, or may be obvious or known to counsel, as discussed through the lens of film in this Article.

I. MORAL GUILT, LEGAL GUILT, AND COUNSEL'S "KNOWLEDGE"

Despite significant, often compelling, evidence of the accused's actual guilt, legal guilt is not established until a jury or trial court – having heard and considered the evidence – arrives at the conclusion that the evidence proves the accused's guilt beyond a reasonable doubt.²⁴ Moral guilt, as opposed to legal guilt, reflects a different consideration of the competing explanations about the client's actual involvement or blame in the commission of

21. *Id.*

22. *Id.*

23. *Id.*

24. *E.g.*, *In re Winship*, 397 U.S. 358, 364 (1970) (“[W]e explicitly hold that the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.”); *accord* *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (stating that upon federal review of state court convictions “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt”).

an offense, making the defense lawyer's answer to questions about willingness to represent the guilty client less than clear-cut in many cases.

When recounting his experience as part of the defense team in the O.J. Simpson case, Professor Alan Dershowitz explained that the search for truth may be misleading²⁵ because there are many "truths" that may be pursued. The concept of guilt presented in film is often elusive, reflecting a truth about the difficulty of incorporating moral guilt into the system of criminal law – a system in which personal culpability is an acceptable part of the criminalization equation. In virtually all cases involving serious offenses, proof of a criminal intent possessed by the accused is necessary for conviction – the fact that the evidence may show that the accused did the act or failed to do an act is typically not sufficient for conviction.²⁶ Two important films about legal proceedings in which the issue of guilt is discussed in contexts outside the American experience demonstrate the complexity of the issue of moral guilt and its incorporation into a system of criminal law. Punishment may be imposed as an instrument of policy without concern for the moral guilt of the punished, or punishment may reflect not only an intense search for moral guilt, but also an exercise necessary to affirm the requirement for basic human decency in the rule of law.

A. Punishment Without Regard for Truth of Guilt

In Stanley Kubrick's compelling anti-war film, *Paths of Glory*,²⁷ the court-martial of three French soldiers is ordered as a general punishment for "unit cowardice" based on the French's failure to take a highly-fortified German position, the "Anthill," during the trench-warfare fighting in World War I.²⁸ The commanding general (George Macready) initially orders the execution of ten soldiers from each unit,²⁹ following the Roman practice of "decimation," in which soldiers in groups of ten drew lots to determine which one would be executed by the remaining nine.³⁰ The unit's commander, Colonel Dax (Kirk Douglas), the most distinguished criminal lawyer in France before the war, volunteers to defend the soldiers accused of cowardice.³¹

25. ALAN M. DERSHOWITZ, *REASONABLE DOUBTS* 34-48 (1996).

26. *E.g.*, *Morrisette v. United States*, 342 U.S. 246, 274-75 (1952) (stating that in a prosecution for theft of government property "the question of intent can never be ruled as a question of law, but must always be submitted to the jury").

27. *PATHS OF GLORY* (United Artists 1957).

28. *Id.*

29. *Id.*

30. Jona Lendering, *Decimation*, LIVIUS.ORG, <http://www.livius.org/de-dh/decimation/decimation.html> (last visited Sept. 10, 2014); Wikipedia, *Decimation (Roman army)*, http://en.wikipedia.org/wiki/Decimation_%28Roman_army%29 (as of Sept. 11, 2014, 2:19 GMT).

31. *PATHS OF GLORY*, *supra* note 27.

In the court-martialing of the three soldiers, culpability or moral guilt is not a factor in the decision to prosecute or convict.³² One soldier is chosen by lots, another is chosen by an officer who deemed him “socially undesirable,” and the third is deliberately selected by an officer because the soldier knows of the officer’s cowardice during a reconnaissance mission that had resulted in another soldier’s death.³³ During the sham trial, Colonel Dax tries to introduce evidence of the men’s lack of culpability, including the fact that one of the soldiers had been knocked out when another soldier had fallen back on him after being fatally shot and was, consequently, incapable of advancing on the enemy position.³⁴ When the presiding officer responds that there is no defense available based on lack of culpability, Dax lashes out at the court, attacking the lack of due process in the proceeding:

Colonel Dax: Gentlemen of the court, there are times when I’m ashamed to be a member of the human race and this is one such occasion. It’s impossible for me to summarise the case for the defence since the Court never allowed me a reasonable opportunity to present that case.

General Mireau: Are you protesting the authenticity of this court?

Colonel Dax: [pause] Yes, sir. I protest against being prevented from introducing evidence which I considered vital to the defence; the prosecution presented no witnesses; there has never been a written indictment of charges made against the defendants, and lastly, I protest against the fact that no stenographic records of this trial have been kept.

[pause]

Colonel Dax: The attack yesterday morning was no stain on the honour of France, and certainly no disgrace to the fighting men of this nation. But this Court Martial is such a stain, and such a disgrace. The case made against these men is a mockery of all human justice. Gentlemen of the court, to find these men guilty would be a crime, to haunt each of you till the day you die. I can’t believe that the noblest impulse for man – his compassion for another – can be completely dead here. Therefore, I humbly beg you . . . show mercy to these men.³⁵

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.*; *Paths of Glory: Quotes*, IMDB.com, http://www.imdb.com/title/tt0050825/quotes?ref_=ttco_ql_trv_4 (last visited July 7, 2014).

Dax's passionate argument defending not only his clients but the rule of law itself fails to convince the court martial – a court martial convened specifically to convict the men in order to preserve the “honor” of the commanding general.³⁶ The conviction of the three soldiers and their execution involves no search for truth at all. Instead, it is an exercise designed to impress upon the remaining members of the unit the authority of their commanders, and the expectation that the soldiers perform aggressively and successfully despite the futility of an order or its disastrous results.

B. Collective Guilt and the Prosecution of Individual Defendants

In *Paths of Glory*, moral culpability and guilt have no bearing on the decision to prosecute the three soldiers for cowardice because they are scapegoats for the flawed judgment of the commanding general whose reputation is damaged by the failure of Colonel Dax's troops to take the German position.³⁷ The reverse situation is presented in *Judgment at Nuremberg*,³⁸ a film classic that examines the issues of personal and collective culpability through the prosecution of the Nazi Ministry of Justice for war crimes in the Nuremberg trials.³⁹ There, four defendants, including Germany's most distinguished pre-War jurist, Ernst Janning (Burt Lancaster), are tried for crimes committed by the Nazi regime through its judicial system. The trials occur before a panel of three American judges, with Dan Haywood (Spencer Tracy) presiding.⁴⁰

The four defendants represent the various evils perpetrated by the Ministry of Justice. These evils included the persecution of Jewish defendants and others to promote the goal of racially cleansing the German homeland, the use of legal proceedings to seize the property of Jewish defendants, and the manipulation of politically-inspired trials to further the goals of the State.⁴¹ In the film, defense counsel, Hans Rolfe (Maximillian Schell), presents a spirited defense of Janning without apparent concern for any defenses that might have been advanced on behalf of the other defendants, a significant plot device because it focuses the moral issue of guilt on the most sympathetic and, arguably, noble of the accused.⁴² But the filmmakers do not ignore a particularly important objection to the war crimes trials – an objection raised when the defiant, unrepentant Nazi prosecutor, Emil Hahn (Werner Klempe-

36. *PATHS OF GLORY*, *supra* note 27.

37. *Id.*

38. *JUDGMENT AT NUREMBERG* (United Artists 1961).

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

rer), challenges the jurisdiction of the Tribunal conducting the trial as an exercise of "victor's justice."⁴³

Rolfe offers a brilliant defense of Janning, who served as Minister of Justice during the Nazi regime. Rolfe initially pleads that Janning, so well known for his jurisprudential writings, has a character that essentially calls into question the legitimacy of the prosecution.⁴⁴ Rolfe counters the heavy emphasis on the Nazi's sterilization policy as evidence of Nazi oppression by referring directly to its advocacy by others, including Supreme Court Justice

43. *Id.* At one point, Hahn urges Janning to see the co-defendants as sharing in the Allied oppression in bringing the prosecution for war crimes and implores him to consider the fact that he was not only part of the Ministry of Justice but is also a German. *Id.* Janning upbraids Hahn:

We have fallen on happy times, Herr Hahn. In old times it would have made your day if I'd deigned to say good morning to you. Now that we are here in this place together . . . you feel obliged to tell me what to do with my life. . . . Listen to me, Herr Hahn, there have been terrible things that have happened to me in my life. But the worst thing that has ever happened . . . is to find myself in the company of men like you.

Id.; *Paths of Glory*: *Quotes*, *supra* note 35.

For another example of the unrepentant defendant, consider the former Klansman, Sam Cayhall (Gene Hackman), convicted of murder of an African-American who had been a long-time acquaintance over a perceived slight committed by the dead man. *THE CHAMBER* (Universal Pictures 1996). The victim had accused Cayhall's son of a theft for which his own son had been blamed. *Id.* Cayhall, awaiting execution on death row, retains his persona of hate while resisting the efforts of his grandson, a young lawyer, Adam Hall (Chris O'Donnell), who fights to prevent his execution. *Id.* Hall's effort to forge a reconciliation with the grandfather he knew is perhaps doomed by his father's suicide, which was caused by guilt over the murder he witnessed his own father, Cayhall, commit. *Id.*

The unrepentant capital defendant is not merely a plot device in fiction. *See, e.g., Hopper v. Evans*, 456 U.S. 605 (1982). In *Hopper v. Evans*, for instance, the defendant facing the death penalty refused to express remorse for the killing of his robbery victim, leading the Court to conclude that he suffered no prejudice by being denied a lesser-included offense based on lack of criminal intent:

From the outset, beginning with his appearance before the grand jury, respondent made it crystal clear that he had killed the victim, that he intended to kill him, and that he would do the same thing again in similar circumstances. At trial, he testified that he always tried to choose places to rob so that he could avoid killing people. However, he also testified that, if necessary, he was always prepared to kill. . . . Respondent was convicted, under Ala. Code § 13-11-2(a)(2) (1975), of robbery when the victim was intentionally killed.

Id. at 612. In *Beck v. Alabama*, the Court held that a state statute precluding instructions on lesser-included homicide offenses in capital cases violated federal constitutional protections in forcing capital juries to either convict on the capital murder charge or acquit the accused, freeing him entirely from the possibility of punishment even though the evidence clearly showed that he had committed the crime. 447 U.S. 625, 632-38 (1980). In excluding the possibility that jurors might find that the evidence did not prove the requisite intent for the capital charge and convict on a lesser offense, the statute unfairly exposed the accused to the death penalty. *Id.* at 637.

44. JUDGMENT AT NUREMBERG, *supra* note 38.

Oliver Wendell Holmes' rather unfortunate defense of sterilization in *Buck v. Bell*.⁴⁵ Justice Holmes wrote in *Buck v. Bell*:

We have seen more than once that the public welfare may call upon the best citizens for their lives. It would be strange if it could not call upon those who already sap the strength of the State for these lesser sacrifices, often not felt to be such by those concerned, in order to prevent our being swamped with incompetence. It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind . . . *Three generations of imbeciles are enough.*⁴⁶

Rolfe's argument that the judges merely enforced legitimate legislative attempts to address social problems is supported by his aggressive cross-examination of Rudolph Petersen (Montgomery Clift), a laborer. The witness, whose sterilization had been ordered by the court at Nuremberg in proceedings in the same courtroom in which the war crimes trials are being prosecuted, falls apart on the stand, unable to meet the standard test used to assess feeble mindedness – a test that requires a person to form a sentence using the words “hare,” “hunter,” and “field.”⁴⁷ Petersen cannot form the sentence.⁴⁸ His failure and subsequent outburst disarm the prosecution.⁴⁹

The lead prosecutor (Richard Widmark) shifts focus away from the forced sterilization of opponents of the Reich – Petersen's family were Communists – to focusing on the imposition of the death penalty for violation of the Nuremberg Health Laws prohibiting intimate relations between Aryans and non-Aryans.⁵⁰ Application of the laws prohibiting miscegenation and intimacy had resulted in the trial of an elderly Jewish man accused of having intimate relations with a young German girl, Irene Hoffman (Judy Garland).⁵¹ The accused had been a lifetime family friend, and Hoffman reluctantly agrees to testify for the Allies.⁵²

Janning had presided over the trial, with Hahn prosecuting the accused.⁵³ Irene Hoffman testifies dramatically for the prosecution, accusing

45. *Id.*

46. *Buck v. Bell*, 274 U.S. 200, 207 (1927) (emphasis added).

47. JUDGMENT AT NUREMBERG, *supra* note 38; *Judgment at Nuremberg – (Movie Clip) Feeble Mindedness*, TURNER CLASSIC MOVIES, <http://www.tcm.com/mediaroom/video/306210/Judgment-At-Nuremberg-Movie-Clip-Feeble-Mindedness.html> (last visited July 7, 2014).

48. JUDGMENT AT NUREMBERG, *supra* note 38.

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

Hahn of mocking the accused Jewish man, Feldenstein,⁵⁴ a long-time friend of her family who assumed a fatherly role in her life after her parents had died.⁵⁵ Rolfe's cross-examination proves devastating for her, however, as he becomes increasingly aggressive in suggesting that, in fact, the relationship was not merely platonic, but in fact reflected a mutual sexual attraction between the teenager and her father-figure.⁵⁶

But, as Hoffman appears to reach her breaking point, Janning intervenes to save her, forcefully interrupting Rolfe's questioning, asking, "Are we going to start it all over again?"⁵⁷ Janning advises the Tribunal that he intends to testify, leading Rolfe to request a continuance to counsel his client.⁵⁸ Judge Haywood grants a recess over the prosecutor's spirited objection. The prosecutor's objection obviously reflects his impression that Janning will offer compelling testimony – and perhaps, also a fortuitous opportunity for his own dramatic cross-examination – and his concern that during the recess, Rolfe may convince Janning to withdraw his decision to take the stand.⁵⁹ Indeed, Rolfe attempts to persuade Janning not to testify, arguing the need to defend the German people from a threatened loss of national sovereignty that

54. *Id.* The Feldenstein case was based on an actual trial of a Jewish defendant named Katzenberger:

One case used by the tribunal to illustrate Rothaug's guilt involved a sixty-eight-year-old Leo Katzenberger, head of the Nuremberg Jewish community. Katzenberger stood accused of violating Article 2 of the Law for the Protection of German Blood. The law [forbade] sexual intercourse between Jews and other German nationals. Katzenberger was accused of having sexual intercourse with a nineteen-year-old German photographer, Seillor. Both Katzenberger and Seillor denied the charge. Katzenberger described the relationship between the two of them as "fatherly." The most incriminating evidence the prosecution produced was that Seiler was seen sitting on Katzenberger's lap. That, in Rothaug's view, was enough: "It is sufficient for me that the swine said that a German girl sat upon his lap!" Rothaug arranged to have Katzenberger's trial transferred to a special court. In the special court, high-ranking Nazi officials – in uniform – took the stand to express their opinions that Katzenberger was guilty. Rothaug's real trick, however, was getting Katzenberger's punishment increased from life in prison (the normal punishment for violations of Article 2) to death. This he did by a creative construction of a law that prescribed death for breaking certain laws "to take advantage of the war effort." Rothaug argued that death was the appropriate punishment for Katzenberger because he exploited the lights-out situation provided by air raid precautions to develop his "romance" with Seiler.

Doug Linder, *The Nuremberg Trials: The Justice Trial, A Commentary on the Justice Case*, UMKC.EDU (2000), <http://law2.umkc.edu/faculty/projects/ftrials/nuremberg/alstoetter.htm>; see also United States Holocaust Memorial Museum, *Katzenberger Case, March 13, 1942*, USHMM.ORG, <http://www.ushmm.org/wlc/en/article.php?ModuleId=10007908> (last updated June 20, 2014).

55. JUDGMENT AT NUREMBERG, *supra* note 38.

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

may come with a successful attack on the German rule of law. Rolfe reminds Janning of the American decision to drop the atomic bomb on Hiroshima, questioning whether Janning would prefer the moral posture of the victor to the preservation of a German national identity.⁶⁰

Janning is unpersuaded, however.⁶¹ He delivers a devastating monologue tracing the history of Hitler's rise to power in response to the emotional fervor of Germany following the failure of the Weimar Republic, including re-armament and successful expansionist policies under the Third Reich.⁶² In doing so, he concedes not only his personal guilt, but also a national guilt.⁶³ Janning's stinging indictment of the perversion of the system of justice is finally accentuated by his confession that he had already arrived at a decision about Feldenstein's guilt and his death sentence before the trial had even commenced.⁶⁴ Faced with his client's repudiation of his first line of defense, Rolfe shifts his approach dramatically.⁶⁵

Rolfe essentially acknowledges that Janning's confession has repudiated his argument justifying the judiciary's application of the Third Reich's internal rule of law based on the traditional role of judges in simply carrying out the law, as prescribed by the lawmaker.⁶⁶ He re-focuses his defense, arguing that the international community and specific leaders, including the Vatican and Winston Churchill, validated Hitler's rise to power, while American industrialists were profiting from German re-armament after the First World War.⁶⁷ Moreover, in Rolfe's reasoning, the collective guilt of Germany, admitted by Janning in his testimony, is shared by the Allies themselves in light of their tacit capitulation to Hitler's rise – a capitulation reflected in their policy of appeasement in the Sudetenland and Anschluss.⁶⁸

Rolfe's attempt to spread the blame for Nazi transgressions beyond the regime is destined to fail, of course, but his closing argument is not without intellectual force, even if it is logically flawed.⁶⁹ It appears to have served his purpose, however, in arguing for some recognition that the German populace should not be condemned as predisposed to commit acts of barbarism, or at least, not exclusively.⁷⁰ Justice Haywood, reading the verdict of two of the three justices, acknowledges Rolfe's argument in explaining the tragedy evi-

60. *Id.*

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* *Anschluss* was the union of Germany and Austria in 1938. United States Holocaust Memorial Museum, *Anschluss*, USHMM.ORG, <http://www.ushmm.org/research/research-in-collections/search-the-collections/bibliography/anschluss> (last visited July 7, 2014).

