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THE MAN WHO SHOT LIBERTY VALANCE: TRUTH OR JUSTICE IN THE OLD WEST

Steven Lubet *

From out of the east a stranger came, a law book in his hand, a man.
The kind of a man the west would need to tame a troubled land;

....

But the point of a gun was the only law that Liberty understood.
When the final showdown came at last a law book was no good.¹

Gene Pitney's hit song is better known than John Ford's classic motion picture,² which in turn is much better known than the Dorothy Johnson short story on which the film was loosely based.³ But whatever the source, the image is nearly universal. A quiet, educated man brings order to a western town, making it safe for women and children, by showing the courage to stand up to a villainous outlaw.

Of course, it could never be quite that easy. Somewhere along the line the hero will be forced to abandon his law books in favor of a firearm. Before justice can prevail, there will have to be a gunfight. And so it was in *The Man Who Shot Liberty Valance*, when Ransome Stoddard, played nobly by James Stewart, challenged the cruel and arrogant Liberty Valance, leeringly portrayed by Lee Marvin.

Ev'ryone heard two shots ring out, one shot made Liberty fall,
The man who shot Liberty Valance . . . he was the bravest of them all.

It was a fight that Liberty would not win. By the time the smoke cleared, he was lying dead on the ground, the improbable victim of the mild mannered

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1. Gene Pitney, *The Man Who Shot Liberty Valance* (Musicor Records 1962) (words and music by Burt Bacharach & Hal David) (all subsequent song lyrics are from the same source).

2. See *THE MAN WHO SHOT LIBERTY VALANCE* (Paramount Pictures Corp. 1962) (screenplay by James Bellah & Willis Godbeck). Gene Pitney began work on "The Man Who Shot Liberty Valance" for Musicor Records in 1962 while the John Ford western was still in production by the Paramount Studio. Interestingly, the film was released somewhat ahead of schedule, before the song was finished. Consequently, one of the most recognizable of all western movie theme songs was not actually included in the film.

3. See Dorothy Johnson, *The Man Who Shot Liberty Valance*, *COSMOPOLITAN*, July 1949, at 57, reprinted in *GUNFIGHT 38* (James C. Work ed., 1996).

lawyer who had somehow managed to get off a lucky—or perhaps it was destined—shot.

Ransome Stoddard was immediately celebrated for his courage. He gets the girl, of course, and goes on to an honorable career as a statesman and diplomat—though the plot line has a twist or two and a bit of a surprise ending. The last thing anyone seriously suggests is that Ransome Stoddard be prosecuted. The man who shot Liberty Valance is a hero, a champion writ large, not a criminal. Who would ever dream of prosecuting the man who saved the town from that swaggering, gunslinging bully?

When Liberty Valance rode to town the womenfolk would hide,
they'd hide.

When Liberty Valance walked around the men would step aside;
'Cause the point of a gun was the only law that Liberty understood.
When it came to shootin' straight and fast he was mighty good.

All of which fits the formula for a western legend as long as Liberty had been killed in self-defense. While only a few ruffians mourned his death, one must wonder what might have happened if there had been just one more lawyer in town—say a prosecutor who was tempted to look a bit more deeply into the gunfight. Perhaps the prosecutor would have sought to enhance his reputation by becoming the Man Who Indicted the Man Who Shot Liberty Valance.

GO WEST

Our story begins on a westbound stagecoach.⁴ Ransome Stoddard, for reasons never disclosed, is headed for the tiny town of Shinbone, located somewhere “south of the Picketwire” on the very edge of civilization. Evidently fresh out of law school, or perhaps just having finished an apprenticeship, he is an obvious tenderfoot, carrying law books but no weapon.

Suddenly, a masked man steps into the road, pointing his gun at the stagedriver. “Stand and deliver,” he shouts. It is a holdup. The driver reins in the horses as six robbers emerge from the shadows. The frightened passengers are forced to surrender their valuables. One of the thieves notices the jewelry of an older woman, roughly grabbing at it with his soiled fingers. “Please don’t take it,” she tearfully begs, “my dead husband gave it to me.” The outlaw just laughs. “I’ll take it anyway,” he says, reaching for the brooch. The driver and the male passengers watch in horror, too frightened to make a move.

4. The facts that follow are from the movie *THE MAN WHO SHOT LIBERTY VALANCE*, *supra* note 2, not the short story from which it was adapted with a good deal of cinematic license.

With one exception. Ransome Stoddard steps forward, shoving the outlaw aside. "What sort of man are you?" he asks, in both shock and dismay. "Take your hands off her."

Stoddard pays dearly for his valor. The leader of the bandits strikes him hard across the face, knocking him to the ground. "Now, what kind of man are you, dude?" the leader smirks.

"I am an attorney at law. And you may have us in your guns now, but I'll see you in jail for this."

"Lawyer? Hah! I'll teach you law, Western law."

Using his trademark silver-handled quirt, the outlaw stands over the fallen Stoddard, whipping him savagely until restrained by his own men. Leaving his victim for dead, he tears up one of Stoddard's law books for a synecdoche of good measure.

Ransome's life is saved by Tom Doniphan, a local rancher—played by the ever-sturdy John Wayne—who fortunately finds him lying unconscious on the road.⁵ Tom brings the bruised and delirious Ransome into town, delivering him for nursing care to a young woman named Hallie (a decision that Doniphan would soon regret). Hallie, a waitress at Andersons' restaurant and boarding house, is Tom's fiancé-apparent. No words have been spoken, but everyone in Shinbone assumes they are destined for each other. This aspect of the plot is bound to thicken, but not until Ransome recovers from his ordeal and begins his fatal *pas de deux* with Liberty Valance.

