

2016

# CLIENT PERJURY, IMPLICIT BIAS, AND THE PROBLEM OF ACTUAL KNOWLEDGE

Caleb J. Fountain

Follow this and additional works at: [http://scholarship.law.nd.edu/ndjepp\\_online](http://scholarship.law.nd.edu/ndjepp_online)



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

---

## Recommended Citation

Fountain, Caleb J., "CLIENT PERJURY, IMPLICIT BIAS, AND THE PROBLEM OF ACTUAL KNOWLEDGE" (2016). *Notre Dame Journal of Law, Ethics & Public Policy Online*. Paper 4.  
[http://scholarship.law.nd.edu/ndjepp\\_online/4](http://scholarship.law.nd.edu/ndjepp_online/4)

This Article is brought to you for free and open access by the Notre Dame Journal of Law, Ethics & Public Policy at NDLScholarship. It has been accepted for inclusion in Notre Dame Journal of Law, Ethics & Public Policy Online by an authorized administrator of NDLScholarship. For more information, please contact [lawdr@nd.edu](mailto:lawdr@nd.edu).

# CLIENT PERJURY, IMPLICIT BIAS, AND THE PROBLEM OF ACTUAL KNOWLEDGE

CALEB J. FOUNTAIN\*

*The Model Rules of Professional Conduct require a lawyer, including defense counsel in a criminal proceeding who actually knows that her client has committed or intends to commit perjury, to take remedial measures, up to and including disclosure to the tribunal. This rule has justly caused considerable handwringing among academics, practitioners, and clients. The present Essay begins with the simple observation that a lawyer's determination that her client is, or intends to be, perjurious is a legally consequential finding of fact. It proceeds to argue that, like all other findings of fact bearing on the legal rights and duties of the client, the determination that the client is, or intends to be, perjurious should be subjected to carefully calibrated procedural protections. These protections would, as they do in other settings, attempt to insulate the fact-finder—here, the lawyer—from prejudicial information and possible implicit biases. The Essay then concludes that the Model Rules should be interpreted to require the incredulous attorney to bear the burden of rebutting her client's presumed honesty by proof not less than that beyond a reasonable doubt.*

## I.

Over the course of the trial that “may almost be said to have made him,” Mr. Jaggers, one of Charles Dickens’ great legal caricatures and peripheral character in *Great Expectations*, made certain strategic decisions as a lawyer that Dickens expected his reader to find ethically questionable.<sup>1</sup> In the classic novel, Mr. Jaggers’ client, and later maidservant, Molly, was accused of strangling another woman in “a case of jealousy,” and “on the improbabilities of her having been able to do it[,] Mr. Jaggers principally rested his case.”<sup>2</sup> Specifically, “her sleeves are always remembered to have been so skilfully contrived that her arms had quite a delicate look.”<sup>3</sup> As such, Mr. Jaggers eloquently argued in part, that she was simply too weak to have strangled a much larger woman. In the end, “Mr. Jaggers was altogether too many for the jury, and they gave in.”<sup>4</sup> Yet, as Dickens revealed in the text sometime before, Molly possessed singularly powerful hands. For instance, Mr.

---

\* J.D., 2015, New York University School of Law; B.A., 2010, Sarah Lawrence College; member, New York State Bar. The author gratefully thanks Professor Randy Hertz of New York University School of Law for his insight and example, and David Patton of the Federal Defenders of New York, Inc., for his instruction, and the staff of the *Notre Dame Journal of Law, Ethics & Public Policy* for their comments.

1. CHARLES DICKENS, *GREAT EXPECTATIONS* 359 (Oxford Univ. Press 1987) (1861).
2. *Id.*
3. *Id.* at 360.
4. *Id.*

Jaggers stated, when showing Molly's wrists to his houseguests, "There's power here . . . Very few men have the power of wrist that this woman has. It's remarkable what mere force of grip there is in these hands."<sup>5</sup> This, and the cornerstone of his defense consisted of the "skillfully contrived" appearance of weak forearms!

The reader is left with the impression that Mr. Jaggers believed his client murdered the decedent, and, indeed, that he relishes in this belief. However, from what the reader can tell, despite Mr. Jaggers' opinions regarding whether she committed the crime or not, only Molly herself *actually knew* whether she had strangled the deceased woman. The reader is left with a clear impression—inferences Dickens expects the reader to draw—that Molly committed the murder. In all events, whether the reader believes Molly committed the crime or not, the question arises: at what point would Mr. Jaggers' knowledge regarding his client's guilt trigger an obligation to prevent fraud to the court—contriving Molly's appearance to be that of a frail person, physically incapable of committing the crime? Put another way, when would Mr. Jaggers have been required to disclose his "knowledge" of Molly's possible guilt were she to insist on testifying to her innocence?<sup>6</sup> The point at which Mr. Jaggers' belief may have ripened into "actual knowledge," and the subsequent ethical ramifications of such "knowledge," is the subject of the present Essay.

Certain professional responsibilities are created for attorneys in possession of "actual knowledge," and nowhere are these duties more dramatically tested than in the defense of the criminally accused. Among them is the responsibility, triggered by counsel's *actual knowledge* that an accused plans to commit or has already committed perjury, to take remedial measures, including disclosure of the perjurious intent or perjurious testimony to the tribunal.<sup>7</sup> Whether and when this responsibility is triggered has been deemed the hardest of the "three hardest questions" a criminal defense attorney can face,<sup>8</sup> and has been

5. *Id.* at 196.

6. Because it is anachronistic, this question should be taken solely as an analytical starting point, rather than as a question of historical interest. First, it presumes the same ethical rules applied to counsel in Victorian England as apply to American attorneys since 1986. This is, of course, not the case. Second, at the time Dickens published *Great Expectations*, criminal defendants were disqualified from testifying on their own behalf. This common law rule was not abrogated until the passage of the Criminal Evidence Act 1898, 61 & 62 Vict. c. 36, § 1 (Eng.). See also *Ferguson v. Georgia*, 365 U.S. 570, 578 (1961) (discussing significance of the Criminal Evidence Act of 1898); 4 STEPHEN'S COMMENTARIES ON THE LAWS OF ENGLAND § 3 (L. Crispin Warmington ed., 21st ed. 1950) (same). For this reason, Mr. Jaggers' contrivance of his client's physical appearance was about as close to calling her as a witness as he could have come.

