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Teaching Criminal Law: Integrating Professional Responsibility

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TEACHING CRIMINAL LAW: INTEGRATING PROFESSIONAL RESPONSIBILITY

*Robert Batey**

As indicated in another article,¹ my days of teaching first-year Criminal Law are probably over. Before exiting, I would like to detail a few of the ways in which I tried to introduce ethical issues into that course. Whenever possible, I used cases involving lawyer defendants, or lawyers whose trial tactics ran afoul of the law, to show the kinds of messes wayward attorneys can get themselves into. In this respect, one particularly rich area is the law of theft, where I not only used lawyer cases, but also devised a series of hypotheticals raising ethical questions for both lawyers and law students. However, my most serious foray into professional responsibility came when discussing the law of mens rea and its temptations for the subornation of client perjury.

* * *

The study of almost all the topics in Criminal Law can be adorned with cases involving lawyer defendants or lawyers using questionable trial tactics. Not only do such cases illustrate the topic being studied, they also strongly suggest that students ought to avoid these lawyers' behaviors. Moreover, students might realize the scope of misconduct in the profession they are about to enter and begin to understand the need for higher standards of professional behavior.

Following the casebook I long used,² the first topic covered in depth in my Criminal Law course was the vagueness doctrine. For years, I included a note on *United*

¹ Professor of Law Emeritus, Stetson University, College of Law. LL.M. University of Illinois 1976, J.D. University of Virginia 1974, B.A. Yale University 1970.

¹ See Robert Batey, *Teaching Criminal Law: Buzzgroups, Short Writings, and Hypotheticals*, STETSON U. COLLEGE OF L. LEGAL STUD. RES. PAPER SERIES, Oct. 2013, <http://ssrn.com/abstract=2291153> (last updated Nov. 21, 2013).

² PETER W. LOW ET AL., *CRIMINAL LAW: CASES AND MATERIALS* (2d ed. 1986). For the last two decades, I have combined excerpts from this casebook and its successor editions (with appropriate copyright notices) with notes on cases, statutes, and other legal developments in a single ring-bound book. Almost all of the legal materials mentioned in this article were presented to the students in this way. The local publisher of the book took responsibility for all copyright issues and still managed to sell the book at less than the cost of the casebook. I received no profits from any of the book's sales.

States v. Rybicki,³ the prosecution of two lawyers for mail fraud.⁴ The lawyers had given kickbacks to insurance adjusters regarding the settlement of tort claims.⁵ The prosecution was unable to prove that the settlements were higher than they would have been without the kickbacks and argued instead that the lawyers had used the mails to deprive the adjusters' employers of their right to the adjusters' "honest services" under 18 U.S.C. sec. 1346.⁶ The lawyers contended that sec. 1346 was unconstitutionally vague – an argument subsequently accepted by the Supreme Court in *Skilling v. United States*.⁷ The same claim was rejected by the Second Circuit eight years before *Skilling*.⁸ *Rybicki* thus adds a sidebar on lawyer misconduct to the fascinating interaction of the "honest services" statute and the vagueness doctrine.

Attorney misfeasance surfaced in the succeeding unit, on statutory construction. In *United States v. Baum*,⁹ a criminal defense attorney concocted a plan to try to win a reduction for his already-sentenced client, in which a former client would lure a suspected drug dealer to the United States (in exchange for some money from the current client), but Baum would get this cooperation credited to the current client by lying to the government about the relationship between his two clients (that they were close friends) and about the money.¹⁰ When this scheme blew up (because the current client decided instead to cooperate with the government in its investigation of the lawyer), Baum was charged with obstruction of justice.¹¹ Baum countered that because the current client had already been sentenced, there had been no "pending proceeding" – a requirement case law had read into the federal obstruction of justice statute¹² – but District Judge Denny Chin (since promoted to the Second Circuit) read the requirement broadly. Specifically, "[c]orrupt attorneys pose a grave threat to our adversarial system of justice."¹³ In addition to illustrating that policy considerations sometimes push judges to construe criminal statutes broadly,¹⁴ *Baum* thus also portrays attorney behavior that students need to be warned against.

In teaching possession, I mentioned in passing *Schalk v. State*,¹⁵ the prosecution of a criminal defense lawyer who arranged a drug buy from a police confidential informant in order to discredit the informant, who was an integral part of the case against one of Schalk's clients.¹⁶ The courts rejected Schalk's many variations on the theme of innocent possession, a concept that has been recognized in other contexts.¹⁷ Another lawyer prosecution given brief attention, in the unit on mens rea, is *United States v. Flores*,¹⁸ where Flores facilitated several transactions for his client that were ultimately

³ See 354 F.3d 124 (2d Cir. 2003). See also Batey, *supra* note 1, at 9 n.21.

⁴ *Rybicki*, 354 F.3d at 127.

⁵ *Id.*

⁶ *Id.* at 128.

⁷ 130 S. Ct. 2896 (2010).