After regaining consciousness, Ransome learns the name of his tormentor and begins to speak loudly about bringing him to justice. Seeking out the town marshal (played to perfection by the artfully ineffectual Andy "Jingles" Devine), Ransome demands Valance's arrest. Of course, such an attempt would be suicide for the bumbling marshal, who quickly begs off. The stage robbery occurred outside the town limits, conveniently allowing the marshal to disavow jurisdiction.

The fainthearted ploy is evident to everyone but Stoddard, whose naïve faith in the law compels him to take the marshal's abstention at face value. Everyone else realizes that Liberty Valance is simply above the law. The whole town is intimidated; no one would willingly cross him. Except, that is, for Tom Doniphan, who is tough enough to handle Valance but too dispassionate to take him on.

5. It is never explained why the stage driver and passengers abandoned Ransome Stoddard following the robbery. Even if they believed he was dead, one would hope they would have brought the body into town for burial. Perhaps they were afflicted by the same cowardice that kept all of Shinbone in thrall to Liberty Valance and his men.

Ransome Stoddard, on the other hand, is not easily deterred. Consulting his law books, he locates a territorial statute that gives the town marshal jurisdiction over stage robberies. "Aha," he shouts. "Now we've got Liberty Valance just where we want him!" Of course, no one agrees. They all want Liberty Valance as far away from town as possible. Most of all, the marshal wants no part of him. Stoddard suddenly realizes just how thoroughly brow-beaten a community he has joined. You can see the steely resolve flash across Ransome Stoddard's face. There will have to be a reckoning; the law demands it.

But first there will be some symbolic, low-key violence. Finding no immediate demand for lawyers, Stoddard takes a job waiting tables at the Andersons' rooming house. One Saturday night, Valance and his henchmen ride into town for dinner. Amused at the sight of a man in an apron, Valance knocks Stoddard to the floor, daring him to get up. Though no physical match for Valance, Stoddard is both principled and unafraid. When Doniphan intervenes, apparently ready to shoot it out with Valance over a ruined meal, Stoddard will have none of it. He is willing to accept humiliation rather than become the cause of needless gunplay.

Inescapably, the unsophisticated, beautiful Hallie (played by Vera Miles with spirited grace) is drawn to the well-spoken, nonviolent newcomer. How can it be that the sole unarmed man in town is the only one with sufficient nerve to resist the gunslinger? What is it that gives Stoddard the courage that others lack? It has to be his education, his belief that the ideals of civilization will ultimately triumph over raw brutality. And though Hallie herself is illiterate, she understands what it will take to cast her lot with Stoddard and the forces that are changing the West. She asks him to teach her to read—and then to open a school, for children and adults, where the good people of the town can study the ABCs and citizenship as well.

Hallie and Ranse avoid the realization, but of course they are falling in love. Tom Doniphan is the first to notice, but by then it is too late. Hallie will never be his, though he silently vows to protect her happiness. Which in turn makes him the reluctant guardian of Ransome Stoddard. Tom is bitter, though not hateful, over the loss of Hallie. More, he realizes that Ransome Stoddard's law will end the frontier way of life on which Doniphan has thrived. Nonetheless, he will do everything in his power to keep Stoddard alive for Hallie's sake.

Ranse does not know that he has gained a defender, but he is smart enough to recognize that law and order will not arrive in Shinbone quickly enough to do anything about Liberty Valance. So the lawyer acquires a gun and heads out to the open range for secret target practice in his spare time. The effort is futile. There is no way he can adequately prepare himself for the inevitable confrontation with Liberty Valance.

GUNFIGHT

With Ransome Stoddard representing reasoned civilization and Liberty Valance standing for loutish anarchy, the eventual showdown comes over the issue of admission to the Union.⁶ The Territory, it seems, is divided on that question, and residents living "south of the Picketwire" are entitled to elect two representatives to a convention that will decide whether or not to seek statehood. As Ransome Stoddard explains, statehood will mean security, schools, and opportunity for the region's decent, hardworking, church-going townsfolk and farmers. It is opposed, needless to say, by the nefarious "cattle interests" who want to continue their undemocratic control of the Territory.

A town meeting is called to elect the Shinbone delegates. Two pro-statehood nominees are quickly proposed, Ransome Stoddard and Dutton Peabody, the alcoholic-but-incorruptible publisher of the *Shinbone Star*. And then Liberty Valance invades the meeting hall, accompanied by his thuggish sidekicks (Strother Martin and Lee Van Cleef, one coarse and the other sleek—both appropriately evil). Liberty, obviously in the employ of the sinister cattle barons, announces that *he* will be the Shinbone delegate. He pulls out his six-shooter, daring the sod-busters to vote against him.

Steeled by the resolve of Stoddard, Peabody, and Tom Doniphan, the assembled citizens screw their courage to the sticking point and vote for statehood and against the open range. Stoddard and Peabody are duly installed amid ecstatic cheers. Valance leaves the meeting vowing revenge.

Later that night, a somewhat tipsy Mr. Peabody repairs to his office to lay out the next morning's edition of the *Star*. Valance and his toughs break into the print shop. They destroy the press, smash the furniture, and scatter the type. Peabody tries to stop them, but even sober he would have been easily overcome by the outlaws. As it is, the enraged Valance uses his silver-handled quirt to beat the helpless editor to within an inch of his life.

Word spreads quickly. Valance nearly killed Dutton Peabody and is threatening that Ransome Stoddard will be next. For the time being, however, Valance and his men hold forth in a saloon, allowing Stoddard time to escape. Hallie begs him to leave town. Tom Doniphan offers to help, putting his wagon and hired hand at Stoddard's disposal.

6. The film seems to take place in the 1870s (before the railroad reached towns like Shinbone) and appears to be set in Arizona, but that would make the statehood issue an anachronism—Arizona having been admitted to the Union in 1912. Dorothy Johnson, whose short story formed the basis of the movie, was a Montana writer. Montana became a state in 1889, which almost fits into the time frame of stage coaches and gunslingers, though the topography does not match the scenery in the film. An alternative possibility is Colorado, admitted to the Union in 1876, with enough desert landscape to satisfy John Ford.