7. MODEL RULES OF PROF'L CONDUCT r. 1.0(f) (AM. BAR ASS'N 2013) ("'Knowingly,' 'known,' or 'knows' denotes actual knowledge of the fact in question. A person's knowledge may be inferred from the circumstances."); *Id.* r. 3.3(a)(2)–(3) (requiring "remedial measures," including, if necessary, disclosure to the tribunal, if counsel "knows" a witness has committed, or plans to commit, perjury).

8. Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1475 (1966). The two other "hardest questions" are, according to Professor Freedman, whether it is "proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you

the subject of a great deal of handwringing by the American Bar Association (“ABA”),<sup>9</sup> the Supreme Court,<sup>10</sup> the lower state and federal courts,<sup>11</sup> and, most importantly, criminal defendants whose faith in their attorneys to believe their (sometimes changing, sometimes unlikely) stories is less than adamant.

The purpose of this Essay is to revisit the proper standard of “knowing”—the meaning, in effect, of “actual knowledge”—that defense counsel should apply when faced with the possibility that her client intends to commit, or has already committed, perjury. Its first central thesis is that the determination of whether a client intends to commit perjury is a *factual* one that should not, as a practical matter, and cannot, as an ethical matter, be made in the absence of meaningful legal standards designed to put restraints on counsel’s discretion. The second thesis is that “actual knowledge” represents a standard of proof not less than proof beyond a reasonable doubt,<sup>12</sup> in which the burden is placed on counsel and levied against a presumption that the client acts in good faith. Because determining whether a client intends to lie has dramatic legal consequences for the criminally accused, one including the disclosure of otherwise protected confidences to the tribunal, counsel’s duties to her client necessitate a rigorously disciplined restraint on the unfettered discretion that presently permits counsel to make such a factual determination with little more than her gut instinct.

This Essay proceeds by first outlining the trajectory of the professional consensus regarding client perjury. It then attempts to elucidate the essential aspects, and the current procedural deficiencies, of an attorney’s factual determination that her client intends to commit perjury. It then discusses the necessity of a rigorously applied legal standard against which counsel’s determination that her client intends to perjure herself must be measured.

It may be helpful at the outset to take note of those areas with which the Essay is not centrally concerned. The arguments set forth below are principally occupied with the *ethical* responsibility of defense counsel under certain circumstances. They are not directed at the constitutional ramifications of those responsibilities. It is important to rec-

---

know to be telling the truth,” and whether it is “proper to give your client legal advice when you have reason to believe that the knowledge you give him will tempt him to commit perjury.” *Id.* at 1469.

9. MODEL RULES OF PROF’L CONDUCT r. 3.3(a) cmt. 2 (AM. BAR ASS’N 2013) (acknowledging simultaneously that counsel is an “officer[ ] of the court,” but is “in an adversary proceeding[.] not required to present an impartial exposition of the law or to vouch for the evidence submitted in a cause”).

10. *Nix v. Whiteside*, 475 U.S. 157, 175 (1986) (holding that it was neither objectively unreasonable nor prejudicial, for purposes of *Strickland v. Washington*, 466 U.S. 668 (1984), for counsel to threaten client with abandonment and disclosure should his client testify perjurally).

11. *See, e.g.,* *People v. Andrades*, 828 N.E.2d 599 (N.Y. 2005); *State v. McDowell*, 681 N.W.2d 500 (Wis. 2004).

12. This particular idea is not without precedent. *See, e.g.,* Monroe H. Freedman, *Client Confidences and Client Perjury: Some Unanswered Questions*, 136 U. PA. L. REV. 1939, 1942 (1988) [hereinafter Freedman, *Client Confidences*]; Monroe H. Freedman, *The Aftermath of Nix v. Whiteside: Slamming the Lid on Pandora’s Box*, 23 CRIM. L. BULL. 25 (1987).

ognize, however, that any discussion of counsel's ethical responsibilities must be done in the proverbial "shadow" of the Constitution, for certainly it would be unethical for counsel to do anything that would violate her client's constitutional rights. Thus, whether counsel's revealing to the court of her client's intent to commit perjury would conflict with her client's Fifth and Sixth Amendment rights are live questions, to which there are varying answers.<sup>13</sup> I am principally concerned with the first order question: when is it ever *ethical* under the *rules* to reveal, or threaten to reveal, a client's intent to commit perjury? It may well be that, because of constitutional limitations, the constitutional and ethical standards should be essentially coterminous, but for present purposes they will be assumed distinct.

## II.

The tortuous story of the ABA's approach to an attorney's responsibilities in the face of client perjury has been told elsewhere.<sup>14</sup> It is nevertheless essential to briefly recount the ABA's trajectory, as the arguments below are made against the backdrop of these past approaches and their dominant critiques. From the first Canon of Professional Ethics in 1908 to the Model Code of Professional Responsibility in 1969, the ABA has traditionally prohibited attorneys from revealing client confidences even in the event of anticipated or completed client perjury.<sup>15</sup> Despite the fact that the ABA recognized defense counsel as an "officer of the court," the ABA found that in counsel's function as an "officer," it was principally in "the steadfast maintenance of the principles which the courts themselves have evolved for the effective administration of justice, one of the most firmly established of which is the preservation of undisclosed confidences commu-

---

13. Certain Supreme Court precedents should, in the author's opinion, render it a violation of a client's Fifth Amendment privilege for counsel to reveal her client's intent to commit perjury, under any circumstances. *See, e.g.*, *Fisher v. United States*, 425 U.S. 391, 404 (1976) (finding that where documents could not be subpoenaed from a defendant because of his Fifth Amendment privilege, they could not then be subpoenaed from the defendant's lawyer because of the attorney-client privilege); *New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (finding that defendant's Fifth Amendment privilege entitled him to present an alibi without being impeached with inconsistent sworn testimony he gave at an earlier grand jury proceeding for which he was granted use immunity). *But see* Stephen Gillers, *Monroe Freedman's Solution to the Criminal Defense Lawyer's Trilemma Is Wrong as a Matter of Policy and Constitutional Law*, 34 *HOFSTRA L. REV.* 821, 832-38 (2006) (arguing against the use of, *inter alia*, *Portash* as a constitutional support for the proposition that defense counsel is constitutionally prohibited from revealing a client's perjury) (citing *United States v. Apfelbaum*, 445 U.S. 115 (1980)). *Apfelbaum* held that immunized testimony, which *Portash* found could not be used against the accused in a trial concerning the subject of the testimony, could be used in a proceeding alleging false statements. It is not clear to the author, however, how Professor Gillers' use of *Apfelbaum* refutes *Portash* in connection with the attorney's obligation not to advise the court of her client's perjury in the situation relevant for our purposes: where her client claims, for example, an alibi that is inconsistent with immunized prior testimony.