69. JUDGMENT AT NUREMBERG, *supra* note 38.

70. *Id.*

denced by Janning's descent from the position of international respect that he had once earned and enjoyed, before he permitted his character to be corrupted by his participation in the perverted system of justice demanded by loyalty to the Nazi regime:

[T]his trial has shown that under the stress of a national crisis, men – even able and extraordinary men – can delude themselves into the commission of crimes and atrocities so vast and heinous as to stagger the imagination. No one who has sat through this trial can ever forget. The sterilization of men because of their political beliefs . . . The murder of children . . . How *easily* that can happen! There are those in our country today, too, who speak of the “protection” of the country. Of “survival.” The answer to that is: *survival as what?* A country isn't a rock. And it isn't an extension of one's self. *It's what it stands for, when standing for something is the most difficult!* Before the people of the world – let it now be noted in our decision here that this is what we stand for: *justice, truth . . . and the value of a single human being!*⁷¹

Thus, Herr Rolfe's most capable representation of his client, Janning, earns no mitigation of Janning's sentence,⁷² a result Janning himself concedes is just.⁷³ It does evince some measure of understanding of the circumstances Janning described in his testimony. In that sense, Rolfe's defense succeeds in avoiding denunciation of the German population as fatally flawed by a cultural and ethnic predisposition towards barbarism and inhumanity.

C. The Popular Tendency to Assume the Accused's Guilt

All too often, observers and legal commentators, in televised coverage of particularly sensational trials or proceedings involving high-profile defendants or crimes, suggest that the guilt of the accused is obvious. As a consequence, these commentators may end up second-guessing defense counsel in the choice of representation strategies or tactics.⁷⁴ The viewer, perhaps

71. *Id.*; *Judgment at Nuremberg: Quotes*, IMDB.COM, http://www.imdb.com/title/tt0055031/trivia?tab=qt&ref_=tt_trv_qu (last visited July 7, 2014).

72. Judge Haywood addressed Janning's guilt individually: “Janning, to be sure, is a tragic figure. We believe he loathed the evil he did. But compassion for the present torture of his soul must not beget forgetfulness of the torture and death of millions by the government of which he was a part.” *Id.*; *Judgment at Nuremberg: Quotes*, *supra* note 71.

73. JUDGMENT AT NUREMBERG, *supra* note 38.

74. Consider, for instance, FOX News Channel host Bill O'Reilly of *The O'Reilly Factor* who filed an ethics complaint against defense lawyers representing defendant David Westerfield. Westerfield was ultimately convicted of capital murder and sentenced to death for the murder of a neighborhood child. Cathy Young, *A Lawyer's Obligation When Client Is Guilty*, REASON.COM (Sept. 24, 2002), <http://reason.com/archives/2002/09/24/a-lawyers-obligation-when-clie>. O'Reilly's

failing to discount the entertainment factor interwoven into what often amounts to extended and redundant coverage of these trials, may be led to conclude that the defense lawyer is engaging in improper conduct when it appears defense counsel is advancing a defense that counsel does not, herself, believe is factually credible or truthful. Because the commentator, possessing impressive or at least credible credentials, demonstrates an unwavering opinion of the accused's guilt, both highly-focused and casual viewers may conclude that because the accused's guilt is so unquestioned, defense counsel's approach to representation amounts to little more than an attempt to obstruct justice or emphasize counsel's skill for publicity or ego-gratification.

Defense counsel's knowledge that a client is factually guilty is often far from clear. The client may offer a false explanation relating to the charges or fabricate some explanation designed to minimize culpability or shift guilt to others. Where the client's explanation differs from that of prosecution witnesses or other evidence, defense counsel may well evaluate the client's credibility unfavorably, but still may not know to a certainty that the client is, in fact, morally guilty.

For example, in *Tom Horn*, a former Army scout on the frontier, Tom Horn (Steve McQueen), has been enlisted by a group of ranchers to stop cattle rustling.⁷⁵ His expertise as a "stock detective" proves a source of trouble for a community moving toward civilization: his violent style, while effective, is simply too effective and too final.⁷⁶ Eventually, Horn is set up by the politically savvy local marshal, Joe Bell (Billy Green Bush), who tries to extract an admission that Horn is responsible for the particularly notorious killing of a fourteen-year-old boy by what is termed a remarkable shot – presumably a shot Horn was capable of making.⁷⁷ As Bell and a drunken Horn talk in the marshal's office, the local newspaperman, hidden in an adjacent room, attempts to record Horn's comments.⁷⁸ The newspaperman later testifies inaccurately at trial – whether deliberately or simply as a result of error –

complaint stemmed from the claim that Westerfield's lawyers had approached prosecutors and offered to disclose the location of the child's body in return for a life sentence. *Id.* Rebuffed when police located the body without information supplied by the defense, they proceeded to defend Westerfield at trial by arguing that other individuals could have been responsible for the child's murder in light of the evidence, which was circumstantial, and by attacking the moral character of the child's parents. *Id.*

75. TOM HORN, *supra* note 1.

76. *Id.* *Tom Horn* may illustrate the power of artistic license for filmmakers. While he is presented as a somewhat lovable character in the film – and possibly innocent of the murder for which he is tried, convicted, and executed – there is considerable debate that in real life Tom Horn was an exceedingly accomplished and remorseless sociopathic killer, unlike the Tom Horn played by Steve McQueen. See, Wikipedia, *Tom Horn*, http://en.wikipedia.org/wiki/Tom_Horn (as of Oct. 10, 2014, 20:00 GMT), for a discussion of conflicting views regarding Horn and his activities in the old West and references to original sources.

77. TOM HORN, *supra* note 1.

78. *Id.*

that Horn made a highly inculpatory, even prideful, admission of guilt.⁷⁹ Horn is called by the prosecutor, but Horn denies recalling any statements he might have made while drunk.⁸⁰

Horn's close friend in the rancher's association, John Coble (Richard Farnsworth), hires an attorney, Thomas Burke (Harry Northup), to represent Horn at the quickly scheduled trial.⁸¹ Coble warns Horn that the politically ambitious prosecutor intends to use the case as a show trial on which to base his campaign for elected office.⁸² When Horn first meets his lawyer, he asks Burke directly about the question central in his mind to his defense – the issue of his guilt – and Burke responds that the question of guilt will not come up between them.⁸³ Although the film audience likely prefers to conclude that Horn is not guilty of murder, there is no evidence other than his purported admission, which the film clearly shows to be inaccurately recorded and reported by the newspaperman.⁸⁴ Horn refuses to testify further at the trial and Burke, and the audience, are left without actually knowing if he did make the remarkable shot that killed the boy.⁸⁵

79. *Id.*

80. *Id.* Lawyers might initially point to the film's apparent inaccuracy in depicting this testimony, noting Horn's right to remain silent; however, Horn's trial precedes selective incorporation of the Fifth Amendment protection against self-incrimination to apply to state prosecutions by several decades. See Wikipedia, *Tom Horn*, http://en.wikipedia.org/wiki/Tom_Horn#cite_ref-13 (as of May 11, 2014, 16:40 GMT), for more on the life and trial of the real Tom Horn.

Significant judicial and scholarly comment has focused on the doctrine of "selective incorporation." See, e.g., Akhil Reed Amar, *The Bill of Rights and the Fourteenth Amendment*, 101 YALE L.J. 1193 (1992); Felix Frankfurter, *Memorandum on "Incorporation" of the Bill of Rights into the Due Process Clause of the Fourteenth Amendment*, 78 HARV. L. REV. 746 (1965). See, for example, *Adamson v. California*, 332 U.S. 46 (1947), the concurrence of Justice Frankfurter, *id.* at 59, 63-65, and the dissent of Justice Black, *id.* at 68, 71-90, for discussions of the "selective incorporation" doctrine in Supreme Court opinions. The *Adamson* majority concluded that the Fifth Amendment protection against self-incrimination did not apply to a California capital prosecution. *Id.* at 54-55. *Adamson* was overruled in *Malloy v. Hogan*, 378 U.S. 1, 6 (1964).

81. TOM HORN, *supra* note 1.

82. *Id.*

83. *Id.* In *Red Corner*, Jack Moore confronts his counsel, much as Horn did, by asking her directly if she believes he is guilty of the crime. RED CORNER (MGM 1997). Moore, an American lawyer played by Richard Gere, is arrested and charged in the murder of a young Chinese woman with whom he had a sexual liaison while in China on business. *Id.* When his appointed counsel, Shen Yuelin (Bai Ling), enters a plea of guilty without having discussed the case with him in an attempt to avoid a capital sentence based on mitigating circumstances, Moore questions her representation. *Id.* In fact, his prosecution is the product of official corruption designed to influence a major trade decision in favor of Moore's client's competitor. *Id.*

84. TOM HORN, *supra* note 1.

85. *Id.*

Burke's disavowal of desire to know the truth of the charges, however, must not only interest Horn, but the audience as well because the audience may take Horn's refusal to testify as evidence of his culpability. After all, his claim of drunkenness related only to his *recollection* of what he told Bell when discussing the shooting; his recollection never included any denial that he shot the boy, or that he did not recall the shooting.⁸⁶ Whether Horn's prosecution was righteous or he was actually the scapegoat for the cattlemen who hired him, proof of his guilt was clearly dependent upon the jury's perception of the newspaperman's inaccurate testimony of Horn's purported confession and Horn's refusal to offer a defense by denying moral guilt for the crime.⁸⁷

Horn's counsel elected to avoid the troubling question of Horn's guilt by explaining, "That question will never come up between us."⁸⁸ This approach may be taken by defense lawyers concerned that disclosure of culpability itself may compromise the ability to develop or preserve a trusting relationship with the accused. Certainly, many criminal defendants believe that once their attorney knows or believes they are, in fact, guilty of the offense charged, the attorney's interest in advancing an aggressive defense will fade. But Horn displays what may be a quite sophisticated understanding of the very thorny nature of disclosing guilt. His counsel denies interest in the critical question on which Horn's life literally hangs; therefore, one might ask if his counsel's response suggests some cynicism about his role in the proceedings. Clearly, one might speculate that had Horn been guilty of the murder, he would not have questioned counsel's posture on the issue of his guilt at all. Or, perhaps, the actual murderer would be the most likely of clients to challenge counsel on this point, intending to leave his lawyer with the impression that he is, in fact, not guilty. After all, if he *was* guilty, he never would have raised the issue.

D. Determining "Guilt" in Light of Recognized Legal Defenses

Even when the evidence does establish that the defendant committed an act apparently warranting conviction, there may be additional circumstances that preclude conviction: such as justification, as in the case of self-defense;⁸⁹

86. *Id.*

87. *Id.*

88. *Id.*; *Tom Horn*, SUBZIN, <http://www.subzin.com/s/That+question+will+never+come+up+between+us> (last visited May 22, 2014).

89. Self-defense is recognized as a defense in all American jurisdictions. PAUL H. ROBINSON, *CRIMINAL LAW DEFENSES: CRIMINAL PRACTICE SERIES* § 132 (1984). However, the particular formulation of the right to stand and defend oneself, as opposed to being required to retreat from a threat or altercation, varies among the states. *See, e.g.*, RICHARD MAXWELL BROWN, *NO DUTY TO RETREAT: VIOLENCE AND VALUES IN AMERICAN HISTORY AND SOCIETY* (1994) (discussing application of duty to retreat to avoid violent confrontation). The issue of "stand your ground" laws arose during the highly publicized prosecution of George Zimmerman for the killing

or a legal excuse, such as insanity;⁹⁰ or the fact that the defendant acted reasonably because of duress or necessity.⁹¹ Existence of a legal excuse for

of Trayvon Martin in Florida, although the defense that resulted in Zimmerman's acquittal did not rest on the Florida statute. See Sean Sullivan, *Everything You Need to Know About 'Stand Your Ground' Laws*, WASHINGTON POST (July 15, 2013, 9:30 AM), <http://www.washingtonpost.com/blogs/the-fix/wp/2013/07/15/everything-you-need-to-know-about-stand-your-ground-laws/>.

"Self-defense" is the plea of socially prominent antiques dealer Jim Williams (Kevin Spacey) in *Midnight in the Garden of Good and Evil* when he is charged with the murder of his younger gay lover (Jude Law). MIDNIGHT IN THE GARDEN OF GOOD AND EVIL (Malpaso Prods. 1997). The film is based on John Berendt's book of the same title, recounting an actual homicide that occurred in Savannah, Georgia. JOHN BERENDT, MIDNIGHT IN THE GARDEN OF GOOD AND EVIL (1994). Eastwood's paean to the city is beautifully filmed and a tribute to Savannah's native son, lyricist Johnny Mercer. The Mercer House, where the shooting occurred, was built for Johnny Mercer's great-grandfather. *Midnight in the Garden of Good and Evil: Trivia*, IMDB.COM, http://www.imdb.com/title/tt0119668/trivia?ref_=tt_ql_2 (last visited May 25, 2014). One of Williams' real life lawyers (Sonny Seiler) was cast in the role of the trial judge, with Jack Thompson in the role of trial counsel who delivers a very interesting and effective closing argument in dealing with his client's homosexuality. MIDNIGHT IN THE GARDEN OF GOOD AND EVIL, *supra*. The film is laden with trivia.

90. The insanity defense defined in the Model Penal Code provides:

(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality [wrongfulness] of his conduct or to conform his conduct to the requirements of law.

(2) As used in this Article, the terms "mental disease or defect" do not include an abnormality manifested only by repeated criminal or otherwise antisocial conduct.

MODEL PENAL CODE § 4.01 (1962).

91. The Model Penal Code ("MPC") defines the defense of duress:

(1) It is an affirmative defense that the actor engaged in the conduct charged to constitute an offense because he was coerced to do so by the use of, or a threat to use, unlawful force against his person or the person of another, that a person of reasonable firmness in his situation would have been unable to resist.

(2) The defense provided by this Section is unavailable if the actor recklessly placed himself in a situation in which it was probable that he would be subjected to duress. The defense is also unavailable if he was negligent in placing himself in such a situation, whenever negligence suffices to establish culpability for the offense charged.

(3) It is not a defense that a woman acted on the command of her husband, unless she acted under such coercion as would establish a defense under this Section. [The presumption that a woman acting in the presence of her husband is coerced is abolished.]

(4) When the conduct of the actor would otherwise be justifiable under Section 3.02, this Section does not preclude such defense.

Id. at § 2.09 (1962). Section 3.02 of the MPC defines the justification of "choice of evils," or necessity, a parallel theory of defense to culpability in which the actor is forced to violate a statute or ordinance in order to prevent a greater evil or injury from occurring. See *id.* § 3.02.

conduct is particularly troubling when the defense of mental impairment is interposed where factual evidence of responsibility for the offense is uncontested. The defense of insanity is troubling for many. In defenses based upon justification or other excuse, such as duress, the juror is asked to make a decision as to the reasonableness of the accused's conduct viewed from the perspective of the average person.⁹² With insanity, however, the question is entirely different: the juror is asked to consider whether the alleged impairment is sufficiently severe to warrant judgment based on the non-average person. Jurors are asked to rely on expert or lay testimony regarding the accused's actual state of mind, instead of simply proceeding from a common understanding of what behavior may be deemed acceptable under the peculiar circumstances in which the accused acted.⁹³

Duress and necessity have been successfully advanced as defensive theories in prison escape cases when the accused pleads that threats to personal safety or inhumane conditions of confinement warrant escape from the institution. *See, e.g.,* United States v. Bailey, 444 U.S. 394, 410-13 (1980) (recognizing the possibility that facts could warrant reliance on escape to avoid an imminent threat for which there were no reasonable institutional alternatives to avoid the threat, but requiring an escapee claiming the defense to demonstrate that he attempted to surrender or return to custody once the threat had been averted); People v. Lovercamp, 43 Cal. App. 3d 823, 831 (Cal. Ct. App. 1974) (recognizing defense in extraordinary circumstances, but cautioning: "We, therefore, conclude that the defense of necessity to an escape charge is a viable defense. However, before *Lovercamp* becomes a household word in prison circles and we are exposed to the spectacle of hordes of prisoners leaping over the walls screaming 'rape,' we hasten to add that the defense of necessity to an escape charge is extremely limited in its application. This is because of the rule that upon attaining a position of safety from the immediate threat, the prisoner must promptly report to the proper authorities.").

92. MODEL PENAL CODE § 2.09 (1962).

93. The issue as to what impairments may give rise to the use of the insanity defense is itself an important question. Subsection (2) of the Model Penal Code definition excludes reliance on personality disorders that are not considered to constitute "mental disease or defect," but this exception might lead to divergent views as to what disorders support the defense that are manifested by conduct that is not necessarily criminal. *Id.* at § 4.01. The question of what conduct may be considered "antisocial" is itself subjective. For example, homosexuality, at one time classified as deviant in the third addition of the *Diagnostic and Statistical Manual of Mental Disorders*, has been removed from this category by the American Psychiatric Association. Gregory M. Herek, *Facts About Homosexuality and Mental Health*, SEXUAL ORIENTATION: SCIENCE, EDUCATION AND POLICY, http://psychology.ucdavis.edu/faculty_sites/rainbow/html/facts_mental_health.html (last visited May 27, 2014).

