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Who Stole The Cookie From The Cookie Jar?: The Law and Ethics of Shifting Blame in Criminal Cases

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WHO STOLE THE COOKIE FROM THE COOKIE JAR?: THE LAW AND ETHICS OF SHIFTING BLAME IN CRIMINAL CASES

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Who stole the cookie from the cookie jar?
Number 1 stole the cookie from the cookie jar
Not me
Yes you
Couldn't be
Then who?
Number 2 stole the cookie from the cookie jar.[1]

INTRODUCTION

DENIALS are a basic and often automatic response to an allegation that we have committed some wrong. Every parent has heard "not me" more times than he or she wants to acknowledge. This common retort is reflected in the children's game above. The "not me" response is instinctive in young children, but as we mature, we learn that "not me" is often followed by the question: "If not you, then who?" Accordingly, we discover that denial is not nearly as effective unless we shift the blame to someone else. This phenomenon of childhood applies with equal force in criminal cases, where a defendant has been accused of wrongdoing.[2] Where that defendant denies responsibility, says "not me," and attempts to introduce evidence to address the "then who" question, what, if any, responsibilities does defense counsel have before engaging in blame-shifting behavior? Are there specific rules or considerations that apply in such situations? This Article will address those questions.

The issue of blame-shifting has appeared recently in a series of episodes on the popular television show "The Practice" as well as in

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1. The source of this verse is unknown.

2. "'I didn't do it, *someone else* did!' This claim is certainly among the most ancient and basic that a criminal defendant can make." David McCord, *"But Perry Mason Made It Look So Easy!": The Admissibility of Evidence Offered By a Criminal Defendant to Suggest That Someone Else Is Guilty*, 63 Tenn. L. Rev. 917, 919 (1996).

recent cases.[3] In analyzing this issue, Part I will initially focus on the situation in "The Practice."[4] It will set out the scenario from the show and discuss the responsibilities of the defense lawyers in presenting an alternative-perpetrator defense,[5] both from the standpoint of general ethical considerations and prevailing rules and standards of professional conduct. Part II will then explore the limitations on this type of blame-shifting found in rules of evidence. After questioning whether the evidentiary rules are consistent with our conclusions based on ethical analysis in Part III, Part IV will suggest that the prevailing evidentiary rules are wrong. Finally, this Article will conclude with proposals to change these rules to address the apparent disjunction between the perceived ethical obligations of reasonably

3. For example, the effort to shift blame to Columbian drug lords in the O.J. Simpson case, see McCord, *supra* note 2, at 972 n.251; the attempt to shift blame to the "Elohim City conspiracy" in the *McVeigh* case and the related effort to attack the police investigation, see *United States v. McVeigh*, 153 F.3d 1166, 1189-92 (10th Cir. 1998); and the recent attempt to shift blame to Abner Louima, the victim of brutality by New York City police officer Justin Volpe which, although it involved shifting blame to the victim, was highly publicized and precipitated much public reaction. Incidents of blame-shifting such as these have prompted one recent article on the subject and action by the Center for Community Interest to make lawyers liable for false statements made about third parties during trial. *See* Debra Baker, *Shredding the Truth*, ABA J. 40, 44 (October 1999); CCI Friday Fax (last modified June 4, 1999) <http://www.communityinterest.org/Friday_fax /ff060499.htm> (a publication of the Center for Community Interest). For a discussion of the related issue of shifting blame to victims, see Ellen Yaroshefsky, *Balancing Victim's Rights and Vigorous Advocacy for the Defendant*, 1989 Ann. Surv. Am. L. 135 (1990).

4. It may appear odd to some to use a fictional case as a basis for a discussion of a legal and ethical issue, but it sets out the problem well and has other significant advantages. Because it is fictional, we are privy to information that we normally would not have, or could not disclose (due to confidentiality considerations), that is helpful to the discussion. Of course, there is the issue of realism, but I find the development of the story to be reflective of the issues at stake, at least with regard to a defendant represented by private counsel, whether they are addressed realistically or not. Moreover, and equally important, it reflects what members of the public (or at least some segment of the TV-watching public) see as how lawyers conduct themselves. Many lay people believe TV accurately reflects the way lawyers behave. *See* Leonard E. Gross, *The Public Hates Lawyers: Why Should We Care?*, 29 Seton Hall L. Rev. 1405, 1407, 1424 (1999). In fact, a surprising number of people actually believe Perry Mason and Matlock are real lawyers. *See* Angelique M. Paul, *Turning the Camera on Court TV: Does Televising Trials Teach Us Anything About the Real Law?*, 58 Ohio St. L.J. 655, 656 n.6 (1997). "Most people get most of their information about law and lawyers from watching television and movies." Michael Asimow, *Section Watches a Little TV at Midyear Meeting*, Admin. & Reg. L. News, Spring 1999, at 1. Looking at this issue using a case which provides much background information and to which lawyers and members of the public can relate thus seems sensible.

5. This defense is sometimes called the SODDI defense, which "is popularly known in the trade as 'Some Other Dude Did It'." United States v. Lively, 817 F. Supp. 453, 462-63 & n.4 (D. Del. 1993); James Joseph Duane, *What Message Are We Sending to Criminal Jurors When We Ask Them to "Send a Message" With Their Verdict?*, 22 Am. J. Crim. L. 565, 627 (1995); *see also* McCord, *supra* note 2, at 920 (coining a new term for "SODDI" called "aaltperp" (alleged alternative perpetrator)).

zealous criminal defense attorneys and rules that improperly restrict that zeal.

I. "THE PRACTICE:" PLAN B[6]

The storyline in a series of episodes of "The Practice" began when the defendant, George Vogelman, arrived at the law offices of Donnell, Dole, Young & Frutt with a human head in his medical bag. Vogelman had a prior relationship with Ellenor Frutt, one of the partners in the firm, and he came to the firm seeking assistance. He told the attorneys that he had had a sexual encounter with a young woman the night before at a hotel and left to return home. In the morning, he found the victim's head in his medical bag in his car. He denied any involvement in her death and insisted she was alive when he left. The attorneys arranged for Vogelman to surrender to the authorities.

When the police investigated, they found the victim dead in the hotel room, with no indication of forced entry or anyone else having been present in the room. In addition, they found a small amount of the victim's blood in the defendant's car. Not surprisingly, the police charged Vogelman with murder.

Vogelman was a loner who had difficulty establishing sustained relationships with women. He continued to deny any part in the murder. He was represented by the firm, and more particularly by Ellenor Frutt and Eugene Young, experienced criminal defense lawyers. They believed his protestations of innocence and concluded that he must have been framed. They expended considerable resources in unsuccessfully investigating possibilities of who could have killed the victim, but eventually ran out of money to continue.[7]

As trial approached, they discovered that the victim had found her boyfriend with another woman shortly before her death. This could have possibly explained why she would have gone to a hotel with George Vogelman. They also discovered, in interviewing the victim's brother, that she had been spending a lot of time on the Internet talking to people she did not know.[8] Because they were looking for some evidence to show the jury that someone else could have killed the victim and framed Vogelman, Frutt and Young asked her brother to testify to that effect and he reluctantly agreed.

The trial progressed as expected. In a firm meeting prior to beginning the defense, a discussion ensued regarding how to proceed.

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6. This description is based on television episodes of the show aired primarily in October and November 1998. *See The Practice* (ABC television broadcast, Oct.-Nov. 1998).

7. They explored one lead, that the murderer might be "The Poet," a serial killer still at large, but the killing did not sufficiently fit his modus operandi. *See id.*

8. The lawyers requested that the police follow up on these leads, but the police declined to do so. *See id.*

One attorney suggested they rest without putting the defendant on the stand and urged a "burden of proof" defense. There was general agreement that such a defense was not likely to work. The obvious question, raised by Jimmy Berluti, the practical, down-to-earth attorney in the firm, was "If not George, who?" When Frutt responded that it was not their job to answer that question, Berluti reminded her that "It's the question the jury will ask." Frutt responded that she could not advance a theory she could not support. When the senior partner reminded them that the defense was "the police stopped looking; that's why we don't know," Berluti cautioned the attorneys that, on the facts of this case, the jury was unlikely to be persuaded by arguments relating solely to faulty police investigation.

After considerable argument about strategy, Lindsey Dole, one of the attorneys, asked why the boyfriend and brother had not been considered as possible suspects. She noted, looking through the file, that they had no official alibis. Frutt responded that they were checked out and were "choir boys," but Dole suggested that the attorneys "Plan B" them. After discussion it was agreed that if, after dissecting their statements, they were still viable suspects, both the boyfriend and the brother would be subjected to a "soft Plan B." While the attorneys recognized that this strategy was risky and had to be executed carefully so as not to backfire, a preliminary decision was made to proceed with the plan.

"Plan B" is the term used by the firm for blame-shifting. The plan involves examination of a witness in a manner designed to suggest that the witness, rather than the defendant, may have committed the offense. In its "hard" version, Plan B is designed to create a reasonable doubt by identifying a proposed alternative perpetrator on whom to shift the blame. In its "soft" version, which was planned here, the plan is designed to create doubt by providing a basis to argue a series of "what if's."

Young and Frutt met with Vogelman and presented the Plan B option to him. They explained the risks and dangers[9] and recommended that they go forward with a "soft Plan B" of both the boyfriend and brother. Although Vogelman claimed not to be "a big fan of accusing people falsely," he reluctantly agreed in light of the lack of options. Meanwhile, others in the firm investigated the whereabouts of the brother and the boyfriend on the night of the crime to make sure there was nothing that could rule them out.

In traditional TV fashion, just as Frutt was beginning her cross-examination of the boyfriend with an intent to engage in a soft Plan B,

9. They were concerned that the jury could erroneously view the alternative theory as one that the defendant was required to prove, and that they could thereby lose the benefit of being able to merely create reasonable doubt. In addition, they were concerned that, if not handled properly, the strategy could backfire and alienate the jury. *See id.*

she received a message indicating that the boyfriend's whereabouts were established for the time of the homicide by phone records. As a result, she backed off. Based on this setback, a decision was made to subject Steve Robin, the victim's brother, to a hard Plan B.

He was called as the next witness. Young elicited testimony from Robin that the victim had talked to someone on a chatline and he requested more details. The brother was unable to provide the requested information and indicated that he and his sister had not been very close. In response to that statement, Young elicited that there had been some tension between the victim and her brother over the effect of his failed business and his moving back home on their father, who was terminally ill. Through astute examination, and over the continuing objections of the prosecutor, Young developed a series of questions to suggest that Robin could have followed his sister to the bar where she met Vogelman and then to the hotel. After having the brother declared a hostile witness, Young asked a series of questions to confirm the brother's business failure, his substantial debts, his father having only eight months to live and his becoming the sole beneficiary of his father's will upon his father's death. He then questioned Robin to establish that he took lithium for depression and that no one could confirm his claim to have been at home on the night of the crime.

Young closed his examination by asking, "did you murder your sister and frame George Vogelman, follow her to the bar and go to the hotel, get the address by running her plates, make yourself the sole beneficiary, and plant her head in George Vogelman's car?" Of course, Robin answered an indignant "no," but the seeds had been planted. After suggesting that the brother may have been able to deal with sibling rivalry and his debts all at once, Young turned to another line of questioning. He asked if the police had ever questioned Robin about his involvement in the crime and elicited the expected negative answer. After some likely objectionable comments, Young concluded his examination.

Although the attorneys believed that the examination had been effective, Young was upset at having been forced to do it.[10] Again, in dramatic TV fashion, the father, enraged by Young's conduct, confronted him in the hallway and charged him with betraying their trust. He struck Young with his crutch. The trial then proceeded with George Vogelman's testimony denying involvement in the crime.[11]

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10. When Frutt told him he "did great," Young responded, "The kid lost his sister, I accused him of killing her and his dad is dying. Don't try to make me feel good." *See id.*

11. Again, in TV fashion, the defense called Helen Gamble as their final witness. She was a member of the prosecutor's office and a friend of members of the firm. Frutt had her testify to a conversation between the two women in which Gamble admitted the prosecutor's office needed a conviction in the case and was not anxious

In closing argument, Frutt admitted that, with the victim's head in his bag, Vogelman was the likely suspect, but stressed that no one saw him do it and no weapon was ever found. She argued that this was because "he didn't do it." She then addressed Steve Robin and admitted they had no direct evidence he committed the crime. However, she argued that he could have, and that the reason we can't know is because the police never bothered to investigate. She claimed he had motive, opportunity, and no alibi, yet the police did not even investigate the possibility. Frutt mentioned the boyfriend and the Poet as other possible suspects who were also unaccounted for,[12] and stressed that the police never even investigated these two suspects because they wanted to keep the case uncomplicated. She argued Vogelman's lack of motive and his voluntarily coming forward to the police. She concluded by reminding the jury that there were lots of questions that were never asked or explored. The prosecution's case is "'It must've been him.' But he didn't do it. They're prosecuting the wrong man."

The government's closing stressed that all of the evidence pointed to George Vogelman. The prosecution characterized the defense case as "nothing but spin." After a relatively brief deliberation, the jury returned a verdict of not guilty.[13]

II. THE ETHICAL PROPRIETY OF BLAME-SHIFTING: APPLICATION OF ETHICAL CONSIDERATIONS TO THE VOGELMAN CASE

Did the lawyers representing George Vogelman do the right thing in their questioning of Steve Robin? Was their conduct morally and ethically proper? Did they act as reasonably zealous criminal defense lawyers or were they acting in an inappropriate, super-aggressive manner? These are difficult questions about which reasonable minds may differ.[14]

Potential problems with the lawyers' conduct seemingly arise from the fact that Young and Frutt clearly did not believe that Robin had anything to do with the murder of his sister. They had no basis to believe that he did, and in fact, the evidence pointed clearly to the fact that he did not. Yet, despite the lack of any true, non-frivolous basis to contend that Steve Robin might be a murderer, their aggressive,

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to confuse things with further investigation. *See id.*

12. Of course, she knew the boyfriend had actually been ruled out by the firm's investigation. *See id; supra* note 7.

13. In a later episode, the firm is sued for defamation and intentional infliction of emotional distress by the Robins. Although the judge allowed the case to go to trial, the attorneys prevailed. Eventually, it was revealed that George Vogelman was in fact guilty of killing Susan Robin as well as of vicious attacks on other women. *See The Practice* (ABC television broadcast, Fall 1999).

14. The degree of disagreement is demonstrated by discussions on CRIMPROF, the discussion list for criminal law and procedure professors. Postings are on file with this author.

hostile examination of him was designed to create just that impression in the minds of the jurors. Did this blame-shifting conduct constitute presentation of a false defense? Moreover, if it did, was it improper?

Initially, it seems clear that their conduct would have been viewed as immoral and unethical had the questioning occurred outside the context of the adversary system. Their attempt to create the false impression that Steve Robin was responsible for the murder of his sister constituted deceptive conduct, and their false attribution of criminal conduct to him may well have been defamatory.[15] Does the fact that this conduct occurred in the course of their role as criminal defense lawyers within the adversary system of criminal justice shield them from moral criticism for their actions?[16]

There are those who urge that defense counsel can, and perhaps must, do anything within the bounds of law to represent their clients, regardless of innocence or guilt and regardless of the effect on third persons or the truth.[17] Proponents of this view often quote Lord Brougham's classic statement in his representation of the Queen in *Queen Caroline's Case*:[18]

> An advocate, in the discharge of his duty, knows but one person in

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15. "Imputing criminal behavior to an individual is generally considered defamatory *per se*, and actionable without proof of special damages." Paul v. Davis, 424 U.S. 693, 697 (1976); *see also* Rodney A. Smolla, Law of Defamation § 7.11, at 7-7 (2d ed. 1999) (stating that implication of criminal conduct by another is slanderous).

16. It does likely shield them from liability for defamation due to the litigator's absolute privilege to defame, which is recognized in virtually all jurisdictions in the United States. *See* Paul T. Hayden, *Reconsidering the Litigator's Absolute Privilege to Defame*, 54 Ohio St. L.J. 985, 991-92 (1993). The existence of this privilege as absolute has been questioned, not only in scholarly commentary but by an organization seeking legislative change as well. *See* Baker, *supra* note 3, at 44; CCI Friday Fax, *supra* note 3.

17. *See* Charles P. Curtis, *The Ethics of Advocacy*, 4 Stan. L. Rev. 3, 15 (1951). For more recent views, see Abbe Smith and William Montross, *The Calling of Criminal Defense*, 50 Mercer L. Rev. 443, 523-33 (1999); Gerald F. Uelmen, *Lord Brougham's Bromide: Good Lawyers as Bad Citizens*, 30 Loy. L.A. L. Rev. 119, 122 (1996).

18. *See, e.g.*, Curtis, *supra* note 17, at 3-4 (quoting Lord Brougham's statement); Monroe H. Freedman, Understanding Lawyers' Ethics 65-66 (1990) [hereinafter Freedman, Understanding] (same); W. William Hodes, *Lord Brougham, The Dream Team, and Jury Nullification of the Third Kind*, 67 U. Colo. L. Rev. 1075, 1083 & n.18 (1996) (same); Smith & Montross, *supra* note 17, at 446 n.20 (same); Uelmen, *supra* note 17, at 120 (same). Geoffrey Hazard characterized Lord Brougham's statement as:

> "the classic vindication of the lawyer's partisan role" and says that "[t]his basic narrative has been sustained over two centuries notwithstanding pervasive changes in American society and in the profession itself." In recent years, however, scholars of the legal profession generally have criticized Brougham's stance and have taken a less single-minded view of an advocate's responsibility.

Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Team*, 29 McGeorge L. Rev. 291, 292 (1998) (citations omitted).

> all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and, amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may bring upon others. Separating the duty of a patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.[19]

Generally, those who take this position are willing to accept a high degree of role-differentiated[20] behavior on the part of criminal defense lawyers and are unwilling to hold such attorneys accountable for the guilt or immorality of their clients or actions taken on their clients' behalf.[21]

Varying justifications have been advanced for this conception of zealous advocacy in service to the client's interests.[22] It has been suggested that an aggressive defense is necessary to advance the

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19. 18 Trial of Queen Caroline 8 (1821).