14. *See, e.g.*, Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 *GEO. J. LEGAL ETHICS* 133, 139:48 (2008).

15. *See* ABA CANONS OF PROF'L ETHICS CANON 27 (AM. BAR ASS'N 1908); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(B)(1) (AM. BAR ASS'N 1980).

nicated by his clients to the lawyer in his professional capacity.”<sup>16</sup> Anytime the rules could be construed to require disclosure in violation of a confidence or a fraud upon the court, the ABA would resolve the question in favor of nondisclosure.<sup>17</sup>

However, after the Supreme Court’s homiletic dicta on the ethical responsibility of counsel to reveal confidences in the event counsel develops a “belief with good cause” of a client’s intent to commit, or having already committed, perjury,<sup>18</sup> the ABA adopted Model Rule 3.3(a)(3).<sup>19</sup> This rule, the focus of the present Essay, imposes on counsel the obligation to take “remedial measures,” up to and including disclosure to the tribunal, when counsel “knows”—defined under Rule 1.0(f) as “actual knowledge”—that her witness, including her client in a criminal proceeding, intends to commit, or has committed, perjury.

As the late Professor Freedman observed on several occasions, the result of the change has been “virtually nullified” by interpretations of the phrase “actual knowledge.”<sup>20</sup> Now, in many jurisdictions, possessing “actual knowledge” means a client clearly and unequivocally expresses to his counsel an intent to commit perjury.<sup>21</sup> Professor Freedman would have resolved this issue instead by rejecting the requirement in the Rules, and permitting counsel to elicit her client’s testimony in the “ordinary way”—this is, by simple direct examination, without concern on the part of counsel of whether the answers were perjurious or not.<sup>22</sup>

While the author prefers Professor Freedman’s solution since it puts to rest otherwise intractable constitutional issues regarding the taking of remedial measures by counsel who believes her client to be lying,<sup>23</sup> that solution does not revise the Model Rules. Indeed, the Rules continue to exist, and defense attorneys continue to regularly interpret the Rule’s provisions on a day-to-day basis—often in state-adopted forms.<sup>24</sup> Of utmost concern for our present purposes, these attorneys do so in the absence of any meaningfully rigorous analytical standards. It is the goal of this Essay to propose a process by which “actual knowledge” can be given a more defined and practicable meaning.

---

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

17. See, e.g., ABA Comm. on Ethics & Prof’l Responsibility, Formal Op. 341 (1975) (construing “privileged communications” to include “secrets,” which covered frauds upon the court, in deciding that such communications could not be revealed even when the attorney knew it resulted in a fraud).

18. *Nix v. Whiteside*, 475 U.S. 157 (1986); for criticisms on Justice Burger’s interpretation of the then-existing rules of ethics, see also Norman Lefstein, *Reflections on the Client Perjury Dilemma and Nix v. Whiteside*, 1 CRIM. JUST. 27 (1987).

19. MODEL RULES OF PROF’L CONDUCT r. 3.3 (AM. BAR ASS’N 2013).

20. Freedman, *supra* note 14, at 142.

21. See, e.g., *Doe v. Fed. Grievance Comm.*, 847 F.2d 57 (2d Cir. 1988); *State v. McDowell*, 681 N.W.2d 500 (Wis. 2004). See also *infra* notes 59–61 and accompanying text.

22. Freedman, *supra* note 14, at 147.

23. See *supra* note 13.

24. See, e.g., N.Y. RULES OF PROF’L CONDUCT r. 3.3 (2013).

## III.

We might begin with a simple, facially inoffensive proposition: “It is the role of the judge or jury to determine the facts, not that of the attorney.”<sup>25</sup> This proposition would seem to deprive counsel of *any* fact-finding role. Indeed, it seems to suggest that counsel has no responsibility to either (a) determine whether her client is “lying,” or (b) to disclose any such “lying” to the court, because performing either function necessitates a finding that the client is “lying,” which is a *finding of fact* beyond not just the competence, but also the technical role, of counsel. However, these deductive consequences of our inoffensive proposition have been rejected,<sup>26</sup> and now it is regularly expected of counsel to make a factual determination as to the perjurious intent of her witness, including her criminally accused client.

Since it is apparently within the competence and the role of counsel, as an “officer of the court,” to determine *some* facts in this regard, and to take certain actions thereon, something must be done to determine *how* these findings of fact are made. It is at this point that the consequences of Rule 3.3 are brought into their starkest relief: the ethical duties described in the Rule—predicated upon “actual knowledge”—require a finding of fact that carries discernible, profound, and irreversible *legal* ramifications. What is more, this finding of fact, like all other findings of fact in life and law, is the result of a *procedure*. As it stands today, however, no meaningful standard actually governs this procedure. It is my hope to propose one that might bring order to this subsurface process. Before setting out on this task, some preliminary observations about findings of fact, as well as the legal governance of such findings, ought to be made, even at the risk of being overly elementary.

All of us, of course, make “factual determinations” all of the time. The next train leaves the station at half past three o’clock; it is raining outdoors; that particular dog is a schnauzer; my mother was born in 1954—all of these, and countless others, are made to varying degrees of inferential certitude, and with various consequences. For the most part, determination of fact on a day-to-day basis is a process regulated by little more than our individual constitutions, sensory perceptions, instincts, experiences, and analytical predispositions ranging, philosophically speaking, anywhere from Cartesian doubt to Wittgensteinian picture theory (which are, for our present purposes, so many matters of taste).