A more comprehensive approach to addressing the issue of impairment warranting reliance on the insanity defense is provided in the Arkansas Criminal Code for instance, which defines "mental disease or defect" as:

- (i) Substantial disorder of thought, mood, perception, orientation, or memory that grossly impairs judgment, behavior, capacity to recognize reality, or ability to meet the ordinary demands of life;

In *Primal Fear*, defense counsel (Richard Gere) relies on a defense of multiple personality disorder to represent his client (Edward Norton) who is charged with the murder of a priest.⁹⁴ The disorder is controversial and has arguably been subject to being over-diagnosed.⁹⁵ One very simple question that can be raised about this disorder concerns the issue of whether the accused – even if legitimately experiencing *multiple personalities* resulting from a dissociative disorder – must be excused from liability for actions admittedly committed while under the influence of the alternate persona.⁹⁶ Even if the expert consensus supports the conclusion that the accused suffers from what is popularly termed “multiple personality disorder” and, moreover, that the offense was committed while the accused was under the influence of an alternate personality, the question of excusing the accused from punishment is undoubtedly going to present problems for many jurors and the public, more generally.

E. Distinguishing Moral and Legal Guilt in Light of Exotic Circumstances

The issue of legal guilt may also be compromised by unique factual contexts in which an apparent offense has occurred,⁹⁷ but which are not directly

(ii) State of significantly subaverage general intellectual functioning existing concurrently with a defect of adaptive behavior that developed during the developmental period; or

(iii) Significant impairment in cognitive functioning acquired as a direct consequence of a brain injury.

(B) As used in the Arkansas Criminal Code, “mental disease or defect” does not include an abnormality manifested only by:

(i) Repeated criminal or otherwise antisocial conduct;

(ii) Continuous or noncontinuous periods of intoxication, as defined in § 5-2-207(b)(1), caused by a substance such as alcohol or a drug;

(iii) Dependence upon or addiction to any substance such as alcohol or a drug

...

ARK. CODE ANN. § 5-2-301(6) (West 2014).

94. *PRIMAL FEAR* (Paramount Pictures 1996).

95. See *Dissociative Identity Disorder*, TRAUMA & DISSOCIATION PROJECT, <http://www.dissociative-identity-disorder.org/> (last visited Sept. 15, 2014). This source includes the description of the diagnosis previously referred to as “multiple personality disorder,” now identified in the current edition of the *Diagnostic and Statistical Manual of Mental Disorders* as dissociative identity disorder. *Id.*; see also *Bowen v. State*, 911 S.W.2d 555, 560-61 (Ark. 1995) (appealing a jury verdict of guilty when conflicting expert testimony regarding the diagnosis of a capital murder defendant as suffering from “multiple personality disorder” resulted in jury rejecting insanity defense with diagnosis questioned by forensic psychiatrist called by the State).

96. For a case illustrating several issues suggested by the multiple personality diagnosis, see *Bowen*, 911 S.W.2d 555.

97. Culture and language may play a direct part in determining whether the accused acted with the requisite criminal intent for guilt. In *American Playhouse: The*

addressed by recognized theories of justification or excuse. For example, in *A Reasonable Man*,⁹⁸ defense counsel (Gavin Hood) represents a native cowherd accused of homicide. In an attempt to protect his family, the cowherd had mistakenly killed his baby while trying to kill an evil spirit that he believed had invaded his home.⁹⁹ Defense counsel argues that the question of culpability must be assessed in terms of the accused and his culture's system of belief.¹⁰⁰

However, in a modern legal system, the problem of reconciling guilt with cultural norms that are predicated on recognition of supernatural realities may prove problematic.¹⁰¹ Notions of culpability that rest on the exercise of free will – devoid of supernatural considerations – may clash with those alternative views of reality in multicultural societies, which purport to respect unorthodox systems of belief held by minorities not fully assimilated in the larger community. To respect diversity of belief within a generally applicable system of criminal law likely would lead to varying applications of the law, undermining the necessary uniform expectations of conduct and application of the criminal laws.

A similar conflict between the secular ground of the legal system and supernatural systems of belief is illustrated in *The Exorcism of Emily Rose*,¹⁰² a film based on a true story involving the death of a young woman during an exorcism performed by a Catholic priest (Tom Wilkinson) who is subsequently tried for negligent homicide.¹⁰³ The question of guilt is brought into sharper focus by defense counsel's (Laura Linney) own skepticism.¹⁰⁴ The plot raises the question of whether the accused priest should be shielded from prosecution because of the sincerity of both his and the victim's shared beliefs and the victim's willingness to endure the ritual to escape the spiritual torment that could not be addressed by conventional psychology.¹⁰⁵

Ballad of Gregorio Cortez, defense counsel (Barry Corbin) discovers that the conflict giving rise to the homicide charged in the trial of his client (Edward James Olmos) arose from a translation error made by a deputy sheriff whose Spanish was inadequate, resulting in confusion over a witness's identification of a stolen horse as a stallion or mare. *American Playhouse: The Ballad of Gregorio Cortez* (Embassy Pictures June 29, 1982). For more on the actual events depicted in the film, which took place in Gonzales, Texas, in 1901, see Wikipedia, *Gregorio Cortez*, http://en.wikipedia.org/wiki/Gregorio_Cortez (as of Nov. 7, 2013, 16:40 GMT).

98. *A REASONABLE MAN* (African Media Entertainment 1999).

99. *Id.*

100. *Id.*

101. A similar theme is presented in *The Last Wave*, in which defense counsel (Richard Chamberlain) represents aboriginal defendants accused of murder. *THE LAST WAVE* (Australian Film Commission 1977). Defense counsel's representation leads him into an experience with the alternative spiritual reality that his clients shared with the victim. *Id.*

102. *THE EXORCISM OF EMILY ROSE* (Screen Gems 2005).

103. *Id.*

104. *Id.*

105. *Id.*

The defense lawyer, however, is capable of mounting an aggressive and sympathetic defense, regardless of her own questions of faith. Her capability is not compromised by any fear that her defense will lead to ridicule based on an incorrect perception that she must share the belief system of her client in order to argue on his behalf. In fact, while the ethical rules provide that counsel may refuse to offer evidence believed to be false, the applicable rule does not permit counsel to refuse to let the accused in a criminal case testify.¹⁰⁶

The complexity of questions suggesting a conflict between moral culpability and legal guilt does not characterize every prosecution, of course, and, often, there is a bright line that defense counsel, jurors, and the public will recognize, regardless of whether guilt can be excused in light of the particular moral considerations in a specific case. That line is likely to be obscured, however, when the character of the accused is not marred by a history of violence or criminality, but, instead, is socially admired, as in the case of the common herder and the uncommon priest. The role of the lawyer may not change with regard to the attractiveness of the client, but certainly, the public perception of counsel is likely to be influenced by its view of the accused.

II. THE RIGHT TO COUNSEL

Regardless of whether the evidence suggests or demonstrates that the criminal defendant is guilty of an offense, the accused is entitled to the assistance of an attorney to represent her if the punishment upon conviction includes the possibility of incarceration and the loss of her liberty.¹⁰⁷ The concept of the right to counsel is commonplace in popular media today, but this is almost certainly a product of the historical evolution and understanding of the right to counsel.¹⁰⁸ But in many films dealing with the apprehension and disposition of individuals accused of crimes, particularly those set on the Western frontier in the 1800s, the notion of a fair trial is often not well-developed and "justice" is the product of vigilantism.¹⁰⁹

The importance of counsel, as well as other basic procedural safeguards, is illustrated profoundly in *The Ox-Bow Incident*¹¹⁰ by the absence of safeguards common to criminal proceedings today.¹¹¹ Based on the classic West-

106. See MODEL RULES OF PROF'L CONDUCT R. 3.3 (1983) (providing in pertinent part: "(a) A lawyer shall not knowingly . . . (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, *other than the testimony of a defendant in a criminal matter*, that the lawyer reasonably believes is false.") (emphasis added).

107. See *infra* note 126 and accompanying text.

108. See *infra* notes 126-130 and accompanying text.

109. See, e.g., *THE OX-BOW INCIDENT* (Twentieth Century Fox 1943).

110. *Id.*

111. *Id.*

ern novel by Walter Van Tilburg Clark,¹¹² the story, set in 1885 Nevada, concerns the vigilante lynching of three strangers believed to have killed a local rancher and stolen his cattle.¹¹³

The leader of the three men, Donald Martin (Dana Andrews), a new resident in a nearby community who claims to have bought the herd to start his own spread, pleads their innocence, but unsuccessfully.¹¹⁴ Martin also complains about what amounts to the lack of due process for the three as the mob proceeds with a sham trial without the accused men being afforded counsel. The group of men, upon finding the three strangers guilty, prepares to hang them.¹¹⁵ Yet, seven members of the posse vote against the hanging. These members include two saddle tramps who somewhat reluctantly have joined the posse, Gil Carter (Henry Fonda) and Art Croft (Harry Morgan); Davies (Harry Davenport), the local hardware store owner who pleads with the posse to take the three back to town for trial; and Sparks (Leigh Whipper), an African-American preacher who ministers to the men.¹¹⁶ The posse's self-appointed leader, Major Tetley (William Eythe), dressed in a Confederate uniform, despite his questionable service in the Civil War, overrules the dissenters and orders the execution to proceed as the sun rises.¹¹⁷ This is an important symbolic point in the film – the light of the sun shines on the hanged men to show their innocence as the Sheriff arrives to tell them the rancher had not died.¹¹⁸ Carter then delivers a devastating indictment of lynching:

Major Tetley: This is only slightly any of your business, my friend. Remember that.

Gil Carter: Hangin' is any man's business that's around.¹¹⁹

Prior to being hanged, Martin writes a letter to his wife, saying goodbye and discussing the importance of the rule of law.¹²⁰ Later, after the posse's actions prove to be tragically misguided, Carter reads the letter to those responsible in the town's saloon:

My dear Wife, Mr. Davies will tell you what's happening here tonight. He's a good man and has done everything he can for me. I suppose there are some other good men here, too, only they don't seem to realize what they're doing. They're the ones I feel sorry for. 'Cause it'll

112. WALTER VAN TILBURG CLARK, *THE OX-BOW INCIDENT* (1940).

113. *THE OX-BOW INCIDENT*, *supra* note 109.

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

be over for me in a little while, but they'll have to go on remembering for the rest of their lives. A man just naturally can't take the law into his own hands and hang people without hurtin' everybody in the world, 'cause then he's just not breaking one law but all laws. Law is a lot more than words you put in a book, or judges or lawyers or sheriffs you hire to carry it out. It's everything people ever have found out about justice and what's right and wrong. It's the very conscience of humanity. There can't be any such thing as civilization unless people have a conscience, because if people touch God anywhere, where is it except through their conscience? And what is anybody's conscience except a little piece of the conscience of all men that ever lived? I guess that's all I've got to say except kiss the babies for me and God bless you. Your husband, Donald.¹²¹

Martin's passionate argument for due process – but ultimate failure to avert the lynching – expresses the essential truth that the “legal” system fails the law when it ignores justice. Central to the pursuit of justice is the concept of due process, affording the accused basic procedural protections designed to avoid injustice in the conviction of both the innocent, as the three men lynched in *The Ox-Bow Incident*, but the guilty as well, including the members of the posse who voted to hang them. Having hanged the innocent men, those members of the posse participating in their executions are, now, themselves, subject to the authority of the criminal law.¹²²

The accused's right to assistance of counsel is integral to ensuring the efficacy of due process protections; it lies at the heart of the due process guarantee.¹²³ The three men hanged in *The Ox-Bow Incident* had no lawyer to speak for them, and Martin's argument for basic fairness, while powerful, failed to transform the “trial” conducted by the posse into the type of proceeding which even its members acknowledged would have resulted had they decided to return the three men to town where the proceedings would have been held in a court and before a judge.¹²⁴ What is also likely true is that, while Martin's ability to speak to the mob and the mock trial were important plot devices in the story, vigilante justice on the frontier typically lacked even the formality of the Ox-Bow posse's process, in which the rather compelling evidence was first examined before the question of their guilt was decided by vote of the posse members. In films portraying more contemporary proceedings, the assistance of counsel is not only assumed but is essential to the story told.¹²⁵

121. *Id.*

122. *Id.*

123. See *infra* note 130 and accompanying text.

124. *THE OX-BOW INCIDENT*, *supra* note 109.

125. See *infra* note 130 and accompanying text.

The right to assistance of counsel in felony cases was established by the United States Supreme Court in *Gideon v. Wainwright*,¹²⁶ a key decision in the Court's selective incorporation of the protections afforded defendants in federal proceedings to apply in state court prosecutions.¹²⁷ Prior to *Gideon*, the Court had rejected arguments that the right to assistance of counsel ensured by the Sixth Amendment should be extended to include all felony offenses, rather than limited to capital prosecutions,¹²⁸ as the Court had earlier held in *Betts v. Brady*.¹²⁹ The *Gideon* majority explained its decision to overrule *Betts*:

Betts argued that this right is extended to indigent defendants in state courts by the Fourteenth Amendment. In response the Court stated that, while the Sixth Amendment laid down "no rule for the conduct of the states, the question recurs whether the constraint laid by the amendment upon the national courts expresses a rule so fundamental and essential to a fair trial, and so, to due process of law, that it is made obligatory upon the states by the Fourteenth Amendment."¹³⁰

Today, the right to assistance of counsel is understood to be a bedrock rule of constitutional criminal procedure. Moreover, the Sixth Amendment right is so well-grounded that an accused is entitled to representation by retained counsel of his choice and denial of that right constitutes error without

126. 372 U.S. 335, 343-45 (1963); *cf.* *Argersinger v. Hamlin*, 407 U.S. 25, 36 (1972) (holding that the right to assistance of counsel extends to misdemeanors). *But cf.* *Scott v. Illinois*, 440 U.S. 367, 373 (1979) (holding that the right to assistance of counsel only attaches where a loss of liberty results from the sentence, thus the Sixth Amendment guarantee is violated only if the defendant is sentenced to jail time). See *Alabama v. Shelton*, 535 U.S. 654, 674 (2002), for an opinion which impliedly questions *Scott* by holding that even the possibility of incarceration following conviction is unconstitutional if uncounseled. In *Shelton*, the court imposed a sentence that included probation and suspension after the defendant waived counsel without being advised of the right to court-appointed counsel. *Id.* at 658.

127. See *supra* note 80 (discussing the subject of "selective incorporation").

128. See *Powell v. Alabama*, 287 U.S. 45, 71 (1932) (requiring appointment of counsel in capital cases).

129. 316 U.S. 455, 471 (1942); see also *Bute v. Illinois*, 333 U.S. 640, 674 (1948) (affirming distinction between right to counsel in capital and non-capital cases as a matter of Fourteenth Amendment due process).

130. *Gideon*, 372 U.S. at 340 (citing *Betts v. Brady*, 316 U.S. 455, 465 (1942)). The story of *Gideon* was most skillfully told by the late Anthony Lewis in his masterpiece of legal reporting, *Gideon's Trumpet*. ANTHONY LEWIS, *GIDEON'S TRUMPET* (1964). The book provided the basis for a later Emmy-winning film, with Henry Fonda in the role of Clarence Gideon and Jose Ferrer as Abe Fortas. *GIDEON'S TRUMPET* (Worldvision 1980). Fortas was appointed by the Court to argue the case on behalf of Gideon and was later appointed to the Court by President Lyndon Johnson. *Abe Fortas*, THE OYEZ PROJECT, http://www.oyez.org/justices/abe_fortas (last visited June 9, 2014).

requiring any showing of prejudice.¹³¹ But the right does not require the appointment of counsel preferred by the accused who is unable to afford or otherwise unable to secure representation by counsel of choice,¹³² or when the choice of counsel would result in a serious risk of conflict of interest.¹³³ The Court has also held that the defendant has a right to refuse counsel and represent himself,¹³⁴ although this right is not absolute.¹³⁵

Prior to the Court's ruling in *Gideon*, the issue of representation was complicated by the fact that even appointment of capital counsel did not necessarily ensure that appointed counsel was sufficiently experienced, or interested, in capital defense to provide the effective assistance necessary for effective capital representation. In *Blind Faith*,¹³⁶ for example, an African-American lawyer, John Williams (Courtney B. Vance), struggling to leave criminal law for the more respected and lucrative world of civil practice in 1957 Brooklyn, is forced to take on the defense of his nephew who is charged with the murder of an Irish-American youth in a local park.¹³⁷ Williams cannot escape the familial obligation to put his expertise to work for the young defendant because no white lawyer will agree to take the racially-charged case.¹³⁸ Compounding counsel's conflicts in undertaking representation is the fact that the accused's father, John Williams' older brother, Charles (Charles S. Dutton), is attempting to become the first black officer to rise in the ranks of the police department.¹³⁹ Further, the police have likely beaten the accused in obtaining his confession,¹⁴⁰ during an interrogation conducted

131. *United States v. Gonzalez-Lopez*, 548 U.S. 140, 147-48 (2006).

132. *Wheat v. United States*, 486 U.S. 153, 159 (1988).

133. *Gonzales-Lopez*, 548 U.S. at 148 n.3 (citing *Wheat*, 486 U.S. at 159); see also FED R. CRIM. P. 44(c)(2) (providing that the trial court may inquire about potential conflicts of interest in counsel's representation and order a change in counsel if necessary to avoid an eventual attack on counsel's representation).

134. *Faretta v. California*, 422 U.S. 806, 819-20 (1975); see also *FIND ME GUILTY* (Yari Film Group 2006). In *Find Me Guilty*, the story of the longest mafia trial in United States history, the Government prosecutes multiple defendants for organized criminal activity. *Id.* One, Giacomo "Jackie" DiNorscio (Vin Diesel), chooses to represent himself at trial and asks the jury to find him alone guilty and permit the other defendants to return home to their families, refusing a prosecution offer to obtain his immediate freedom in return for testifying against the Lucchese organized crime family. *Id.* The jury acquitted all defendants. *Id.*

135. See, e.g., *McKaskle v. Wiggins*, 465 U.S. 168, 176-78, 183-84 (1984) (finding that defendant's right to self-representation is not violated by trial court appointment of stand-by counsel to ensure proceedings proceed in orderly fashion).