20. Role-differentiation occurs when, due to her professional role, the lawyer assumes a different moral posture than laypersons facing similar ethical questions. *See* Freedman, Understanding, *supra* note 18, at 45 (citing Wassertstrom, *Lawyers As Professionals: Some Moral Issues*, 5 A.B.A. Human Rights 1, 3 (1975)); Fred C. Zacharias, *The Civil-Criminal Distinction in Professional Responsibility*, 7 J. Contemp. Legal Issues 165, 165 (1996).

21. *See* Charles J. Ogletree, Jr., *Beyond Justifications: Seeking Motivations to Sustain Public Defenders*, 106 Harv. L. Rev. 1239, 1249-50 (1993) (describing this view); *see also* Murray L. Schwartz, *On Making the True Look False and the False Look True*, 41 Sw. L.J. 1135, 1152 (1988) ("A lawyer who undertakes to provide a service that the Constitution demands, and who does so in ways that are both expected and powerfully justified, should have a sufficient answer to a charge of immoral behavior posed by the moralist in a particular case.").

22. Another well-known statement appears in Mr. Justice White's concurrence in *United States v. Wade*, 388 U.S. 218 (1967):

> But defense 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.

Id. at 256-59 (citations omitted).

autonomy and dignity of the criminal defendant,[23] and that obligations of loyalty and fidelity to the client not only justify, but command, aggressive advocacy by the lawyer on behalf of the defendant.[24] This is sometimes termed the "client-centered" justification for zealous advocacy.[25]

Alternatively, other theorists believe that systemic justifications[26] warrant a zealous criminal defense. Relying on the nature of the adversary system, they claim that aggressive advocacy is necessary to check oppression or overreaching by the state.[27] Viewing criminal defense as the classic situation in which adversary ethics are justified, these proponents of zealous advocacy in criminal defense recognize "the importance of overprotecting individual rights against the state"[28] and urge for "something closer to the standard picture of the adversary advocate."[29]

Not surprisingly, these views are not universally held. There are those who strongly dispute the justifications offered for what they see as overly aggressive advocacy by criminal defense lawyers. Perhaps the primary proponent of this position is Professor William Simon, who challenges each of the justifications proposed by the proponents of aggressive defense and finds them "implausible."[30] While Professor Simon recognizes that there may be situations in which aggressive advocacy is justified, as a general rule, he is unpersuaded that "there is

23. *See* Freedman, Understanding, *supra* note 18, at 65 ("Closely related to the concept of client autonomy is the lawyer's obligation to give 'entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of [the lawyer's] utmost learning and ability.'" (quoting ABA Canons of Professional Ethics Canon 15 (1908))); *see also* Ogletree, *supra* note 21, at 1251-54 (discussing Professor Charles Fried's personal autonomy argument). This emphasis on autonomy is rejected by Professor David Luban. *See* David Luban, *Partisanship, Betrayal and Autonomy in the Lawyer-Client Relationship: A Reply to Stephen Ellmann*, 90 Colum. L. Rev. 1004, 1035-43 (1990) [hereinafter Luban, *Reply to Ellmann*].

24. This position was taken most recently in a provocative article relying heavily on religious texts to justify what the authors characterize as the noble calling of criminal defense. *See* Smith & Montross, *supra* note 17, at 519-21. Using "virtue ethics" to establish the ethical framework for their analysis, the authors conclude that the ethic of fidelity supports aggressive advocacy by criminal defense lawyers. *See id.* at 511-33.

25. *See* Ogletree, *supra* note 21, at 1250.

26. *See id.* at 1254-60.

27. A prime proponent of this position is Professor David Luban. *See* David Luban, *Are Criminal Defenders Different?*, 91 Mich. L. Rev. 1729, 1730-52, 1755 (1993) [hereinafter Luban, *Criminal Defenders*]; *see also* John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission"*, 1 Geo. J. Legal Ethics 339, 346-49 (1987) (characterizing our criminal justice system as a "screening system" in which the defense attorney protects the interests of the factually innocent).

28. Luban, *Criminal Defenders*, *supra* note 27, at 1756.

29. *Id.*

30. William H. Simon, *The Ethics of Criminal Defense*, 91 Mich. L. Rev. 1703, 1728 (1993).

any feature distinctive to the criminal sphere that would lead one who disapproved of aggressive defense . . . in the civil sphere to approve of it in criminal defense."[31]

Other detractors of aggressive defense are more particularly concerned with its impact on the ascertainment of truth. They urge that criminal defense lawyers have a primary obligation to the truth and that aggressive tactics that distort and mislead are inconsistent with this obligation.[32] These scholars urge that a defendant does not have a right to present a false defense, which they define as putting forward a defense the lawyer knows is false by means of "truth-defeating devices"[33] or deceiving jurors by asking them to draw knowingly false inferences from the facts.[34] In response to those who urge that systemic justifications warrant aggressive advocacy that includes truth-distortion, these theorists contend that engaging in distortion, deceit, and similar conduct in individual cases to advance truth in the larger scheme is unjustified.[35]

Thousands of pages have been dedicated to these competing arguments, and this Article has nothing to add to the general discourse.[36] Suffice it to say that, while "nearly all theorists and practitioners agree that the defender's role is morally justified,"[37] there is no clear-cut consensus on precisely what that role is or should be and what kind or degree of conduct is justified within it. This is

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31. *Id.* at 1705. Others have questioned whether it is appropriate to draw a categorical distinction between criminal and civil cases. *See, e.g.*, Stephen L. Pepper, *A Lawyer's Amoral Ethical Role: A Defense, A Problem, and Some Possibilities*, 1986 Am. B. Found. Res. J. 613, 623 (suggesting that the lines between criminal and civil litigations are not that clear); Zacharias, *supra* note 20, at 178-94 (arguing that only a small minority of criminal cases really fit into the "criminal paradigm").

32. Judge Frankel was an early proponent of this position, and Professor Harry Subin has more recently advanced these views. *See generally* Marvin E. Frankel, Partisan Justice (1980) (discussing the flaws in the advocacy system); Marvin Frankel, *The Search for Truth: An Umpireal View*, 123 U. Pa. L. Rev. 1031, 1055-57 (1975) (arguing for a standard which would "make truth a paramount objective"); Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 Geo. J. Legal Ethics 125, 149-52 (1987) [hereinafter Subin, *Different Mission*] (proposing a new standard that prohibits an attorney from asserting defenses that she knows to be untrue).

Professor Subin's views initially appeared in a series of articles involving a dialogue between him and Professor Mitchell. *See* Mitchell, *supra* note 27; Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 Geo. J. Legal Ethics 689 (1988) [hereinafter Subin, *Further Reflections*].

33. Subin, *Different Mission*, *supra* note 32, at 126.

34. *See* Subin, *Further Reflections*, *supra* note 32, at 697.

35. *See* Subin, *Different Mission*, *supra* note 32, at 148-49.

36. For those unfamiliar with the discourse, I suggest starting with Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 Mich. L. Rev. 1469 (1966), which, to a large extent, precipitated much of the later debate and the Simon-Luban and Subin-Mitchell dialogues. *See* Luban, *Criminal Defenders*, *supra* note 27; Simon, *supra* note 30; *supra* note 32 and sources cited therein.

37. Ogletree, *supra* note 21, at 1259.

particularly true with regard to issues related to the representation of a guilty defendant. However, there is no serious dispute that when a defendant chooses to go to trial,[38] the criminal defense lawyer has an obligation to represent the defendant, whether guilty or not, so as to require the government to meet its constitutionally mandated burden of proof.[39] Failure to conduct such a defense constitutes both ethical misconduct[40] and potentially violates the defendant's right to effective assistance of counsel.[41]

Analysis of the blame-shifting examination and argument in the Vogelman case has two separate but related dimensions. First, to the extent that the attorneys did not believe, and in fact likely disbelieved, the inferences they advanced by their questioning and argument regarding Steve Robin's responsibility for his sister's death, their conduct potentially subverted, rather than advanced, the truth. Was their use of this examination and argument ethically objectionable on this ground? Additionally, they engaged in a hostile, harassing examination of a witness who they ambushed on the witness stand and virtually accused of murdering his sister. Did their actions in attempting to cast guilt on an innocent person similarly amount to morally inappropriate conduct? For clarity, these related issues will be addressed separately.

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38. The overwhelming majority of defendants do not do so. Statistics indicate that over 90% of defendants charged with violent felonies plead guilty. *See* Daniel Givelber, *Meaningless Acquittals, Meaningful Convictions: Do We Reliably Acquit the Innocent?*, 49 Rutgers L. Rev. 1317, 1337 (1997); *see also* Donald A. Dripps, *Miscarriages of Justice and the Constitution*, 2 Buff. Crim. L. Rev. 635, 646 (1999) [hereinafter Dripps, *Miscarriages*] ("Once it becomes clear that the government has a strong case, the factually guilty plead in large numbers.").

39. *See, e.g.*, Mitchell, *supra* note 27, at 347 (arguing that by "pushing hard in every case," whether the client is guilty or not, a lawyer fulfills his obligation); Subin, *Further Reflections*, *supra* note 32, at 696-97 (arguing that an attorney has to use different tactics to make the prosecution meet its burden of proof).

40. Failure to advance the client's legitimate interests likely constitutes violation of the duties of diligence and competence found in Model Rules 1.1 and 1.3. The concern with underzealous representation by criminal defense lawyers is serious. Studies demonstrate that many defense lawyers provide less than adequate representation to their clients at all stages of the proceedings. Despite the volume of writing on aggressive advocacy and overly zealous representation, many commentators have noted that there is a much more serious problem in the system with underzealous, rather than overzealous, representation. *See* Abbe Smith, *Burdening the Least of Us: "Race-Conscious" Ethics in Criminal Defense*, 77 Tex. L. Rev. 1585, 1589-90 n.27 (1999) (collecting authorities); *see also* James S. Kunen, "How Can You Defend Those People?" 256 (1983) ("[I]t's better to be overzealous than underzealous. Overzealousness can be corrected by the prosecution.... Underzealousness cannot be corrected by anyone.").

41. While most tactical or strategic choices are insulated from review as ineffective assistance of counsel, failure to competently assess tactical obligations can fall below the constitutionally mandated standard of acting as a reasonably competent attorney. *See* Strickland v. Washington, 466 U.S. 668, 685-86 (1984).

A. *Presenting a False Defense*

Did George Vogelman's attorneys "present a false defense"[42] in this case? In the course of his examination of Steve Robin, Eugene Young elicited truthful answers to his questions regarding Robin's debts, his disagreements with his sister, his status as a beneficiary under his father's will and other information related to a possible motive to kill his sister. Young and Frutt then used these truthful answers to suggest what they believed to be a possible, yet likely untrue,[43] inference that Steve Robin murdered his sister. Does this constitute improper, truth-subverting conduct?

Obviously, those who believe that truth is not the primary objective in the adversary system of criminal justice will likely have no problem with this scenario on truth-subversion grounds. They believe that, in order to adequately defend, attorneys need freedom to argue any legitimate inference from true facts, regardless of the lawyer's belief in the truth of those inferences.[44] Moreover, Professor Luban specifically acknowledges the need to permit a criminal defense lawyer, as part of suggesting reasonable doubts, to present an alternative scenario. "[W]e are typically able to doubt an explanation only when we are persuaded, at least provisionally, of an alternative explanation. Thus, the effective defender cannot simply protest that the prosecution has not made its case. Rather, she must introduce and embellish plausible alternatives to the prosecutor's explanations."[45]

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42. "In Subin's terms, a false defense is an attempt to 'convince the judge or jury that facts established by the state and known to the attorney to be true are not true, or that facts known to the attorney to be false are true.'" Mitchell, *supra* note 27, at 340.

43. This can be a controversial issue. At what point does an attorney know the client is guilty or that a fact asserted is not true? Some commentators have asserted that the attorney must know "beyond a reasonable doubt." Subin, *Different Mission*, *supra* note 32, at 142. There are those who question whether the attorney can ever really "know." *See, e.g.*, David N. Yellin, *"Thinking Like A Lawyer" or Acting Like A Judge?: A Response to Professor Simon*, 27 Hofstra L. Rev. 13, 17-18 (1998) (asserting that there are different degrees of knowledge and suspicion, and hypothesizing that an attorney can easily evade this 'knowledge'). However, this view has been largely discredited. *See, e.g.*, Schwartz, *supra* note 21, at 1140 (stating that the Supreme Court established clear boundaries on when knowledge would be presumed). For an interesting discussion of such knowledge in the context of the O.J. Simpson case, see Hodes, *supra* note 18, at 1077-78 n.5. In the Vogelman case, the lawyers clearly did not believe that Steve Robin killed his sister. The attorneys working on the case never even anticipated that theory, and there is every reason to believe that they rejected it as a real possibility. Moreover, the characterization of Steve Robin as a "choir boy" in the course of discussing Plan B belies any belief on their part that he was a murderer. *See The Practice* (ABC television broadcast, Oct.-Nov. 1998).

44. *See* Schwartz, *supra* note 21, at 1146. Professor Schwartz notes, however, that untrue testimony should not be exploited for its probative value but only to show that the government failed to meet its burden of proof. *See id.* As will be argued, however, this distinction may be illusory. *See infra* note 45.

45. Luban, *Criminal Defenders*, *supra* note 27, at 1760. For an analysis that supports Luban, see Carl M. Selinger, *Dramatizing On Film the Uneasy Role of the*

Professor Luban recognizes that

> if these alternatives are plausible, whether or not they are true, then it is logically impossible that the state has proven its case beyond a reasonable doubt. But in another sense, it involves deception, because the advocate will never get the judge or jury to accept the plausibility of an alternative without at least half-persuading them of its actuality.[46]

Despite this recognition, Professor Luban apparently concludes that this is an acceptable part of putting the government to its proof. If this is so, then affirmatively asking the jury to believe that Steve Robin was the killer would be appropriate.

It is possible that even those, like Professor Harry Subin, who find it ethically objectionable for attorneys to present a false defense and who would therefore permit attorneys who know of a client's guilt to serve only in a "monitor" role,[47] might not object to the cross-examination in the Vogelman case on "truth-subversion" grounds. John Mitchell states that an argument that goes to the quality, reliability, or adequacy of the prosecution's case is always an appropriate reasonable doubt argument.[48] He suggests that an "it doesn't make sense" argument meets even the monitoring

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American Criminal Defense Lawyer: True Believer, 22 Okla. City U. L. Rev. 223, 225-26 (1997). *But see* Theresa Stanton Collett, *Understanding Freedman's Ethics*, 33 Ariz. L. Rev. 455, 465 (1991) (recognizing the need for story-completeness but rejecting the right of attorneys to complete the story using false evidence or inferences). This need for competing stories is confirmed by recent studies that have shown that decision-making by juries really involves narrative construction. Rather than engaging in sophisticated logical analysis of the evidence, jurors are thought to instead construct stories out of the evidence presented. *See* Nancy Pennington & Reid Hastie, *A Cognitive Theory of Juror Decision Making: The Story Model*, 13 Cardozo L. Rev. 519, 533-44 (1991). This process generally involves determining the prosecutor's story, assessing any gaps therein, and attempting to fill in those gaps based on the juror's pre-existing experience and understanding. The defense, too, must generally present a story despite having no burden of proof. In deciding what story to accept, the trier of fact will likely rely on the coverage and coherence of the competing stories. *See id.* at 520-33. And while it is true that, because the government bears the burden of proof beyond a reasonable doubt, the jury does not have to fully "buy" the defendant's story, to a large extent the benefits to a defendant of the government being required to carry a high burden of proof may be negated unless the defense can present its own version of the case. *See also* Smithart v. State, 988 P.2d 583, 591 (Alaska 1999) (reversing a conviction because the defendant, who was restricted from referring to evidence in his opening statement, was unable to present a coherent story to the jury, finding that the restriction "robbed [defendant's] case of its cohesion and narrative force and impaired his right to present his own defense.").

46. Luban, *Criminal Defenders*, *supra* note 27, at 1760. In addition to the ethical concerns, there are tactical considerations that may affect how the attorney proceeds. There is a risk that raising the issue through hostile examination and then backing off or pushing a weak theory too far, if not done carefully, can alienate the jury or hurt the attorney's credibility. *See supra* note 9. These tactical considerations themselves serve as a limit on the attorney's conduct.

47. Subin, *Different Mission*, *supra* note 32, at 146-47.

48. *See* Mitchell, *supra* note 27, at 358-59.

requirements Professor Subin has proposed.[49] Professor Subin, in response to Professor Mitchell, has himself acknowledged that "when the defense attorney knows that the prosecution's evidence is true, he or she may nonetheless suggest to the jury alternative explanations of the facts, for the purpose of assisting the jury to measure the weight of the evidence."[50] Professor Subin would, however, require that the jury "be instructed as to the limited purpose for which these alternative explanations, made without a good faith basis, are being offered."[51] Ellenor Frutt's argument to the jury, which suggested reasonable doubt by raising the possibility of Steve Robin as the killer and urging the jury to use that possibility as a means of questioning the propriety of the police investigation, may not have met Subin's exacting requirements.[52] But this is not a case in which the attorneys knew that their client was guilty. Given the absence of such knowledge, it is unclear whether Professor Subin would find this argument objectionable.[53]

Thus, where, as here, the attorneys do not know that their client is guilty, blame-shifting conduct does not appear to be ethically inappropriate on "truth-subversion" grounds. In the more difficult case where the guilt of the client is known, some commentators would draw a distinction and preclude the argument of false inferences, at least if those inferences are to be used for their probative value.[54] Where the false inferences are argued merely to suggest that the government has not met its burden, most commentators would not find this ethically objectionable.[55]

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49. *Id.*

50. Subin, *Further Reflections*, *supra* note 32, at 690.

51. *Id.*

52. The argument may have gone too far in suggesting that the jury accept the proposition that Steve Robin might be guilty, and it lacked any explicit disclaimer regarding the appropriate and inappropriate uses of the inferences.