By contrast, findings of fact that discretely touch upon our legal rights and duties are subject to elaborate procedures, usually entailing some mixture of evidentiary presumptions, burdens, and standards. Each mixture of presumptions, burdens, and standards reflects certain communal judgments, developed over time, of what legal rights and

---

25. United States *ex rel.* Wilcox v. Johnson, 555 F.2d 115, 122 (3d Cir. 1977).

26. See, e.g., MODEL RULES OF PROF’L CONDUCT r. 3.3(a)(2)–(3) (AM. BAR ASS’N 2013); Nix v. Whiteside, 475 U.S. 157 (1986); N.Y. RULES OF PROF’L CONDUCT r. 3.3 (2013); People v. DePallo, 754 N.E.2d 751 (N.Y. 2001); Hinds v. State Bar, 119 P.2d 134 (Cal. 1941).

duties are most valued, and thus more or less protected. As Justice Harlan observed regarding one such legal standard, “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.”<sup>27</sup>

Among the purposes of these combinations of evidentiary presumptions, burdens, and standards is the desire to root out unreliable methods of determining fact, such as bias that infects situations otherwise subject to the vast discretion of the fact-finder. For example, the Fourth Amendment, which articulates a standard of proof necessary for the government to meet before it may engage in a search or seizure of an individual, theoretically deprives the police of the ability to lawfully stop a person solely on account of her race or some other biased basis. Instead, in order to engage in a search or seizure, police need probable cause that a misdemeanor or a felony has occurred or is occurring.<sup>28</sup> Similarly, in order to conduct a stop-and-frisk, officers need reasonable suspicion that a crime has occurred or that the suspect is about to commit a crime and is armed and dangerous.<sup>29</sup>

Prosecutors are also subject to certain processes of determination of fact before proceeding on a case and then also during the prosecution. If they determine that a piece of evidence is material and exculpatory—findings of fact with articulated standards—the evidence must be turned over to opposing counsel.<sup>30</sup> A prosecutor’s ability to ethically proceed with a case is also governed by certain findings of fact subject to discrete procedures: a prosecutor “should file only those charges which he reasonably believes can be substantiated by admissible evidence at trial.”<sup>31</sup> Or, as another standard directs, a prosecutor “shall refrain from prosecuting a charge that the prosecutor knows is not supported by probable cause.”<sup>32</sup>

Naturally, the list goes on: juries (and judges under certain circumstances) must apply certain evidentiary presumptions, burdens, and

27. *In re Winship*, 397 U.S. 358, 372 (1970) (Harlan, J., concurring). This language is derived from William Blackstone’s famed “ratio,” see 4 WILLIAM BLACKSTONE, COMMENTARIES \*352 (“[B]etter that ten guilty persons escape, than that one innocent suffer.”), which itself arguably has its roots in YHWH’s assertion to Abraham that he would refrain from destroying Sodom should ten righteous individuals be found there. *Genesis* 18:32. Though the “ratio” has taken on canonical significance in Anglo-American law, it is not without its critics. See, e.g., Daniel Epps, *The Consequences of Error in Criminal Justice*, 128 HARV. L. REV. 1065, 1089 (2015) (summarizing historical critiques of the “ratio,” and positing that blind adherence to the rule is not empirically justified). As these authorities suggest, standards of proof have historically served as a measure of the social value of whatever is being subjected to the judicial process—in the case of Blackstone’s Ratio, life and liberty—even if those values change over time or are subjected to criticism.

28. See, e.g., *Dunaway v. New York*, 442 U.S. 200 (1979).

29. See generally *Terry v. Ohio*, 392 U.S. 1 (1968).

30. See generally *Brady v. Maryland*, 373 U.S. 83 (1963).

31. NAT’L DIST. ATTORNEYS ASS’N, NATIONAL PROSECUTION STANDARDS § 43.3 (2d ed. 1991). This resource articulates the standard of putting forward the basic elements of a charge such that a jury *could* find guilt beyond a reasonable doubt (that is, a *prima facie* case).

32. MODEL RULES OF PROF’L CONDUCT r. 3.8(a) (AM. BAR ASS’N 2013).

standards in adjudicating liability during civil and criminal trials, and judges must apply certain of these presumptions, burdens, and standards to findings of fact at, for example, pretrial probable cause, competency, and suppression hearings, as well as at post-trial proceedings such as sentencings. Appreciating that the foregoing are simple restatements of constitutional law and ethical standards, it is nevertheless important to emphasize that each reflects processes that regulate findings of fact touching upon the legal rights and duties of the individual. These processes have the effect of decreasing instances of arbitrariness, and essentially making such findings of fact less subject to gut instinct.

The determination by defense counsel that her client intends to commit, or has already committed, perjury, however, is hardly subject to these strictures. Indeed, that determination is not governed by any of the evidentiary presumptions, burdens, or standards that regulate police-civilian interactions, decisions by the prosecutor to charge, decisions by juries to convict or acquit, or judges' sentencing decisions. Yet, in some instances, counsel's conclusion that her client intends to perjure himself has as great an effect on the legal rights of a defendant as decisions by any of these other actors in the criminal justice system. Since the Sixth Amendment does not prohibit counsel from revealing, or threatening to reveal, that her client intends to commit perjury to the judge,<sup>33</sup> nor to act in a fashion that clearly conveys to the fact-finder that she believes her client to be lying,<sup>34</sup> a client's decision to testify may become subject to the whim of her attorney's finding of fact regarding that client's intent to commit perjury. The process by which counsel makes this determination is dangerously subject to the very biases legal procedure is ideally composed to avoid.

As an initial consideration, the Bill of Rights offers no protections to a defendant who tries to convince his attorney that he does not intend to commit perjury. The ostensibly perjurious client has no right to *another* attorney to argue to her *trial* attorney that she is not being perjurious, notwithstanding her prior statements, contrary evidence, or even "admission" that she intends to commit perjury. Nor is the client able to avail herself of her Fifth Amendment right to silence, since she necessarily must communicate with her lawyer—so much for the assurances of the attorney-client privilege and the ethical duty of confidentiality!

Furthermore, defense counsel—perhaps more than any other actor in the legal system—is subjected to a wide range of legally unreliable information that would never see the light of a courtroom, and never meet the ears of a fact-finder in the process of determining the factual guilt of her client: hearsay evidence; privileged, often incriminating, statements that may or may not be true; inadmissible information regarding her client's criminal history; and so on. Granted, some of this information may be reliable; yet much of it may be categorically unreliable, as well.

---

33. See *Nix v. Whiteside*, 475 U.S. 157, 171 (1986).

34. See, e.g., *People v. Andrades*, 828 N.E.2d 599 (N.Y. 2005).

In addition to the absence of actual procedural safeguards and the presence of highly prejudicial and unreliable information, counsel is also subject to implicit biases—deeply held and unconscious biases based on many unfounded assumptions about, among other things, race and gender.<sup>35</sup> These unconscious biases have consistently been shown to inform the discretionary decisions of individuals generally,<sup>36</sup> and courtroom actors in particular.<sup>37</sup> Professors Richardson and Goff have found that implicit biases affect an overworked public defense attorney's evaluation of the evidence against her client, the attorney's interactions with her client, and the willingness of the attorney to accept outsized punishments.<sup>38</sup> So, too, may implicit biases affect an attorney's determination that her client's intended testimony is false, since, for example, she may be more likely to weigh the evidence against her client if she associates her client's race, background, gender, or religion with criminality.