Ranse will have none of it. He might save his life by fleeing, but that will betray all he stands for. He cannot abandon Shinbone to the likes of Valance, even for Hallie's love. He will have to face him down.

Alone and afraid she prayed that he'd return that fateful night,
that night.

When nothing she said can keep her man from goin' out to fight.
From the moment a girl gets to be full grown the very first thing
she learns—

When two men go out to face each other only one returns.

Gun in hand, Ransome Stoddard heads for the saloon. "Valance," he shouts, "I'm calling you out." Smiling drunkenly, Liberty Valance steps into the street. Knowing that Stoddard has no chance against him, he decides to toy with his prey. Liberty's first shot shatters a gaslight, sending shards of glass down over Ransome's head. Stoddard is not a coward, but he is not a gun-fighter either. He stands transfixed. Unable to shoot, unwilling to run, he waits for Valance to make the next move.

Liberty's second shot hits Ranse in the right shoulder, causing him to drop his gun. "Go ahead, pick it up," Liberty taunts. The wounded Stoddard retrieves his weapon with his left hand and turns again toward Valance. "The next one goes right between the eyes," the outlaw sneers as he aims his pistol. Knowing this is the end, Stoddard raises his own firearm with his trembling left hand.

Two shots are fired but only one man is hit. Incredibly, it is Liberty Valance who falls dead. Ransome Stoddard—wounded, disoriented, firing with his left hand—somehow managed to do the impossible. Bloodied but still standing, shocked with disbelief, he is a hero, soon to lead the Territory into the comforts and advantages of statehood. Liberty's henchmen shout murder, but Tom Doniphan shuts them up in short order. Nobody is about to prosecute the man who shot Liberty Valance.

In the jubilant town of Shinbone, only one man has second thoughts about the death of Liberty Valance. Ransome Stoddard, lawyer and peace-maker, takes no pride and little fulfillment in having killed a man. Even less is he willing to trade on his new reputation as a gunman, as much as others might admire him. He confides in Tom Doniphan that he is planning to resign his position as Territorial delegate.

Then Tom explains what really happened. When Ranse refused to leave town with Tom's driver, Doniphan followed him to the saloon. Standing in the shadows, Tom watched the confrontation while Liberty fired his first two tormenting shots. When Valance announced that the next one will go "right between the eyes," Doniphan raised his own rifle, firing before Liberty had a chance to shoot.

"It was cold-blooded murder," says Tom, "but I ain't ashamed." He had done it for Hallie, as Ransome well understood but could not acknowledge.

Ransome marries Hallie and goes on to a distinguished political career far from Shinbone. First governor of the state, then senator, then ambassador to England, and then back to the U.S. Senate, always with Hallie (who presumably has learned to read) at his side.

Many years later he returns to Shinbone for Tom Doniphan's funeral. It is great news that Senator Stoddard has arrived in the town where his legend began. A young reporter and the new editor of the *Shinbone Star* persuades him to give an interview about the old days, and Stoddard surprises everyone by telling the true—but until then unknown—story of the shootout.

It is an incredible scoop, but the editor kills the story. It will never be published. "When truth becomes legend," the editor says, "print the legend."

PROSECUTE THE LEGEND

But what is the legend and what is the truth? And what might have happened if an independent prosecutor had looked more closely into the death of Liberty Valance? Everyone in Shinbone believed they knew the facts. Enraged over the delegate election, Valance had mercilessly beaten Peabody and threatened Stoddard's life. Ransome had no choice but to arm himself for the confrontation. Valance's third bullet would have killed him for sure, but for the lawyer's surprisingly charmed aim. It was a clear case of self-defense, for which Ransome Stoddard deserved well to be praised.

But self-defense is a matter of interpretation, not observation. The only "true fact" was that Liberty Valance lay dead; everything else was a matter of detail and inference. Who was the aggressor? Who had an opportunity or duty to retreat? What was Stoddard's actual intent? Was he doing "what a man has to do," or was he out for vigilante vengeance? The answers to these questions—articulated in a trial lawyer's theory and theme—can determine the difference between heroism and guilt.

A successful murder prosecution of Ransome Stoddard would depend upon the construction of a viable theory of the case. The best theory would evoke the theme of revenge. Stoddard, once badly beaten and repeatedly humiliated by Liberty Valance, had vowed retaliation. Arming himself for the task, he slipped out of town to practice gunplay in preparation for a shootout. The battering of Dutton Peabody provided the excuse. Although Stoddard had every chance to leave Shinbone without a confrontation, he sought out Liberty—who was playing cards in the saloon, not stalking the streets—and insisted on a duel. The theme of the trial would be "taking the

law into his own hands.” No one liked Liberty Valance, who was a bully and a brute, but that was not lawful cause to gun him down.

But theory is one thing and proof is another. The case would have to be supported by the accumulation of persuasive details. The prosecution would begin, no doubt, with the stagecoach robbery.

Liberty Valance had beaten Ranse Stoddard and torn up his treasured law books. Unable to fight back, Stoddard must have been tormented by his own weakness. Believing that lawyering would bring him power over men like Valance, it turned out that he was at their mercy. He must have raged at the thought.

Stoddard’s anger could only have increased when he discovered that his law degree meant nothing in Shinbone. He drew amazed laughter when he suggested the arrest and prosecution of Valance, even when he succeeded in locating an applicable statute. Finding no work as a lawyer, he was reduced to donning an apron and washing dishes. And when he ventured into the dining room, there was Liberty Valance mocking him again. Valance knocked Stoddard to the floor, causing him to endure the raucous laughter of dozens of customers. Worse, it happened in front of Hallie, who rushed to protect him from further harm, making Stoddard the one man in Shinbone who hid behind a woman’s skirts.