53. This likely turns on whether he believes that the determining factor is whether they knew beyond a reasonable doubt that Steve Robin was not the murderer, or whether they knew beyond a reasonable doubt of defendant's guilt. This is somewhat unclear from Professor Subin's analysis. The reference in Frutt's closing argument to the victim's boyfriend may have been more problematic, because the attorneys actually knew, rather than merely believed, that there was no basis for the claim. *See The Practice* (ABC television broadcast, Oct.-Nov. 1998).

54. *See, e.g.*, Schwartz, *supra* note 21, at 1146 (discussing the propriety of introducing alternative inferences into evidence); Subin, *Further Reflections*, *supra* note 32, at 696-97 (arguing that while defense attorneys should be allowed to suggest alternative inferences, they cannot, within the "monitor" role, be allowed to argue for the truth of such inferences).

55. *See, e.g.*, Luban, *Criminal Defendants*, *supra* note 27, at 1760-61 (contending that the distinction "between forceful-but-honest advocacy and deception is so artificial that it can never form the basis for drawing the magic moral line"); Mitchell, *supra* note 27, at 346 (explaining that the raising of alternative inferences by defense counsel represents nothing more than pointing out weaknesses in the prosecution's case); Schwartz, *supra* note 21, at 1146 ("If the prosecution's own case does not carry the necessary burden, the system demands a not guilty outcome, no matter how

B. *False Accusation of Criminal Conduct*

Arguably, a more difficult question is posed by the attorneys' actions accusing Steve Robin of his sister's murder. While the accusations were in the form of leading questions and inferences, the effect on Steve Robin's reputation and personal well-being were likely significant.[56] Do their obligations of zealous advocacy justify this significant harm?

The classic Lord Brougham formulation tells lawyers that, in representing a client, they "must not regard [with] alarm... destruction which [they] may bring upon others."[57] This view suggests that an attorney cannot be constrained in her representation of a client by concern for others; her primary loyalty must be to her client.[58] At some level, this position is difficult to justify. From a moral standpoint, using others as a means to an acquittal is questionable,[59] yet this is arguably what this conduct entails.

In some respects, blame attribution is similar to the hostile cross-examination of the truthful witness. In each situation, the attack on the witness is not gratuitous; it is done with the "good" intention of rebutting the government's case.[60] In each instance, the attorney is significantly impugning the character, integrity and reputation of the witness. Yet there is substantial authority that such cross-examination

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erroneous that outcome might appear to those who 'know' the 'true' story.").

56. *See supra* note 15. False accusations of criminal conduct can have significant adverse effects on the individual accused. *See* Joel Jay Finer, *Therapists' Liability to the Falsely Accused for Inducing Illusory Memories of Childhood Sexual Abuse–Current Remedies and a Proposed Statute*, 11 J.L. & Health 45, 64-65 (1996) (examining false allegations in the context of child molestation charges); *cf.* Klopfer v. North Carolina, 386 U.S. 213, 222 (1967) (discussing the impact of criminal charges generally).

57. 18 Trial of Queen Caroline 8 (1821); *supra* note 18 and accompanying text.

58. This position was recently espoused by Smith and Montross, who contend that the virtue of fidelity requires that defense lawyers "go to the mat" for their clients, even if this means attacking victims or witnesses. *See* Smith & Montross, *supra* note 17, at 523-30. While the attorney can have compassion for the person harmed, it should not interfere with zealous advocacy. *See id.* at 529-30. They quote with apparent approval language of Charles Curtis that the lawyer "is required to treat outsiders as if they were barbarians and enemies." *Id.* at 518-19 (quoting Curtis, *supra* note 17, at 5). For an interesting discussion of this issue, see chapter entitled "Casting Guilt Upon the Innocent" in David Mellinkoff, The Conscience of a Lawyer 192-204 (1973).

59. *See* R. George Wright, *Cross-Examining Legal Ethics: The Roles of Intention, Outcomes, and Character*, 83 Ky. L.J. 801, 810-14 (1994-95) (discussing Kant and Nagel).

60. *See id.* at 813 (discussing the role of intentions and effects in determining the morality of one who "intend[s] abuse and deception as a means to some further desired goal, such as the acquittal of the client"). Arguably, cross-examination of a prosecution witness is a more direct means of challenging the government's case, and therefore justifies more aggressive advocacy than advancing the defendant's theory of the case, but this is open to question. *See supra* note 45.

is appropriate,[61] and by analogy, that the attribution of blame, such as in "The Practice," is appropriate as well.

A serious argument can be advanced, however, against permitting such conduct, at least when the client is known to be guilty. It may be difficult to have confidence in a system that allows the attorney, under the guise of responsibility to that system and in order to serve the autonomy and dignity values of the defendant, to act in a manner that dehumanizes an innocent individual by falsely suggesting that person is responsible for a heinous crime.[62] This is easier to accept where the client himself may be falsely charged. But where the client-defendant is known to be guilty, and is participating with his attorney in an attempt to avoid punishment and personal responsibility by attempting to shift blame to another known to be innocent, it is not surprising that the public has concerns.[63] Moreover, many find it difficult to accept that the systemic value in preserving the adversary system to protect innocent defendants in *other* cases, or to ensure that the awesome power of the state does not wrongfully take the liberty or reputation of individuals in *other* cases, justifies allowing a guilty defendant to avoid punishment and responsibility by significantly harming the autonomy and dignity of an innocent third party in *this* case.[64]

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61. *See* Freedman, Understanding, *supra* note 18, at 167-68; Luban, *Reply to Ellmann*, *supra* note 23, at 1031 ("In other criminal cases [other than rape] . . . I would (reluctantly) permit the brutal cross-examination of prosecution witnesses."). The same considerations that are deemed to justify zealous defense generally provide justification here. *See generally supra* notes 18-19 and accompanying text (discussing Lord Broughman's view on zealous representation).

62. *See* Collett, *supra* note 45, at 464 ("[H]ow is human dignity enhanced by facilitating a denial of responsibility by the client and denying the rights of another?"). This might suggest that the client-centered justifications for aggressive advocacy cannot support this conduct when a guilty defendant is involved. "The idea that helping the accused escape substantively appropriate punishment through aggressive defense serves individual dignity is hard to square with the legitimacy of punishment after conviction. A viable ideal of dignity has to make room for respect for the rights of others . . . ." Simon, *supra* note 30, at 1714; *see* Collett, *supra* note 45, at 464. Collett examines this client-centered justification in the context of a rape hypothetical:

> [T]he most troubling aspect of the rape hypothetical is that the lawyer is required to 'respect' the dignity of the client who is lying by destroying the dignity of the truthful prosecutrix. . . . Such assistance is required only if the client's right is defined as an unqualified right to avoid punishment. But the client does not have an unqualified right to avoid punishment.

Id.

63. *See* Baker, *supra* note 3, at 42-43. Whether and how public perceptions of this type of conduct can and should be taken into account in the assessment of propriety is itself a difficult question. *See, e.g.*, Craig M. Bradley & Joseph L. Hoffmann, *Public Perception, Justice and the "Search for Truth" in Criminal Cases*, 69 S. Cal. L. Rev. 1267, 1300-02 (1996) (speculating on the direction that public opinion is likely to push criminal lawyers and the "desirability of traveling down that particular road").

64. Several commentators have expressed concerns in this regard. *See, e.g.*, Robert P. Lawry, *Cross-Examining the Truthful Witness: The Ideal Within the Central Moral*

The ultimate conclusion of this ethical analysis appears to be that while there may be cases where blame-shifting behavior by criminal defense lawyers simply goes too far, in most cases the adversary system of criminal justice permits, and in some cases even requires, attorneys to engage in such behavior on behalf of their clients. While there are those who believe a prohibition on such conduct may be appropriate where a guilty client is involved and the attorney has no basis to believe the truth of the blame-shifting allegations, as one moves along a sliding scale of increasing doubt regarding client guilt and increasing reason to believe the blame-shifting evidence, the justifications, both institutional and situational, increase to where, at some point, they likely render what would be permissible questioning and argument mandatory based on the attorney's duty of zeal.

III. GUIDANCE FROM ETHICAL RULES AND STANDARDS

The conclusion above appears consistent with the three primary sources of guidance for criminal defense attorneys, the Model Rules of Professional Conduct,[65] the Restatement of the Law Governing Lawyers,[66] and the ABA Standards Relating to the Defense Function.[67] It is arguable that each of these sources would permit, but not require, the questioning and argument that suggests that Steve Robin may have killed his sister.

Tradition of Lawyering, 100 Dick. L. Rev. 563, 575 (1996) (considering it "unconscionable to knowingly accuse an innocent person of a crime she did not commit"); *id.* at 577 ("The innocent cannot be blamed."); *id.* at 580 ("I suggest there may be tactical advantages in casting the guilt on an innocent. Is that fair game . . . ?"); Richard H. Underwood, *The Professional and the Liar*, 87 Ky. L. Rev. 919, 937 (1998-99) ("False imputation of guilt during cross-examination would appear to be prohibited . . . ."). Many of those who believe in the strength of the systemic justifications for aggressive advocacy are unwilling to draw distinctions regarding acceptable zeal depending on the guilt or innocence of the client, at least in part because the systemic justifications require zealous advocacy on behalf of the guilty to keep the government honest in all cases, including those involving the innocent. *See* Luban, Lawyers and Justice 151 (1988); *see, e.g.*, Hodes, *supra* note 18, at 1077-78 (discussing O.J. Simpson's defense strategy).

65. The Model Rules of Professional Conduct were adopted by the American Bar Association in 1983 and have been adopted in some form in most jurisdictions. Model Rules of Professional Conduct Preface (1999).

66. The Restatement (Third) of the Law, The Law Governing Lawyers has been in development by the American Law Institute since 1988. A final draft was approved in principle and is expected to be in print sometime in the year 2000.

67. The American Bar Association Standards for Criminal Justice include standards for the defense and prosecution functions. The Standards for the Defense Function were first adopted in 1971 and have been revised on several occasions. The most recent version of Chapter 4, "The Defense Function," was approved by the American Bar Association House of Delegates in 1991. *See* ABA Standards Relating to the Defense Function Introduction (3d ed. 1993). The Standards are a product of drafting and extensive review by representatives of all segments of the criminal justice system. "They were adopted by the ABA in an attempt to ascertain a consensus view of all segments of the criminal justice community about what good, professional practice is and should be." *Id.*

Initially, the decision regarding whether to explore an avenue of defense and how to present it is largely a matter of tactics or strategy.[68] This is reflected in Model Rule 1.2(a), which allocates primary decision-making authority to the attorney with regard to the way a case will be defended, subject to consultation with the client.[69] While the Commentary recognizes that "[a] clear distinction between objectives and means sometimes cannot be drawn,"[70] it provides that "the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding . . . concern for third persons who might be adversely affected."[71]

This Rule appears to allow the attorney some decision-making authority with regard to means, but requires consultation with the client, especially with regard to matters that affect third persons[72] or "that directly affect the ultimate resolution of the case."[73] The decision to cross-examine the victim's brother and argue that he was a possible suspect, thereby purporting to shift blame to him, clearly appears to be the type of tactical decision that requires consultation with the client. Although the attorneys initially proposed the idea to "Plan B" Steve Robin, they did consult with George Vogelman regarding the presentation of this evidence. Although he was hesitant to permit the examination,[74] he ultimately agreed given the lack of

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68. "Defense counsel has the ultimate responsibility for decisions related to defense strategy and tactics, such as deciding 'which witnesses, if any, to call, and what defenses to develop.'" Laws. Man. on Prof. Conduct (ABA/BNA) at 61:416 (May 29, 1996) (quoting Wainwright v. Sykes, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring)). "Historically, lawyers have been deemed to be the master of procedural and tactical aspects of litigation. This inherent authority is derived from the lawyer's expertise in strategy and procedure." Annotated Model Rules of Professional Conduct 15-16 (4th ed. 1999); *see also* Strickland v. Washington, 466 U.S. 668, 681 (1984) (stating that "strategic choices must be respected in these circumstances if they are based on professional judgment.").

69. *See* Model Rules of Professional Conduct Rule 1.2(a) (1999).

70. *Id.* Rule 1.2 cmt.

71. *Id.* It has been suggested that the Model Rules "offer inconsistent guidance on the lawyer's control of the means used in a client's case," Rodney Uphoff & Peter Wood, *The Allocation of Decisionmaking Between Defense Counsel and Criminal Defendant: An Empirical Study of Attorney-Client Decisionmaking*, 47 U. Kan. L. Rev. 1, 15 (1998), and that despite the suggestion that the lawyer should defer in matters affecting third parties, "the vagueness of the ends/means test and the inconsistencies in the Model Rules and its official comments leave the lawyer basically free to decide this question as she sees fit." *Id.*

72. *See id.* Professor Freedman is critical of this Model Rule formulation for not providing sufficient control to the client over decisions involving the rights of third parties who might be adversely affected by litigation tactics. *See* Freedman, Understanding, *supra* note 18, at 61-63.

73. Uphoff & Wood, *supra* note 71, at 15. The requirement of consultation with the client is further supported by the duty of communication contained in Model Rules of Professional Conduct Rule 1.4.

74. In initially questioning the tactic, Vogelman indicated that he did not like reading about himself in the papers and was not a "big fan of accusing people falsely." *See The Practice* (ABC television broadcast, Oct.-Nov. 1998).

viable alternatives.[75] Thus, to this extent, the attorneys appear to have acted in conformity with the Rules.

A similar conclusion is reached in analyzing the attorneys' conduct under the Restatement of the Law Governing Lawyers.[76] While the Restatement does not focus specifically on tactics and strategies or ends versus means in allocating decision-making authority, it provides that a lawyer "may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client."[77] This gives the lawyer "broad authority to make choices advancing the client's interests."[78] In general, this authority includes "the initial decision concerning which witnesses to call to testify at deposition or trial."[79] The Restatement requires, however, that the lawyer keep the client "reasonably informed about the matter [and] consult with [the] client to a reasonable extent concerning decisions to be made by the lawyer...."[80] This appears to have been done in the meeting between Ellenor Frutt, Eugene Young, and George Vogelman prior to the implementation of Plan B.[81]

The ABA Standards[82] allocate to defense counsel "[s]trategic and tactical decisions,"[83] indicating that such decisions should be made by counsel "after consultation with the client where feasible and appropriate."[84] Decisions regarding "what witnesses to call, whether and how to cross-examine... and what evidence should be introduced"[85] are explicitly allocated to the attorney "[b]ecause these decisions require the skill, training and experience of the advocate."[86] Unlike the Model Rules, the ABA Standards does not suggest particular deference to the client on matters involving the rights of third parties, but does encourage that decisions regarding witnesses

75. Frutt explained that the tactic was "risky," and in response to the client's question, "Why do it?" she responded "We don't have anything else." *Id.*

76. *See* Restatement (Third) of the Law Governing Lawyers § 32 (Proposed Final Draft No. 1, 1996).

77. *Id.* § 32(3).

78. *Id.* cmt. b. "[T]he client may limit the lawyer's authority by agreement or instructions." *Id.* No such limitation, however, was apparent in the Vogelman case.

79. Restatement (Third) of the Law Governing Lawyers § 166 cmt. c (Tentative Draft No. 8, 1997).

80. *See* Restatement (Third) of the Law Governing Lawyers § 31(1) (Proposed Final Draft No. 1, 1996).

81. *See supra* note 9.

82. "The standards are intended to be used as a guide to professional conduct and performance." ABA Standards Relating to the Defense Function Standard 4-1.1 (3d ed. 1993). They are designed to provide "reasoned and appropriate professional advice" and to "serve as a guide to what is deemed to be proper conduct." *Id.* Standard 4-1.1 cmt.

83. *Id.* Standard 4-5.2(b).

84. *Id.*

85. *Id.*

86. *Id.* cmt. (Strategy and Tactics).

that can be anticipated sufficiently in advance be made on the basis of consultation with the client.[87] Frutt and Young's discussion of Plan B with George Vogelman would appear to be in accord with the Standards as well.

What of the fact, however, that the questioning and arguments were designed to create the arguably false impression that Steve Robin was responsible for the death of his sister? Do the Rules prohibit questioning or argument that creates this arguably false impression? The Model Rule regarding Candor to the Tribunal, Rule 3.3, prohibits attorneys from making false statements of material fact to the tribunal or offering evidence that the lawyer knows to be false.[88] This Rule prohibits an attorney from making an affirmative false statement of fact and from participating in the presentation of perjured testimony;[89] however, it would appear that an attorney does not make a false statement or offer false evidence when asking questions that lead to truthful answers from a witness and then arguing those answers to create possible inferences for the jury.[90] While the inferences the attorney urges may be "false" in the sense that they are known to be false, or in this case strongly believed to be false, this conduct does not

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87. *See id.*

88. Model Rules of Professional Conduct Rule 3.3(a) (1999) provides, in part: "A lawyer shall not knowingly: (1) make a false statement of material fact or law to a tribunal; . . . or offer evidence the lawyer knows to be false." *Id.* Rule 3.3(a).

This Rule requires knowledge on the part of the attorney, which is defined in the "terminology" section of the Rules as denoting "actual knowledge of the fact in question." *Id.* Terminology. The section goes on to state, however, that "[a] person's knowledge may be inferred from [the] circumstances." *Id.* It is arguable that Frutt and Young did not "know" that George Vogelman was guilty, nor did they know that Steve Robin had not, in fact, killed his sister, because they had no evidence that this theory was not true. It is clear that, in having characterized Steve Robin as a "choir boy" and in using "Plan B" itself, they believed he was not responsible. It is equally arguable, however, that even without such evidence, their state of awareness and belief caused them to "know" that there was no basis for the argument they were advancing (that Steve Robin committed the crime) and therefore that they "knew" the argument was false. *See supra* notes 46, 53.

89. *See* ABA Comm. on Ethics and Professional Responsibility, Formal Op. 353 (1987).