Thus, defense counsel, subject as she is to a wide range of prejudicial information, is left at sea in her determination of whether she has "actual knowledge" that her client has perjurious intent. The determination is left to little more than some combination of the attorney's independent investigation, her commitment to the client's defense, her "gut instincts" about criminal defendants generally and/or her client in particular, or, most regrettably, her unplumbed and biased opinions about the race, ethnicity, socioeconomic background, gender, sexual orientation, or religious beliefs of her client. Put another way, the process of determining whether a client intends to commit, or has already

---

35. See Anthony G. Greenwald et al., *Measuring Individual Differences in Implicit Cognition: The Implicit Association Test*, 74 J. PERSONALITY & SOC. PSYCHOL. 1464, 1464 (1998) ("Implicit attitudes are manifest as actions or judgments that are under the control of automatically activated evaluation, without the performer's awareness of that causation.") (citation omitted).

36. See, e.g., Elizabeth N. Chapman et al., *Physicians and Implicit Bias: How Doctors May Unwittingly Perpetuate Health Care Disparities*, 28 J. GEN. INTERNAL MED. 1504 (2013).

37. On implicit bias in the law generally, and on the role of legal procedure in reducing implicit biases, see Christine Jolls & Cass R. Sunstein, *The Law of Implicit Bias*, 94 CAL. L. REV. 969, 971, 976-85 (2006). On the role of implicit biases with respect to judges, see Jeffrey J. Rachlinski et al., *Does Unconscious Racial Bias Affect Trial Judges?*, 84 NOTRE DAME L. REV. 1195, 1208-17 (2009) (finding implicit biases affect judicial decision-making). On the role of implicit biases with respect to on-the-street policing, see L. Song Richardson, *Arrest Efficiency and the Fourth Amendment*, 95 MINN. L. REV. 2035, 2053-56 (2011) (discussing the role of implicit biases on the exercise of, inter alia, the stop-and-frisk power under *Terry v. Ohio*, 392 U.S. 1 (1968)). On the role of implicit biases with respect to prosecutors, see, for example, Robert J. Smith & Justin D. Levinson, *The Impact of Implicit Racial Bias on the Exercise of Prosecutorial Discretion*, 35 SEATTLE U. L. REV. 795, 822 (2012) ("[T]here are compelling reasons to believe that prosecutors unwittingly display implicit racial bias at a variety of decision points."). On the role of implicit biases in the decisions of public defense attorneys, see Andrea D. Lyon, *Race Bias and the Importance of Consciousness for Criminal Defense Attorneys*, 35 SEATTLE U. L. REV. 755, 755-58 (2012). See generally L. Song Richardson & Phillip Atiba Goff, *Implicit Racial Bias in Public Defender Triage*, 122 YALE L.J. 2626 (2013). Professors Lyon, Richardson, and Goff, however, do not address the role that implicit biases may play in an attorney's conclusion that her client's intended testimony is perjurious.

38. Richardson & Goff, *supra* note 37, at 2636-46.

committed, perjury is dangerously biased, unregulated, and discretionary.

The profoundly discretionary function served by defense counsel in determining this highly significant fact stands in stark contrast to most other aspects of the defense attorney's role. Many of the most important elements of her client's case are left to other individuals: to the client is vested the sole discretion to plead guilty or not guilty, to testify, and in some cases to be represented by counsel at all. And though matters of trial strategy are largely within the discretion of defense counsel,<sup>39</sup> the range of possibilities are frequently dictated by opposing counsel (who holds most information and bargaining power), and the vagaries of circumstance, such as jury selection and the random assignment of the judge. Much of the defense counsel's role is entirely non-discretionary; it is in significant respects beholden to the client, the prosecutor, the judge, or sheer luck.

Every other actor, of course, possesses an exceedingly broad, often unchecked, discretion: the police to arrest, the prosecutor to charge, the jury to find, and the judge to sentence. As discussed above, once discretion is exercised such that each party is required to find a fact, procedures are applied to regulate that finding. Yet, in a dark corner of the system, defense counsel wields a great power: whether to believe or disbelieve a client's story, such that a finding adverse to the client would ethically condone disclosure of client confidences to the tribunal.

Without finely-tuned evidentiary presumptions, burdens, and standards in place, a client will too often be presumed guilty by her own counsel, and face the burden of proving, at least to the level of beyond a reasonable doubt, the truth of a changed or facially implausible story.

#### IV.

The foregoing observations have suggested three significant conclusions. First, the determination that a client intends to commit, or has already committed, perjury, is fundamentally a finding of fact; second, this finding of fact, like many other such findings in the legal process, discretely touches upon the legal rights of, *inter alia*, criminal defendants; and third, unlike other legally consequential findings of fact, this particular finding of fact appears subject to none of the procedural or evidentiary controls that otherwise insulates fact-finders (and protects defendants) from bias and unreliable information. From these conclusions, another ought to be drawn: that determination of fact regarding whether defense counsel's client intends to commit, or has already committed, perjury, ought to be governed by standards. After

---

39. *Cf.* *Taylor v. Illinois*, 484 U.S. 400, 417:18 (1988) (finding that defense counsel has authority to control most aspects of her client's defense without obtaining her client's approval); *Florida v. Nixon*, 543 U.S. 175, 187 (2004) (finding that although defense counsel "undoubtedly has a duty to consult with the client regarding important decisions, including questions of overarching defense strategy . . . [t]hat obligation[ ] does not require counsel to obtain the defendant's consent to every tactical decision") (citations omitted) (internal quotation marks omitted).

all, every other significant actor in the trial process, from the police to the jury, is also governed by standards. But, the question that remains to be answered is, what exact standards should apply in this context? Should the standard of “actual knowledge” be as great as the actual knowledge that Molly in *Great Expectations* had, or would Mr. Jagger’s conclusions be enough?