136. *BLIND FAITH* (Showtime Entertainment 1998).

137. *Id.*

138. *Id.*

139. *Id.*

140. *Id.*

without the suspect being afforded the right to assistance of counsel, which is meant to protect against coerced confessions.¹⁴¹

The duty of the criminal defense lawyer, whether retained to represent the defendant or appointed by the court due to the defendant's indigence, is to provide competent representation.¹⁴² This duty is implicit in the Sixth Amendment guarantee of effective representation by counsel¹⁴³ and by the general obligations imposed upon all counsel by the ethical rules governing the profession.¹⁴⁴

Counsel's representation, which protects the accused's right to a fair trial, may involve the representation of a defendant whose person or charged offense is particularly disfavored in the community. Regardless of the public disapproval of the client, defense counsel still bears the burden of representing the client zealously. The Supreme Court explained this duty in the context of a post World War II prosecution of a German countess who moved to the United States in the mid-1920s and was charged with conspiring with other agents to commit acts of espionage against the United States, a charge

141. The right to assistance of counsel during interrogation of an arrested suspect was established by the Supreme Court in *Miranda v. Arizona*, 384 U.S. 436, 469-71 (1966), while the use of coerced confessions has been routinely condemned by the Court. See, e.g., *Arizona v. Fulminante*, 499 U.S. 279, 285-88 (1991) (upholding state court's conclusion that violent threat by another inmate inducing defendant's statement rendered it coerced and subject to suppression); *Payne v. Arkansas*, 356 U.S. 560, 566-67 (1958) (finding that confession given by "mentally dull, 19-year-old youth" in response to promise to prevent mob from taking accused from custody was coerced, requiring reversal of conviction obtained through admission of statement, even though police chief did not personally assault suspect); *Brown v. Mississippi*, 297 U.S. 278, 286 (1936) ("It would be difficult to conceive of methods more revolting to the sense of justice than those taken to procure the confessions of these petitioners, and the use of the confessions thus obtained as the basis for conviction and sentence was a clear denial of due process.").

142. *Cuyler v. Sullivan*, 446 U.S. 335, 345 n. 9 (1980) ("A rule which would apply one fourteenth amendment test to assigned counsel and another to retained counsel would produce the anomaly that the non-indigent, who must retain an attorney if he can afford one, would be entitled to less protection . . . The effect upon the defendant – confinement as a result of an unfair state trial – is the same whether the inadequate attorney was assigned or retained.") (quoting *United States ex rel. Hart v. Davenport*, 478 F.2d 203, 211 (3d Cir. 1973)).

143. U.S. CONST. amend. VI. The Sixth Amendment provides, in pertinent part, "In all criminal prosecutions, the accused shall . . . have the assistance of counsel for his defense." *Id.* The right to "assistance of counsel" has been construed by the Supreme Court to be meaningless unless it necessarily provides for "effective assistance of counsel." *McMann v. Richardson*, 397 U.S. 759, 771 n. 14 (1970).

144. E.g., MODEL RULES OF PROF'L CONDUCT R. 1.1 (1983) ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *Id.* at R. 1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client.").

that carried a potential punishment of death.¹⁴⁵ In *Von Moltke v. Gillies*,¹⁴⁶ the Court considered the fairness of the proceedings in which the countess had been unable to afford counsel and entered a plea of guilty after discussing her case and plea options with two FBI agents who were also attorneys.¹⁴⁷ The Court ordered relief.¹⁴⁸ Justice Hugo Black discussed the right of the unpopular client to expect representation by counsel committed to her defense:

Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. It is this kind of service for which the Sixth Amendment makes provision. And nowhere is this service deemed more honorable than in case of appointment to represent an accused too poor to hire a lawyer, even though the accused may be a member of an unpopular or hated group, or may be charged with an offense which is peculiarly abhorrent.¹⁴⁹

The duty to represent a client charged with an offense that is “particularly abhorrent” will necessarily constitute a challenge for many lawyers; otherwise, there might be little reason for the Court to have noted that duty in the passage from *Von Moltke*. The consequence of undertaking the representation is that counsel may suffer the same public rejection as the client. Further, a client whose membership in an unpopular or hated group will result in counsel being identified with the group, rather than seen as merely performing an obligation to further the law’s interest in ensuring that the client receives due process of law in the prosecution process.

Another example of an unpopular client charged with an abhorrent offense is the trial of Casey Anthony, a Florida mother charged with the murder of her daughter, Caylee.¹⁵⁰ The prosecution and the popular press characterized Anthony’s demeanor as particularly hard-hearted and unfeeling.¹⁵¹ Anthony was tried for capital murder and acquitted.¹⁵² Her acquittal produced a firestorm of adverse public feeling.¹⁵³ The public’s reaction could well have engulfed her trial counsel.

Lost in the aftermath of the controversial acquittal, however, was evidence that the prosecution had relied on expert testimony, which was subse-

145. *Von Moltke v. Gillies*, 332 U.S. 708 (1948).

146. *Id.*

147. *Id.* at 716-17.

148. *Id.* at 726-27.

149. *Id.* at 725-26. This statement, reflecting Justice Black’s view, was joined by Justices Douglas, Murphy, and Rutledge. *Id.* at 709.

150. Kristen R. Brown, *Somebody Poisoned the Jury Pool: Social Media’s Effect on Jury Impartiality*, 19 TEX. WESLEYAN L. REV. 809, 824 (2013).

151. *Id.* at 825.

152. *Id.*

153. *Id.*

quently recanted as inaccurate by the testifying expert.¹⁵⁴ At trial, the State offered the expert's testimony that Anthony had conducted extensive computer searches targeting the word "chloroform," evidence suggesting that Anthony had researched the chemical for use in rendering her child unconscious.¹⁵⁵ After trial, the expert reformulated the computer program that had produced his conclusions about Anthony's computer searches.¹⁵⁶ The reformulation led the expert to believe that, in fact, Anthony had only searched for "chloroform" a single time, rather than 84 times – as he had testified at trial.¹⁵⁷ Although the expert reported his own error to prosecutors, they failed to take appropriate action to correct the impression his testimony had been designed to leave on the jury.¹⁵⁸

Anthony is but a single recent example of a client whose unpopularity could well have affected counsel's decision to accept representation or his approach to representing Anthony in the course of the trial. It obviously did not, and counsel's reputation was undoubtedly enhanced in many quarters by her acquittal. The acquittal spared the courts the reconsideration of the quality of the State's evidence in light of the expert's recantation of his "chloroform" search results. Had Anthony been convicted, there was every possibility that a reviewing court would have rejected a newly-discovered evidence claim¹⁵⁹ or an allegation that prosecutors deliberately suppressed the expert's recantation and new evidence, resulting in a violation of Anthony's right to

154. Lizette Alvarez, *Software Designer Reports Error in Anthony Trial*, N.Y. TIMES, July 19, 2011, at A4, available at <http://www.nytimes.com/2011/07/19/us/19casey.html> (last visited May 16, 2014).

155. *Id.*

156. *Id.*

157. *Id.*

158. *Id.* The New York Times article explained:

A former Canadian police sergeant who specializes in computer forensic analysis, Mr. Bradley said he first became suspicious of the data after he testified on June 8. He said he had been called to testify by the prosecution about his CacheBack software. Instead, he was asked repeatedly about the Sheriff's Office report detailing the 84 search hits on "chloroform," which he had not seen.

"I had translated the data into something meaningful for the police," he said. "Then I turned it over to them. The No. 1 principle for them is to validate the data, and they had the tools and resources to do it. They chose not to."

Id.

159. Newly discovered evidence is one of the least favored grounds for granting relief from a conviction under Arkansas law. In *Bennett v. State*, the Arkansas Supreme Court explained:

[T]his court has recognized that newly discovered evidence is one of the least favored grounds to justify granting a new trial. A new trial will not be granted because of perjury on an immaterial issue, or on a collateral issue, nor generally where the false testimony may be eliminated without depriving the verdict of sufficient evidentiary support.

821 S.W.2d 13, 15 (Ark. 1991) (citing *Williams v. State*, 482 S.W.2d 810 (Ark. 1972); *Little v. State*, 255 S.W. 892 (Ark. 1923)).

due process of law.¹⁶⁰ While her lead attorney, Jose Baez, demonstrated an aggressive approach to representing Anthony and would have undoubtedly challenged the suppression of the recantation had it been necessary, other criminal lawyers might have been reticent to do so for fear of damaging their on-going relationships with prosecutors.¹⁶¹

The problem of the unpopular client is central to the plot in *Music Box*, a film in which an experienced criminal defense lawyer, Ann Talbot (Jessica Lange), agrees to represent her father, Michael Laszlo (Armin Mueller-Stahl), in a deportation proceeding resulting from charges that he committed war crimes as a member of a Hungarian SS unit, the Arrow Cross or Special Section, during the final years of World War II.¹⁶² As counsel, Ann is forced throughout the film to address the crisis of her own identity, which is threatened by the allegations in the Government's case. Yet, Ann persists in aggressively defending her father.¹⁶³

But the nature of the charges and the public climate surrounding the proceeding is clearly overwhelming – or would be for a less passionate and skilled defense attorney.¹⁶⁴ In public, the case is marred by both supportive and opposing public demonstrations, with threats and acts of violence directed at Laszlo in the presence of his grandson, Ann's only child.¹⁶⁵

Ann is also forced to address the cynical posture of her father-in-law, Harry Talbot (Donald Moffat), a highly-regarded lawyer whose history as an OSS officer in the post-WWII period included recruitment of Nazi officials to build the anti-Soviet intelligence network in Europe and who expresses clear Holocaust-denier sympathies.¹⁶⁶ Harry not only threatens Ann's perception of her father's innocence by suggesting that he might, in fact, be guilty, but also undermines her relationship with his grandson by telling him that the Holocaust was exaggerated – a disclosure she incorrectly assumes was made by her own father.¹⁶⁷ Yet, she is dependent upon Harry and willing to use his

160. The prosecutor's failure to correct false testimony offered by its witness at trial or failure to disclose material evidence favorable to the defense constitutes a violation of constitutional due process protections. *See* *Alcorta v. Texas*, 355 U.S. 28, 30-31 (1957); *see also* *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (quoting *Napue v. Illinois*, 360 U.S. 264, 269 (1959) ("The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears.")).

161. Heather M. Kolinsky, *Just Because You Can Doesn't Mean You Should: Reconciling Attorney Conduct in the Context of Defamation with the New Professionalism*, 37 NOVA L. REV. 113, 140-42 (2012).

162. *MUSIC BOX* (Carolco Pictures 1989).

163. *Id.*

164. *Id.*

165. *Id.*

166. *Id.*

167. *Id.* It is, ironically, Harry Talbot who expresses anti-Semitism in the movie, rather than Ann Talbot's father, who is actually accused of war crimes. *Id.* When Ann Talbot tells her former father-in-law that the deportation case has been assigned to a Jewish judge (J.S. Block), it is Harry who raises the possibility of seeking his

connections and sources to aid her father, contrary to her professional instinct to rely on her skills, in a desperate attempt to save her case. She also must deal with the threat to her son from a public unsympathetic to war criminals – an unsympathetic environment that leads her son into fights at school.

Music Box clearly illustrates the problems inherent in representing a member of one's family in a proceeding in which the client's character will itself be a critical issue. Ann is warned by another attorney in her own firm, at a time when it still would have been possible for her to decline to represent Laszlo, "What do we know about our parents?"¹⁶⁸ The warning is reiterated by the federal prosecutor (Jack Burke) when offering to agree to a continuance to permit Ann to obtain alternative counsel for Laszlo, "You trust your heart, you gonna get it broken."¹⁶⁹

Music Box also suggests the problem implicit in Justice Black's admonition in *Von Moltke v. Gillie*: a notorious or unpopular client, or a client charged with truly heinous and horrific crimes, is still entitled to representation that necessitates "[u]ndivided allegiance and faithful, devoted service."¹⁷⁰ The Sixth Amendment demands no less, perhaps, but this is a demand likely to press the best of defense lawyers to the limit when charged with representing the most unattractive of criminal defendants. Some defense lawyers respond by accepting the challenge, while others may resort to an almost overly aggressive posture in order to demonstrate their fidelity to the client, the rule of law, or their own persona – or all three. Others simply fail. The problem of counsel's ineffectiveness is one that haunts the Sixth Amendment guarantee and the criminal justice system because even the proven failings of lawyers do not necessarily result in relief for the convicted client.

III. THE CLIENT'S EXPECTATION OF "EFFECTIVE ASSISTANCE"

The film *12 Angry Men* tells the story of protracted, heated jury deliberations about the guilt of a young Puerto Rican man accused of murdering his

recusal based on the fact that he is Jewish, not Laszlo, who shows no concern and merely asks his daughter if he is a "good" judge. *Id.* The script is flawed on this point, however, as Harry actually asks Ann if she might have "his verdict set aside." *Id.* In practice, the argument for disqualification would be made prior to the hearing and rendition of verdict, through a recusal motion. Jason Hutt, *A Wrong Without a Remedy: Proposing a Recusal Procedure for Circuit Court Judges*, 22 VT. L. REV. 627, 641-43 (1998). J.S. Block is the stage name used by United States District Judge James B. Zagel, Northern District of Illinois. See *J.S. Block – Biography*, IMDB, http://www.imdb.com/name/nm0088727/?ref=ttfc_fc_cl_t8 (last visited Nov. 3, 2013).

168. MUSIC BOX, *supra* note 162; *Music Box: Quotes*, IMDB, http://www.imdb.com/title/tt0100211/quotes?ref=ttfc_ql_trv_4 (last visited May 16, 2014).

169. *Id.*

170. *Von Moltke v. Gillies*, 332 U.S. 708, 725 (1948).

father.¹⁷¹ The defendant's guilt is debated with cleverness, cynicism, and savage logic. The film is particularly interesting because there is no discussion of the trial itself, or the actions of the prosecutor or defense counsel, included in the drama.¹⁷² The opening includes a monotonous, uninspired reading of the jury instructions by the trial judge and a short, but revealing, view of the scared face of the defendant.¹⁷³ The trial is recounted by the jurors in their discussion of what initially appears to be overwhelming evidence of the boy's guilt. Juror #8 (Henry Fonda) initially prompts a closer analysis of the trial when he is the lone juror voting to acquit when the first ballot is taken, and the others then call upon him to explain his doubts about the case.¹⁷⁴ He begins by questioning the reliability of the evidence in the prosecution's case, and he is subsequently aided by other jurors who join, successively, in his skepticism.¹⁷⁵ Juror #8 initially questions the defense lawyer's tactics:

Juror #8: According to the testimony, the boy looks guilty . . . maybe he is. I sat there in court for six days listening while the evidence built up. Everybody sounded so positive, you know, I . . . I began to get a peculiar feeling about this trial. I mean, nothing is that positive. There're a lot of questions I'd have liked to ask. I don't know, maybe they wouldn't have meant anything, but . . . *I began to get the feeling that the defense counsel wasn't conducting a thorough enough cross-examination. I mean, he . . . he let too many things go by . . . little things that. . .*

Juror #10: What little things? Listen, when these fellas don't ask questions it's because they know the answers already and they figure they'll be hurt.

171. 12 ANGRY MEN (United Artists 1957); see PAUL BERGMAN & MICHAEL ASIMOW, REEL JUSTICE: THE COURTROOM GOES TO THE MOVIES, 268 (1996) ("'Twelve Angry Men' may be the best film about jury deliberations ever made. It contains many realistic insights about the jury system"). See generally *State ex rel. Rosenthal v. Poe*, 98 S.W.3d 194, 195 (Tex. Crim. App. 2003) (reversing the trial court's decision to permit videotaping on the prosecutor's petition for writ of mandamus); Dee McAree, *Jurors' I.D.s To Be Sealed in Missouri*, NAT. L.J., Dec. 9, 2002 at A1 ("Whether citizens should eventually be permitted to view jury deliberations in actual cases emerged as a serious issue for professional and public debate based on a decision by a Texas judge to permit filming of jury deliberations in a death penalty trial in 2002."). *Reel Justice* includes an excellent bibliography of legal and related sources for the films included in the authors' discussion. BERGMAN & ASIMOW, *supra*.

172. 12 ANGRY MEN, *supra* note 171.

173. *Id.*

174. *Id.*

175. *Id.*

Juror #8: Maybe. It's also possible for a lawyer to be just plain stupid, isn't it? I mean it's possible.¹⁷⁶

Juror #10 (Ed Begley, Sr.) makes a valid point, although perhaps not for the right reason, because able trial counsel are trained to avoid asking questions that will elicit unfavorable or potentially unfavorable answers not known by counsel beforehand. The point is echoed in the following exchange:

Juror #3: [as Juror #8 sets up an experiment to see if the old man could reach his front door in 15 seconds] What do you mean, *you* wanna try it? Why didn't his lawyer bring it up if it's so important?

Juror #5: Well, maybe he just didn't think about it, huh?

Juror #10: What do you mean didn't think of it? Do you think the man's an idiot or something? It's an obvious thing!

Juror #5: Did *you* think of it?

Juror #10: Listen, smart guy, it don't matter whether I thought of it. He didn't bring it up because he knew it would hurt his case. What do you think of that?

Juror #8: Maybe he didn't bring it up because it would've meant bullying and badgering a helpless old man. You know that doesn't sit very well with a jury; most lawyers avoid it if they can.

Juror #7: So what kind of a bum is he, then?

Juror #8: That's what I've been asking, buddy.¹⁷⁷

Of particular note is a challenge made by Juror #7 (Jack Warden), who counters Juror #8's retrospective analysis of the evidence in the following exchange:

Juror #7: Look, the kid had a lawyer, didn't he? He presented his case, not you. How come you got so much to say?

Juror #5: Look, lawyers aren't infallible, you know.

Juror #7: Baltimore, please, uh, uh.