90. Whether such questioning and argument constitute false statements or the offering of false evidence is a question that does not lend itself to an easy answer. On the one hand, it is arguable that "false evidence" in Model Rule 3.3 relates only to perjury and not to false implications from true facts. *See* 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering: A Handbook on the Model Rules of Professional Conduct* § 3.3:208, at 593-95 (2d ed. 1990 & Supp. 1998) (discussing the definition of false evidence and a lawyer's ethical obligations); *see also* Charles W. Wolfram, Modern Legal Ethics § 12.3.4, at 642-43 (1986) (acknowledging that it is not clear whether distortion of facts alone falls within the proscriptions of Rule 3.3). Professor Wolfram notes that "[a]n early draft of the Model Rules would have created an explicit obligation for lawyers to avoid creating misleading impressions through advocacy," but finds that the failure to enact an explicit rule is not decisive. *Id.* at 642 (citing Model Rules of Professional Conduct Rule 3.1(a)(3) (Discussion Draft 1980)); *cf.* Underwood, *supra* note 64, at 942-43 n.74 (appearing to question whether literally true statements fall within the proscription of Rule 3.3).

appear to rise to the level of a Rule 3.3 violation.[91]

The Restatement provision, prohibiting lawyers from knowingly making a false statement to a tribunal or offering testimony or other evidence known to be false, is similar to Model Rule 3.3.[92] Like the Model Rules, the Restatement is not clear on whether this prohibition applies only to false evidence and testimony or to false implications from true facts as well. The comments following illustration 5 do provide some insight that would support the application of Restatement § 180 only to actual false evidence and false statements and not generally to false implications from true facts. The commentary provides that "[a] lawyer may make conditional or suppositional statements so long as they are so identified and are neither known to be false nor made without a reasonable basis in fact for their conditional or suppositional character."[93] This appears to recognize the difference between an attorney's affirmative statements and assertions made in the context of litigation.[94] The Restatement provision appears to place a limitation on such conditional or suppositional statements to the extent that they are neither known to be false nor made without a reasonable basis. However, this would not appear to apply in criminal litigation where, for purposes of defending an individual charged with a crime, the attorney may present a defense that requires the government to prove all elements of the offense even where there is no reasonable basis for the

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91. *See* Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 Fordham L. Rev. 327, 367-69 & n.176 (1998) (questioning whether counsel's arguments for a client known to be guilty should be viewed as representations of fact and suggesting instead that they are more properly viewed as assertions of the "client's legal position or conclusions that arguably should be drawn from the facts"). Of course, it is not clear that the Rule should be so limited, but no cases of discipline have been found under Rule 3.3 involving false implications from true facts. Note, too, that Model Rule 8.4(c) makes it professional misconduct for a lawyer to "engage in conduct involving dishonesty, fraud, deceit or misrepresentation." Model Rules of Professional Conduct Rule 8.4(c). One could argue that attempting to convince a jury that someone other than the client committed the crime with which the client is charged, albeit by arguing from "true" facts, when the lawyer knows such not to be the case is conduct involving deceit and misrepresentation, yet lawyers are not disciplined under this Rule for such conduct. It seems likely that understandings of what is within the range of appropriate litigation conduct in criminal cases are incorporated into the interpretation of this Rule.

92. *See* Restatement (Third) of the Law Governing Lawyers § 180 (Tentative Draft. No. 8, 1997).

93. *Id.* illus. 5.

94. The Restatement recognizes that

> [i]t may be difficult in practice to maintain the line between permissible zealous argument about facts and inferences to be drawn from them and impermissible personal endorsement. Latitude is left to the advocate in doubtful cases, subject to the superintending power of the presiding officer to prevent improper or misleading argument.

Restatement (Third) of the Law Governing Lawyers § 167 cmt. b (Tentative Draft No. 8, 1997).

defense.[95]

The ABA Standards have three sections that may have relevance to the propriety of questions and argument creating a false impression of blame on an innocent individual, such as Steve Robin. First, Standard 4-1.2 states that defense counsel "should not intentionally misrepresent matters of fact or law to the court."[96] As with Model Rule 3.3, the questions and arguments at issue do not constitute assertions of "matters of fact" by counsel, and thus this section appears not to control. Standard 4-7.5 is potentially more relevant because it involves the presentation of evidence, stating that the lawyer should not "knowingly . . . offer false evidence, whether by documents, tangible evidence, or the testimony of witnesses . . . ."[97] It would appear that Eugene did not offer false evidence because the testimony he elicited from Steve Robin was truthful. Instead, only the implications from this evidence were potentially false, but this appears to be outside the scope of this Standard.

Standard 4-7.7 is likely the most relevant in this situation because it provides that "in closing argument to the jury, [defense counsel] may argue all reasonable inferences from the evidence in the record."[98] It cautions, however, that defense counsel should not "intentionally . . . misstate the evidence or mislead the jury as to the inferences it may draw."[99] Particularly relevant for our purposes is what this Standard omits. The prior version had a provision stating that it was "unprofessional conduct for a lawyer . . . to attribute the crime to another person unless such an inference is warranted by the evidence."[100] The provision's[101] deletion[102] created the inference that

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95. *See id.* § 170. *See generally infra* note 109 (discussing § 170(1) which creates an exception for criminal defense lawyers).

96. ABA Standards Relating to the Defense Function Standard 4-1.2(f) (3d ed. 1993).

97. *Id.* Standard 4-7.5(a).

98. *Id.* Standard 4-1.2.

99. *Id.*

100. ABA Standards Relating to the Defense Function Standard 4-7.7(b) (2d ed. 1980).

101. The rationale for the rule was stated as follows:

> The argument in a criminal case will sometimes include points based on probabilities, but this is permissible only if those probabilities are supported by the record or by common experience. Counsel may not suggest, for example, that the evidence is consistent with the probability that someone other than the defendant committed the crime unless there is some basis in the record for doing so. . . . The naming of a specific person other than the defendant as the one responsible for the crime, however, is subject to an important limitation. Since such a line of argument could lead to the prosecution of the person named and, at least, may be destructive of the person's good name and reputation, counsel should not make such an argument unless there is reasonable ground in the evidence to support that position.

Id. cmt.

102. *See* ABA Standards Relating to the Defense Function Standard 4-7.7 (3d ed.

such attribution of blame is no longer viewed as improper argument even when not supported by the evidence. It would thus appear that neither the questioning of Steve Robin nor the argument suggesting his responsibility for the murder of his sister would constitute the presentation of false evidence or misleading argument in violation of the ABA Standards.[103]

In questioning Steve Robin and arguing the inferences from his testimony to the jury, Young and Frutt advanced a theory that they did not have a reasonable basis to believe was supported by the evidence, namely that Steve Robin was responsible for the murder of his sister. Does this constitute a violation of the Model Rules? Rule 3.1 provides that a lawyer "shall not . . . assert or controvert an issue . . . unless there is a basis for doing so that is not frivolous . . . ."[104] The rule is qualified, however, in criminal cases. "A lawyer for the defendant in a criminal proceeding . . . may nevertheless so defend the proceeding as to require that every element of the case be established."[105] "This exception reflects the constitutional principle that the state must prove every element of the crime charged and may not, by procedural rule or otherwise, shift its burden to the defendant."[106] This provision allows the criminal defendant more leeway in putting the government to its proof.[107] It is axiomatic that one element of the prosecution's proof is the defendant's identity as the perpetrator of the crime.[108] Evidence designed to suggest that

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1993). No explanation is provided for this change, but it appears consistent with the general tenor of the third edition, which places fewer restrictions on what is considered acceptable conduct at trial. *See infra* note 103.

103. This is particularly true in a case like the one under consideration, where the attribution of blame is in part designed to demonstrate the weakness of the police investigation rather than to have the jury believe that the other individual actually committed the crime. The Commentary to Standard 4-7.8 specifically notes that

> [t]here are often circumstances in which [defense] counsel may be entitled to argue to the jury that they should draw an inference adverse to the prosecution as the result of its failure to bring forth some particular item of evidence or to call as a witness someone who has a special relation to the facts of the case.

ABA Standards, Standard 4-7.8 cmt. (2d. ed. 1980). While it is ordinarily a misrepresentation, and therefore improper, for counsel to argue such an inference where evidence has been excluded, here the basis for absence of evidence demonstrating that Steve Robin was not responsible for the crime was based on alleged police failure to investigate, and thus the blame-shifting conduct is directly related to the theory of defense. *See id.* Accordingly, it is unlikely that the argument suggesting Steve Robin as the potential murderer would run afoul of this Standard.

104. Model Rules of Professional Conduct Rule 3.1 (1999).

105. *Id.*

106. Annotated Model Rules of Professional Conduct 304 (4th ed. 1999).

107. Putting the government to its proof may require more than merely allowing the defendant to create a reasonable doubt. It may require that the defendant have the opportunity to present an alternative theory to the trier of fact. *See supra* note 45.

108. "An implied element that must be proven beyond a reasonable doubt by the prosecution under every criminal statute is that the defendant–not someone else–committed the offense." McCord, *supra* note 2, at 920. While, as Professor McCord

someone else may have committed the offense, and that the government did not adequately rule out other suspects, appears clearly to constitute defending so as to require that every element be established. Accordingly, it would appear that Rule 3.1 would not preclude the questioning of Steve Robin or the argument that he may have been the perpetrator and that the government failed to account for this and other alternatives.

The Restatement provision regarding frivolous advocacy is virtually identical to Rule 3.1.[109] Restatement § 170 permits a lawyer for a defendant in a criminal proceeding to "defend the proceeding to require that the prosecution establish every necessary element."[110] This is true "even if [the lawyer is] convinced that the guilt of the offense charged can be proved beyond a reasonable doubt . . . ."[111] The ABA Standards do not appear to directly address the issue of frivolous claims. It thus appears that the absence of any support for the belief that Steve Robin actually had any role in his sister's death should not serve as an impediment to the questioning and argument presented on the basis of frivolousness under either the Restatement or the ABA Standards, making the attorneys' conduct permissible under these provisions.

From the foregoing discussion, it is reasonable to conclude that neither the fact that the questioning and argument, while based on true facts, were designed to create a false impression, nor the fact that there may not have been a non-frivolous basis for advancing the theory that Steve Robin was responsible for his sister's death, would cause the attorneys' conduct in this case to violate the relevant rules and standards for attorney conduct. But what of the fact that the questioning and argument had the effect of falsely accusing an innocent person of a heinous crime, thereby causing damage to his character and placing him in anguish and distress? Does such conduct run afoul of the respect for the rights of third persons required by the rules?

Model Rule 4.4 provides that, "[i]n representing a client, a lawyer shall not use means that have no substantial purpose other than to

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recognizes, doctrines such as accomplice liability, vicarious liability, and conspiratorial liability can render a defendant liable for an act not personally committed, the Vogelman case clearly did not involve such possibilities. *See id.* at 920-21 n.9. I, as Professor McCord, will assume throughout this Article that the defendant would not be liable under any of these theories, and instead that "the defendant claims that some third person, for whose actions defendant is not criminally responsible, committed the crime." *Id.*

109. The Restatement of the Law Governing Lawyers § 170(1) (Tentative Draft No. 8. 1997) provides: "A lawyer may not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis for doing so that is not frivolous, which includes a good-faith argument for extension, modification, or reversal of existing law."

110. *Id.* § 170(2).

111. *Id.* § 170 cmt. f.

embarrass... or burden a third person...."[112] As stated in the Comment, "[r]esponsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that a lawyer may disregard the rights of third persons."[113] While abusive treatment of witnesses can implicate Rule 4.4,[114] the Rule focuses on the "substantial purposes" of an action rather than its effect.[115] Where the purpose is permitted,[116] the Rule appears to tolerate a high level of negative effect. Thus, if Young and Frutt were acting with a permissible purpose and using otherwise legal means to defend, the fact that their examination of Steve Robin was humiliating and degrading would not likely, by itself, lead to violation of Rule 4.4.[117]

The language of the Restatement is nearly identical to that of Rule 4.4.[118] As currently formulated, the Restatement provides "[w]ide

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112. Model Rules of Professional Conduct Rule 4.4 (1999). This concept is also embodied in the Preamble to the Model Rules, which states "A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others." *Id.* at Preamble. The Model Code of Professional Responsibility, the predecessor to the Model Rules, prohibited an attorney from asking "any question that he has no reasonable basis to believe is relevant to the case and is intended to degrade a witness or other person." Model Code of Professional Responsibility DR 7-106(c)(2) (1980).

113. Model Rules of Professional Conduct Rule 4.4 cmt. The Lawyers' Manual on Professional Conduct states:

> A lawyer's principal duty is to the client, and is stated in affirmative obligations such as loyalty, confidentiality, and diligence. However, a lawyer also has obligations to the court and to third persons. These other obligations temper the zeal with which a lawyer is permitted to represent the client. They are often expressed negatively, as prohibitions against going too far. Model Rule 4.4, 'Respect for Rights of Third Persons,' collects many of these prohibitions, but they may also be found throughout the Model Rules.

Laws. Man. on Prof. Conduct (ABA/BNA) at 71:101 (1993); *see also* Hazard & Hodes, *supra* note 90, § 4.4:101, at 754 ("Rule 4.4 continues the theme of fairness in advocacy by recognizing the rights of non-clients.... Such recognition is testimony to the fact that lawyers are not supposed to be mere amoral hired guns; their role is rather to fight for their clients as hard as need be, but fairly.").

114. *See* Hazard & Hodes, *supra* note 90, § 4.4:102, at 756 ("In litigation, it is often the duty of an advocate to 'burden' or 'embarrass' an adverse witness during cross-examination, if doing so will make the witness less likely to be believed.... Legally, the situation is probably no different where the examining lawyer knows that the witness is telling the truth."); *see also* Freedman, Understanding, *supra* note 18, at 171 (explaining how the lawyer's duty to discredit the truthful witness is rooted in the ethic of zealousness).

115. Annotated Model Rules of Professional Conduct 424 (4th ed. 1999).

116. *See* Hazard & Hodes, *supra* note 90, § 4.4:102, at 756 (Although cross-examining the truthful witness "tends to move a trier of fact away from the truth rather than toward it, the advocate may *still* point to a 'substantial purpose' *other* than harassing the witness, namely winning the case at hand" (emphasis in original)).

117. In the Legal Background to this section found in the Annotated Model Rules, with reference to cross-examining a truthful witness, the authors refer to the colloquy between Mitchell and Subin on the right to present a false defense. *See* Annotated Model Rules of Professional Conduct 426-27 (4th ed. 1999); *supra* note 32.

118. *See* Restatement (Third) of the Law Governing Lawyers § 166(2) (Tentative Draft No. 8, 1997). It adds the words "in a matter before a tribunal" immediately

latitude . . . to advocates in examining an adverse witness."[119] The Commentary recognizes that "some measure of embarrassment, delay, and burden is inherent in litigation,"[120] but cautions that a lawyer "may be subject to professional discipline for intimidating or demeaning witnesses."[121] While not directly addressing the propriety of questioning that shifts blame, the Reporter's Notes to the Restatement explicitly acknowledge, and perhaps implicitly approve, the type of blame-shifting done by Young and Frutt. After noting that "on the whole, courts seem to accept that cross-examination may be made difficult and wearing on witnesses,"[122] the Notes compare "the permissive stance of American law" to "British professional rules [that] regulate a barrister more closely."[123] When conducting proceedings at court, a practicing barrister "must not suggest that a witness or other person is guilty of crime, fraud or misconduct or attribute to another person the crime or conduct of which his lay client is accused unless such allegations go to a matter in issue (including the credibility of the witness) which is material to his lay client's case and which appear to him to be supported by reasonable grounds."[124] This discussion appears to suggest that American lawyers are ethically permitted to do so even when these requirements are not met.

The Restatement separately addresses the cross-examination of witnesses[125] whose testimony the lawyer "knows to be truthful, including harsh implied criticism of the witnesses's testimony,

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after "in representing a client." This was likely designed to make clear that the section applies to conduct in litigation. As noted by Hazard and Hodes, "[t]he placement of Rule 4.4 in Part 4 of the Rules of Professional Conduct (without a corresponding rule in Part 3) was a minor error of draftsmanship, for it might create the impression that Rule 4.4 is limited to out-of-court behavior. No such limitation was intended." Hazard & Hodes, *supra* note 90, § 4.4:101, at 755.

119. Restatement (Third) of the Law Governing Lawyers, § 166 cmt. c.

120. *Id.* § 166 cmt. e. While the Comment further states that "when an advocate lacks a substantial purpose for conduct having those consequences, a disciplinary offense occurs," this would not necessarily be the case in criminal defense because of the lessened duty of the advocate regarding frivolous claims. *Id.* (citing § 170); *supra* note 109 and accompanying text.

121. Restatement (Third) of the Law Governing Lawyers § 166 cmt. c.

122. *Id.* § 166 reporter's note, cmt. a.

123. *Id.*

124. *Id.* (quoting Code of Conduct of the Bar of England and Wales, Rule 610(h)).

125. While the Vogelman case does not technically involve cross-examination because the defense called Steve Robin, ostensibly for a different, limited purpose, he was questioned as if on cross after Young had him declared hostile by the judge. *See The Practice* (ABC television broadcast, Oct.-Nov. 1998). Blame-shifting often involves use of cross-examination to point fingers at others and, because the defendant rarely just admits being the perpetrator, it may well involve the type of embarrassment and intimidation discussed in the Comment. *See* Underwood, *supra* note 64. The examination of Steve Robin is a good example. *See The Practice* (ABC television broadcast, Oct.-Nov. 1998).

character or capacity for truth-telling."[126] The Commentary, which does not appear particularly supportive of such conduct, notes that the lawyer has discretion in this regard, and would presumably only do so "where that would not cause the lawyer to lose credibility with the tribunal or alienate the fact finder."[127] This would appear to exist where the only purpose is to degrade the witness, but could be true as well where the trier of fact perceives the purposes behind the cross-examination to be clearly outweighed by its degrading nature.