True, this account exposes Liberty Valance as a bully and a thug, making Stoddard’s theorized angry reaction seem all the more human, and perhaps unavoidable. But that is precisely where trial theory plays its most important role. It is often said among trial lawyers that every fact has two faces. Here, the advocate’s challenge is to take the fact of Valance’s bullying—which would ordinarily seem to work in Stoddard’s favor—and turn it into evidence for the prosecution.

First, the prosecution will have to openly acknowledge Valance’s cruelty. Any attempt to soft-pedal or sanitize Valance would only engender sympathy for Stoddard. On the other hand, recognition of Valance’s ruthlessness can be used to develop the theme of Stoddard’s bitter frustration. The worse Valance appears, the more reason Stoddard had for challenging him. In other words, the prosecution will need to develop the idea that Stoddard was motivated by personal animosity rather than enforcement of the law.

The catch, then, will be to demonstrate that Stoddard’s life was never in danger. As long as Valance can be portrayed as “merely” sadistic, Stoddard cannot be excused for killing him. But if Valance was murderous, Stoddard could make his own case for self-defense.

Until the final showdown, however, we never see Liberty Valance use a firearm. In the stage robbery he battered Stoddard with his silver-handled quirt, a tactic he repeated on Dutton Peabody when he destroyed the office

of the Shinbone Star. At one point it is rumored that "Valance and his men murdered two sodbusters up near the Picketwire," but that claim is never repeated or substantiated. For all Ransome Stoddard knew, Liberty Valance liked to threaten and pummel people, but he never shot them.

Stoddard was no match for Valance with his fists; he needed an equalizer. That is why he armed himself, sneaking alone out of town to work on gun-play. What reason did he have for taking target practice other than preparing to shoot Liberty Valance? On the night of the election, Valance did his dirty work by hand, never drawing his gun. When he threatened that Stoddard would be next (a threat that he took no immediate steps to carry out), the reference must have been to a beating.

To be sure, Stoddard was under no obligation to accept a whipping from Valance and his men, but neither was he entitled to use deadly force to prevent it—especially since he had every opportunity to avoid the confrontation and keep the peace. He could have left town, with or without Hallie. He could have hidden. He could have surrounded himself with other citizens, on the theory that even Valance would not attack him in front of a crowd. He could even have locked himself in the marshal's jail until his tormentor left town. Instead, he deliberately chose the one course of action that was certain to lead to violence. He went gunning for Liberty Valance.

Valance, on the other hand, had taken no steps to pursue Stoddard. He seemed content to enjoy himself in the saloon—perhaps biding his time or perhaps having decided that he had exacted sufficient revenge on Peabody. In any event, he was not given the chance to menace Stoddard because Stoddard acted first.

Stoddard approached the saloon, gun in hand, demanding that Valance come out and fight. Liberty emerged with his pistol holstered, facing a man with his weapon already drawn. Was Stoddard a victim or an aggressor? Was Valance ready or reluctant to fight?

Encountering Stoddard at gunpoint, the "law of the West" surely entitled Valance to accept the challenge. He probably could have killed the lawyer immediately in the name of self-defense. Instead, he fired two shots intentionally wide of the mark, giving Stoddard two opportunities to back down.

Here again we see that every fact has two faces. Valance was actually warning Stoddard, not toying with him. At any moment, Liberty could have dispatched his adversary with ease. Instead, he fired a warning shot above his head, hoping to make him flee. But Stoddard stood there, gun at the ready. Yet again Valance did not shoot to kill, aiming instead at Stoddard's shoulder in order to forestall the fight. Undeterred, Stoddard retrieved his weapon, leaving Valance little choice. Said Liberty, "the next shot goes right between the eyes," but still he did not fire while he had the chance. Valance

waited, giving Ransome Stoddard one final opportunity to call the whole thing off.

That hesitation, arrogantly merciful if not entirely generous, cost Liberty Valance his life and made Ransome Stoddard a murderer. The outlaw attempted to avoid the fight, and the lawyer shot him down.

FOR THE DEFENSE

If indicted and brought to trial, Stoddard would not be without defenses. The shooting of Liberty Valance, as everyone in Shinbone seemed to believe at the time, was a case of justifiable homicide. The man was a brute and a killer, dangerous to everyone who got in his way. He had used his whip and gun to intimidate the entire town, including the marshal. In the end, only Ransome Stoddard stood between Liberty Valance and continued mayhem.

At the territorial election, Valance threatened everybody who refused to vote for him. After the ballot, he left the hall vowing swift retribution. And it was no empty promise, as Dutton Peabody quickly learned. Valance's own men had to pull him off of the luckless editor, beaten into unconsciousness and perhaps to the brink of death. Liberty announced that Stoddard would be the next victim, and nobody doubted his word.

Thus, the trial strategy for the defense would be some variation on the theme of "duty and courage." Ransome Stoddard had the moral duty to defy Liberty Valance and the courage to do it.

True, Stoddard could have fled town to avoid the fight, but that would have left Shinbone at Valance's mercy. Certainly the duly elected territorial delegate had a public responsibility to stay and represent his constituency. With Peabody bludgeoned and Stoddard gone, Valance could have subverted the process of democracy itself by insisting that he become Shinbone's new representative. And while the citizenry had mustered the nerve to resist him once, could they do it again after he had literally trampled his opponents?

Besides, with Valance loose and angry it was only a matter of time until he tracked down Ransome Stoddard. Why let Valance pick the time and place of the inevitable confrontation? Why should the lawyer risk being ambushed or shot in the back? Liberty Valance had never shown any respect for fair play. It was far safer for Stoddard to choose the venue, so to speak, giving him what little chance he might have of surviving the showdown. By calling Valance out of the saloon, for all the town to see, at least Stoddard would be protected against a bushwhacking.