176. *Id.*; *12 Angry Men: Quotes*, IMDB, <http://www.imdb.com/title/tt0050083/quotes> (last visited May 16, 2014) (emphasis added).

177. *12 ANGRY MEN*, *supra* note 171; *12 Angry Men: Quotes*, *supra* note 176.

Juror #8: He was court-appointed.

Juror #7: Now, what's that supposed to mean?

Juror #8: Well, it could mean a lot of things. Could mean he didn't want the case, or he resented being appointed. It's the kind of case that brings him nothing, no money, no glory, not even much chance of winning. That's not a very promising situation for a young lawyer. He'd really have to believe in his client to put up any kind of a good case and as you pointed out a minute ago, obviously he didn't.¹⁷⁸



Juror #8 (Henry Fonda) argues for a reasonable doubt in *12 Angry Men*. 12 ANGRY MEN (United Artists 1957).

Juror #8 offers a number of explanations for trial counsel's uninspired performance in representing his client during the trial.¹⁷⁹ But the fact that the jury arrives at its own conclusions about the credibility of the evidence, of course, does not necessarily mean that trial counsel had not already considered alternative explanations and rejected them for sound reasons, as the foregoing exchanges suggest. But Juror #8's explanations are well-founded in both practice and in the common experience of many clients, jurors, and other observers in the courtroom. Even when defense counsel makes a polished and seemingly thoughtful presentation, the performance does not necessarily mean that the case was thoroughly investigated, witnesses skillfully interviewed, or defensive theories and argument soundly assessed. Impressive performance may, for the trial lawyer, simply be the product of innate skill and practice over time, often leading to a mistaken conclusion that her performance actually reflects dedication to the client's case.

178. 12 ANGRY MEN, *supra* note 171.

179. *Id.*

Indeed, a polished and seemingly thoughtful presentation does not necessarily reflect the criminal defense lawyer's personal belief in his client's innocence, although such belief may be important in convincing jurors to acquit. In the military court-martial drama *The Caine Mutiny*, a Navy JAG, Greenwald (Jose Ferrer), defends an officer, Maryk (Van Johnson), against charges that the officer committed serious misconduct in assuming command of a vessel based on the officer's perception that the commanding officer, Queeg (Humphrey Bogart), was mentally unbalanced and unfit for command.¹⁸⁰ But the officer had been improperly influenced to assume command by the ship's communications officer, Keefer (Fred MacMurray), who had worked to manipulate Maryk by trying to convince him of Queeg's mental incapacity – an incapacity that did not exist.¹⁸¹ After an acquittal by the military tribunal, the accused and his fellow officers, including Keefer, celebrate, but Greenwald interrupts, disparaging their jubilation.¹⁸² When questioned about his failure to join in the celebration, Greenwald initially explains that he thought the ship's officers had acted improperly.¹⁸³ Then, with an obvious reference to Keefer, Greenwald addresses the acquitted Maryk:

I got a guilty conscience. I defended you, Steve, because I found the wrong man was on trial. So I torpedoed Queeg for you. I had to torpedo him, and I feel sick about it.¹⁸⁴

Greenwald's admission of personal guilt for the successful defense of his client is instructive, precisely because it demonstrates that a skillful lawyer can represent even an individual whom he believes to be guilty, but may later despise his own actions in representing his client effectively. Greenwald's conduct and his retrospection reflect the very difficult duty imposed upon the criminal attorney of putting his client's interests above his own conscience.

In *United States v. Wade*, the Supreme Court held that the client's lawyer must be present during the post-indictment lineup conducted by police – a critical stage of the prosecution.¹⁸⁵ In a separate opinion, Justice White wrote about the different duties imposed upon prosecutors in the trials of criminal cases:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent,

180. *THE CAINE MUTINY* (Columbia Pictures 1954).

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*; *The Caine Mutiny: Quotes*, IMDB, <http://www.imdb.com/title/tt0046816/quotes> (last visited June 8, 2014).

185. 388 U.S. 218, 236-38 (1967).

our so-called adversary system is not adversary at all; nor should it be.¹⁸⁶

He then contrasted the prosecutor's obligation with that of defense counsel:

[D]efense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. The State has the obligation to present the evidence. Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. If he can confuse a witness, even a truthful one, or make him appear at a disadvantage, unsure or indecisive, that will be his normal course. *Our interest in not convicting the innocent permits counsel to put the State to its proof, to put the State's case in the worst possible light, regardless of what he thinks or knows to be the truth.* Undoubtedly there are some limits which defense counsel must observe but more often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.¹⁸⁷

Greenwald's expression of self-doubt over his actions in representing Maryk effectively and successfully echoes Justice White's description of criminal defense in cases in which the accused's guilt is known or suspected by his lawyer. This is precisely what the constitutional guarantee of effective assistance may entail and it is a complication of criminal defense representation that is reinforced by the ethical rules governing lawyers. Rule 3.1 provides:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. *A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding*

186. *Id.* at 256 (White, J. dissenting in part and concurring in part).

187. *Id.* at 256-58 (White, J., dissenting in part and concurring in part) (emphasis added).

*that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.*¹⁸⁸

The Rule recognizes the general principle that guilt is a legal conclusion dependent upon proof, rather than speculation or surmise. Consequently, defense counsel's burden to provide a defense challenging the prosecution's evidence is not dependent upon a belief in the client's innocence. In fact, even if the client admits her guilt to counsel, the ethical rules still regard the prosecution's ability to meet its burden of proof as the controlling issue in the criminal trial.¹⁸⁹ As a consequence, defense counsel's duty to contest the evidence offered by the prosecution overrides any personal knowledge of the client's guilt in discharging her ethical obligation.¹⁹⁰

The ethical rules also inform counsel's duties in representing the client, including the guilty client, in rather general ways. For example, the duty to provide competent representation is amplified in Rule 1.1: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."¹⁹¹

Other rules include directives to perform diligently and promptly;¹⁹² to inform the client of material developments essential to representation, including advising the client of any offer made by the prosecution with respect to a negotiated plea of guilty;¹⁹³ to keep confidential information disclosed to the attorney in the course of representation;¹⁹⁴ and the duty to avoid conflicts of interests arising from representation of other clients,¹⁹⁵ which typically limits counsel's representation of more than one defendant charged with the same offense.¹⁹⁶

188. MODEL RULES OF PROF'L CONDUCT R. 3.1 (1983) (emphasis added).

189. *See id.*

190. *See id.*

191. *Id.* at R. 1.1 (1983).

192. *Id.* at R. 1.3 (1983).

193. *Id.* at R. 1.4 (1983); *Rasmussen v. State*, 658 S.W.2d 867, 868 (Ark. 1983). *But see Peeler v. Hughes & Luce*, 909 S.W.2d 494, 496 & n.1 (Tex. 1995). In *Peeler*, the criminal defendant sued retained counsel for malpractice for failure to convey the United States Attorney's offer of transaction immunity for herself and her husband after eventually pleading guilty and providing testimony originally sought by the Government. *Id.* The court held that public policy precluded malpractice liability of criminal defense counsel, even for admitted breach of ethical duties, unless defendant could prove actual innocence and exoneration, finding that defendant's own conduct was cause of her claimed injury. *Id.* at 495. The court noted that the same public policy consideration led a majority of jurisdictions to similarly rule that a malpractice action may not lie unless the civil plaintiff could establish that she would have been exonerated. *Id.* at 497-98.

194. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983).

195. *Id.* at R. 1.7 (1983); *Id.* at R. 1.8 (1983).

196. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7 (1983) ("A concurrent conflict of interest exists if: (1) the representation of one client will be directly adverse to another client . . ."); *see, e.g., Greer v. Black*, 758 F.2d 327, 328 (8th Cir. 1985).

But, in assessing a criminal defense lawyer's performance in an individual case, the ethical rules operate in an aspirational sense only, and violation of an ethical rule will not necessarily demonstrate that counsel failed to render the effective assistance contemplated by the Sixth Amendment.¹⁹⁷ Allegations of ineffectiveness are typically met with one or more of three generic responses which, when applied to the facts of the individual case, will result in denial of relief on a claimed constitutional violation. The test articulated by the Supreme Court in *Strickland v. Washington* provides that, in order to prevail on a claim of ineffective assistance, a defendant must generally demonstrate that counsel's performance was defective¹⁹⁸ and that, but for the deficiency, there was a reasonable probability of a different outcome in the proceedings.¹⁹⁹

However, the fact that counsel's strategy or tactics may have failed to achieve the client's desired outcome does not necessarily mean that the representation provided was ineffective under the Sixth Amendment because the strategy or tactics may have been reasonable under the circumstances.²⁰⁰ Objectively reasonable choices made by the defense lawyer do not render her

The court in *Greer* described a not uncommon circumstance where petitioner, one of three brothers charged with robbery and represented by the same lawyer, argued that counsel's representation was compromised by conflicting interests following his conviction on charges of robbery and use of a firearm to commit a felony. *Id.*

197. HOWARD BRILL, ARKANSAS PROFESSIONAL AND JUDICIAL ETHICS, RULE 1.1, at 15-16 (4th ed. 1996) (citing *Wiseman v. Batchelor*, 864 S.W.2d 248, 250 (Ark. 1993) (stating that the rules do not necessarily provide a basis for civil liability under state law)) ("The relationship between the Rules of Professional Conduct and civil liability is unclear."); *see also*, *Dudley v. Dudley*, CA 98-12, 1998 WL 865030, at *1 (Ark. Ct. App. Dec. 9, 1998) ("The Rules are not designed for use as a basis for civil liability, but are to provide guidance to lawyers and to provide a structure for regulatory conduct through a disciplinary agency. . . . No cause of action should arise from a violation, nor should it create any presumption that a legal duty has been breached.").

198. 466 U.S. 668, 687 (1984).

199. *Id.* at 694.

200. *Id.* at 690-91. One of the most difficult decisions the defendant, with advice of counsel, must make in the criminal trial regards the decision to testify. While it may be important for jurors to hear the defendant deny the offense, it is often the case that other factors, such as the ability of the prosecutor to impeach the defendant with prior convictions pursuant to Evidence Rule 609, militate against the accused exercising his right to testify. FED. R. EVID. 609. Quite often, the decision is actually made by defense counsel. In *Presumed Innocent*, Rusty Sabich (Harrison Ford), a deputy prosecuting attorney is charged with the murder of another deputy prosecutor with whom both he, Sabich, and his boss, Prosecuting Attorney Raymond Horgan (Brian Dennehy), had had an affair. PRESUMED INNOCENT (Warner Bros. 1990). When Sabich tells his attorney, Sandy Stern (Raul Julia), that, as a prosecutor, he always knew he would obtain a conviction when the defendant refused to testify – his reason for deciding to testify to deny guilt – Sterne dismisses his reasoning and tells him that he will not testify at trial. *Id.*

representation substandard under *Strickland*.²⁰¹ Moreover, counsel's performance is presumed to be effective, meaning that the defendant has the burden of proving not only defective performance, but the very important second prong of *Strickland* as well – that there was a reasonable probability that the defective performance prejudiced his right to a fair trial.²⁰²

201. *Strickland*, 466 U.S. at 690-91. Of course, not all “strategic reasons” advanced to explain counsel's actions are objectively reasonable and, when they are unreasonable, they can support a claim of defective performance. See, e.g., *Simmons v. Luebbers*, 299 F.3d 929, 938-39 (8th Cir. 2002); *United States v. Villalpando*, 259 F.3d 934, 939 (8th Cir. 2001); *State v. Dillard*, 998 S.W.2d 750, 753 (Ark. 1999) (rejecting the decision not to call a witness who would have impeached complainant's veracity as an unreasonable strategy).

202. *Echols v. State*, 127 S.W.3d 486, 492-93 (Ark. 2003) (rejecting claim of ineffective assistance in trial counsel's failure to object to testimony by psychologist regarding information contained in defendant's mental health records due to lack of prejudice from trial counsel's strategic decision not to object). The *Echols* prosecution arose in the context of what is popularly known as the West Memphis Three case in which three teenage boys were convicted of capital murder of smaller boys, with Damien Echols being sentenced to death. *Echols v. State*, 936 S.W.2d 509 (Ark. 1996). During the trial, the State offered evidence that the motivation for the capital crime, the murder of a child, was related to Echols's interest in the occult. *Id.* at 519. Baldwin's counsel consistently sought to distance his client from any evidence of involvement or shared interest in the occult. *Id.* at 527-29. The prosecution has drawn national attention including two books published and three documentaries made about the events. MARA LEVERITT, *DEVIL'S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE* (2003); GUY REEL, MARC PERRUSQUA & BARTHOLOMEW SULLIVAN, *BLOOD OF INNOCENTS: THE TRUE STORY OF MULTIPLE MURDER IN WEST MEMPHIS, ARKANSAS* (1995); *DEVIL'S KNOT: THE TRUE STORY OF THE WEST MEMPHIS THREE* (Dimension Films 2013) (focusing on the issue of the teen defendants' guilt, the conduct of the prosecution, and the conduct of the defense in the case; screenplay by Scott Derrickson and directed by Atom Egoyan); *PARADISE LOST: THE CHILD MURDERS AT ROBIN HOOD HILLS* (HBO 1996) (Emmy award winning documentary directed and produced by Joe Berlinger and Bruce Sinofsky); *PARADISE LOST 2: REVELATIONS* (HBO 2000) (directed and produced by Joe Berlinger and Bruce Sinofsky). The Free the West Memphis Three website reported that 5,342,300 visits had been made to the site at the time of the recent defense filings. *Exonerate the WM3 Official Blog*, WM3.ORG, <http://www.wm3org.typepad.com/blog-deleted-20121011-7krqr/> (last visited June 8, 2014).

Eventually, the prosecution was stymied in the process of post-conviction proceedings, perhaps because of the extensive publicity and serious questions about the integrity of the State's evidence in the case. See Campbell Robertson, *Deal Frees 'West Memphis Three' in Arkansas*, N.Y. TIMES, A1 (Aug. 19, 2011), available at <http://www.nytimes.com/2011/08/20/us/20arkansas.html?pagewanted=all>. The convictions of the defendants were vacated and based on a negotiated plea agreement, they were freed upon newly entered “Alford pleas” that resulted in their release from further custody in return for guilty pleas that permitted them to preserve their claims of innocence. See *id.* The article notes, “In keeping with the tenor of this case since its first horrific hours, the circumstances of the release were bizarre, divisive and bewildering even to some of those who were directly involved.” *Id.*

The fact that counsel may know or suspect the client is morally guilty is typically not a determining factor in assessing the effectiveness of the lawyer's performance, although, in some instances, it might well suggest that counsel's performance could have readily been affected by that fact. For example, in *Smith v. Spisak*, the Court rejected a capital defendant's ineffective assistance challenge despite counsel's strategy in closing argument to characterize the mentally impaired defendant as "sick," "twisted," and "demmented," reminding jurors of the defendant's admiration for Hitler.²⁰³ The Court held that even this questionable line of argument did not support a finding that counsel rendered ineffective assistance where the record does not support a conclusion that a "more reasonable" argument would have, within reasonable probability, led to a different result.²⁰⁴ Nevertheless, it is not unreasonable to assume that Spisak himself might have questioned counsel's dedication to representing him effectively at his capital trial.

IV. COUNSEL'S APPROACH TO THE "GUILTY" CLIENT

For the character Tom Horn, and undoubtedly for many in the audience viewing the film *Tom Horn*, defense counsel Burke's response that the question of Horn's guilt "will never come up between [them]" is troubling.²⁰⁵ There is a sense that the lawyer should be concerned about his client's guilt or innocence because the jury undoubtedly will be. Yet, Burke, like many criminal defense lawyers, avoids the issue, perhaps as a way of remaining free from the critical knowledge that would impair his ability to provide a defense.²⁰⁶

A. A "Need" to Know Whether the Client is Guilty?

The approach of many lawyers that involves a deliberate decision not to inquire into the client's actual guilt may still serve the interests of both the lawyer and client by avoiding the creation of a moral barrier to effective representation. Many lawyers are simply unable to represent a client whom they know or believe to be guilty without experiencing guilt themselves. In particularly heinous crimes, the lawyer's duty to represent the client's interest may be compromised by identification with the victim of the crime, or by counsel's less-charitable concern that the public's identification of counsel with the accused will result in rejection in social situations or loss of business. Because criminal defendants often perceive their lawyer's dilemma, criminal defendants may proceed on the very logical assumption that if their lawyer knows or believes that they actually committed the crime charged and are guilty, the lawyer will either actively undermine the client's interest in the

203. 558 U.S. 139, 150-51 (2010).

204. *Id.* at 685.

205. TOM HORN, *supra* note 1.

206. *Id.*

defense of the case or fail to put forth a maximum effort on the client's behalf.

The client's fear that the "truth" will make counsel free to disregard the client's interest and lead to her conviction, rather than her "freedom,"²⁰⁷ is illustrated in the Australian film, *Breaker Morant*.²⁰⁸ In the film, Morant (Edward Woodward), an Australian army officer, and two subordinates, Handcock (Brian Brown) and Witton (Lewis Fitz-Gerald), fighting in the Boer War under British command, are court-martialed by British officers for executing Boer prisoners and killing a German missionary believed by Morant to be a Boer spy.²⁰⁹ The youngest and most idealistic of the three soldiers, Witton, learns that Morant and Handcock lied to their appointed military counsel about the shooting of the missionary, and confronts them outside the courtroom:

George Witton: [after Handcock has admitted to murdering the missionary] Major Thomas has been pleading justifying circumstances and now we're just lying.

Peter Handcock: We're lying? What about THEM? It's no bloody secret. Our graves were dug the day they arrested us at Fort Edwards.

George Witton: Yeah, but killing a missionary, Peter?