The current tenor of the Restatement appears to be tolerant, but not particularly supportive, of vigorous cross-examination of the truthful witness.[128] This position, however, is still under consideration. Following the American Law Institute's 75th Annual Meeting, the Reporters indicated that they "will consider discussing in more detail cross-examination of the truthful witness" with particular focus on distinguishing between the standard for such cross-examination in criminal and civil cases.[129] The Restatement thus appears to reflect some hesitation in continuing to allow the level of embarrassment and burden on witnesses that the Model Rules now permit, although this hesitation may reflect more serious concerns in civil rather than criminal cases.

While the Restatement may be moving away from acceptance of a broad license for attorneys to intimidate or degrade witnesses as long as there is some legitimate purpose behind it, the ABA Standards appear to be moving toward a greater willingness to tolerate and allow such conduct, especially with regard to cross-examination of truthful witnesses. While the proscription on using means "that have no substantial purpose other then to embarrass, delay or burden a third person"[130] was newly added to the third edition,[131] the Standards have always addressed the examination of witnesses and suggested that "[the] interrogation of all witnesses should be conducted fairly, objectively, and with due regard for the dignity and legitimate privacy of the witness . . . ."[132] Moreover, because the Standards have always addressed the cross-examination of witnesses known or believed to be telling the truth, and it is here where the changes are most noticeable.

The first edition of the Standards provided that a "lawyer's belief

126. Restatement (Third) of the Law Governing Lawyers § 166 cmt. c.

127. *Id.*

128. The Reporter's Notes indicate that "[d]iscussions of cross-examining a truthful witness are found only in judicial dicta and academic scholarship and mainly concern criminal defense counsel . . . ." *Id.*

129. The "summary is presented as a guide to actions taken with respect to the drafts submitted at the Meeting" pending publication of the 1998 Proceedings. Summary of Proceedings of the 75th Annual Meeting (visited Feb. 22, 2000) <*http://www.ali.org/ali/ACTIONS.HTM.*>

130. ABA Standards Relating to the Defense Function Standard 4-4.3(a) (3d ed. 1993).

131. "Section (a) is new to this Standard." *Id.* History of Standard.

132. *Id.* Standard 4-7.6(a).

that the witness is telling the truth does not necessarily preclude appropriate cross-examination in all circumstances, but may affect the method and scope of cross-examination."[133] It further cautioned that the lawyer "should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if he knows the witness to be testifying truthfully."[134] The Commentary to this section was "lengthy and replete with ethical concerns,"[135] indicating that "'the high purpose' of cross-examination and impeachment is to expose 'falsehood, not to destroy truth or the reputation of a known truthful witness.'"[136] It appeared clear that, while intimidating cross-examination designed to discredit a truthful witness was not prohibited, it was clearly discouraged.[137]

The second edition of the Standards "changed the operative language of what became Standard 4-7.6 (b) by removing the second sentence of the former provision. The language that admonished criminal defense lawyers not to misuse cross-examination 'to discredit or undermine' the truthful witness was deleted . . . ."[138] The Standard that remained provided that "[a] lawyer's belief or knowledge that the witness is telling the truth does not preclude cross-examination, but should, if possible, be taken into consideration by counsel in conducting the cross-examination."[139] This change appears to reflect a "shift from an aspiration not to undermine truthful witnesses,"[140] unless absolutely essential, to broad permission to do so unless such action can be avoided "without jeopardizing the defense."[141]

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133. ABA Standards Relating to the Defense Function Standard 7.6(b) (1st ed. 1971).

134. *Id.*

135. Lawry, *supra* note 64, at 577.

136. Lawry, *supra* note 64, at 577 (quoting ABA Standards, Standard 7.6(b) commentary).

137. Such conduct was viewed to "'so undermine[ ] the administration of justice that it should be avoided.'" *Id.* at 578 (quoting ABA Standards, Standard 7.6(b)).

138. *Id.* Professor Lawry notes that the language "was deleted because '[t]here are some cases where, unless counsel challenges the prosecution's known truthful witnesses, there will be no opposition to the prosecution's evidence, and the defendant will be denied an effective defense." *Id.* (quoting ABA Standards Relating to the Defense Function Standard 4-7.6(b) (2d ed. 1980)). While the Comment indicates that "[i]f defense counsel can provide an effective defense for the accused and also avoid confusion or embarrassment of the witness, counsel should seek to do so," it acknowledges that "there unquestionably are many cases where defense counsel cannot provide the accused with a defense at all if counsel is precluded from engaging in vigorous cross-examination of witnesses either believed or known to have testified truthfully." ABA Standards, Standard 4-7.6 commentary. In cases where the lawyer "simply intends to put the state to its proof and raise a reasonable doubt, skillful cross-examination of the prosecution's witnesses is essential," and is therefore permitted and perhaps required. *Id.*

139. ABA Standards, Standard 4-7.6(b).

140. Lawry, *supra* note 64, at 579.

141. ABA Standards, Standard 4-7.6 commentary. The concerns expressed in the second edition relate more to tactical considerations and a concern for not discouraging witnesses to come forward than to matters of "conscience and honor"

The third edition goes even further. The current version of Standard 4-7.6(b) removes the qualification suggesting that, "if possible, counsel should take the fact that the witness is telling the truth into account in determining whether and how to examine the witness."[142] This clause was "deleted as inappropriate."[143] Now, the Standard merely states that "defense counsel's belief or knowledge that the witness is telling the truth does not preclude cross-examination."[144] As noted by Professor Lawry, "[t]hough some lip service is paid to ethics, the commentary is written largely in terms of tactics."[145] The attorney can cross-examine in a manner that will demean or humiliate the witness as long as there is an available tactical basis for doing so.[146] Under the current ABA Standards, it would thus appear that Young and Frutt's conduct in questioning Steve Robin in a vigorous manner that suggested he might have been responsible for his sister's murder, and arguing that theory to the jury despite their lack of any basis to believe it to be true, was appropriate as long as it was tactically acceptable.[147]

The foregoing discussion would indicate that nothing in the relevant rules or standards precludes the blame-shifting examination and argument in the Vogelman case.[148] But a significant question remains. Do the Rules require that the lawyer engage in such conduct? At least in the circumstances of this case, it appears the answer is no.

The Model Code of Professional Responsibility required that lawyers "represent a client zealously within the bounds of the law."[149] The black-letter rule, however, held only that lawyers "shall not [fail] to seek the lawful objectives of [their] client[s]."[150] The Model Rules do not adopt the specific requirement of zeal. Rather, Rule 1.3

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that pervaded the Commentary to the first draft. ABA Standards Relating to the Defense Function Standard 7.6 commentary (1st ed. 1971). In fact, the second edition quoted to Justice White's concurrence in *Wade*, ostensibly to demonstrate the ethical propriety of this conduct. *See supra* note 22 and accompanying text.

142. ABA Standards, Standard 4-7.6(b) (2d ed. 1980).

143. ABA Standards Relating to the Defense Function Standard 4-7.6, History of Standard (3d ed. 1993).

144. *Id.* Standard 4-7.6(b).

145. Lawry, *supra* note 64, at 579.

146. Professor Lawry characterizes the change as follows: "Appeals to honor and conscience are gone. In place of the lawyer's discretion and judgment is an admonition to degrade, demean, invade, and insult if there is any tactical advantage to be gained by the client." *Id.* at 580.

147. In fact, Professor Lawry intimates, albeit somewhat sarcastically, this very conclusion: "I suggest there may be tactical advantages in casting the guilt on an innocent. Is that fair game, too?" *Id.*

148. This conclusion would appear to be the same even if the attorneys believed or knew George Vogelman to be guilty. Nothing in the rules or standards appear to distinguish on this basis.

149. Model Code of Professional Responsibility Canon 7 (1980). This was one of the "axiomatic norms" contained in the Code. *See* Annotated Model Rules of Professional Conduct 26 (3d ed. 1996).

150. Model Code of Professional Responsibility DR 7-101.

substitutes "reasonable diligence and promptness" for zeal.[151] The Commentary to the Rule does, however, suggest that "[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client's behalf."[152] Rule 1.3 must be read in conjunction with Rules 1.1 through 1.4, requiring competence, diligence, communication, and a duty to act within the scope of the representation. Taken together, these rules provide a duty to serve the client's legitimate interests.[153] This requirement would not, however, appear to require the attorney to pursue any particular tactics,[154] and there is support for the proposition that, "even over the objection of the client, a lawyer can present or refuse to present certain witnesses . . . refuse to submit a defense as a matter of trial expediency or tactics . . . and decline cross-examination."[155] It thus appears that the Model Rules, by their own terms, neither mandate nor prohibit the blame-shifting conduct in the Vogelman case.

The Restatement, too, focuses on the more particularized duties of competence, diligence, and furthering the lawful objectives of the client rather than on zeal.[156] It suggests that the lawyer work with the client in identifying objectives and deciding means to pursue them, but is less clear in articulating if and when a lawyer must defer to the

151. Model Rules of Professional Conduct Rule 1.3. In fact, a proposal to revise the Restatement so as to reflect that the Model Rules, like the Code, "require zeal as a duty rather than merely an aspiration" was defeated at the 73rd Annual Meeting. 19 ALI Reporter 1, § 28, cmt. d. *But see* Freedman, Understanding, *supra* note 18, at 72-73, 171 (suggesting that the commitment to zeal as a fundamental principle of lawyering should be read into the Model Rules).

152. Model Rules of Professional Conduct Rule 1.3 cmt. 1.

153. *See id.* Preamble. ("As advocate, a lawyer zealously asserts the client's position under the rules of the adversary system.").

154. "[A] lawyer is not bound to press for every advantage that might be realized for a client. A lawyer has professional discretion in determining the means by which a matter should be pursued." *Id.* Rule 1.3 cmt. 1. *See generally* Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 McGeorge L. Rev. 291 (1998) (discussing the lawyer's discretion in pursuing adversarial tactics).

155. Annotated Model Rules of Professional Conduct 21 (3d ed. 1996). This is true "in both criminal and civil matters." *Id.*

156. *See* Restatement (Third) of the Law Governing Lawyers § 28 (1)-(2) (Proposed Final Draft No. 1, 1996). The Comment notes the reference in the Code to a duty to act "'zealously' for a client" and characterizes this term as setting forth a "traditional aspiration." *Id.* cmt. d. It goes on to say, however, that this "should not be misunderstood to suggest that lawyers are legally required to function with a certain emotion or style of litigating, negotiating, or counseling. For legal purposes, the term encompasses the duties of competence and diligence." *Id.*; *see also* W. Bradley Wendel, *Public Values and Professional Responsibility*, 75 Notre Dame L. Rev. 1, 60 n.205 (1999) (citing to this provision to support the proposition that the "Restatement recognizes that the word 'zealous,' which is used to refer to the lawyer's obligation of loyalty, has been misused to justify unwarranted combativeness in representing clients").

client with regard to tactics the lawyer prefers not to pursue.[157] Comment d states that "[a] lawyer is not required to carry out an instruction . . . which the lawyer reasonably believes to be unethical or similarly objectionable,"[158] but continues that "a lawyer may not continue a representation while refusing to follow a client's continuing instruction."[159] In such situations, the lawyer may have a duty to withdraw.[160]

This general conclusion is reinforced in a more concrete context by the Comment to Restatement § 166, which states that "a lawyer has discretion whether to cross-examine a witness with respect to testimony the lawyer knows to be truthful," but "is never required to conduct such examination, and the lawyer may withdraw if the lawyer's client insists on such a course of action in a setting in which the lawyer considers it imprudent or repugnant."[161] Of course, such withdrawal may require approval of the tribunal.[162] Whether the lawyer is required to present the option of this type of examination to the client is not clear, but once the attorney has done so, the Restatement appears to require that the lawyer follow the client's instructions or withdraw.

The ABA Standards establish the "basic duty of defense counsel . . . to serve as the accused's counselor and advocate with courage and devotion and to render effective, quality representation."[163] This requires defense counsel's "zealous professional advocacy"[164] and includes the "responsibility of furthering the defendant's interest to the fullest extent that the law and applicable standards of professional

157. Restatement (Third) of the Law Governing Lawyers §§ 31-34 (Proposed Final Draft No. 1, 1996). Section 32(3) indicates that, for the most part, "a lawyer may take any lawful measure within the scope of representation that is reasonably calculated to advance a client's objectives as defined by the client . . . ." *Id.* § 32(3). The Comment indicates that the "lawyer begins with broad authority to make choices advancing the client's interests. But the client may limit the lawyer's authority by agreement or instructions." *Id.* cmt. b.

158. Restatement (Third) of the Law Governing Lawyers § 32 cmt. d (Proposed Final Draft No. 1, 1996). This appears to be true even if it would not violate professional rules or other law, since this is dealt with in the Comment in a previous clause.

159. *Id.*

160. "A lawyer may, after obtaining any required court permission, withdraw from the representation if the instructions are considered repugnant or imprudent . . . or render the representation unreasonably difficult . . . ." *Id.* Of course, this may be difficult in a criminal defense context where counsel is appointed or where the issue arises during trial.

161. Restatement (Third) of the Law Governing Lawyers § 166, cmt. c (Tentative Draft No. 8, 1997).

162. *See* Restatement (Third) of the Law Governing Lawyers, § 44(4) (Proposed Final Draft No. 1, 1996).

163. ABA Standards Relating to the Defense Function Standard 4-1.2(b) (3d ed. 1993).

164. *Id.* Standard 4-1.2.

conduct permit."[165] The Standards apportion to the lawyer the power of decision in matters of trial strategy and tactics, including what witnesses to call and how to examine.[166] The Comment to Standard 4-1.2 recognizes, however, that "our system of justice is inherently contentious, albeit bounded by the rules of professional ethics and decorum, and it demands that the lawyer be inclined toward vigorous advocacy."[167] Thus, "once a case has been undertaken, a lawyer is obliged not to omit any essential lawful and ethical step in the defense...."[168] Finally, as do the Model Rules, the Standards indicate that a lawyer is not bound to press for every advantage.[169] Taken together, these provisions would appear to require the attorney to exercise discretion in choosing what strategies and tactics to use, but to exercise that discretion in a manner that best advances the client's objectives rather than the attorney's own interest.

Reference to the Standards' treatment of the cross-examination of truthful witnesses reinforces this view. The Comment indicates that, where no other defenses are available and such cross-examination is necessary to put the government to its proof, the attorney may well have an obligation to engage in such examination.[170] "Indeed, were counsel in the circumstance to forego vigorous cross-examination of the prosecution's witnesses, counsel would violate the clear duty of zealous representation that is owed to the client."[171] This is immediately followed by the statement that "the mere fact that defense counsel can, by use of impeachment, impair or destroy the credibility of an adverse witness does not impose upon counsel a duty to do so."[172] In giving guidance on this issue, however, the Comment speaks only in terms of whether the tactic is in the client's best interest,[173] and it would appear that if it is, the attorney may well have an obligation to proceed with the cross-examination or withdraw.

IV. EVIDENTIARY LIMITATIONS ON BLAME-SHIFTING: THE DIRECT CONNECTION DOCTRINE

The discussion of the ethical propriety and permissibility of blame-shifting behavior by criminal defense lawyers under the relevant rules and standards of professional conduct leads to the conclusion that, at least in some cases, such behavior is permitted, and perhaps even

165. *Id.*
166. *See id.* Standard 4-5.2(b) & cmt.; *see also supra* notes 66-87 and accompanying text (discussing the treatment of attorney and client roles in bringing a defense and cross-examination).
167. ABA Standards, Standard 4-1.2 cmt (3d ed. 1993).
168. *Id.*
169. *See id.* Standard 4-1.3 cmt.
170. *See id.* Standard 4-7.6. cmt.
171. *Id.*
172. *Id.*
173. *See id.*

required. While, as noted, defense lawyers and scholars may well disagree, it seems fair to conclude that most commentators would accept that a criminal defense lawyer is ethically permitted to engage in blame-shifting activity, at least where the attorney does not know the client to be guilty and where there is a non-frivolous factual basis for the blame-shifting allegations.[174] While there is still potential concern for the rights of the third person to whom blame is to be shifted, where there is a non-frivolous basis for the claim, it is hard to justify telling a criminal defendant who similarly asserts innocence that a third person's rights outweigh his or her right to present a defense. Yet, interestingly, in most jurisdictions, this does not appear to be the law.

Rules of evidence in a majority of jurisdictions prohibit the introduction of alternative perpetrator evidence unless there is a "direct connection" established between the evidence and the crime. Because an attorney's zeal on behalf of the client must be exercised within the "bounds of the law"[175] and attorneys must comply with rules of procedure and evidence in the course of representing their clients,[176] these rules likely prevent attorneys in many cases from engaging in blame-shifting conduct that appears ethical and appropriate.[177] What accounts for this apparent disjunction between conclusions based on ethical analysis and what the law of evidence requires? In light of the analysis of the ethical propriety of this conduct, are these restrictive rules justified?

This Article contends that they are not. As the remaining section will show, the direct connection doctrine is inconsistent with our understanding of the role of the criminal defense lawyer in the adversary system of criminal justice, unduly restricts defendants' constitutional rights, and increases the risk of erroneous conviction of innocent defendants both in individual cases and on a systemic basis. Accordingly, this rule should be changed.

The direct connection doctrine is an evidentiary rule that prohibits a defendant from introducing evidence to show that someone other than the defendant (an alternative perpetrator) may have committed the offense for which the defendant is charged unless the defendant can establish a direct connection between the alternative perpetrator

174. *See supra* notes 56-65 and accompanying text.

175. Model Code of Professional Responsibility Canon 7 (1980); *supra* note 149 and accompanying text.

176. *See* Model Rules of Professional Conduct Rule 3.4(c) (1999).