And, as defense counsel would be certain to remind the jury, Ransome Stoddard had approached the showdown with no illusions about winning the fight. He believed, along with everyone else, that he was heading into

nearly certain death, or at least grave harm. It was honor and sacrifice that Stoddard had on his mind, not murder.

But would that be enough to establish self-defense? Murder for honor is murder nonetheless, and the fact remains that it was Stoddard who called out Liberty Valance.

Stoddard's best defense would be the absolute truth. He did not kill Valance; Tom Doniphan fired the fatal shot. Would Stoddard share this secret with his lawyer? And if he did, would he allow his attorney to make the argument in court?

Doniphan saved Stoddard's life, not out of friendship but rather for the sake of the woman they both loved. Would Stoddard now see an obligation to his rival in love? He could reveal Doniphan's involvement, which would save his own skin and thereby ensure the happiness of Hallie (which was Doniphan's intention in the first place). Or he could keep his mouth shut, risking trial and pinning his hopes on his counsel's powers of persuasion in the name of self-defense. Each course of action could be morally justified, one in the name of honesty and the other for the sake of loyalty.

A more challenging question arises when we consider the participation of counsel. Imagine that Stoddard told his attorney all about Doniphan's deadly role. The lawyer, being primed always to win if possible, would obviously jump at the chance to blame the crime on someone else, no matter what the cost to decent Tom. And of course it would be ethical to do so. No matter how despicable the motivation—and some people would find the betrayal of Doniphan to be contemptible indeed—it could hardly be improper for a lawyer to tell the truth.

But what if Ransome Stoddard—perhaps out of gratitude, perhaps to keep Hallie's love and respect—insisted that Doniphan be protected? Could his lawyer go along? If so, how would that affect the conduct of the defense?

In modern terms, a lawyer is required to "abide by a client's decisions concerning the objectives of representation . . . and [to] consult with the client as to the means by which they are to be pursued."⁷ We do not know what formal rules might have applied in prestatehood Shinbone, since we do not even know the name of the territory, but surely the profession would have followed some variation on the objectives-means division of authority. In Stoddard's case, the client's unquestionable objective would be acquittal or exoneration, unless he decided to plead guilty instead. But once the client makes that decision concerning his objective, do all other decisions fall to the lawyer—subject to "consultation"—in the name of selecting the means of the defense? In other words, could counsel virtually compel Stoddard to betray Tom

7. MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (1995).

Doniphan: "You can plead guilty if you want to Ranse, but if this case goes to trial I'm afraid you cannot stop me from calling Doniphan to the stand."

For good or ill, the contemporary rules allow for more client autonomy than that. The Comments to the American Bar Association Model Rules of Professional Conduct provide that "the lawyer should assume responsibility for technical and legal tactical issues, but should defer to the client regarding such questions as . . . concern for third persons who might be adversely affected."⁸

In other words, Ransome Stoddard could order his lawyer to keep Tom's name out of it, suffering the consequences if that decision resulted in conviction.⁹ A more subtle question, however, cannot be quite so easily resolved. How would—indeed, how could—a competent, ethical lawyer conduct a defense under such a constraint?

The prosecution always goes first. Unsuspecting of Tom Doniphan's handiwork from the shadows, and unaware of the issues confronting the hobbled counselor for the defense, the prosecutor would call his witnesses as planned, based on the theory that Stoddard instigated the fight and murdered Valance with an admittedly lucky shot.

Defense counsel would likewise proceed to claim self-defense, cross-examining witnesses to establish Valance's history of threats and brutality. Though well informed that Stoddard did not kill Valance at all, much less in self-defense, the lawyer would nonetheless seek to draw out all the reasons that Ranse had to fear for his life: Didn't Liberty Valance attempt to intimidate the entire town into electing him territorial delegate? Hadn't he immediately threatened revenge when the vote went to Peabody and Stoddard? Wasn't he a notorious criminal with a reputation for having killed "two sodbusters up near the Picketwire"? Hadn't he already attacked Dutton Peabody, leaving him for dead? If he wanted to save his own life, what choice did Ranse Stoddard have but to shoot Liberty Valance?

Except, of course, that Stoddard didn't shoot him. The cross-examinations would all be designed to hide the truth, to create the false impression that Stoddard acted in self-defense—all the while concealing the fatal involvement of Tom Doniphan.

8. *Id.* R. 1.2 cmt. The former Model Code of Professional Conduct was even more explicit, stating that "[i]n the final analysis, however, . . . the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client." MODEL CODE OF PROF'L RESPONSIBILITY EC 7-8 (1980).

9. Another question is whether the attorney, thus hobbled, would be entitled to withdraw as counsel on the ground that "the representation . . . has been rendered unreasonably difficult by the client." MODEL RULES OF PROF'L CONDUCT R. 1.16(b)(5). We will assume that Ransome Stoddard's lawyer has chosen to stick with him.

In criminal cases especially, we accept the idea that cross-examination may be used to suggest hypothetical scenarios that deflect attention from the defendant's culpability. While some chafe at what they see as the facile obfuscations of defense counsel, most understand that the concept of "proof beyond a reasonable doubt" permits the defense to propose "reasonable hypotheses inconsistent with guilt."¹⁰ A criminal defendant is entitled to demand that the prosecution prove his guilt to a moral certainty, which can mean the exclusion of other reasonable explanations for the crime. Short of such protection, the presumption of innocence would be eroded.

There is a meaningful ethical limitation on what can be done in the course of insinuating reasonable doubt. Most important, cross-examination questions may not "allude to any matter . . . that will not be supported by admissible evidence."¹¹ This principle, also referred to as the "good faith basis" rule, provides that lawyers must build their cases on a foundation of truth. They are free to use their questions to intimate all manner of guilt-negating possibilities, but only on the basis of truthful answers.