Harry Morant: It's a new kind of war, George. A new war for a new century. I suppose this is the first time the enemy hasn't been in uniform. They're farmers. They come from small villages, and they shoot at from behind walls and from farmhouses. Some of them are women, some of them are children, and some of them . . . are missionaries, George.²¹⁰

Handcock's outrage is based on the underlying theme of the film – that the British staged the court-martial of the Australians in an effort to portray

207. "And ye shall know the truth, and the truth shall make you free." *John* 8:32 (King James).

208. *BREAKER MORANT* (S. Australian Film Corp. 1980).

209. *Id.* Efforts to secure posthumous pardons for Morant and his co-defendants have proved futile thus far, but his cause continues to be championed by those who argue the lack of fairness in the court-martial and question the merits of the case against the Australian soldiers brought to further British policy in the Boer War. See Jasper Copping, *High Court "Pardon" Bid for Boer War Soldier "Breaker" Morant*, THE TELEGRAPH (July 25, 2013, 4:15 PM), <http://www.telegraph.co.uk/news/worldnews/australiaandthepacific/australia/10202624/High-Court-pardon-bid-for-Boer-war-soldier-Breaker-Morant.html>. For more on the pardon effort, see the website devoted to the case: *Justice Denied*, *BREAKER MORANT*, <http://breakermorant.com> (last visited Oct. 6, 2014).

210. *BREAKER MORANT*, *supra* note 208; *Breaker Morant: Quotes*, IMDB, <http://www.imdb.com/title/tt0080310/quotes> (last visited July 7, 2014).

British colonial policy as fair and even-handed in an effort to induce the Boers to accept a peace conference for a negotiated end to the war.²¹¹ Their prosecution is, thus, a sham designed only to achieve a political purpose and they are to be sacrificed as a key part of the overall scheme.²¹² As Australian subjects of the British Crown, their sacrifice is seen as acceptable by the commanding officer, Lord Kitchener (Alan Cassell).²¹³

Counsel appointed to represent the three Australian soldiers, while disdaining his appointment and the soldiers' alleged crimes, performs with remarkable brilliance in their defense despite his total lack of experience in criminal or trial practice prior to serving in the War.²¹⁴ Nevertheless, Morant and Handcock are reluctant to trust him with the truth regarding their involvement in the missionary's death.²¹⁵ By contrast, the charges based on execution of Boer prisoners are essentially admitted, except for the key fact that the executions had actually been ordered by British commanders in the field.²¹⁶ The film strongly suggests that the order to execute Boer prisoners was effectively suppressed at Kitchener's direction in order to conceal his own culpability and to demonstrate to the Boers and other parties the earnestness of the British in seeking a peace conference.²¹⁷ The conduct of the military tribunal facilitates their commander's purpose at the expense of fair process and the lives of the Australians.

This instinctive fear that counsel's allegiance will depend on belief in the client's innocence undoubtedly fuels denials of culpability that ultimately serve to compromise counsel's effectiveness. Yet the fear is understandable precisely because it is difficult to accept the legal fiction that counsel's performance should not be impaired – at least in terms of loyalty – by recognition of the client's guilt or probable guilt. Moreover, non-lawyer clients are also undoubtedly correct in assuming that many attorneys lack either the moral fiber or ego to remain dedicated to the client's cause if guilt or probable guilt is known.²¹⁸

211. BREAKER MORANT, *supra* note 208.

212. *Id.*

213. *Id.*

214. *Id.*

215. *Id.*

216. *Id.*

217. *Id.*

218. See Lloyd B. Snyder, *Is Attorney-Client Confidentiality Necessary?*, 15 GEO. J. LEGAL ETHICS 477, 478-79 (2002). Professor Snyder observes that despite confidentiality rules that arguably serve to insulate clients from disclosure of admissions against their interests:

[C]lients will distort facts and withhold information from their lawyers no matter how strict or loose the rules of confidentiality may be. . . . So long as clients are subject to the vicissitudes of human nature and the vagaries of human emotion, attorneys can expect less than complete and accurate information about their clients' legal problems.

Id. at 485.

Of course, there are instances in which the criminal defense lawyer's involvement with a client is so substantial that the lawyer becomes an accomplice in the offenses committed by the client or acts with actual knowledge of the continuing criminality. Perhaps the most obvious example in popular culture is Tom Hagen (Robert Duvall), serving as consigliere or, in Hagen's case, as in-house counsel, to the Corleone organized crime family in *The Godfather*.²¹⁹ But Hagen's culpability in the series of films is not without some parallel in real practice. The prosecution of the Gambino organized crime family²²⁰ reflects the Government's concern involving continuing representation of certain defendants provided by defense counsel. In cases involving the Gambino crime family, the Government sought defense counsel Bruce Cutler's disqualification based on allegations that charged impropriety in his relationships with his client and co-indictees, finally securing the disqualification.²²¹ Cutler was then sanctioned for contempt when he violated the trial court's order restricting counsel's extrajudicial statements regarding the case, which included Cutler telling the press that the Government had "thrown the Constitution out the window."²²²

Defense attorneys functioning like Tom Hagen in the *Godfather* series are undoubtedly the extreme exception rather than the rule, and many who are

219. THE GODFATHER (Paramount Pictures 1972); *The Godfather*, IMDB, <http://www.imdb.com/title/tt0068646> (last visited July 7, 2014). Duvall's character, Tom Hagen appears in the first of two sequels. See *The Godfather*, *supra*; see also THE GODFATHER: PART II (Paramount Pictures 1974); *The Godfather: Part II*, IMDB, http://www.imdb.com/title/tt0071562/fullcredits?ref_=tt_ql_dt_1 (last visited Oct. 30, 2013).

220. *United States v. Gambino*, 838 F. Supp. 749, 751 (S.D.N.Y. 1993).

221. *United States v. Locascio*, 6 F.3d 924, 932 (2d Cir. 1993). The extensive history of the litigation involving John Gotti and his attorney is detailed in *United States v. Locascio*:

In re Heimerle, 788 F. Supp. 700 (E.D.N.Y. 1992) (motion to quash subpoena); *United States v. Gotti*, 787 F.Supp. 319 (E.D.N.Y. 1992) (motion by media for transcripts of jury voir dire during trial and of side bar conferences); *United States v. Gotti*, 784 F. Supp. 1017 (E.D.N.Y. 1992) (motion for bill of particulars); *United States v. Gotti*, 784 F. Supp. 1013 (E.D.N.Y. 1992) (motion to disclose names of jurors in two prior trials); *United States v. Gotti*, 784 F. Supp. 1011 (E.D.N.Y. 1992) (defendants' motion for writ of habeas corpus *ad testificandum* to compel production of prison inmate and participant in witness protection program to testify); *United States v. Gotti*, 782 F. Supp. 737 (E.D.N.Y. 1992) (motion to disqualify attorneys); *United States v. Gotti*, 777 F. Supp. 224 (E.D.N.Y. 1991) (motion to empanel an anonymous and sequestered jury); *United States v. Gotti*, 776 F. Supp. 666 (E.D.N.Y. 1991) (motion to reconsider order of detention); *United States v. Gotti*, 771 F. Supp. 535 (E.D.N.Y. 1991) (motion to suppress electronic surveillance; for *Franks v. Delaware* hearing; for audibility hearing); *United States v. Gotti*, 755 F. Supp. 1159 (E.D.N.Y. 1991) (motion to modify conditions of detention); *United States v. Gotti*, 753 F. Supp. 443 (E.D.N.Y. 1990) (motion to close bail hearing to public).

171 F.R.D. 19, 22 & n. 1 (E.D.N.Y. 1997).

222. *United States v. Cutler*, 58 F.3d 825, 829 (2d Cir. 1995).

not functioning as accomplices in their clients' criminal enterprises are likely to approach the issue of a client's guilt much like the defense lawyer in *Tom Horn*. There is a practical reason for this: just as a client's reasonable fear that defense counsel's knowledge of the client's actual guilt may compromise counsel's loyalty in representing the client's interest in the case, counsel may fear losing the ability to assert innocence. That is, the attorney may prefer to have no admission of actual guilt in order to maintain a certain ethical neutrality that can serve not only to allay the client's concerns but also to leave the attorney free to aggressively assert the client's innocence. Once the client admits actual guilt, for instance, counsel's ability to present the defense case – particularly if the client decides to exercise his right to testify²²³ – may well be impaired. This happens when the client persists in testifying to facts that the lawyer knows to be false. Once the client presents perjured testimony, the lawyer cannot facilitate his false testimony without subjecting himself to potential criminal liability or ethical discipline.²²⁴ A refusal to facilitate known perjured testimony will not constitute ineffective assistance.²²⁵

Sometimes, it turns out that actual knowledge of the client's guilt will prove central to defense counsel's ability to make wise strategic choices with regard to alternative courses of action in representing the client. This is particularly true in two contexts. First, recognition of guilt may lead the lawyer and client to a more realistic point in considering plea bargaining options because a persistent assertion of moral innocence may limit counsel's options in negotiating on behalf of the client. This is particularly true where a favorable guilty plea recommendation will ultimately require the defendant to admit guilt²²⁶ in the course of the plea proceeding to obtain the sentencing or other benefits offered by the prosecution, such as dismissal of counts or reduction in the degree of the offenses charged, in return for the guilty plea. When a client persists in claiming innocence, it becomes difficult for counsel to facilitate the plea because the attorney may be required to inform the client that he will be required to admit guilt in order to obtain the benefits of the

223. PRESUMED INNOCENT, *supra* note 200.

224. *Nix v. Whiteside*, 475 U.S. 157, 168-69 (1986).

225. *See, e.g., id.* at 170. In *Nix*, the client admitted his intent to commit perjury to counsel, who then tried to persuade him not to do so, threatening to withdraw from further representation and advise the court of the reason for his withdrawal motion. *Id.* The Supreme Court noted that the Iowa Supreme Court had found that counsel acted properly based on state ethical rules and the state statute criminalization subornation of perjury. *Id.* at 162 (citing *State v. Whiteside*, 262 N.W.2d 468 (Iowa 1978)).

226. For instance, a guilty plea must typically be supported by a factual basis for the plea, determined by the trial court at the time the defendant enters the plea. *See, e.g.,* ARK. R. CRIM. P. 24.6 (requiring the court to make inquiry into the factual basis for the plea). The defendant's admission of guilt may be sufficient. *McDaniel v. State*, 708 S.W.2d 613 (Ark. 1986); FED. R. CRIM. P. 11(b)(3) ("Before entering judgment on a guilty plea, the court must determine that there is a factual basis for the plea.").

negotiated plea. A defendant who affirms guilt in order to obtain the benefits of the plea bargain, even if necessary to avoid the possibility of suffering a death sentence at trial, will not be able to challenge the conviction later by claiming that he was actually innocent and that his guilty plea was coerced.²²⁷

Alternatively, in other circumstances, counsel's strategic decision-making will be informed by an understanding of the client's culpability, although an initial impression may give rise to different information in the course of the trial itself. In *Young Mr. Lincoln*, an inexperienced Lincoln (Henry Fonda) assumes the responsibility for representing two brothers charged with the murder of a townsman killed on the evening of the county fair when the defendants and their family had ventured from their farm to enjoy the day's entertainment.²²⁸ As a mob gathers when the Clay brothers are arrested at the scene, Lincoln approaches their mother and offers his services in a rather unsophisticated, but direct, way: when Mrs. Clay asks who Lincoln is, he responds: "I'm your lawyer, ma'am."²²⁹ Lincoln saves the boys from lynching by the mob.²³⁰

In preparing for trial, Lincoln visits Mrs. Clay at the family farm and, in the course of their conversation, he asks her directly which of her two sons actually killed the victim, Scrub White.²³¹ Both had confessed to the crime.²³² She refuses to name either and when Lincoln asks why both confessed, she explains that one confessed because he was the older, while the other confessed because his older brother was married and had a child.²³³

Lincoln drops the issue, but at trial the prosecuting attorney calls Mrs. Clay to the stand, and in a desperate and despicable attempt to force her to identify which of her sons killed White, offers to allow the other son to avoid a death sentence in the process.²³⁴ Under intense examination, Mrs. Clay breaks down, causing Lincoln to intercede forcefully on her behalf, explaining that as a mother she could never make the choice to save one son at the

227. See *North Carolina v. Alford*, 400 U.S. 25 (1970) (finding that an accused's protestation of his innocence of the offense for which he pled guilty in order to avoid possible imposition of a capital sentence would not provide a constitutionally-required basis for setting aside his conviction). The Court explained that an accused likely facing conviction and a death sentence in light of a realistic view of the evidence available to the prosecution might rationally opt to enter a guilty plea to avoid the possibility of execution while still believing in his own moral innocence. *Id.* at 37-38. The Court previously held in *Brady v. United States*, a federal prosecution, that the accused's decision to plead guilty to avoid the possible imposition of a death sentence was not impermissibly compelled in violation of the Fifth Amendment. 397 U.S. 742, 748 (1970).

228. *YOUNG MR. LINCOLN* (Twentieth Century Fox Film Corp. 1939).

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.*

234. *Id.*

expense of the other.²³⁵ She eventually causes the prosecutor to withdraw the offer in light of Lincoln's morally-persuasive argument.²³⁶ Lincoln's lack of actual knowledge of guilt proves fortuitous when he is able to show that another townsman, John Palmer Cass (Ward Bond), a deputy sheriff, actually killed the victim himself when he rushed to the scene to break up the fight.²³⁷ Lincoln cross-examines Cass after the deputy re-takes the stand and identifies the son whom he claims he had seen actually kill the victim.²³⁸ When Lincoln asks White how he could have seen the killing at that time of night, Cass replies that he could see clearly because it was "moon bright."²³⁹ Lincoln, having pressed the witness on the moonlight being critical to his observation, then impeaches Cass, showing that he lied by using the Farmer's Almanac to prove that the moon had set at the time of the murder.²⁴⁰

Lincoln's joint representation of the two brothers reflects what would today be considered an ethical violation²⁴¹ because he could not represent co-defendants, either of whom might well have implicated the other in the actual killing.²⁴² He, in a sense, would have faced the same problem as Mrs. Clay in being pressed by the prosecution to identify which of her sons was guilty in order to save the other son. Mrs. Clay could not do this because of her love for both sons. Lincoln could not have done this without violating his ethical obligation to the client who would be hanged for the crime.²⁴³ And, in light of current professional norms, knowledge that one brother had not actually killed the victim would have been powerful mitigating evidence in the sentencing phase that could have spared him a death sentence.²⁴⁴

Lincoln's lack of actual knowledge fortuitously saves both Clay sons from conviction.²⁴⁵ Because Mrs. Clay refused to tell him which of her sons she believed had killed White, Lincoln could not be tempted by the prosecution's offer for leniency for the less culpable client.²⁴⁶ He proceeded to trial

235. *Id.*

236. *Id.*

237. *Id.*

238. *Id.*

239. *Id.* See generally Roger W. Sinnott, *Astronomical Computing: Lincoln and the Almanac Trial*, SKY AND TELESCOPE 186 (Aug. 1990), http://www.skyandtelescope.com/wp-content/uploads/almanac_trial.pdf.

240. YOUNG MR. LINCOLN, *supra* note 228.

241. MODEL RULES OF PROF'L CONDUCT R. 1.7(a)(1) (1983). For the text of the rule, see *supra* note 196.

242. YOUNG MR. LINCOLN, *supra* note 228.

243. *Id.*

244. See, e.g., *Brady v. Maryland*, 373 U.S. 83, 84-86 (1963) (finding that prosecutor's failure to disclose to defense co-defendant Boblit's confession that he actually killed victim in capital felony murder prosecution violated due process because there was a reasonable probability that this admission would have resulted in Brady not receiving the death sentence).

245. YOUNG MR. LINCOLN, *supra* note 228.

246. *Id.*

assuming that one of the boys had killed White and the other was an accomplice, but in fact, he could not be certain which one was more culpable. Lincoln was forced to try the case ignorant of the fact that neither of his clients was guilty of the murder. Instead of one son being sentenced to death and the other sentenced to life, both were acquitted.²⁴⁷ This result is ironic, but it is also part of a glorified and fictionalized personification of President Lincoln produced for a Depression-era audience on the brink of World War.²⁴⁸

B. Guilt and Nullification

In contrast to the considerations that may impact counsel's decision-making when actual knowledge of the client's liability is uncertain, in many cases the facts will almost certainly show at trial that the client has committed the criminal act. The issue of counsel's actual knowledge is clearly important in developing a strategy when the representation requires counsel to construct a theory for acquittal, or mitigation of the client's culpability, because the development of the defensive theory proceeds from some admission of the apparent moral and legal culpability of the accused. Still, for many people, including criminal defense lawyers, actual knowledge of the client's apparent moral or legal culpability raises the precise question initially noted: "How can the lawyer defend the guilty client?"

In some cases, the explanation may simply be that the instincts, training, and experience of trial lawyers takes over and the moral question of guilt is relegated to the "back-burner," while counsel focuses on the issue of legal guilt and the client's interest in avoiding conviction or mitigating the potential sentence. That is evident in the character of Ann Talbot in *Music Box*. Ann must closely examine continuing disclosures of evidence of her father's guilt in order to serve her client's interest in avoiding deportation and trial for war crimes in his native Hungary.²⁴⁹ She works to mitigate her client's sentence even as the mounting evidence of his guilt causes her great internal conflict.

Yet, counsel's ability to disregard factual guilt may also reflect a moral stance that will likely be met with audience approval. In *A Time to Kill*, for instance, defense attorney Jake Brigance (Matthew McConaughey) advances a passionate and unorthodox defense on behalf of Carl Lee Hailey (Samuel L. Jackson), who admitted he killed the two racist white men who violently raped his ten-year-old daughter.²⁵⁰ The story begs for audience approval of Hailey's understandable, but illegal, act of vengeance. Yet, interestingly, despite Brigance's liberal sentiments and well-meaning empathy, Hailey re-

247. *Id.*

248. *Id.*; see *Young Mr. Lincoln*, IMDB, <http://www.imdb.com/title/tt0032155/> (last visited May 18, 2014).