177. Of course, an attorney can offer evidence she reasonably believes to be admissible, see Model Rule 3.4(e), and can make a good faith argument for change in the law (to admit evidence that otherwise would be inadmissible). *See* Model Rules of Professional Conduct Rule 3.1. The evidence must be proffered to obtain judicial consideration and preserve the issue for appellate review. This generally requires making an offer of proof. *See* Fed. R. Evid. 103; McCormick on Evidence § 51 (John W. Strong ed., 5th ed. 1999).

and the offense.[178] Although the language used by jurisdictions varies,[179] the direct connection doctrine provides a preliminary evidentiary hurdle for a defendant who seeks to affirmatively offer evidence or engage in cross-examination[180] that purports to identify another person as the potential perpetrator of the crime.[181]

In effect, the direct connection doctrine substantially limits, and in many cases completely prevents, a defendant who says "not me" from attempting to answer the question "then who?" The doctrine considers evidence inadmissible that would serve to shift blame to a third party "if it simply affords a possible ground of suspicion against such person."[182] In order to be admissible, any evidence of motive or opportunity "must be coupled with substantial evidence tending to directly connect that person with the actual commission of the offense."[183] The proffered evidence must not only raise a reasonable inference of the defendant's innocence, but must also "directly connect the other person with the corpus delicti."[184] Courts use various formulations to characterize the nature of the "nexus"[185] or "link"[186] required between the third person and the crime,[187] but in

178. *See* McCord, *supra* note 2, at 921.

179. *See id.* at 926 nn.39-40; *see also infra* notes 185-92 and accompanying text.

180. The direct connection doctrine applies to testimony elicited on direct or cross-examination as well as to non-testimonial evidence offered to prove the guilt of a third party.

181. There may be other hurdles when alternative perpetrator evidence is offered, including issues of hearsay and other bad act evidence under Rule 404(b). *See* McCord, *supra* note 2, at 977-82 (discussing the general ban on character evidence as well as one of the large exceptions to that ban); *see, e.g.*, Joan L. Larsen, Comment, *Of Propensity, Prejudice, and Plain Meaning: The Accused's Use of Exculpatory Specific Acts Evidence and the Need to Amend Rule 404(b)*, 87 Nw. U. L. Rev. 651, 692-95 (1993) (proposing an amendment to Rule 404(b) that acknowledges the situation of an accused seeking to introduce evidence of a third person's specific acts to exculpate himself); Dennis Prater and Tammy M. Somogye, Comment, *Some Other Dude Did It (But Will You Be Allowed To Prove It?)*, 67 J. Kan. B. Ass'n, May 1998, at 28-29 (discussing the admissibility of bad act evidence under the alternative perpetrator defense). These issues are beyond the scope of this Article.

182. State v. Rabellizsa, 903 P.2d 43, 46 (Haw. 1995) (quoting People v. Green, 609 P.2d 468, 480 (Cal. 1980)).

183. *Id.* (citation omitted). Courts explain that "[u]nless that direct connection exists, it is within 'the sound discretion of the trial court to refuse to admit such evidence when it simply affords a possible ground of possible suspicion against another person.'" State v. Harris, 711 A.2d 769, 775 (Conn. App. 1998) (quoting State v. Payne, 591 A.2d 1246, 1259 (Conn. 1991)).

184. Santana v. State, 510 S.E.2d 916, 917 (Ga. App. 1999) (quoting Klinect v. State, 501 S.E.2d 810, 814 (Ga. 1998)). It is also sufficient if the evidence shows "that the other person has recently committed a crime of the same or similar nature." *Id.* at 917.

185. Winfield v. United States, 676 A.2d 1, 5 (D.C. App. 1996).

186. Pyles v. State, 947 S.W.2d 754, 757 (Ark. 1997).

187. These formulations range from "direct connection," *Santana*, 510 S.E.2d at 917; State v. Clark, 859 S.W.2d 782, 788 (Mo. App. 1993); State v. Grega, 721 A.2d 445, 454 (Vt. 1998), to "inherent tendency," State v. Williams, 593 N.W.2d 227, 233 (Minn. 1999) (quoting State v. Hawkins, 260 N.W.2d 150, 159 (Minn. 1997)), to

each case, there must be an actual connection between the individual and the crime itself.[188] The degree of connection also varies, with some courts requiring only "some evidence,"[189] and others "substantial evidence."[190] In some instances, courts require that the evidence be such as "to clearly implicate someone besides the accused as the guilty person,"[191] or "clearly to point to another, rather than the accused."[192]

The direct connection doctrine has been applied to prevent introduction of blame-shifting evidence in a wide variety of cases.[193] Because the doctrine leads to exclusion of evidence that an alternative perpetrator had the motive and means to commit the crime absent "direct evidence placing the third party at the scene,"[194] exclusion has been deemed appropriate in cases with strong evidence of motive or opportunity. Thus, the fact that the alternative perpetrator may have made threats against the victim,[195] or was seen with blood on his hands in the vicinity of the crime,[196] or had assaulted the victim two weeks before the crime,[197] have been deemed insufficient in the absence of evidence clearly linking the alternative perpetrator to the actual crime itself.[198] As the cases demonstrate, without such a link, no evidence

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"legitimate tendency," *Rabellizsa*, 903 P.2d at 46; State v. Denny, 357 N.W.2d 12, 17 (Wis. 1984).

188. An additional formulation states that "such evidence is inadmissible unless it points directly to the guilt of the third party." *Pyles*, 947 S.W.2d at 757 (quoting State v. Wilson, 367 S.E.3d 589, 600 (N.C. 1988)).

189. *See* State v. Harris, 711 A.2d 769, 775 (Conn. App. Ct. 1998); *Denny*, 357 N.W.2d at 17.

190. *Denny*, 357 N.W.2d at 16; *Rabellizsa*, 903 P.2d at 46. Additionally, some courts require a "reasonable possibility formulation [to] govern the relevance decision in the case of evidence of third-party perpetration." *Winfield*, 676 A.2d at 5.

191. *Clark*, 859 S.W.2d at 788.

192. Romano v. State, 847 P.2d 368, 381 (Okla. Crim. App. 1993).

193. *See* McCord, *supra* note 2, at 948-72 nn.153-250. Professor McCord documents 240 cases involving alternative perpetrator evidence between 1976 and 1996 and attempts to categorize the cases to better understand how courts rule in such cases. He identifies six categories of evidence and eventually concludes that, analyzing the strength of each type of evidence and the combination of categories of evidence offered, it is possible to predict whether evidence will be admitted based on ten general predictive principles. *See id.* at 938-63. He concludes that a trial court's decision to exclude alternative perpetrator evidence will be upheld in almost 80% of cases, and that there are only three categories in which evidence is likely to be admitted. *See id.* at 947.

194. State v. Williams, 593 N.W.2d 227, 234 (Minn. 1999).

195. *See, e.g.*, State v. Robinson, 628 A.3d 664, 667 (Me. 1993) (explaining that such statements would be admissible to reasonably establish a link between the alternative perpetrator and victim).

196. *See* State v. Luna, 378 N.W.2d 229, 232 (S.D. 1985).

197. *See* State v. Stokes, 638 S.W.2d 715, 723 (Mo. 1982). The alleged alternative perpetrator was the victim's former boyfriend and his fingerprints were found in her apartment after the crime. *See id.*

198. As the Supreme Court of Minnesota noted in a fairly typical passage, "[i]n cases in which we have upheld or required the admission of evidence of other bad acts by a third party, there always has been some direct evidence placing the third party at

tending to show motive, opportunity, or commission of prior serious crimes will make its way to the jury.[199]

Returning to the Vogelman scenario, it seems clear that the alternative perpetrator evidence that was introduced in that case would not have been admissible in most jurisdictions. The evidence and argument regarding Steve Robin related solely to motive and opportunity. In most jurisdictions, this alone would have been fatal.[200] The absence of any evidence whatsoever linking Steve Robin to the crime itself would have precluded the entire line of examination designed to set up the "Plan B" blame-shift. This conclusion is likely the same under Professor McCord's analysis as well because the motive evidence would likely have been characterized as weak to moderate[201] and the opportunity evidence was likely weak as well.[202] Thus, in almost every direct connection jurisdiction, the prosecution's objection to this line of questioning, which showed merely motive and opportunity,[203] would likely have been sustained.[204]

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the scene of the charged crime." *Williams*, 593 N.W.2d at 234. Other courts will permit alternative perpetrator evidence where there is "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." Pyles v. State, 947 S.W.2d 754, 757 (Ark. 1997) (quoting People v. Kaurish, 802 P.2d 278, 295-96 (Cal. 1990)).

199. *See* State v. Umfrees, 433 S.W.2d 284, 288 (Mo. 1968) ("Disconnected and remote acts, outside the crime itself cannot be separately proved" and are inadmissible).

200. *See, e.g.*, *Pyles*, 947 S.W.2d at 757 ("'[E]vidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice . . . .'" (quoting *Kaurish*, 802 P.2d at 805).

201. *See* McCord, *supra* note 2, at 942. This characterization is based on that fact that, although he had some need for money and would inherit more if his sister were dead, there was nothing to indicate he was sufficiently desperate that he would kill his sister in order to eventually inherit more. Professor McCord considered evidence of motive "strong" if the alternative perpetrator had recently threatened the victim or if there were other "easily inferable powerful impulses" such as to cover up a crime or retaliate for criminal or sexual misconduct by the alternative perpetrator. *Id.* "Weak" motive evidence tended to be remote, incommensurably slight compared to the gravity of the offense, or manifested a general dislike of the victim. *Id.* at 942-43. Anything in between was characterized as "moderate." *See id.* at 943. While the nature of the motive could, in some cases, have made it strong, the lack of commensurability to murder significantly undercuts that characterization. *See id.*

202. *See id.* at 940-42. Similarly, although Young tried to imply that Steve Robin could have followed his sister and discovered where she had gone with George Vogelman, there was no actual evidence of opportunity to commit the crime. According to Professor McCord, to be "strong," alternative perpetrator evidence had to place the person at the scene of the crime at the time of commission. *See id.* at 940. Opportunity evidence was considered "weak" when it showed no more than that the named person could have been in the general vicinity at the time of the crime. *See id.* at 941. Cases in the middle were considered "moderate." *See id.* at 942. Although Young speculated that Robin could have followed his sister or otherwise have determined where she had gone the night of the killing, the evidence of opportunity clearly falls in the weak category.

203. The fact that the evidence was offered in part to prove the police failure to investigate does not alter this result. Courts do not distinguish the use to which the alternative perpetrator evidence will be put. If it is evidence that tends to cast blame

While the direct connection doctrine is both frequently applied and long-standing, little scholarly attention was paid to it until Professor McCord's major article in 1996 in which he documented the history of the doctrine and its extensive use by jurisdictions around the country.[205] As Professor McCord illustrated, the direct connection doctrine has a long history and dates back at least into the middle of the nineteenth century.[206] The doctrine "made slow but steady progress during the first half of the twentieth century."[207] By 1950, it was a "freestanding principle of criminal and evidence law" that "came to dominate" American jurisprudence.[208] Despite challenges beginning in the late 1960s based on the emerging constitutional right of a criminal defendant to put on a defense,[209] it has survived relatively intact in most jurisdictions[210] and continues to be used on a regular

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on another, it is subject to the direct connection doctrine.

204. This would at least appear to be true based on evaluation of reported cases. However, it is difficult to know the extent to which appellate cases on this issue reflect the whole universe of cases in the trial courts, since only those cases in which the evidence is excluded are likely to ever be seen by an appellate court. *See id.* at 947. It is unclear whether, in ruling on evidentiary issues, trial judges are more likely to err on the side of the defendant to avoid review and reversal or on the side of the government to preserve reviewability of their rulings. *Compare* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. Pa. L. Rev. 506, 520 & n.22 (1973) (suggesting trial judges may have a government bias in ruling on close cases in order "to preserve reviewability"), *with* Kate Stith, *The Risk of Legal Error in Criminal Cases: Some Consequences of the Asymmetry in the Right to Appeal*, 57 U. Chi. L. Rev. 1, 38-42 (1990) (suggesting a pro-defense bias is more likely if the judges' desire is to avoid reversal). An accurate picture of how the doctrine is actually applied in the trial courts thus cannot be obtained solely through examination of appellate cases; it would require information from the trial courts.

205. *See* McCord, *supra* note 2, at 921-38.

206. *See id.* at 921-25. Professor McCord identifies *State v. May*, 15 N.C. (1 Dev.) 328 (1833), as the earliest alternative perpetrator case he found. McCord, *supra* note 2, at 921.

207. *Id.* at 926.

208. *Id.* Professor McCord notes that, while the direct connection doctrine is prominent, there are two alternative approaches. One is an "aberrant" version of the doctrine in three states that allows a defendant to offer alternative perpetrator evidence only if the government's case is circumstantial. The second is the "capable-of-raising-a-reasonable-doubt" approach. This is based on Professor Wigmore's view that alternative perpetrator evidence should be admitted without special requirements, but as Professor McCord notes, those jurisdictions using Professor Wigmore's terminology do not share his view of admissibility and generally apply a version of the direct connection doctrine under the guise of this language. *See id.* at 926-29.

209. *See id.* at 929-30, nn.52-53 (discussing Washington v. Texas, 388 U.S. 14 (1967); Chambers v. Mississippi, 410 U.S. 284 (1973); United States v. Nixon, 418 U.S. 683 (1974); and Rock v. Arkansas, 483 U.S. 44 (1987)).

210. This is not to suggest that the doctrine is universally accepted. As Professor McCord notes, eight jurisdictions seem to rely solely on the standard balance of probative value versus prejudicial effect, three use the capacity-to-create-a-reasonable-doubt test without imposing a requirement of direct connection, and one rejects the doctrine as setting too high a standard. *Id.* at 936-38 & nn.103-05. Recent cases, too, confirm that some jurisdictions reject the doctrine and allow alternative

basis.[211]

The stated justifications underlying the direct connection doctrine relate largely to the orderly administration of trials.[212] "The asserted rationale of [the rule] is 'to place reasonable limits on the trial of collateral issues . . . and to avoid undue prejudice to the [government] from unsupported jury speculation as to the guilt of other suspects.'"[213] While some courts have viewed this as a question of relevance[214] and have held that evidence which is merely speculative does not have a "legal tendency to establish the innocence" of the

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perpetrator evidence to be admitted under the same standards as any other evidence offered at trial. *See, e.g.*, State v. Fulston, 738 A.2d 380, 384 (N.J. Super. Ct. App. Div. 1999) ("To be admissible, the third party evidence need not show substantial proof of a probability that the third person committed the act; it need only be capable of raising a reasonable doubt of the defendant's guilt."). A recent case established a "reasonable possibility" standard in lieu of direct connection, a standard that is much easier for the defendant to meet. *See* Winfield v. United States, 676 A.2d 1, 5 (D.C. App. 1996). Not surprisingly, such evidence is more likely to be admitted in these jurisdictions. *See Fulston*, 738 A.2d at 384-85.

211. *See* McCord, *supra* note 2, at 929-30. According to Professor McCord, 36 jurisdictions have enough case law regarding alternative perpetrator evidence to support thorough analysis, and of those, twenty-five adhere at least in part to the doctrine. *See id.* at 936-37. Since Professor McCord did his analysis, at least three jurisdictions he listed as not setting forth standards have done so, and each has adopted a version of the direct connection test. *See* Pyles v. State, 947 S.W.2d 754, 757 (Ark. 1997) (adopting requirement that a link must be shown between the alleged perpetrator and the crime before admitting evidence incriminating a third party); State v. Rabellizsa, 903 P.2d 43, 47 (Haw. 1995) (adopting the "legitimate tendency" version of the test); Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997) (upholding a limitation on cross-examination of witnesses designed to shift blame on the ground that an insufficient connection had been established between the cross-examination and the facts in evidence, however, not explicitly adopting the test). It thus appears that a majority of jurisdictions recognize some version of the direct connection doctrine. *See also* Smithart v. State, 988 P.2d 583, 587 (Alaska 1999) (stating that the concerns underlying the direct connection doctrine "have led virtually every state to require some kind of preliminary evidentiary showing before allowing introduction of alternative-perpetrator evidence").

212. *See* State v. Luna, 378 N.W.2d 229, 234 (S.D. 1985). The court recognizes that interest as substantial and the interest in "reliable and efficient trials" to be compelling. *Id.* at 233; *see also* State v. Scheidell, 595 N.W.2d 661, 671 (Wis. 1999) ("The state has a significant interest in preserving orderly trials."). It is interesting that the courts rarely discuss the concern regarding the rights of the alleged third party perpetrator. For examples of a few isolated instances in which courts have done so, see *State v. Williams*, 593 N.W.2d 227, 233 (Minn. 1999) (stating that the doctrine "safeguards the third person from indiscriminate use of past differences with the deceased" (quoting State v. Hawkins, 260 N.W.2d 150, 159 (Minn. 1977)); *State v. Braddock*, 452 N.W.2d 785, 790 (S.D. 1990) (same).

213. Perry v. Rushen, 713 F.2d 1447, 1453 (9th Cir. 1983) (quoting People v. Green, 609 P.2d 468, 480 (Cal. 1980)).

214. *See, e.g.*, State v. Harris, 711 A.2d 769, 775 (Conn. App. Ct. 1998) (stating "[t]he admissibility of evidence of third party culpability is governed by the rules relating to relevancy"); Quinn v. State, 25 P.2d 711, 714 (Okla. Crim. App. 1933) (stating that evidence must clearly point to another). This is likely wrong. *See* McCormick on Evidence § 185 (John W. Strong ed., 5th ed. 1999).

accused,[215] courts now generally recognize that the issue is more properly one of the balance between probative value and prejudice.[216]

In fact, the concerns expressed by the courts in justifying the exclusion of alternative perpetrator evidence—that it risks distracting the jury from the issue of defendant's guilt,[217] that it will cause juror confusion,[218] and that it will lead to waste of judicial resources[219]—are similar or identical to the considerations used under Rule 403[220] to balance probative value and prejudicial effect. Federal Rule of Evidence 403 "codifies the common law power of the judge to exclude relevant evidence 'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.'"[221] In fact, the direct connection doctrine may well be a specialized version of the Rule 403 balance applicable in alternative perpetrator cases.[222]

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215. *Quinn*, 25 P.2d at 714.