The most familiar pedogic example is the near-sighted eyewitness. Knowing full well that an identification was accurate, defense counsel may nonetheless challenge the witness's ability to observe: Isn't it true that you suffer from myopia? Don't you need corrective lenses in order to drive? In fact, that is a condition on your driver's license, correct? Wasn't the crime committed late at night? Isn't it true that you weren't wearing your glasses? Or your contact lenses? And you only observed the criminal from a distance of at least twenty feet? These questions are legitimate if the witness truly is myopic and truly does need glasses in order to drive. They are impermissible, however, if the lawyer is simply trying to create a smokescreen without any basis in fact.

Applying the good faith basis rule, Ransome's counsel would have license to develop the theory of self-defense, as long as the supporting facts could be elicited through truthful testimony. Thus, it would be proper to ask questions about Valance's cruel demeanor, evil reputation, and repeated threats.

But wait. Let us take another look at the reason for allowing attorneys to develop alternate, though misleading, scenarios. There is only one justification for such sanctioned obfuscation—the presumption of innocence. Cloaked in that presumption, a defendant is entitled to make it hard—exceptionally hard!—for the government to obtain a conviction. Thus, the rights of the innocent are protected, since wrongful convictions would surely result if

10. This does not mean that the prosecution must always preclude "every reasonable hypothesis inconsistent with guilt in order to sustain a conviction," but only that the defense is free to suggest, based on the evidence, other possible scenarios. See *United States v. Reeder*, 170 F.3d 93, 102 (1st Cir. 1999).

11. MODEL RULES OF PROF'L CONDUCT R. 3.4(e).

successful prosecution became too easy. So it is logical, even imperative, to allow Ransome Stoddard's lawyer to protect his client by raising a not-really-true claim of self-defense. Ranse is in jeopardy and his rights must be protected.

So far, so good—except that the self-defense claim is not really being put forward on Stoddard's behalf. Remember, Stoddard has an even better defense; Tom Doniphan fired the fatal shot. And this fact is being withheld only because Stoddard has decided to shield his friend from arrest. Consequently, we must wonder whether the attorney's warrant to obfuscate in Stoddard's defense must be extended to allow the same tactic solely for Doniphan's benefit.

The formal rules do not address this situation (as must also have been the situation in the late nineteenth century), requiring only an admissible "factual basis" for cross-examination questions,¹² without regard to their ultimate motive or beneficiary. Perhaps the underlying rationale for wide-ranging latitude might be understood to exclude noble sacrifices for the sake of worthy confederates (or, as would more often be the case, ignoble sacrifices for the sake of nasty coconspirators), but there is no way to police such an exaction. In either case, the questions themselves would sound the same, and the answers would be equally truthful.

We can say with much assurance that no frontier trial lawyer would give a hoot about—or even notice—the nice distinction between defending (exclusively) Ranse Stoddard and safeguarding (incidentally) Tom Doniphan. With unencumbered conscience, the advocate would use his cross-examinations to develop the theme of self-defense. He might wish that he could blame the whole thing on Tom, but would acquiesce in his client's insistence that Ransome shoulder the burden alone.

The ultimate claim of self-defense would be a bit of a sham, but it would be an honest sham.

TAKING THE STAND

Cross-examination allows defense counsel tremendous leeway. If the questions are asked in good faith and the answers are truthful, the lawyer is relatively free to stack inference upon innuendo to construct a story that can lead to acquittal. But sooner or later the prosecution will rest and the defense will have to stop cross-examining and begin to present its own case. The ethical considerations now become trickier.

12. See STEVEN LUBET, *MODERN TRIAL ADVOCACY: ANALYSIS AND PRACTICE* 147–48 (2d ed. 1997).

If there is one bedrock principal, it is that a lawyer may not “counsel or assist a witness to testify falsely.”¹³ On cross-examination, the attorney may skirt that requirement by eliciting sincerely truthful, if unwittingly misleading, answers. But direct examination, especially of the defendant, presents a different problem. The defendant is not unwitting. Complicit in any deception, he knows where the examination is headed and why it is being conducted. Perhaps sincerity is not an absolute condition of “technical truth,”¹⁴ but a purposeful contrivance may set in motion an ethically dangerous chain of events—as becomes immediately evident in the case of Ranse Stoddard.

Stoddard knows more than any jury will ever find out, perhaps more than he could even explain to his own attorney. Most important, only Stoddard could know—depending upon how deeply he was willing to search his soul—whether he truly acted out of fear for his life or whether he was wildly spurred by hatred and revenge. Putting aside the ineffable secrets of the human heart, the more immediate point is that Stoddard knows, even without introspection, all about Tom Doniphan’s role in the killing. Concealing that fact during direct examination will require some serious collusion between lawyer and client. Imagine their final, pretrial meeting:

COUNSEL: Ranse, this is your last chance to tell the whole truth about Tom’s involvement. It could keep you from hanging.

STODDARD: Tom saved my life. There is no way I will betray him now. I’m willing to take the responsibility, no matter how it turns out. After all, I would have shot Valance in self-defense, if I’d been fast enough.

COUNSEL: Then I guess there’s nothing I can do to stop you. But there’s still a limit on what I can do. When you testify, Ranse, you have to tell the truth. That means that you can never say that you killed Valance. You can describe how you felt and why you called him out, but you can’t say that you killed him.

STODDARD: So I can explain about Valance’s threats and the way that he nearly killed Dutton Peabody?

COUNSEL: Absolutely.

STODDARD: And I can tell the jury why I believed that Valance would track me down and shoot me in the back, even if I tried running away?

COUNSEL: Yes, you can.

STODDARD: Can I tell them that I had my gun in my hand, pointed at Valance?

13. The predominant modern iteration is found in MODEL RULES OF PROF’L CONDUCT R. 3.4(b).

14. President Bill Clinton’s memorable trope was “legally accurate.”

COUNSEL: If that's true.