249. *MUSIC BOX*, *supra* note 162.

250. *A TIME TO KILL* (Warner Bros. 1996).

fuses to acknowledge him as his friend and he is deliberately hostile in his explanation as to why:

Jake Brigance: We're going to lose this case, Carl Lee. There are no more points of law to argue here. I want to cop a plea, maybe Buckley will cop us a second-degree murder and we can get you just life in prison.

Carl Lee Hailey: Jake, I can't do no life in prison. You got to get me off. Now if it was you on trial . . .

Jake Brigance: It's not me, we're not the same, Carl Lee. The jury has to identify with the defendant. They see you, they see a yard worker; they see me, they see an attorney. I live in town, you live in the hill.

Carl Lee Hailey: Well, you are white and I'm black. See Jake, you think just like them, that's why I picked you; you are one of them, don't you see? Oh, you think you ain't because you eat in Claude's and you are out there trying to get me off on TV talking about black and white, but the fact is you are just like all the rest of them. When you look at me, you don't see a man, you see a black man.

Jake Brigance: Carl Lee, I'm your friend.

Carl Lee Hailey: We ain't no friends, Jake. We are on different sides of the line, I ain't never seen you in my part of town. I bet you don't even know where I live. Our daughters, Jake; they ain't never gonna play together.

Jake Brigance: What are you talking about?

Carl Lee Hailey: America is at war and you are on the other side. How's a black man ever going to get a fair trial with the enemy on the bench and in the jury box? My life in white hands? You Jake, that's how. You are my secret weapon because you are one of the bad guys. You don't mean to be but you are. It's how you was raised. Nigger, negro, black, African-American, no matter how you see me, you see me different, you see me like that jury sees me, you are them. Now throw out your points of law Jake. If you was on that jury, what would it take to convince you to set me free? That's how you save my ass. That's how you save us both.²⁵¹

251. *Id.*; *A Time to Kill: Quotes*, IMDB, http://www.imdb.com/title/tt0117913/quotes?ref_=ttpl_ql_trv_4 (last visited July 8, 2014).

Later in the film, Brigrance's thought-provoking closing argument advances the most compelling argument for jury nullification:²⁵² the fear shared by many that the victim will never receive justice at the hands of a legal system in which technicalities, incompetence, and racial discrimination may still thwart the rule of law. Retired law professor Lucien Wilbanks (Donald Sutherland), advising Brigrance in the case, notes the tension inherent in nullification: "If you win this case, justice will prevail, and if you lose, justice will also prevail. Now that is a strange case."²⁵³

In *A Time to Kill*, Jake Brigrance's strategy in challenging Carl Lee Hailey's jury to reject the logical and factually supported conclusion that Hailey deliberately killed his daughter's assailants – intentional murder – in favor of acquittal is undoubtedly made far easier to accept as an act of vigilante justice that can be rationalized by the film audience.²⁵⁴ The victims are, after all, hardly sympathetic in the offense they committed and in their own lack of remorse for their actions.²⁵⁵ Similar acts of revenge like Hailey's occur in actual cases but do not result in acquittal.²⁵⁶

252. For an interesting, but unorthodox view supporting jury nullification, see the opinion of Judge David Bazelon, concurring in part and dissenting in part in *United States v. Dougherty*, 473 F.2d 1113, 1117, 1138 (D.C. Cir. 1972), in which the defendant protestors opposed to the Vietnam War had broken into corporate offices of Dow Chemical, the maker of chemical weapons used by American troops during the war, and destroyed documents and damaged property. *Id.* at 1118-19. The defendants unsuccessfully argued for leave to represent themselves in the proceedings, apparently attempting to transform the trial into guerilla theater to give themselves a public forum for attacking the war. *Id.* The claimed right to rely on nullification as a theory of defense was addressed and rejected by the majority in light of the history of the jury trial system. *Id.* at 1130-37, 1144 (Adams, J., concurring). Judge Bazelon offered a contrary view:

My own view rests on the premise that nullification can and should serve an important function in the criminal process. I do not see it as a doctrine that exists only because we lack the power to punish jurors who refuse to enforce the law or to re-prosecute a defendant whose acquittal cannot be justified in the strict terms of law. The doctrine permits the jury to bring to bear on the criminal process a sense of fairness and particularized justice. The drafters of legal rules cannot anticipate and take account of every case where a defendant's conduct is "unlawful" but not blameworthy, any more than they can draw a bold line to mark the boundary between an accident and negligence. It is the jury – as spokesman for the community's sense of values – that must explore that subtle and elusive boundary.

Id. at 1141-42 (Bazelon, J. concurring in part and dissenting in part).

253. A TIME TO KILL, *supra* note 250; *A Time to Kill: Quotes*, *supra* note 251.

254. A TIME TO KILL, *supra* note 250.

255. *Id.*

256. *E.g.*, *State v. Arrasmith*, 966 P.2d 33 (Idaho App. 1998). The defendant's teenage daughter left home with her boyfriend and they moved in with another couple who offered them a place to stay at their automobile repair shop. *Id.* at 38. After the boyfriend was "kicked out" shortly thereafter, the daughter was subjected to repeated sexual assaults by the couple and used methamphetamine and marijuana with them.

In contrast to the murder statute in *A Time to Kill*, the issue of factual guilt may give rise to a straightforward attack on the legitimacy of the law upon which the criminal prosecution is based. This situation is illustrated by the defensive theory presented by Henry Drummond (Spencer Tracy), as counsel for Bertram Cates (Dick York), the high school biology teacher charged with teaching the theory of evolution contrary to state law in *Inherit the Wind*.²⁵⁷ The story is based on the real-life events in the trial of John Scopes in Dayton, Tennessee, in 1927,²⁵⁸ which featured nationally-known

Id. She eventually told her parents about her situation, explaining that she had failed to act sooner out of fear of what the husband might do. *Id.* The appellate court described her father's response:

Arrasmith took steps to aid the police in their investigation but became frustrated that the police had not arrested the Bingham and charged them with the sexual abuse and rape of his daughter. On May 17, 1995, wearing a gun in a shoulder holster and carrying another gun which he had partially concealed in a box, Arrasmith went to the Bingham's repair shop where he shot Ronald twenty-three times and Luella seven times. Luella had been shot six times in the back and Ronald's body was found under a vehicle he had been working on.

Id. The court rejected the appellant's arguments that he had been entitled to jury instructions permitting the jury to consider excluded evidence of the Bingham's predatory sexual practices in support of his "defense of others" theory, separate from the usual self-defense theory, but also recognized under Idaho Code § 19-202A, which provides:

No person in this state shall be placed in legal jeopardy of any kind whatsoever for protecting himself or his family by reasonable means necessary, or when coming to the aid of another whom he reasonably believes to be in imminent danger or the victim of aggravated assault, robbery, rape, murder or other heinous crime.

Id. at 39. The court rejected reliance on this theory of defense, however, explaining:

A defendant, however, could not be "coming to the aid" of a victim when the crime against the victim is long past, as in the cases of the young women allegedly abused by the Bingham in 1972, 1980 and early in 1995. To accept Arrasmith's interpretation of the statute would not only condone vigilantism but also imply that the legislature intended to authorize private citizens to kill offenders to protect victims of the offender's past crimes which, even if prosecuted and punished by the state, would not carry a punishment of death. Such a reading of the statute would lead to an absurd result.

Id. at 40. The court upheld the fixed life and twenty-five years to life concurrent sentences imposed in the case. *Id.* at 38, 48-49. Art may reflect life, but not in all cases, and Carl Lee Hailey likely benefitted from the fact that his fate rested with a fictional jury, acquitting him in a fictional case. A *TIME TO KILL*, *supra* note 250. Vigilantism was itself almost violently condemned in *The Ox-Bow Incident*. See *supra* notes 109-122 and accompanying text.

257. *INHERIT THE WIND* (Stanley Kramer Productions 1960). The film and stage play were based on the famous "Monkey Trial" of teacher John Scopes in 1927. *Id.* The stage play was co-written by Jerome Lawrence and Robert E. Lee. *Notes on Inherit the Wind*, UMKC.EDU, http://law2.umkc.edu/faculty/projects/ftrials/scopes/sco_inhe.htm (last visited July 8, 2014).

258. *Scopes v. State*, 289 S.W. 363 (Tenn. 1927).

advocates, William Jennings Bryan, appearing as special prosecutor, and Clarence Darrow as counsel for the defense.²⁵⁹ In the film, Matthew Harrison Brady (Frederic March), a national political figure and recognized expert on the Bible, travels to the fictional community of Hillsboro to advocate for the fundamentalist religious position he embraced.²⁶⁰

Because Cates has unquestionably violated the state statute,²⁶¹ Drummond develops a defensive strategy that involves attacking the statute in light of scientific advances that challenge the Biblical explanation of creation.²⁶² He brings recognized scientists and philosophical thinkers to testify at trial, only to have the trial court refuse to permit them to testify concerning the merits of Darwinism.²⁶³ Drummond's plea to offer scientific evidence is met with the clear edict of the statute that precludes Cates' exercise of academic freedom.²⁶⁴ This approach lies at the heart of Drummond's defense and underscores the philosophical and political conflict in the case.²⁶⁵ Drummond's intention of offering jurors the option of nullifying the express intent of the statute by acquitting Cates is reflected in an exchange with the local prosecutor:

Henry Drummond: For I intend to show this court that what Bertram Cates spoke quietly one spring morning in the Hillsboro High School is not crime. It is incontrovertible as geometry to any enlightened community of minds.

Prosecutor Tom Davenport: In this community, Colonel Drummond, and in this sovereign state, exactly the opposite is the case. The language of the law is clear, Your Honor. We do not need experts to question the validity of a law that is already on the books.

Henry Drummond: Well, what do you need? A gallows to hang him from?

Prosecutor Tom Davenport: That remark is an insult to this entire community.

259. *INHERIT THE WIND*, *supra* note 257.

260. *Id.*

261. On appeal, the state supreme court characterized the offense as teaching "a certain theory that denied the story of the divine creation of man, as taught in the Bible, and did teach instead thereof that man had descended from a lower order of animals." *Scopes*, 289 S.W. at 363.

262. *INHERIT THE WIND*, *supra* note 257.

263. *Id.*

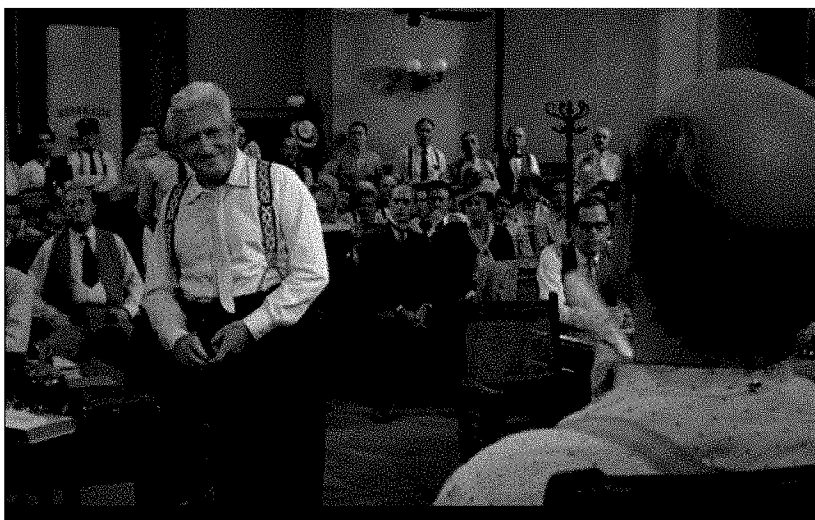
264. *Id.*

265. *Id.*

Henry Drummond: And this community is an insult to the world.²⁶⁶

Denied the use of his scientific experts, Drummond is forced to shift his theory of defense.²⁶⁷ He embarks on the dramatic strategy of calling Brady as an expert on Scripture and engaging in examination ultimately disclosing the narrow-mindedness of the fundamentalist thinking that has led to adoption of the statute Cates stands charged with violating.²⁶⁸ Cornering Brady into an irreconcilable position in which he purports to interpret the Scriptures based upon his belief that “God speaks” to him, Drummond sums up his argument for Cates in a rhetorical question:

Suppose God whispered into a Bertram Cates’ ear that an un-Brady thought could still be holy? Must men go to jail because they find themselves at odds with a self-appointed prophet?²⁶⁹



Drummond (Spencer Tracy) examines opposing counsel Brady (Fredric March), who has been qualified as an expert on the Holy Bible, on the literal accuracy of the Old Testament in *Inherit the Wind*. *INHERIT THE WIND* (Stanley Kramer Productions 1960).

Despite the withering exam of Brady that ultimately destroys not only his credibility but his person as well, the jury convicts Cates of the offense he has admittedly committed.²⁷⁰ The trial judge, influenced by the unfavorable publicity for the community that the case has generated, imposes a minimal fine of \$100 upon conviction, overruling Brady’s argument that the offense

266. *Id.*; *Inherit the Wind: Quotes*, IMDB, http://www.imdb.com/title/tt0053946/quotes?ref_=ttco_ql_trv_4 (last visited Nov. 6, 2013).

267. *INHERIT THE WIND*, *supra* note 257.

268. *Id.*

269. *Id.*; *Inherit the Wind: Quotes*, *supra* note 266.

270. *INHERIT THE WIND*, *supra* note 257.

calls for a far greater punishment that would deter others.²⁷¹ Drummond advises the court, however, that the fine will not be paid because he intends to appeal.²⁷²

The attempt to fashion a theory for jury nullification, whether based upon Carl Lee Hailey's arguably sympathetic search for justice for the rape of his daughter or Drummond's argument for intellectual honesty,²⁷³ addresses the question of responsibility, or guilt, in light of the larger goal of justice. A call for nullification may fail, but it does not rest on any goal of hiding or dismissing the accused's actions that have resulted in prosecution. Nullification is typically a defensive posture designed to use the trial process as political theater in which the law, legal system, or the political system that facilitates the legal system are directly challenged.²⁷⁴ Nullification may also simply be a desperate attempt to fashion a defense otherwise not contemplated by the legislators who have enacted the criminal statute.

C. Guilt and the Creative Defense Attorney

The more troubling ethical dimension to the issue of counsel's response to actual knowledge of the client's guilt is posed in *Anatomy of a Murder*,²⁷⁵

271. *Id.*

272. The Tennessee Supreme Court reversed the case based on the trial judge's legal error in imposing a \$100 fine because state law required a fine in excess of \$50 to be imposed by the trial jury. It closed its opinion with the following directive:

The court is informed that the plaintiff in error is no longer in the service of the state. We see nothing to be gained by prolonging the life of this bizarre case. On the contrary, we think the peace and dignity of the state, which all criminal prosecutions are brought to redress, will be the better conserved by the entry of a nolle prosequi herein. Such a course is suggested to the Attorney General.

Scopes v. State, 289 S.W. 363, 367 (1927).

273. Drummond explains at one point when challenged that he is attacking the community, "I didn't come here to make this town different. I came here to defend this man's right to be different." *INHERIT THE WIND*, *supra* note 257; *Inherit the Wind: Quotes*, *supra* note 266.

274. See, e.g., *BANANAS* (Jack Rollins and Charles H. Joffe Productions 1971). In the film, Fielding Melish (Woody Allen) plays an American citizen who joins a revolution against a stereotypical Latin American "banana republic" dictatorship in order to seduce an ardent opponent of the regime. *Id.* In the aftermath of the revolt's initial success, Melish becomes the newly-minted President of San Marcos following internal conflict in which leaders of the insurgency end up killing each other off. *Id.* On his way to address the United Nations, Melish is arrested and tried as a traitor to the United States. *Id.* The trial is a hilarious parody on the Chicago Seven trial of anti-Vietnam War activists accused of conspiring to disrupt the 1968 Democratic National Convention held in Chicago. *Id.*; see Douglas O. Linder, *The Chicago Seven Conspiracy Trial*, UMKC.EDU, <http://law2.umkc.edu/faculty/projects/ftrials/Chicago7/Account.html> (last visited Nov. 7, 2013).

275. *ANATOMY OF A MURDER* (Columbia Pictures 1959). The film is based on the novel of the same title by the late Michigan Supreme Court Justice John Voelker, who

in which defense counsel Paul Biegler (James Stewart) undertakes the representation of an Army officer, Manion (Ben Gazzara), who has killed Barney Quill, a bar-owner at the Thunder Bay Inn, an hour after learning that Quill raped his wife, Laura (Lee Remick).²⁷⁶ Biegler, who lost the prosecutor's office in the last election, is hesitant to take the case because Manion is extremely arrogant during their first meeting and appears to be a demanding client, asking Biegler about how much prior experience he has in defending cases and if he is competent to "handle" his case.²⁷⁷ After their initial meeting in the county jail, Biegler meets his old friend, an alcoholic lawyer named Parnell McCarthy (Arthur O'Connell), for lunch.²⁷⁸ McCarthy had learned of the homicide while Biegler had been away from his office on a fishing trip and pushes Biegler to take the case when Laura Manion phones to ask if Biegler will represent her husband.²⁷⁹ He questions Biegler about his interview with Manion, responding to Biegler's disparaging remarks about the soldier's demeanor: "You don't have to love him. Just represent him."²⁸⁰ He continues questioning Biegler:

Parnell McCarthy: Did you give the lieutenant the Well-Known Lecture?

Paul Biegler: If you mean, did I coach him into a phony story, no.