216. *See, e.g.*, Hinds v. State, 469 N.E.2d 31, 38 (Ind. Ct. App. 1984) (recognizing that "a reasonable argument can be made" that the requirement that evidence "should not be admitted where its probative value is outweighed by its prejudicial effect" is "the same standard of admissibility [that] should govern evidence of similar crimes by persons other than the defendant, offered . . . to prove his innocence"); *Maddox*, 955 S.W.2d at 721 (requiring the trial judge to determine that the probative value of such evidence is not outweighed by its prejudicial effect before allowing admission of such evidence); State v. Garza, 563 N.W.2d 406, 410-11 (S.D. 1997) (noting that the court must balance between having orderly trials and excluding prejudicial evidence); State v. Grega, 721 A.2d 445, 454 (Vt. 1998) (stating that third party evidence may be excluded when the danger of unfair prejudice or confusion substantially outweighs its probative value); *see also* McCord, supra note 2, at 974-77 (comparing probative value with countervailing considerations).

217. *See* Winfield v. United States, 676 A.2d 1, 5 (D.C. 1996); *Perry*, 713 F.2d at 1453-54.

218. *See Hinds*, 469 N.E.2d at 38 ("[U]nder a less restrictive rule, a defendant could confuse the jury with a plethora of evidence suggesting–but not really showing–that any number of other persons might have committed the crime charged.").

219. *See* Marrone v. State, 359 P.2d 969, 984 & n.19 (Alaska 1961) (citing People v. Perkins, 59 P.2d 1069, 1074-75 (Cal. Dist. Ct. App. 1936)). The direct connection doctrine

> rests upon the necessity that trials of cases must be both orderly and expeditious, but they must come to an end, and that it should be a logical end. To this end, it is necessary that the scope of inquiry into collateral and unimportant issues must be strictly limited . . . [otherwise], a great many trial days might be consumed in the pursuit of inquiries which could not be expected to lead to any satisfactory conclusion.

Id. at 984 n.19; *see also* State v. Luna, 378 N.W.2d 229, 234 (S.D. 1985) (noting that exclusion is appropriate to avoid "unduly tying up the court process").

220. *See* Fed. R. Evid. 403.

221. *See* McCormick, *supra* note 214, § 185, at 644.

222. *See* McCord, *supra* note 2, at 975 ("The direct connection doctrine is really a specialized application of the balance between probative value and countervailing considerations at the preliminary fact stage."); *see also* Smithart v. State, 946 P.2d 1264, 1276 (Alaska Ct. App. 1997), *rev'd on other grounds*, 988 P.2d 583 (Alaska 1999) ("[The] rule is, in essence, an attempt to apply this balancing of probative value against prejudicial impact in the specific context of evidence offered to show that a

The direct connection doctrine, although purportedly designed to increase trial efficiency, in reality impairs a defendant's right to present a defense, interferes with the right to trial by jury, and undercuts the requirements of proof beyond a reasonable doubt. Moreover, it increases the risk of convicting an innocent person. By substituting a mechanistic determination for the necessary balance of probative value and prejudicial effect, it runs dangerously close to violating a defendant's constitutional rights.

Initially, the direct connection doctrine is inconsistent with our adversary system of criminal justice. The criminal justice system requires that the government shoulder the burden of proving a defendant guilty beyond a reasonable doubt while affording the defendant a right to present a defense.[223] While the right is not absolute,[224] it encompasses the ability to advance any legitimate theory of defense and to present evidence necessary to support that theory without undue interference.[225] The direct connection doctrine unduly impairs both aspects of this right. It totally prevents a defendant from introducing evidence to advance an alternative perpetrator theory of defense unless the defendant can overcome a high preliminary hurdle by showing a direct connection.[226] In doing so, the doctrine totally excludes relevant defense evidence from consideration by the jury.[227]

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third party committed the crime."); State v. Wooten, 972 P.2d 993, 1000 (Ariz. Ct. App. 1999) ("The 'inherent tendency' test is little more than the application of these rules [401 and 403] to that category" of evidence.).

223. *See, e.g.*, Washington v. State, 737 So. 2d 1208, 1221 (Fla. Dist. Ct. App. 1999) ("The constitutional guarantees of due process provide for the admission of evidence relevant to the defense of the accused, and it is clear that '[f]ew rights are more fundamental than that of an accused to present witnesses in his own defense.'" (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973))); State v. Scheidell, 595 N.W.2d 661, 666 (Wis. 1999) (recognizing that a defendant's right to cross-examine witnesses and to present witnesses in his or her own defense are fundamental and essential to a fair trial).

224. *See Scheidell*, 595 N.W.2d at 666.

225. *See, e.g.*, *Smithart*, 988 P.2d at 586-87 (noting that when evidentiary rules interfere with a defendant's right to present a defense, such defendant's due process rights are violated); State v. Luna, 378 N.W.2d 229, 239 (S.D. 1985) (Henderson, J., dissenting) ("The accused 'is entitled to have the jury consider any theory of the defense which is supported by law and which has some foundation in the evidence, however tenuous.'" (citations omitted)).

226. *See* McCord, *supra* note 2, at 984 (expressing concern that, due to the requirement of the judge's preliminary ruling and the "coincidence problem" it creates, "in an aaltperp case, where the judge cannot direct a verdict for the prosecution . . . the jury never gets to hear evidence of and consider the defendant's aaltperp defense, which is likely to be the defendant's primary argument for acquittal").

227. As Professor McCord notes, this "coincidence problem," where the judge must rule on the very issue that is to be presented to the jury, "is at least troublesome" in that "the judge's opinion on a single fact question that affects both admissibility and the merits might control the outcome of the case. The most dramatic possibility is that the jury never gets the case because the judge decides such

The direct connection doctrine improperly shifts the focus of admissibility from whether the evidence sought to be offered has a tendency to negate the defendant's guilt to how effectively it proves the guilt of the alternative perpetrator.[228] In doing so, it substitutes a mechanical determination of connection for the careful balancing of probative value and legitimate prejudicial effect that is normally necessary to exclude relevant evidence helpful to the defense.

This use of a mechanistic surrogate for the proper inquiry in determining admissibility of defense evidence may well involve the type of "*a priori* categor[y]"[229] that should not withstand constitutional scrutiny. While courts have reversed exclusion of alternative perpetrator evidence at least in part because of this concern about the doctrine's impact on the defendant's right to present a defense in particular cases,[230] no court has yet held the doctrine itself to be unconstitutional.[231] It is arguable, however, that strict application of the direct connection doctrine may violate the constitutional right of the criminal defendant to put on a defense.

The Supreme Court has held that criminal defendants must be afforded "a meaningful opportunity to present a complete defense."[232] This right, however, is not without limits, and it "may, in appropriate cases, [be required to] bow to accommodate other legitimate interests in the criminal trial process."[233] An accused may be required to "comply with established rules of procedure and evidence designed to

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a fact question...." *Id.* at 984 (quoting Christopher B. Mueller & Laird C. Kirkpatrick, Evidence 43 (1995)).

228. This point has been recognized by several courts in rejecting or limiting the application of the doctrine:

> [T]he crucial issue is whether other-suspect evidence calls the defendant's guilt into question: "There is no requirement that the proffered evidence must prove or even raise a strong probability that [the third party] committed the offense. Rather, the evidence need only tend to create a reasonable doubt that the defendant committed the offense.... [O]ur focus is on the effect the evidence has upon the defendant's culpability and not the third party's culpability."

Smithart, 583 P.2d at 588 (quoting Johnson v. United States, 552 A.2d 513, 517 (D.C. 1989)).

229. Katherine Goldwasser, *Vindicating the Right to Trial By Jury and the Requirement of Proof Beyond A Reasonable Doubt: A Critique of the Conventional Wisdom About Excluding Defense Evidence*, 86 Geo. L.J. 621, 628 (1998).

230. *See, e.g.*, United States v. Armstrong, 621 F.2d 951, 953 (9th Cir. 1980) ("The trial court erred in excluding evidence which indicated that another man may have committed" the crime.); Newman v. United States, 705 A.2d 246, 257-58 (D.C. App. 1997) (citing cases that were reversed due to the exclusion of extrinsic evidence impeaching a third party where the rationale for such reversal was that the defendant's right to present a defense had been curtailed).

231. *See* McCord, *supra* note 2, at 930 ("Indeed, no appellate court has ever held, or even intimated, that the direct connection doctrine is itself unconstitutional.").

232. Crane v. Kentucky, 476 U.S. 683, 690 (1986) (quoting California v. Trombetta, 467 U.S. 479, 485 (1984)).

233. Rock v. Arkansas, 483 U.S. 44, 55 (1987) (quoting Chambers v. Mississippi, 410 U.S. 284, 295 (1973)).

assure both fairness and reliability in the ascertainment of guilt and innocence,"[234] but restrictions may not be "arbitrary or disproportionate" to legitimate government purposes[235] and "may 'not be applied mechanistically to defeat the ends of justice.'"[236]

Applying these rules to the direct connection doctrine, it could be argued that a mechanical application that focuses on the degree of connection between the third party and the crime, rather than on the relevance of third party perpetrator evidence to the defendant's guilt, is a mechanistic application of an arbitrary rule that unduly restricts defendants from presenting exculpatory evidence. Since explicit balancing under Rule 403 is an easily applied alternative that can adequately accommodate the legitimate interests of the state while not risking improper exclusion of defense evidence, the state's use of the direct connection doctrine is unconstitutional.

Alternatively, the state could contend that the right to present a defense is not triggered until a defendant has established that the evidence sought to be admitted is "relevant and material to the defense."[237] The direct connection doctrine is an appropriate means of determining relevance and materiality, and therefore does not contravene the Constitution. Moreover, where the Court has found admission of defense evidence to be constitutionally required, the evidence was "critical to [the] defense."[238] Evidence that does not pass the direct connection test arguably cannot be viewed as critical.

Because the Court has not clearly articulated how the various tests are to be interpreted and the appropriate standard for balancing the competing interests,[239] it is unclear how this issue would be resolved. Even if a court would refuse to strike down the doctrine itself as violative of the Constitution, however, given the fundamental nature of the right that is implicated, its pivotal role in the adversary system of criminal justice, and the potential impact of the direct connection doctrine on that Constitutional right, it seems appropriate that courts should at least use more care in assessing proffers of alternative perpetrator evidence than is currently the case.

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234. *Rock*, 483 U.S. at 55 n.11 (quoting *Chambers*, 410 U.S. at 302). "The accused does not have an unfettered right to offer [evidence] that is incompetent, privileged, or otherwise inadmissible under standard rules of evidence." Montana v. Egelhoff, 518 U.S. 37, 42 (1996) (plurality) (quoting Taylor v. Illinois, 484 U.S. 400, 410 (1988)).

235. *Rock*, 483 U.S. at 56.

236. *Id.* at 55 (quoting *Chambers*, 410 U.S. at 302).

237. *Id.* (quoting Washington v. Texas, 388 U.S. 14, 23 (1967)).

238. *Id.* (quoting *Chambers*, 410 U.S. at 302).

239. *See* Larsen, *supra* note 181, at 676; John Lausch, Note, Stephens v. Miller: *The Need to Shield Rape Victims, Defend Accused Offenders, and Define a Workable Constitutional Standard*, 90 Nw. U. L. Rev. 346, 368 (1995). For another analysis of the constitutional issues relating to such evidence, see Donald A. Dripps, *Relevant But Prejudicial Exculpatory Evidence: Rationality Versus Jury Trial and the Right to Put On a Defense*, 69 S. Cal. L. Rev. 1389, 1402-07 (1996) [hereinafter Dripps, *Relevant but Prejudicial*].

Additionally, the direct connection doctrine unduly interferes with a defendant's Sixth Amendment right to trial by jury. Allowing trial courts to exclude evidence that advances a defendant's theory of defense because of a risk that juries may be confused or distracted is "inconsistent with values embodied in the Sixth Amendment right to trial by jury."[240]

In an insightful article addressing reliability-based exclusionary rules, Professor Katherine Goldwasser recognized that such rules impair a defendant's Sixth Amendment jury trial right.[241] "The Sixth Amendment guarantee of the right to trial by jury in criminal cases is founded on the notion that juries are likely to be more protective of an accused than are judges."[242] As fact finders, juries are given the responsibility "for assessing the credibility of witnesses and reliability of physical evidence, determining the weight to be given each item of evidence and inferences to be drawn from the evidence, and doing whatever else they need to do in order to figure out, as best they can, 'what really happened.'"[243] This responsibility and authority belong to the jury alone. It is simply not the role of the judge to find facts.[244]

As noted by Professor Goldwasser, three essential considerations support the jury's role as fact-finder: that jurors are, like the defendant, ordinary people; that they reflect a group consensus rather than act as an individual decision-maker; and that they bring a fresh perspective to their decision-making.[245] These considerations mean that juries are likely to offer a variety of views, are more conducive to deliberation, and are more likely to "be receptive to—or at least give meaningful consideration to—the unusual, unexpected, or even implausible stories criminal defendants sometimes bring to court."[246] The "net effect" is that the factual issues are likely to

> be resolved by a decisionmaker that is less likely than a judge to be affected by pro-government bias, that is more likely than a judge to bring to bear multiple perspectives, and that is less likely than a judge to truncate its attention to the accused's side of the case.[247]

The direct connection doctrine, by setting an artificially high threshold for admission and excluding jury consideration of any evidence relating to an alleged alternative perpetrator when that threshold cannot be met, categorically deprives a defendant of

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240. Goldwasser, *supra* note 229, at 636.
241. *See id.* at 636-42.
242. *Id.* at 636.
243. *Id.* at 636-37.
244. *See id.* at 637.
245. *See id.* at 637-38. *But see* Samuel R. Gross, *Lost Lives: Miscarriages of Justice in Capital Cases*, 61 Law & Contemp. Probs., Autumn 1998, at 125, 145-46 (suggesting that, because juries lack experience with the system, they may not provide significant protection to innocent defendants) [hereinafter Gross, *Miscarriages of Justice*].
246. Goldwasser, *supra* note 229, at 639.
247. *Id.*

precisely what it is we purport to care about

> in guaranteeing the right to trial by jury—namely, providing for the kind of decisionmaker who is most likely to listen to, actually hear, and be open to full and separate consideration of, each and every item of evidence an accused may offer in support of his or her case.[248]

Moreover, the direct connection doctrine shows a distrust for jurors and their ability to adequately assess evidence. Courts are apparently concerned that a jury will inappropriately rely on speculative evidence and will be distracted from the real issue in the case.[249] However, "[p]robative evidence should not be excluded because of 'crabbed notions of relevance or excessive mistrust of juries.'"[250] Additionally, as Professor Wigmore recognized, the risk is not nearly as significant as these courts indicate, because "if the evidence is really of no appreciable value no harm is done in admitting it."[251] The only "prejudice" to the government occurs if the jury finds the evidence sufficient to create a reasonable doubt—but if it does, it is likely precisely because the government has failed to carry its burden to negate other theories of the crime beyond a reasonable doubt.

At its core, the direct connection doctrine appears to be based largely on a fear of prejudice to the government in the form of "erroneous acquittals."[252] This concern was first identified in *State v. May*,[253] the first known case in which the doctrine appeared.[254] In *May*, the court stated that such excluded evidence is "too uncertain, and too easily fabricated falsely for the purpose of deceiving, to be relied on or acted on in a Court."[255] More recently, a similar theme

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248. *Id.* Professor Goldwasser reached this same conclusion with regard to unreliability-based rules of exclusion. *See id.* at 645. Not all commentators agree that the jury trial right is of such importance. Professor Dripps, in acknowledging the conflict between exclusion of favorable defense evidence and reliability concerns, suggests that this problem can be solved by giving the defendant the option of a bench trial. *See* Dripps, *Relevant but Prejudicial*, *supra* note 239, at 1426.

249. *See supra* notes 212-22 and accompanying text.

250. Allen v. United States, 603 A.2d 1219, 1224 (D.C. 1992) (quoting Riordan v. Kempiners, 831 F.2d 690, 698 (7th Cir. 1987)). The Allen Court included as "probative evidence" those "arguments based on reasonable inferences from such evidence." *Allen*, 603 A.2d at 1224 n.10. Such mistrust may be unwarranted. "The strength of the jury is the difficulty to hoodwink twelve average Americans in rational matters." William David Gross, *The Unfortunate Faith: A Solution to the Unwarranted Reliance Upon Eyewitness Testimony*, 5 Tex. Wesleyan L. Rev. 307, 325 (1999) [hereinafter Gross, *Unfortunate Faith*].

251. 1A Wigmore, Evidence § 139, at 1724 (Tillers. Rev. 1983).

252. State v. Scheidell, 595 N.W.2d 661, 671 (Wis. 1999) ("An additional concern is erroneous acquittals; a judge has no power 'to assure that an acquittal is based on the proper legal standard: a reasonable doubt rather than a speculative one.'" (quoting McCord, *supra* note 2, at 976)).

253. 15 N.C. (1 Dev.) 268 (1833).

254. *See supra* note 206 and accompanying text.

255. *May*, 15 N.C. at 272; *see* McCord, *supra* note 2, at 925 ("[T]he court's public policy rationale for the rule, although tersely stated, is exactly the same one that has

was repeated:

> A defendant is not at liberty to present unsupported theories in the guise of cross-examination and invite the jury to speculate as to some cause other than one supported by the evidence. If it were otherwise, defendants could always present some far-fetched theory on the hope that some juror might be taken in by it.[256]

If speculative alternative perpetrator evidence is admitted, courts believe juries will too easily acquit, and such acquittals will be unreviewable.[257] While this concern is not unfounded, it ignores the value our system places on avoiding conviction of the innocent. The presumption of innocence and the standard of proof beyond a reasonable doubt are safeguards to ensure that the innocent are not convicted.[258] Our system reflects an explicit preference for allowing some guilty people to go free in order to ensure that innocent defendants are not wrongly convicted.[259]

The direct connection doctrine creates an evidentiary hurdle, disrupting the balance of the adversarial system. As noted, courts employ the doctrine largely due to fear of erroneous acquittals. But "to exclude defense evidence (and thereby increase the risk of an erroneous conviction) solely out of concern about the risk of an erroneous acquittal is flatly unacceptable."[260] As Professor Wigmore has recognized,

> if the evidence is in truth calculated to cause the jury to doubt, the court should not attempt to decide for the jury that this doubt is purely speculative and fantastic but should afford the accused every opportunity to create that doubt. A contrary rule is unfair to a really innocent accused.[261]

If the court admits alternative perpetrator evidence and the jury improperly assesses it, at worst, there may be a wrongful acquittal. But if otherwise appropriate evidence is excluded, the court creates an

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animated [alternative perpetrator] doctrine for over a hundred and fifty years–such evidence is 'too easily fabricated falsely for the purpose of deceiving.'" (quoting May v. State 15 N.C. (1 Dev.) at 333 (1833) (emphasis omitted))).