STODDARD: Can I tell them that I had my finger on the trigger?

COUNSEL: Yes, if that is what happened.

STODDARD: And I was sure I was going to die if Valance had a chance to fire another round?

COUNSEL: Yes.

STODDARD: Can I say that everyone heard two shots ring out—one shot made Liberty fall?

COUNSEL: You can, Ranse. But don't push it.

And then what? Stoddard can truthfully set the scene for self-defense, but eventually he will have to confront the actual shooting—at which point his attorney cannot allow him to lie. Perhaps they will try another artful evasion, confining the examination to the night of the shooting when Stoddard had not yet learned of Doniphan's intervention.

COUNSEL: Ranse, how did you feel at that moment when you saw Liberty Valance lying dead in the street?

STODDARD: I couldn't believe it. I was stunned at the thought that I had killed a man. I wanted to cry at what had happened. I did not feel any happiness, only bitter relief. I wished there could have been some other way.

COUNSEL: Ranse, as you stood there that night, was there any doubt in your mind that Valance intended to kill you?

STODDARD: No. He'd made himself all too clear.

COUNSEL: Did you have any doubt that it was impossible to run or hide?

STODDARD: None.

COUNSEL: Did you have any choice but to confront him that night?

STODDARD: No. He would have shot me down for sure.

The lawyer has done his job well. The story fits the facts, and Tom Doniphan's name was never mentioned. The testimony is all true, or rather, none of it is untrue, and it covers all of the necessary elements of self-defense.

But is it all too facile, too crafty, too slick? Does counsel truly avoid "assisting a witness to testify falsely" by asking Stoddard about the necessity of "confronting" Liberty Valance rather than "killing" him? How much sleight of hand are we willing to tolerate in the name of vigorous advocacy or the presumption of innocence?

The answer does not come easily. Clearly, the lawyer and client have engaged in a practice that we might call "evasive recharacterization," intentionally telling an essentially false story through the wily arrangement of fragments of truth. Many would consider that simply a skillful form of lying, all the more dishonorable and dangerous because it is hard to detect.

On the other hand, we continue to place a high value on requiring rigorous proof from the prosecution. For example, suppose that the prosecution in a burglary case accidentally assigned the wrong date to the crime, thinking it had happened a day later than was really the case. The only eyewitness mistakenly testified that the defendant was seen fleeing the crime scene on a certain Thursday afternoon, when it had really happened the previous day. Now assume that the defendant happened to have an ironclad, truthful alibi for Thursday. Wouldn't the defendant be entitled to testify—truthfully—that she was in a hospital emergency room that Thursday afternoon, offering x-rays and medical records to back her up? Certainly, the Fifth Amendment would protect her from having to volunteer the fact that she actually robbed the place on Wednesday. And keeping her off the stand entirely seems like a harsh consequence, imposed on the defendant because of the prosecutor's error.

Most important, there is an extremely strong social interest in requiring prosecutors to prove crimes for the correct day. Laxity in that regard would be extraordinarily dangerous to the innocent, because prosecutors could just as easily end up assigning crimes (negligently or otherwise) to dates on which the defendant had no alibi. Thus, it may turn out to be socially useful to allow the guilty defendant to testify truthfully that "I was nowhere near the crime scene on Thursday afternoon—I was in the hospital emergency room." It keeps the prosecution honest.

Moreover, there is a strong corrective within the system itself. Cross-examination.

ENDGAME

Let us return to Shinbone and the trial of Ransome Stoddard, who has just testified on direct examination. Defense counsel nimbly steered the examination through the narrows of deception, avoiding outright lies while allowing Ransome to convey adroitly, if ever-so-indirectly, the claim that he shot Liberty Valance in self-defense.

Now comes the cross-examination. Even an unsuspecting prosecutor, without so much as an inkling of Tom Doniphan's involvement, would at some point confront the defendant about the killing.

PROSECUTOR: Mr. Stoddard, you heard about the beating of Dutton Peabody, correct?

STODDARD: I did.

PROSECUTOR: You decided to head for the saloon, didn't you?

STODDARD: I feared for my life.

PROSECUTOR: So you went to find Liberty Valance, right?

STODDARD: I didn't think I had a choice.

PROSECUTOR: You had a gun in your hand?

STODDARD: Right.

PROSECUTOR: You called him out of the saloon, didn't you?

STODDARD: Yes.

PROSECUTOR: Isn't it true, Mr. Stoddard, that you shot him dead on the streets of Shinbone?

Ransome Stoddard is now on his own. He cannot turn to his lawyer for help constructing a sly answer to the direct question (although they may have discussed his options in advance). Perhaps he can dodge once.

STODDARD: Valance fired at me first.

But the defendant cannot dodge indefinitely:

PROSECUTOR: Well, you're the man who called him out, right?

STODDARD: Yes.

PROSECUTOR: You're the man who went to the saloon, gun in hand, right?

STODDARD: Yes.

PROSECUTOR: And you're the man who shot Liberty Valance, aren't you?

The line is drawn. Stoddard must decide whether to tell the truth or to lie. If he tells the truth, the game is up and Doniphan will be exposed. That does not get Stoddard off the hook, however. The jury might well mistrust his sudden implication of Doniphan, who was never named during direct examination. They might consider it a desperate ploy to shift the blame, and convict Stoddard nonetheless.

Realizing this, would Stoddard, a lawyer himself, decide to go for broke?

STODDARD: Yes, I am the man who shot Liberty Valance.

That would be a lie. Well intentioned, perhaps even noble, but a lie nonetheless. What will defense counsel do?