Parnell McCarthy: Maybe you're too pure, Paul. Too pure for the natural impurities of the law.²⁸¹

When Biegler remains hesitant to take on the case, McCarthy first asks him if he needs a fee and then opines that Biegler might be afraid to represent Manion.²⁸² When Biegler asks what McCarthy thinks he might be afraid of, McCarthy explains: "I think you might be a little bit afraid . . . that you might get licked."²⁸³

wrote under the pen name Robert Traver. *John Voelker (a.k.a. Robert Traver)*, MICHIGAN DEPARTMENT OF NATURAL RESOURCES, http://www.michigan.gov/dnr/0,4570,7-153-54463_19313_20652_19271_19357-118411--,00.html (last visited June 24, 2014). The book was accepted for publication the same month that the author was appointed to serve on the state supreme court and the success of the film and movie permitted him to retire from the court to pursue his writing career full time. *Id.*

276. ANATOMY OF A MURDER, *supra* note 275.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.*

281. *Id.*; *Anatomy of a Murder: Quotes*, IMDB.COM, http://www.imdb.com/title/tt0052561/quotes?ref_=tt_ql_3. (last visited June 24, 2014).

282. ANATOMY OF A MURDER, *supra* note 275.

283. *Id.*



McCarthy (Arthur O'Connell) challenges Biegler (James Stewart) to take Manion's murder case in *Anatomy of a Murder* over lunch, suggesting that Biegler's hesitance might be the result of his fear of losing the trial. ANATOMY OF A MURDER (Columbia Pictures 1959).

Biegler, apparently spurred on by McCarthy's challenge, returns to the jail to interview Manion where he explains the legal theories for defense in murder cases and further explains why Manion cannot rely on the first three: that someone else committed the crime; that it was an accident; or that the act was justified.²⁸⁴ When Manion claims the "unwritten law" justifies the murder of another who has raped his wife, Biegler responds, "The unwritten law's a myth, Lieutenant. There is no such thing . . . and anyone who commits a murder on the theory that it does exist has just bought himself room and board in the state penitentiary, maybe for life."²⁸⁵

Manion, exasperated, presses Biegler for assistance and responds to the lawyer's question about his reason for killing Quill by saying that he must have been "mad."²⁸⁶ When Biegler answers that anger is not a defense, Manion suggests madness in the sense of being out of his mind.²⁸⁷ At this point, Biegler terminates the second interview to leave the jail but tells Manion to think about "just how mad" he was at the time.²⁸⁸ Manion, whom Biegler had earlier told was "very bright," is left to concoct his claim of temporary insanity, which will eventually be presented as a defense based on *irresistible impulse* under Michigan law.²⁸⁹

284. *Id.*

285. *Id.*

286. *Id.*

287. *Id.*

288. *Id.*

289. In the film, Biegler and McCarthy research state law in the law library at the county courthouse the weekend before commencement of trial, searching for precedent that would support a defense based upon Manion's claimed inability to conform

his behavior to the requirements of the law while still able to distinguish right from wrong. *Id.* They find the precedent in *People v. Durfee*, where the state supreme court had approved an instruction on mental state given by the trial judge in a murder trial that explained to the jury, in pertinent part:

Some men are very bright, – others are very dull; but they are held accountable. Perhaps it would be enough to say – and to leave it right here – that if, by reason of disease, the defendant was not capable of knowing he was doing wrong in the particular act, or if *he had not the power to resist the impulse to do the act by reason of disease or insanity*, that would be an unsound mind. But it must be an unsoundness which affected the act in question, and not one which did not affect it. There is a simple question for you. You have heard the evidence in the case, you know what the circumstances are, and you can judge from all the evidence in the case – including the transaction itself, and his conduct at the time – whether or not he exhibited evidences which leave a reasonable doubt in your minds of the soundness of his mind in that transaction. *Did he know what he was doing, – whether it was right or wrong? [A]nd if he did, then did he know or did he have the power – the will power – to resist the impulse occasioned?* You are not to draw the inference because a man acts frantically mad and angry – very angry – that he does not resist the impulse – that that is unsoundness of mind. [This unsoundness must be the result of a disease, and not the result of his having allowed his passions to run until they have become uncontrollable. We frequently meet men in courts of justice who claim that they have committed a crime because they were drunk. The law holds them responsible, because they should not have got drunk; they should not have formed the habit. So the law requires of a man that he will curb his passions, and restrain himself, and, if he does not do it, holds him accountable, unless it is by reason of disease, which renders him unable to do it.]

29 N.W. 109, 111-12 (Mich. 1886) (emphasis added). There is an inherent tension within this explanation, however, because the trial court initially explains that the impairment of the accused's power to resist the impulse must be the result of disease or insanity, yet later, it restated the test in terms of whether the actor had "the power – the will power – to resist the impulse." *Id.* The latter phrasing did not require jurors to find that the inability to resist the impulse resulted from disease or insanity. *Id.* In *Anatomy of a Murder*, the military psychiatrist testifying on Manion's behalf (Orson Bean), bases his conclusion on Manion's dissociative state of mind, and he rejects any suggestion that Manion suffered from psychosis or neurosis or was unable to distinguish right from wrong. ANATOMY OF A MURDER, *supra* note 275.

In *People v. Martin*, the Supreme Court cited *Durfee* for the proposition that state law recognizes a theory of impairment based on what was essentially the irresistible impulse test: "Did he know what he was doing, – whether it was right or wrong? And if he did, then did he know or did he have the power, the will power, to resist the impulse occasioned?" 192 N.W.2d 215, 219 (Mich. 1971). A year later, the court recognized abrogation of the irresistible impulse test by legislative reform of the state's insanity defense in *People v. Carpenter*, expressly noting *Durfee's* formulation. 627 N.W.2d 276, 281 n.7 (Mich. 2001). Subsequently, in *Metrish v. Lancaster*, the Supreme Court reversed the grant of habeas relief based on ex post facto application of law, holding that the retroactive application of *Carpenter* by state courts to deny the defendant reliance on the diminished capacity theory of defense that arose from *Durfee* did not deprive him of due process. 133 S. Ct. 1781, 1792 (2013). In short, Manion would have no mental impairment defense if tried tomorrow.

Biegler's conduct in explaining the alternative theories of defense and, in a sense, steering Manion in the direction of a mental state defense, is often used to illustrate the line between ethical and unethical behavior on the part of defense counsel.²⁹⁰ It is a very polished presentation, in large part because Manion is portrayed as "very bright," a narcissist able to understand where Biegler is suggesting their conversation should go and that he should develop an explanation for his actions that can be translated into a credible trial defense.²⁹¹ Manion's lack of remorse, reflected in his self-serving vindication for Quill's death as the penalty for the rape of his wife, Laura, suggests the darker side of the client – that his narcissism may actually be symptomatic of a psychopathic or sociopathic personality.²⁹² Biegler's ability to manipulate the jury at trial may also suggest something seen as a darker side of criminal defense – a willingness to obscure the search for truth in the trial based on counsel's urge to win the case, an urge that may well be traced to counsel's own narcissistic impulse.²⁹³

Biegler likely wins the case due to the testimony of a surprise witness, Quill's daughter, who manages the Thunder Bar Inn.²⁹⁴ Her loyalty to her slain father is eventually compromised by a significant piece of physical evidence she comes to realize has been in her possession since shortly after the killing, a pair of torn panties she recovered from the soiled clothes in the Thunder Bay Inn laundry.²⁹⁵ The panties match the description given by Laura Manion at trial of those ripped off of her during the rape.²⁹⁶

Biegler's self-characterization, when advising the court of his surprise witness, explains much about his rather lovable, but devious, character:

Paul Biegler: Thank you very much, Your Honor, we now have another rebuttal witness. The defense calls Mary Pilant to the stand.

Claude Dancer: Your Honor, we must protest this whole affair. The noble defense attorney rushes out to a secret conference and now the last minute witness is being brought dramatically down the aisle. The whole thing has obviously been rigged to unduly excite the jury. It's just another one of Mr. Biegler's cornball tricks.

Paul Biegler: Your Honor, I don't blame Mr. Dancer for feeling put upon. I'm just a humble country lawyer trying to do the best I can against this brilliant prosecutor from the big city of Lansing.

290. ANATOMY OF A MURDER, *supra* note 275.

291. *Id.*

292. *Id.*

293. See John Denvir, *The Ecstasy and the Agony*, PICTURING JUSTICE, <http://usf.usfca.edu/pj/mytake-denvir.htm> (last visited July 9, 2014).

294. ANATOMY OF A MURDER, *supra* note 275.

295. *Id.*

296. *Id.*

Judge Weaver: Swear the witness.²⁹⁷

Biegler wins the trial, but his triumph is marred by the successful manipulation evidenced by his client, Manion, throughout the film.²⁹⁸ When Biegler and McCarthy drive to the mobile home park where the Manions had been living to make arrangements for the payment of Biegler's fee, they find that the couple has fled, leaving Manion's note explaining that he was "seized by an irresistible impulse." In films, as in life, there are often instances of poetic justice.

V. CONCLUSIONS

The ethical dilemma posed in *Anatomy of a Murder* illustrates the often ill-defined line between a lawyer effectively representing his client by fully explaining the law to him – as McCarthy would say, in letting him find his own defense – and "coaching the defendant into a phony story," as Biegler initially characterized the "Well-Known Lecture."²⁹⁹ The continuum of potential behavior, and advice, might be seen as extending from failing to advise a client on the principles of law governing the case at all to providing a defense through fabrication of evidence designed to win an acquittal. Biegler's conduct falls somewhere along this line, within this continuum, and serves as a dramatic scenario for discussion of the appropriate application of ethical standards for criminal defense lawyers. For many non-lawyers and lawyers alike, Biegler's conduct will be seen as over the top, as unethical. For other lawyers, and for at least some "very bright" criminal defendants, he will likely be regarded as a cinematic hero, the lawyer dedicated to serving the interests of his clients. Or, perhaps, he was simply responding to his old friend McCarthy's challenge.

Surprisingly the problems posed by representing a client known by counsel to be guilty of the offense, as is the case in *Anatomy of a Murder*, are less troubling than those developed in other films surveyed in which issues of guilt are less precise.³⁰⁰ Counsel often must proceed without the client's trust, as in *Breaker Morant*³⁰¹ and *A Time to Kill*,³⁰² or despite counsel's dis-

297. Joseph N. Welch, counsel who represented the Army during the televised Army-McCarthy hearings in 1954, was cast in the role of Judge Weaver in *Anatomy of a Murder*. *Id.*; *Anatomy of a Murder: Trivia*, IMDB, http://www.imdb.com/title/tt0052561/trivia?ref=ttqu_q1_1 (last visited Nov. 3, 2013).

298. ANATOMY OF A MURDER, *supra* note 275; Orit Kamir, *Anatomy of Hollywood's Hero-Lawyer: A Law-and-Film Study of the Western Motifs, Honor-Based Values and Gender Values and Gender Politics Underlying Anatomy of a Murder*, 35 STUD. IN L., POL. & SOC'Y 67 (2005), available at http://sitemaker.umich.edu/Orit_Kamir/files/anatomyfinal.pdf.

299. ANATOMY OF A MURDER, *supra* note 275.

300. *Id.*

301. BREAKER MORANT, *supra* note 208.

302. A TIME TO KILL, *supra* note 250.

belief in the righteousness of the defense offered, as in *The Caine Mutiny*.³⁰³ On film, as in life, a lawyer's passionate belief in the moral innocence of the client may prove devastating when the application of the law demands punishment unjustly. For Atticus Finch in *To Kill a Mockingbird*, life must go on and he must raise his children to be responsible citizens, though he and his family are likely forever tainted by the unjust end to the life of his client, Tom Robinson.³⁰⁴

Sometimes, in life, as on film, the defense lawyer's triumph achieves the very goals professed by the system of justice. Lincoln's courtroom theatrics and common sense save his innocent clients from conviction and execution despite his own uncertainty about their innocence. And despite the conviction of Bertram Cates, Drummond's passionate defense of intellectual freedom in *Inherit the Wind* advances that cause, and the community's desire for punishment is defused by the small fine imposed on the teacher.³⁰⁵ True to the very dedication to free thought that has brought him to Hillsboro to defend Cates and the teaching of evolution in the public high school, Drummond refuses to acquiesce to even this obvious recognition by the court that the prosecution's case has been irreparably damaged as he tells the court that he will continue the fight by appealing the case.³⁰⁶

And finally, the work of lawyers on film reflects the tragedy that occasionally confronts the criminal lawyer in practice. Tom Robinson is killed when trying to escape from an unjust verdict.³⁰⁷ Breaker Morant's inexperienced and unprepared trial counsel, who puts up a valiant fight for the Australians who are to be sacrificed to advance British policy, returns to Australia to spend the remainder of his life as a recluse.³⁰⁸ Ann Talbot suffers the destruction of her family when she learns of her father's guilt as a war criminal in World War II after successfully representing him.³⁰⁹ In the end, she commits the ethical sin of violating the confidence of her client, her father, when she sends the most damning evidence she discovers to her opposing counsel at the Justice Department and the photographs documenting his guilt are published for the entire world, including her son, to see.³¹⁰ She violates her oath as a lawyer, whether as a result of her own humanity or hubris, in a desperate effort to rebuild her life while destroying it.³¹¹

An important virtue of film, as well as literature, is that it affords an opportunity to tell stories that people generally, from all stages of life, backgrounds and perspectives, may consider. Because the very nature of criminal

303. *THE CAINE MUTINY*, *supra* note 180.

304. *TO KILL A MOCKINGBIRD*, *supra* note 4.

305. *INHERIT THE WIND*, *supra* note 257.

306. *Id.*

307. *TO KILL A MOCKINGBIRD*, *supra* note 4.

308. *BREAKER MORANT*, *supra* note 208.

309. *MUSIC BOX*, *supra* note 162.

310. *Id.*

311. *Id.*

defense practice demands that counsel act in the client's interest rather than the public interest, including the preservation of a client's confidential disclosures and facts learned in the investigation of the case that may disserve the client, much of the life of a criminal lawyer can never be disclosed in a public forum. The very best films about criminal lawyers exist to give audiences the opportunity to understand why lawyers continue to suffer the indignity and pain that results from representing both the innocent and the guilty among us.

APPENDIX

This Article includes discussions and references to a number of films that are based on trials of criminal cases or in which a criminal trial is a relevant event in the plot. These are listed here with ratings, when available from the Internet Movie Data Base, the source for a majority of footnotes, using the IMDB 1-10 star rating, as voted by respondents to the website.³¹² In addition, the list also includes film ratings from the book *Reel Justice: The Courtroom Goes to the Movies* ("RJ") by Professors Paul Bergman and Michael Asimow where available, with one to four gavels used to designate poor to classic films, respectively.³¹³

12 ANGRY MEN (United Artists 1957) – IMDB 8.9/10; RJ 4

ANATOMY OF A MURDER (Columbia Pictures 1959) – IMDB 8.1/10; RJ 4

A REASONABLE MAN (African Media Entertainment 1999) – IMDB 6.9/10

A TIME TO KILL (Warner Bros. 1996) – IMDB 7.4/10

BANANAS (Jack Rollins and Charles H. Joffe Productions 1971) – IMDB 7.1/10; RJ 3

BLIND FAITH (Showtime Entertainment 1998) – IMDB 7.4/10

BREAKER MORANT (S. Australian Film Corp. 1980) – IMDB 7.9/10; RJ 4

FIND ME GUILTY (Yari Film Group Releasing 2006) – IMDB 7.1/10

GIDEON'S TRUMPET (Hallmark Hall of Fame Productions; Columbia Broadcasting System, television distributor 1980) – IMDB 7.3/10; RJ 4

HEAVENS FALL (Strata Productions 2006) – IMDB 6.8/10

312. INTERNET MOVIE DATABASE, http://www.imdb.com/?ref=mv_home (last visited June 17, 2014). Visitors to the website are able to continually vote for ratings of the movies. All ratings are based on those reported on the website on June 17, 2014.

313. BERGMAN & ASIMOW, *supra* note 171.

INHERIT THE WIND (Stanley Kramer Productions; United Artists, distributor 1960) – IMDB 8.2/10; RJ 4

JUDGMENT AT NUREMBERG (United Artists 1961) – IMDB 8.3/10; RJ 4

MIDNIGHT IN THE GARDEN OF GOOD AND EVIL (Malpaso Productions 1997) – IMDB 6.6/10

MUSIC BOX (Carolco Pictures 1989) – IMDB 7.3/10; RJ 2

PATHS OF GLORY (United Artists 1957) – IMDB 8.5/10; RJ 3

PRESUMED INNOCENT (Warner Bros. 1990) – IMDB 6.9/10; RJ 3

PRIMAL FEAR (Paramount Pictures 1996) – IMDB 7.7/10

RED CORNER (MGM 1997) – IMDB 6.2/10

THE BALLAD OF GREGORIA CORTEZ (Embassy Pictures for American Play-house Television Series, 1982) – IMDB 6.8/10

THE CAINE MUTINY (Columbia Pictures 1954) – IMDB 7.9/10; RJ 4

THE CHAMBER (Universal Pictures 1996) – IMDB 5.9/10

THE EXORCISM OF EMILY ROSE (Screen Gems 2005) – IMDB 6.7/10

THE GODFATHER (Paramount Pictures 1972) – IMDB 9.2/10

THE GODFATHER: PART II (Paramount Pictures 1974) – IMDB 9.1/10

THE OX-BOW INCIDENT (Twentieth Century Fox 1943) – IMDB 8.1/10; RJ 3

THE LAST WAVE (Australian Film Commission 1977) – IMDB 7.2/10; RJ 2

TO KILL A MOCKINGBIRD (Universal Pictures 1962) – IMDB 8.2/10; RJ 4

TOM HORN (Warner Bros. 1980) – IMDB 6.9/10

YOUNG MR. LINCOLN (Twentieth Century Fox 1939) – IMDB
7.7/10; RJ 3

WITNESS FOR THE PROSECUTION (Arthur Hornblower Productions
1957) – IMDB 8.5/10; RJ 4