Analytically, it helps to begin with the standard against which defense counsel’s client would be held before the finder of fact at trial. The same client who may be subject to the gut-instinct of her attorney, could only be determined perjurious by a jury if each juryperson believed her testimony to be false beyond a reasonable doubt. As discussed above, this reflects certain value judgments, accrued over centuries, regarding the relative importance of the liberty of the subject against community security and the upholding of the state’s laws. It also reflects one of Justice Harlan’s propositions regarding standards of proof: that “in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened.”<sup>40</sup>

Nothing less, and arguably a good deal more, must then be demanded of defense counsel. When counsel faces a situation in which she supposes her client intends to perjure himself, she is as likely as not to have heard—from her client and from any number of other sources—a range of inadmissible and dramatically prejudicial information, which may adversely affect her determination; further, she operates in a procedural vacuum in which her client has no protection and faces counsel’s unmitigated biases.

Consideration of some of the cases preceding and following the seminal case of *Nix v. Whiteside*<sup>41</sup> bear out the unfortunate consequences of this procedural vacuum.<sup>42</sup> In the case of Robert Earl Curtis, for example, defense counsel, Isaiah Gant, came to the conclusion that his client’s alibi was false, and would not permit him to testify, after “Curtis’ two other co-defendants, who were released on bond, sought out Gant and informed him that Curtis and his car were involved in the robbery.”<sup>43</sup> At a hearing on a motion for post-conviction relief, Mr. Curtis’ counsel claimed, and Mr. Curtis denied, that his client made an

---

40. *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring). See also Speiser v. Randall, 357 U.S. 513, 525-26 (1958) (emphasizing the role of burdens of proof and persuasion in reducing margins of error in fact-finding).

41. 475 U.S. 157, 171 (1986).

42. It is worth noting, first, that *Nix* did not decide the *ethical* question with which this Essay is concerned. See *id.* at 176-77 (Brennan, J., concurring) (“This Court has no constitutional authority to establish rules of ethical conduct for lawyers practicing in state courts.”). Second, the facts of *Nix* have long been recognized, beginning with *Nix* itself, to be murkier than the factual predicate upon which its opinion was based (*viz.*, that *Whiteside* would have committed perjury had he testified as he had wanted to). See *id.* at 190-91 (Stevens, J., concurring) (“[B]eneath the surface of this case there are areas of uncertainty that cannot be resolved today.”). See also Freedman, *Client Confidences*, *supra* note 12, at 1940-41 (describing the facts of *Nix*). Consequently, this Essay will concern itself with lesser-known instances of an attorney coming to the conclusion that her client will, or has already, committed perjury.

43. *United States v. Curtis*, 742 F.2d 1070, 1072 (7th Cir. 1984).

admission in confidence to having “participated” in the robbery after being confronted with the statements of his co-defendants; nevertheless, the record reflected in the Seventh Circuit’s opinion confined the justification of counsel’s belief that the alibi was untrue, essentially, to the untested insistence of his client’s co-defendants.<sup>44</sup>

Even assuming it to be true that his client had “admitted” to “participating” in the robbery after his lawyer confronted him with his co-defendants’ statements, one can imagine a situation in which a client—finding that his attorney has already decided he is guilty because of the statements of his co-defendants—would concede enough guilt, though he has none, simply to get his lawyer to listen to him; or that, though he “participated” in some way, his alibi was perfectly true to the extent that he was not physically present for the robbery, but “participated” only to the degree, for example, that he helped plan it. Under either scenario, a disciplined attorney could have, and should have, concluded that either Curtis’ “admission” was false, or that the “admission” did not render the alibi untrue. In short, counsel was not, by any stretch of the imagination—and without applying a “disingenuous” definition of “knowing”<sup>45</sup>—in possession of *actual knowledge* that his client’s intended testimony would have been perjurious.

In another case, that of Derek Andrades, counsel came to the conclusion that his client intended to testify perjurally, and notified the court—in no uncertain terms—of his “dilemma” in advance of a hearing on a motion to suppress Mr. Andrades’ statements to the police.<sup>46</sup> Specifically, counsel moved to withdraw, citing “an ethical conflict with my continuing to represent [Mr. Andrades] . . . .”<sup>47</sup> Upon denial of the motion and prior to calling Mr. Andrades to testify in narrative form in the hearing, counsel elucidated further (in the absence of his client): “I think I should tell the court and place on the record that I did tell [Mr. Andrades] and advise [him] that he should not testify at the hearing and as a result of the problem I’m having, the ethical problem I’m having.”<sup>48</sup> Only an especially obtuse judge would be unable to understand counsel’s point: he had come to the conclusion that his client intended to perjure himself.

---

44. The statements of co-defendants and co-conspirators incriminating one another are often unreliable; first, because co-defendants have a natural incentive to incriminate their purported confederates falsely or exaggeratedly; and second, because the Fifth Amendment insulates co-defendants from the crucible of cross-examination. The admission of such statements at trial is consequently regulated to a considerable degree by both the Sixth Amendment and the rules of evidence. *See, e.g., Bruton v. United States*, 391 U.S. 123, 137 (1968) (finding that the Confrontation Clause requires redaction from co-defendant’s statement any reference to other co-defendant); *Williamson v. United States*, 512 U.S. 594, 604 (1994) (limiting statements by co-defendants under the “statement against penal interest” exception to the federal hearsay rules). *See also, e.g., N.Y. CRIM. PROC. LAW* § 60.22(1) (McKinney 2016) (prohibiting the conviction of a defendant solely upon the testimony of an alleged accomplice without further evidence “tending to connect the defendant with the commission” of the crime).

45. *See Freedman, supra* note 14, at 148.

46. *See generally People v. Andrades*, 828 N.E.2d 599 (N.Y. 2005).

47. *Id.* at 601.

48. *Id.*

While the record reflected in the New York Court of Appeals' opinion does not provide much information regarding *how* counsel came to this conclusion, we can compare the facts as found by the court with the testimony provided by Mr. Andrades. Mr. Andrades was charged with stabbing Magalie Nieves to death in concert with a young woman named Ericka Cruz. When Mr. Andrades was arrested the next day, he was read his *Miranda* rights and subsequently gave written and videotaped statements admitting to having killed Ms. Nieves. At the hearing to suppress these statements, Mr. Andrades testified (without the assistance of his incredulous counsel) that he did not stab Ms. Nieves and that his statements were recitations of what the officers had told him Ms. Cruz had told them.<sup>49</sup>

Putting aside the distinct constitutional issue that arose when counsel brought his client's purportedly perjurious intent *directly to the finder of fact*,<sup>50</sup> a bare recitation of the conflicting stories shows to what degree counsel's discretion may lean toward unreasonably finding the client's story to be perjurious. Claims that the police fed a co-defendant's story to a suspect are the stuff of which motions to suppress statements are made; there is nothing suggesting that counsel had *actual* knowledge that his client's intentions were perjurious.