The prevailing modern rule requires the defense lawyer to inform the court of the truth. "A lawyer shall not knowingly . . . fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client," even if that requires disclosure of client confidences.¹⁵

So Ransome Stoddard probably could not get away with protecting Tom Doniphan. He would almost certainly be caught if he brazened it out. He would either be tripped up on cross-examination or his own attorney would

15. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2), 3.3(b). For a minority position, see MONROE H. FREEDMAN, UNDERSTANDING LAWYERS' ETHICS 109-42 (1990) (arguing that a lawyer's duties of loyalty and confidentiality require actively presenting a criminal defendant's perjured testimony). Under any approach, a lawyer who knows in advance of intended perjury, as Stoddard's attorney would at least have to suspect, must attempt to dissuade the client from offering false testimony.

be compelled to reveal the truth. The jury would probably penalize him for misleading them even if—once exposed on cross-examination—he retreated to the flimsy refuge of insisting that he had given “legally accurate” testimony on direct.

A capable attorney would quickly realize that Ranse’s well-intentioned efforts to protect Tom Doniphan would most likely lead to disaster for all involved. Doniphan’s role would probably come to light in the course of investigation and trial, though Stoddard might still be convicted of either perjury or even murder. The lawyer would have to worry about his own exposure as well, because the line between an accurate-though-misleading trial strategy (which may be permissible) and outright assistance in a perjurious coverup (which is not) is at best indistinct and undeterminable. One misstep and the lawyer could find himself facing discipline or indictment.

While Stoddard might be inclined to take a grave risk to shield Tom Doniphan, his lawyer would surely balk. After all, Doniphan never saved counsel’s life. “Ranse,” the lawyer would likely say, “I can defend you with the truth, or you can refuse to testify at all, but you’ll have to find yourself another lawyer if you insist on sticking with self-defense.”

Then Ransome Stoddard would be faced with a bitter choice. The only certain way to protect his friend and benefactor would be to plead guilty. Perhaps he could cut a plea bargain for voluntary manslaughter.¹⁶ But even Ranse would be unlikely to go that far in the name of friendship and obligation. He would have to share the blame and credit with Tom Doniphan, letting the chips fall where they may. Doniphan, of course, would have his own defenses. He could plead necessity, or defense of another, or he could stake his hopes on jury nullification, which was always a possibility in the Old West. But that’s another story.

TRUTH AND JUSTICE

The Murder Trial of the Man Who Shot Liberty Valance would be a fascinating movie in its own right. Would Ransome Stoddard take the fall? Would his lawyer agree to deceive the jury? Would the prosecutor buy into the implication of Tom Doniphan, or would he proceed against Stoddard nonetheless? Would Doniphan calmly accept indictment, or would he go after Stoddard with guns blazing? How would Hallie react to Ransome’s silence or betrayal?

16. Ironically, the appellate cases are clear that one does not need to *actually be guilty* in order to *plead* guilty. Due process is satisfied if the defendant rationally determines that he does not want to undertake the risk of trial, so long as he knowingly and intelligently waives his rights. Moreover, there is no apparent ethical bar against a defense attorney’s involvement in such circumstances.

However the story might turn out, and whatever strategies the characters might follow, for our purposes it is most interesting to consider the ways in which the structure of the adversary system pushes the participants toward justice. First, the general acclaim for the killer of Liberty Valance would not preclude an objective examination of the facts by an able prosecutor. Trained to understand that every fact has two faces, the prosecutor would recognize that even bullies can be murdered. The concept of a trial theory is not merely a device that enables an advocate to win a case. It is also a tool that allows an attorney to reinvestigate facts, looking at them from multiple angles, in order to analyze events from all possible perspectives.

A prosecution for homicide would force Ransome Stoddard to test the extent of his own readiness to protect his friend. If he were willing to endure a trial rather than implicate Doniphan, his lawyer would have to caution him against the deception, if not outright deceit, necessarily implicit in that decision. Stoddard could order his attorney to keep Doniphan's secret, but the lawyer could not assist him in shaping a defense that relied directly on a lie. Stoddard's efforts to present a fabricated story, even one with many elements of truth, would face impediments at every turn.

Eventually, Stoddard would have to confront a harsh reality. The more he tried to extricate Doniphan, the more likely he would be to face conviction for a crime he did not commit. Would even Doniphan want him to go that far? Recall that Tom saved Ransome's life for Hallie's sake, and she would be no less heartbroken to see her beloved hanged by the sheriff rather than gunned down by Liberty Valance. On the other hand, not every selfless lover is Sydney Carton from *A Tale of Two Cities*.

But where is the justice in virtually compelling Stoddard to betray Tom Doniphan? Stoddard, after all, believed that he had shot Liberty Valance, until Doniphan confided the truth. And indeed, Stoddard certainly would have shot Liberty Valance. He had the nerve and the will, lacking only the dexterity. Wouldn't justice be equally served by allowing Ranse to argue self-defense, presenting the facts as he intended them to have occurred? Couldn't a calculated elision in the defense of Ranse actually serve a greater, more holistic, truth—that the gunfight was a moral necessity, lest Liberty Valance continue to terrorize the helpless town of Shinbone?

In fact, the answer is negative. Ransome Stoddard's willingness to suffer conviction might be heroic, but it would not be justice. The social role of the prosecutor is not to accuse just anybody, but to charge the right person with the offense and thereafter determine whether the crime in fact was committed. The prosecution does not win, and neither does society (even frontier society), by trying the wrong man, no matter if the defendant voluntarily undertakes the risk.

And, of course, Ransome Stoddard—who confronted Valance openly in the street, facing almost certain death for the sake of decency in Shinbone—would be an extraordinarily tough defendant to convict, likely as he was to enjoy a jury's sympathy if not outright admiration and support. Tom Doniphan, in contrast, stood with his rifle safely in the shadows, unwilling to face Valance and never giving him a chance. Perhaps it was murder, perhaps not, but justice requires a definitive answer. It was not for Ransome Stoddard to decide who would be the one to face trial, to take the credit or carry the blame.

There are some questions—legal, moral—that can only be answered by *The Man Who Shot Liberty Valance*.