256. Commonwealth v. Maddox, 955 S.W.2d 718, 721 (Ky. 1997).

257. McCord, *supra* note 2, at 977 ("[A]n acquittal–whether reasonable or not–is unreviewable"). *See generally* Joshua Steinglass, *The Justice System in Jeopardy: The Prohibition on Government Appeals of Acquittals*, 31 Ind. L. Rev. 353, 353 (1998) (noting that the "asymmetry in the right of appeal has produced a series of problems in the administration of the criminal law").

258. *See* Schwartz, *supra* note 21, at 1146.

259. *See In re* Winship, 397 U.S. 358, 372 (1970) (Harlan, J. concurring) ("I view the requirement of proof beyond a reasonable doubt in a criminal case as bottomed on a fundamental value determination of our society that it is far worse to convict an innocent man than to let a guilty man go free."); *see also* Mitchell, *supra* note 27, at 341 ("'Beyond a reasonable doubt' expresses the deep cultural value that 'it is better to let ten guilty men go then convict one innocent man.'").

260. Goldwasser, *supra* note 229, at 635-36.

261. Wigmore, *supra* note 251, § 139, at 1724.

undue risk of wrongful conviction. Because our system has chosen to prefer wrongful acquittals over wrongful convictions,[262] any doctrine of exclusion should be based on other compelling justifications and must be carefully crafted to do no more than necessary to meet those justifications. The direct connection doctrine cannot meet this exacting standard.[263]

Additionally, the direct connection doctrine improperly places a burden on defendants[264] which they may be unable to meet, not because the evidence does not exist, but because the system makes this evidence difficult or impossible to obtain. Defendants often operate with limited resources.[265] When a defendant is represented by the public defender, the attorney will often be confronted by limited investigative resources and funds.[266] This is also true when counsel is appointed.[267] Even where counsel is retained, the defendant may not

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262. *See supra* note 259 and accompanying text.

263. To the extent that the interest in orderly trials and avoidance of delay are significant, they can be adequately accommodated by rules that have less of an impact on a defendant's right to present a defense. Courts always have inherent authority to control the introduction of evidence to avoid cumulative evidence or other delaying tactics. *See, e.g.*, Winfield v. United States, 676 A.2d 1, 7 (D.C. 1996) (allowing broad discretion to the trial court to exclude cumulative evidence). Trial judges can use cautionary instructions to ensure that the jury stays focused on the appropriate use to be made of evidence introduced to support the defendant's theory of defense. *See generally* McCormick, *supra* note 214, § 59, at 98-99 (discussing judicial instructions for limited admissibility). In light of these existing mechanisms to protect against actual delay, confusion, and distraction, the direct connection doctrine is unnecessary. Given its potential impact on a defendant's constitutional rights, it is also inappropriate.

264. As one court stated:

> [T]he defense has no responsibility to produce affirmative evidence of an alternative perpetrator's guilt through independent forensic testing or any other means.... Indeed, one court has cautioned that requiring alternative-perpetrator evidence to link clearly the third party to the crime may place "too high a burden on a criminal defendant who is without the vast investigatory resources of the State."

Smithart v. State, 988 P.2d 583, 590 (Alaska 1999) (quoting State v. Robinson, 628 A.2d 664, 667 (Me. 1993).

265. *See, e.g.*, Stephen B. Bright, *Neither Equal Nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 Ann. Surv. Am. L. 783, 816-20 ("The most fundamental reason for the poor quality or absence of legal services for the poor in the criminal justice system is the refusal of government to allocate sufficient funds for indigent defense programs."); Douglas W. Vick, *Poorhouse Justice: Underfunded Indigent Defense Services and Arbitrary Death Sentences*, 43 Buff. L. Rev. 329, 381 (1995) (noting fee caps in some states for appointed counsel in death penalty cases).

266. *See* Kim Taylor-Thompson, *Individual Actor v. Institutional Player: Alternating Visions of the Public Defender*, 84 Geo. L.J. 2419, 2442 (1996); Vick, *supra* note 265, at 390.

267. *See, e.g.*, Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an* Ex Ante *Parity Standard*, 88 J. Crim. L. & Criminology 242, 254-55, 295 (1997) [hereinafter Dripps, *Ineffective Assistance*] (discussing how appointed counsel also suffer from limited resources); Givelber, *supra* note 38, at 1376 (stating that defense counsel must often depend on the goodwill of the state or judge to obtain resources).

possess unlimited resources for investigation.[268] Moreover, regardless of whether lack of funds is a significant problem, the investigative options available to the defense fall far short of those available to the prosecution and police.[269]

Not only does the doctrine improperly shift a part of the government's burden to the defendant, it increases the risk of wrongful conviction of the innocent, both in individual cases and on a systemic level. That innocent individuals are wrongfully convicted is not open to serious debate.[270] Numerous studies, done over the past seventy years, reveal disturbing evidence that erroneous convictions are more prevalent than once believed.[271] While reliable estimates are difficult,[272] it is clear this is a larger problem than previously thought.[273]

"Many courts limit expenditures by requiring a preliminary showing of need...." Vick, *supra* note 265, at 392. "Frequently, lawyers are denied the investigative... assistance essential to providing adequate representation. Here, again, the courts have constructed yet another Catch-22 by requiring the lawyer to demonstrate an extensive need for... investigative assistance, a showing that frequently cannot be made without the very... assistance that is sought." Bright, *supra* note 265, at 820. In the context of alternative perpetrator evidence, this may require that, in order to obtain investigative resources to establish the required direct connection, the attorney will be required to present evidence of such connection. But without investigative resources, finding such evidence may be difficult. This is particularly true with an innocent defendant who, because of lack of knowledge about the offense, cannot help counsel in developing the facts. *See* Dripps, *Ineffective Assistance*, *supra*, at 295.

268. *See, e.g.*, Edward C. Monahan & James J. Clark, *Funds for Resources for Indigent Defendants Represented By Retained Counsel*, Champion, Dec. 1996, 16, 19 (discussing whether the state or the defendant should bear the burden of paying for experts, investigators and other necessary resources).

269. *See, e.g.*, Dripps, *Relevant but Prejudicial*, *supra* note 239, at 1411 (noting "the inability of most defendants to bring to bear the investigative resources available to the police"); Givelber, *supra* note 38, at 1360, 1374-79 ("The prosecution can both compel and purchase testimony in ways that are simply unavailable to the defense."); Luban, *Criminal Defenders*, *supra* note 27, at 1738 (providing examples of this law enforcement advantage: prosecutors can obtain warrants to search defendants and their premises, can plant informants in defendants' cells and can, by means of immunity, compel co-defendants to testify).

270. Judge Learned Hand stated in 1923, "Our procedure has always been haunted by the ghost of the innocent man convicted. It is an unreal dream." United States v. Garsson, 291 F. 646, 649 (S.D.N.Y. 1923). "In the past decade, this complacent view has been shattered." Gross, *Miscarriages of Justice*, *supra* note 245, at 125.

271. *See, e.g.*, Hugo Adam Bedau & Michael L. Radelet, *Miscarriages of Justice in Potentially Capital Cases*, 40 Stan. L. Rev. 21, 56-64 (1987) (discussing causes of error in the judicial process); C. Ronald Huff et. al, Convicted But Innocent 63-82 (1996); National Institute of Justice, Convicted by Juries, Exonerated by Science: Case Studies in the Use of DNA Evidence to Establish Innocence After Trial (1996) [hereinafter Convicted by Juries]. The first systematic study was published in 1932. *See* Edwin M. Borchard, Convicting the Innocent: Errors of Criminal Justice (Da Capo Press 1790) (1932). For a brief description of the case studies dating back to the 1930s, see Givelber, *supra* note 38, at 1346-58. For a fairly complete catalogue of studies since 1932, see Bedau & Radelet, *supra*, at 25 n.20.

272. *See* Givelber, *supra* note 38, at 1322-25; Gross, *Miscarriages of Justice*, *supra* note 245, at 127.

273. *See* Givelber, *supra* note 38, at 1318-20 (cataloguing scholarly and media

Research on wrongful convictions demonstrates that there are many reasons innocent people are convicted of crimes that they did not commit. Among these reasons are eyewitness misidentification, false confessions, erroneous witness testimony, confusing circumstantial evidence, ineffective counsel, and police or prosecutorial error.[274] It should be kept in mind that, in every case in which an innocent person is wrongfully convicted, an alternative perpetrator who is the real criminal has not been apprehended.[275] In every case of wrongful conviction, law enforcement was either unwilling or unable to properly identify the true perpetrator. What is not known is in how many of these cases better police investigation would have done so.[276]

The direct connection doctrine serves as a disincentive for police to adequately investigate alternatives other than the one they have chosen. It is clear that police have a strong incentive to "clear" cases,[277] and this is particularly true with more serious, publicized crimes. [278] Once such cases are cleared, however, police have little incentive to investigate further, especially if that investigation may weaken the case already built.[279] If police and prosecutors know that defendants have limited resources to investigate other possibilities, and that even if defendants obtain resources to do so, evidence that they find will be unusable unless they can establish a direct connection to the crime, police and prosecutors will have little incentive to explore alternative theories once they have reached a preliminary conclusion.[280] Since a defendant's ability to attack that conclusion is sharply limited by the direct connection doctrine, the risk of erroneous conviction increases.

While this would clearly support the conclusion that the doctrine should not apply when there is a significant chance that a defendant is

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discussions of innocent party convictions).

274. *See* Convicted by Juries, *supra* note 271, at 15-18; Bedau & Radelet, *supra* note 271, at 56-64 (compiling data on reasons for innocent party convictions); Huff, *supra* note 271, at 63-82; Gross, *Miscarriages of Justice*, *supra* note 245, at 133-42.

275. *See* Givelber, *supra* note 38, at 1394; Gross, *Unfortunate Faith*, *supra* note 250, at 326-27.

276. Last year, the United States Attorney General, "moved by the recent examples of exoneration of innocent prisoners... announced plans for several initiatives to prevent such injustices." They include an effort to "train law enforcement and prosecutors to affirmatively seek out exculpatory evidence even though a suspect has been identified.... [T]he effort will detail how police and prosecutors overlooked crucial evidence of innocence due to the 'blinders' effect of seeing and seeking only evidence supportive of the initial determination of guilt." NACDL News, Meeting With Attorney General Focuses on Innocence, 22 Champion, June 1998, at 8.

277. *See* Givelber, *supra* note 38, at 1361.

278. *See* Dripps, *Miscarriages*, *supra* note 38, at 639-40.

279. *See* Dripps, *Ineffective Assistance*, *supra* note 267, at 267; Dripps, *Relevant but Prejudicial*, *supra* note 239, at 1416-17; Huff, *supra* note 271, at 64.

280. *See* Dripps, *Relevant but Prejudicial*, *supra* note 239, at 1416-17.

innocent, even in cases where the evidence of the defendant's guilt is strong and the alternative perpetrator evidence is relatively weak, the doctrine is problematic. First, the fact that there is strong evidence against a defendant is no guarantee of the defendant's guilt, as many wrongful conviction cases demonstrate.[281] In each of these cases, the evidence was strong enough for the jury to convict, yet later examination revealed the defendant to be innocent. Thus, the mere fact that the evidence appears strong is not determinative.

Moreover, there are significant systemic benefits to not applying the doctrine, even in cases of relatively strong evidence of guilt and weak alternative perpetrator showings. Over time, if alternative perpetrator evidence is admissible at trial, police may have an incentive to better investigate all alternatives.[282] Such an expanded investigation may unearth evidence that clearly demonstrates that the alleged alternative perpetrator is not guilty of the offense. This will likely preclude the defendant from advancing the alternative perpetrator theory and make conviction of a guilty defendant more likely.[283] Alternatively, the police may find evidence during their expanded investigation indicating that the alternative perpetrator, rather than the defendant, is responsible for the crime. Charges can then be dropped against the defendant and brought against the alternative perpetrator. In such cases, the ultimate goal of the adversarial system, convicting the guilty and avoiding conviction of the innocent, will be served.[284]

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281. *See supra* notes 271-74 and accompanying text. For further discussion of this problem, see generally Yellin, *supra* note 43, at 19 (stressing the need for defense attorneys to be zealous advocates to strengthen the justice system's aims to prevent false convictions).

282. This point is recognized but rejected by Professor Simon in connection with a more generalized discussion of responses to aggressive defense of guilty clients. He states as follows:

> First, we might ask why someone cynical about the dedication of public officials would expect them to respond to acquittals due to aggressive defense by raising their standards of practice. Might not they simply slack off, rationalizing their failures on the excuse that the courts are not cooperating? Or perhaps they might increase their efforts along less constructive lines than those contemplated by the argument, spending more time on misleading and coercive tactics of their own.

Simon, *supra* note 30, at 1711-12; *see also* Deborah L. Rhode, *An Adversarial Exchange on Adversarial Ethics: Text, Subtext, and Context*, 41 J. Legal Educ. 29, 32-33 (1991) (stating that without a zealous defense, prosecutors and police will become complacent in investigating alternative suspects). I acknowledge, as suggested by Professor Simon, the possibility that this may merely force investigative abuses underground, but I do not believe the possibility of abuse should be determinative.

283. If the police respond as hoped, this will generally prevent damage to innocent third parties because the alternative perpetrator evidence will never be presented. While exclusion of such evidence absent a direct connection will accomplish the same result, it does so at much greater risk to convicting the innocent.

284. "When a factually innocent person is convicted and punished, society gains nothing to offset" the burden placed on the wrongfully convicted individual. Carl M. Selinger, *The Perry Mason Perspective and Others: A Critique of Reductionist*

CONCLUSION

Our adversary system of criminal justice requires the prosecution to shoulder the burden of proving a defendant guilty beyond a reasonable doubt. Whether or not our system is the best available, it reflects a balance of competing interests designed to prevent government overreaching, preserve autonomy and dignity of defendants, and convict the guilty while protecting innocent individuals against false convictions. Attorneys operating within this system must have broad leeway to challenge the government's case, which includes both the ability to make technical arguments urging reasonable doubt and the power to present evidence that creates a foundation for the defendant's version of the case.

Ethical rules must and do allow attorneys to engage in conduct that might otherwise be morally or ethically questionable in order to implement this balance of competing interests.[285] But in many jurisdictions, this leeway is compromised by the direct connection doctrine, an evidentiary rule of exclusion that keeps from the jury the very evidence that is needed to advance these institutional and individual goals. This rule should be changed. Jurisdictions should abolish the direct connection doctrine, either as a matter of constitutional interpretation or in the exercise of sound policy. In its place courts should substitute a more appropriate analysis to determine admissibility of alternative perpetrator evidence.

Initially, in determining the admissibility of such evidence, courts should be clear that the focus is not on whether the evidence establishes the guilt of the third party, but on what relevance the evidence has to the guilt or innocence of the defendant on trial. That determination should be made using traditional standards of relevance.[286] Thus, if the evidence has any "rational tendency to engender a reasonable doubt with respect to an essential feature of the State's case,"[287] or "tends in any way, even indirectly, to establish a reasonable doubt of [a] defendant's guilt,"[288] the evidence is relevant.

Thinking About the Ethics of Untruthful Practices By Lawyers for 'Innocent' Defendants, 6 Hofstra L. Rev. 631, 643 (1978).

285. Although this analysis focuses on the ability of the attorney to offer the evidence, the evidence is offered on behalf of the defendant. Thus, the defendant must be involved in the decision whether to present it. Before offering such evidence, the attorney should consult with the client and fully explore both the tactical risks and potential effect on the third party involved. If, after consultation, the client chooses to go forward with the blame-shifting evidence, the attorney should be required to do so. This implements the defendant's personal right to present a defense.

286. *See* Fed. R. Evid. 401.

287. State v. Fulston, 738 A.2d 380, 384 (N.J. Super. Ct. App. Div. 1999) (quoting State v. Sturdivant, 155 A.2d 771, 778 (N.J. 1959)).

288. Washington v. State, 737 So. 2d 1208, 1222-23 (Fla. Dist. Ct. App. 1999) (quoting Rivera v. State, 561 So. 2d 536, 539 (Fla. 1990)).

If the evidence passes this test of relevance,[289] the court should then engage in a careful balancing of probative value and prejudicial effect. In doing so, the court should "ask what rational inferences of innocence the evidence supports, what risks of improper decision the evidence poses, and whether any response short of exclusion could secure the probative value of the evidence without its prejudicial baggage."[290] After addressing these questions, the court should exclude relevant exculpatory alternative perpetrator evidence only if it can make a finding on the record "that the jury's consideration of the proffered evidence would make an irrational acquittal substantially more likely than a rational acquittal."[291] By focusing on the precise issues at stake and limiting the role of the judge in resolving issues that appropriately belong to the jury, this revised approach will allow criminal defense attorneys to serve as zealous advocates for their clients and will help to insure that the important interests of all participants in the adversary system of criminal justice are properly accommodated.

289. In almost all cases, evidence of an alternative perpetrator will be relevant.

290. Dripps, *Relevant but Prejudicial*, *supra* note 239, at 1421.

291. *Id.* at 1420. "[A]n on-the-record finding about prejudice would impress upon trial judges the special sensitivity of excluding defense evidence in a criminal case. It would also help to put some teeth into appellate review of decisions excluding evidence." *Id.* at 1421.