Such examples of attorneys rapidly, and in an undisciplined manner, concluding that their clients are lying to them abound in the case law.<sup>51</sup> Yet, the careful reader will note that no answer has been given to the central question, "What is actual knowledge?" The answer, I submit, is that "actual knowledge" is a standard of proof, *not less*, and perhaps more, than that of proof beyond a reasonable doubt. The ultimate finder-of-fact, whether judge or jury, must rest its conclusions on proof beyond a reasonable doubt, at least at the guilt stage of the proceeding. It is impossible to demand of the fact-finder a higher burden of proof, since she is an *impartial* party, who was not present for the earlier events over which the parties are in dispute. The attorney, however, is—assuming "finder-of-fact" is an appropriate role at all—precisely a *partial* fact-finder. That is to say, the attorney is, or ought to be, entirely biased in favor of her client, and should be particularly disposed to resolving factual disputes or uncertainties in her client's favor.

---

49. *Id.* at 601:02.

50. On Andrades' petition for post-conviction relief, the Southern District of New York found that this scenario raised no constitutional issues *Nix* could not resolve. *See Andrades v. Ercole*, No. 06 Civ. 2573(LOS), 2010 WL 3021252 (S.D.N.Y. July 23, 2010) (finding that it was not ineffective assistance of counsel to suggest to the trier of fact—in this case, a judge in a hearing on a motion to suppress statements—of client's intention to commit perjury). *But see Lowery v. Cardwell*, 575 F.2d 727 (9th Cir. 1978) (finding that revealing client's perjurious intent to court, where the court was fact-finder, constituted denial of due process).

51. *See, e.g., United States ex rel. Wilcox v. Johnson*, 555 F.2d 115, 122 (3d Cir. 1977) (finding that counsel had no basis for concluding client was lying); *People v. DePallo*, 754 N.E.2d 751, 752 (N.Y. 2001) (basing belief that client was lying on the fact that he changed his story); *Thornton v. United States*, 357 A.2d 429, 432 (D.C. 1976) (same). *See also Hinds v. State Bar*, 119 P.2d 134, 137 (Cal. 1941) (finding that "belief" that client had perpetrated fraud on the court was sufficient to require counsel to disclose the fraud to the court, where there was reason to think the attorney *participated* in the fraud).

Thus, at an absolute minimum, she ought to be persuaded beyond a reasonable doubt, and arguably to an absolute certainty that only comes with personal knowledge of the facts of her client's perjurious intentions or actions before taking "remedial measures."<sup>52</sup>

Assuming this procedural approach to the problem of "actual knowledge," it remains analytically necessary to consider who bears the burden of establishing perjurious intent, and whether any presumptions must be overcome by the proponent of the assertion that the client intends to commit perjury. These same elements of process undergird the relationship of the criminally accused to every other actor in the system: the police could only arrest her on a showing of probable cause, which was their burden to meet either before a magistrate judge or on a motion to suppress; the prosecutor may only proceed on a charge if she is persuaded, on her own investigation, that a reasonable juror could find beyond a reasonable doubt, and so on. The central thesis of this Essay is that defense counsel's determination that her client intends to commit perjury ought also to be governed by such presumptions and burdens. The contours of these presumptions and burdens may reasonably be deduced from already existing presumptions and burdens informing other aspects of the criminal process.

We may return to the inoffensive proposition that the accused is presumed innocent. This particular presumption carries with it a range of significant legal consequences.<sup>53</sup> Just as the accused is entitled to be informed of the nature and circumstances of the charges set out against her *because an innocent person would be unaware of them*,<sup>54</sup> so too ought to it be presumed that the accused, being innocent of any crime, would act in good faith. To this end, if and when counsel is confronted with inconsistencies, the "actual knowledge" procedure suggested here does not necessarily demand that counsel believe *both* stories (or either story), but rather that the client simply be asked to explain which of the two is the one she intends to testify to under oath. Legally speaking, the client's presumption of innocence accords counsel enormous leeway, as it should.

The burden of disproving a client's confidences must certainly lie upon counsel, since it is counsel who accuses the client of lying. The

52. In any event, the standard must be higher than that implicitly condoned in *Nix*—that is, of "belief with good cause." *Nix v. Whiteside*, 475 U.S. 157, 163 (1986) (citing *Whiteside v. Scurr*, 744 F.2d 1323, 1326 (8th Cir. 1984)). Notably, Professor Freedman and Brent Appel, the former deputy attorney general for the State of Iowa who argued for the warden in *Nix*, believe that certain members of the court would require proof beyond a reasonable doubt. See Freedman, *supra* note 8, at 1342 n.19. However, as Mr. Appel has noted, the Court made no ruling on the issue. See Brent R. Appel, *The Limited Impact of Nix v. Whiteside on Attorney-Client Relations*, 136 U. PA. L. REV. 1913, 1935 (1988).

53. See, e.g., *Coffin v. United States*, 156 U.S. 432, 453 (1895) ("The principle that there is a presumption of innocence in favor of the accused is the undoubted law, axiomatic and elementary, and its enforcement lies at the foundation of the administration of our criminal law.")

54. See *Fontana v. United States*, 262 F. 283, 286 (8th Cir. 1919) ("[T]he presumption is that [the defendant] is innocent thereof, and consequently that he is ignorant of the facts on which the pleader founds his charges.")

reasons for this were aptly summarized in Justice Brennan's opinion in *Speiser v. Randall*,<sup>55</sup> in which the Court invalidated a procedure requiring the California taxpayer to bear the burden of affirmatively proving that she was *not* a "person who advocate[s] the overthrow of the government" in order to claim a veteran tax exemption.<sup>56</sup>

The vice of the present procedure is that, where particular speech falls close to the line separating the lawful and the unlawful, the possibility of mistaken factfinding—inherent in all litigation—will create the danger that the legitimate utterance will be penalized. The man who knows that he must bring forth proof and persuade another of the lawfulness of his conduct necessarily must steer far wider of the unlawful zone than if the state must bear these burdens.<sup>57</sup>

Similarly, should a criminal defendant have to prove to her counsel the veracity of his story, she will feel compelled to "steer far wider of the unlawful zone"—that is, she will feel compelled to recite to her attorney a story more facially "believable," but not necessarily more "true." This result does violence to the central purpose of both the evidentiary protections of the attorney-client privilege and the ethical protections of client confidences—namely, to encourage unrestrained communication between a client and his attorney.<sup>58</sup> Consequently, the burden of disproving the content of a client's confidences should fall upon the client's counsel.

As discussed above, that burden should call a standard of proof at least as high as, if not higher than, proof beyond a reasonable doubt. It is all the more appropriate that counsel carry this burden in light of the fact that counsel is exposed—as was discussed above—to any number of unreliable, legally inadmissible, and often prejudicial "facts," such as statements of co-defendants, conversations with clients who have languished in jail and perhaps have abandoned any hope of being believed by anyone, or conversations with clients who have mental illnesses and whose grasp on what happened was *always* somewhat shaken.

Indeed, to return to Dickens' *Great Expectations*, what of the prisoner Molly? Imagine her attorney—like Derek Andrades' attorney—looks at her wrists, and concludes that she committed the crime. What becomes of the hapless and possibly innocent Molly if she realizes her wrists' appearance (rather than their *actual* strength) will incriminate her terribly, and decides to contrive her appearance in order to convey physical frailty; or even to testify that she simply did not commit the murder because she is too weak? Only a very unfortunate system of criminal justice, barely worthy of the name, would condone Mr. Jaggers'

55. 357 U.S. 513 (1957).

56. *Id.* at 521.

57. *Id.* at 526.

58. See MODEL RULES OF PROF'L CONDUCT r. 1.6 cmt. 2 (AM. BAR ASS'N 2013) ("[The rule governing confidentiality of information] contributes to the trust that is the hallmark of the client-lawyer relationship. The client is thereby encouraged to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter.").

revealing of his client's intent to "commit perjury" under these circumstances, when he surely cannot be actually aware of the circumstances of the offense, or even of her *actual* physical strength at the time of the offense.

A final consideration concerns the client who states unequivocally to her attorney, "The testimony I intend to give satisfies each of the elements of the crime of perjury." Several facts, following deductively from the foregoing reasons, should prevent an attorney, even under these circumstances, from concluding that her client actually intends to commit perjury.<sup>59</sup> Hearing such an anticipatory confession, in the absence of complete knowledge of the underlying circumstances against which the client's statement will be measured for truth, is not sufficient to prove to counsel, under a standard equal to or greater than proof beyond a reasonable doubt, that her client's purported testimony is not the truth. Again, her client may well believe that what she is about to testify to *is* a lie, but her client's belief that it is a lie does not make it so. Her client may even be falsely persuaded of her guilt. An interpretation of Rule 3.3 that condones an attorney eliciting testimony a client has stated *will be false* consequently has the potential to protect innocent individuals.<sup>60</sup> To critics who would find such an interpretation of the rule disingenuous, I would reply with the foregoing observations regarding the presumption of the accused's innocence, as well as the following observation: "there are more things in heaven and earth, Horatio, than are dreamt of in your philosophy."<sup>61</sup>

## V.

This Essay has suggested the following. First, assuming (as the current rules of ethics force us to assume) that there exists a proper fact-finding role for defense counsel, the current process in making this determination is essentially subject to the complete discretion of the attorney in determining what "actual knowledge" means. Second, as in any setting where nothing more concrete exists to regulate decision-making than unfettered discretion, it is subject to the vagaries of bias.

---

59. Notably, however, courts that have construed "actual knowledge" in the strictest fashion have suggested that such circumstances as are described above are the only ones under which counsel has an obligation to take "remedial measures," including disclosure to the tribunal. *See, e.g., Doe v. Fed. Grievance Comm.*, 847 F.2d 57 (2d Cir. 1988); *State v. McDowell*, 681 N.W.2d 500 (Wis. 2004).

60. Other rules similarly protect individuals who may falsely have confessed either to crimes that did *not* occur, as with the doctrine of the *corpus delicti*, or to crimes for which there is no evidence corroborating a defendant's confession to having been involved. On the *corpus delicti*, see, for example, *Allen v. Commonwealth*, 752 S.E.2d 856, 859 (Va. 2014) (discussing the history and rationale of the doctrine of the *corpus delicti*); David A. Moran, *In Defense of the Corpus Delicti Rule*, 64 OHIO ST. L.J. 817 (2003) (same). On corroboration rules that apply even when the *corpus delicti* has been established, see, for example, *People v. Bjork*, 963 N.Y.S.2d 472 (App. Div. 2013) (requiring, under N.Y. CRIM. PROC. LAW § 60.50 (McKinney 2016), greater corroborative evidence of guilt, outside defendant's confession, other than his mere presence at the scene of the crime).

61. WILLIAM SHAKESPEARE, *HAMLET* act 1, sc. 5.

Third, to regulate this bias, the determination of fact as to whether an accused individual actually intends to commit perjury should be subjected to a rigorous analysis in which the incredulous counsel has the burden of overcoming a presumption that her client intends to act in good faith by a standard of proof not less than proof beyond a reasonable doubt.

The method discussed in this Essay may impermissibly conflict with the Fifth and Sixth Amendments, condoning, as it might under the rarest of possible circumstances, the use of “remedial measures” that include disclosure of confidences to the tribunal.<sup>62</sup> However, the constitutional ramifications of the Rule have not been the present inquiry. Rather, I have sought an interpretation of Rule 3.3 that is both faithful to the text of the Model Rules of Professional Conduct, and that would also steer clear of the serious constitutional questions the Rule itself raises. That interpretation is simply to require that counsel possess proof, at least beyond a reasonable doubt, that a client has perjurious intent before taking such a grave remedial measure as disclosure to the court. “Actual knowledge” should consist of knowledge that cannot be doubted, the very sort that Molly herself had, rather than the gut-instinct of a Mr. Jaggars, or that of the reader of *Great Expectations*. Only in the rarest of cases would counsel possess such knowledge, and thus only in the rarest of cases should counsel consider herself to have the true ethical problem of client perjury.

---

62. Because he finds that disclosure of client confidences implicates insuperable constitutional difficulties, Professor Freedman concludes that Rule 3.3 is simply misguided. See Freedman, *supra* note 14, at 148?52.