⁸ *Rybicki*, 354 F.3d at 126-27. *Skilling*'s rewriting of the statute in order to save it from vagueness, which limits § 1346 to cases of bribery and kickbacks, would likely have upheld the convictions in *Rybicki*. See *Skilling*, 130 S. Ct. at 2929-31. Thus *Rybicki* could be used in class discussion to tease out the meaning of *Skilling*.

⁹ 32 F. Supp. 2d 642 (S.D.N.Y. 1999).

¹⁰ *Id.* at 644-45.

¹¹ *Id.* at 643-44.

¹² *Id.* at 648.

¹³ *Id.* at 650.

¹⁴ A few students may see how the same policy considerations affected the resolution of the vagueness issue in *Rybicki*. See *United States v. Rybicki*, 354 F.3d 124, 129-32 (2d Cir. 2003).

¹⁵ 943 N.E.2d 427 (Ind. Ct. App. 2011).

¹⁶ *Id.* at 428.

¹⁷ See, e.g., *Stanton v. State*, 746 So. 2d 1229, 1229-31 (Fla. Dist. Ct. App. 1999).

¹⁸ 454 F.3d 149, 152 (3d Cir. 2006).

found to be money laundering.¹⁹ With the assistance of the client's testimony, the government was able to convict Flores of conspiracy to commit money laundering on a willful blindness theory.²⁰

Flores could also have been used in the unit on conspiracy, but instead I noted a similar case, *United States v. Sharpe*,²¹ where willful blindness was used to convict a lawyer who managed the proceeds of his client's fraud and let a coconspirator use the lawyer's office in furtherance of the fraud.²² *Sharpe* can profitably be contrasted with *Vinluan v. Doyle*,²³ in which the appellate court enjoined the conspiracy prosecution of an attorney for advising his clients, nurses in a contract dispute with their nursing home employer, that they could resign en masse.²⁴ The prosecution charged a conspiracy to endanger some of the patients at the nursing home, specifically, chronically ill children on ventilators.²⁵ While such endangerment was certainly foreseeable to the lawyer, the appellate court prevented his prosecution because "it would eviscerate the right to give and receive legal counsel with respect to potential criminal liability if an attorney could be charged with conspiracy . . . whenever a District Attorney disagreed with that advice."²⁶ So policy reasons overcame any application of willful blindness or of any other version of the mens rea necessary for conspiracy.

Supplementing these lawyer defendant cases were a few cases involving much paler forms of lawyer misconduct. Prosecutors frequently err in stating the burden of persuasion to the jury.²⁷ One flamboyant example involved a PowerPoint presentation:

The PowerPoint program begins with a blue screen. When the program is started, a slide show begins in which six different puzzle pieces of a picture come onto the screen sequentially. The picture is immediately and easily recognizable as the Statue of Liberty. The slide show finishes when the sixth puzzle piece is in place, leaving two rectangular pieces missing from the picture of the Statue of Liberty—one in the center of the image that includes a portion of the statue's face and one in the upper left hand corner of the image.

...

The prosecutor went on to tell the jury that "[w]e know this picture is beyond a reasonable doubt without looking at all the pieces of that picture. We know that that's a picture of the Statue of Liberty, we don't need all the pieces of the [*sic*] it. And ladies and gentlemen, if we fill in the other two pieces" [at this point the prosecutor apparently clicks the computer mouse again, which triggers the program to add the upper left hand rectangle that includes the image of the torch in the statue's right hand and the central rectangle that completes the entire image of the

¹⁹ *Id.* at 152, 154-56.

²⁰ *Id.* at 154-56, 159.

²¹ 193 F.3d 852 (5th Cir. 1999).

²² *Id.* at 870-72.

²³ 837 N.Y.S.2d 72 (N.Y. App. Div. 2009).

²⁴ *Id.* at 82-83.

²⁵ *See id.* at 76.

²⁶ *Id.* at 83.

²⁷ *See, e.g.,* *Bristol v. State*, 987 So. 2d 184, 185-86 (Fla. Dist. Ct. App. 2008) ("If you find the Defendant not guilty, what's the evidence?"); *Paul v. State*, 980 So. 2d 1282, 1283 (Fla. Dist. Ct. App. 2008) ("[I]f [the defense attorney] wants to present theories of how she believes this case should play out, there's got to be some level of proof that [the state's star witness] was lying") (emphasis omitted). The ethical implications of *Bristol* are doubled because the defendant's actual claim was that his trial lawyer was ineffective for failing to object to the prosecution's statement. 987 So. 2d at 185.

statue], “we see that it is, in fact, the [S]tatue of [L]iberty. And I will tell you in this case, your standard is to judge this case beyond a reasonable doubt.” The prosecutor argued such standard was met by the evidence.²⁸

The appellate court declared this PowerPoint unacceptable,²⁹ which emphasizes to prospective prosecutors the need to rein in at least some of their more inventive attempts to succeed with juries.

The same caution applies to defense attorneys tempted to make a nullification argument. *Harding v. State*³⁰ approves the trial judge’s actions in the following situation:

During closing argument, Harding’s counsel told the jury that “sometimes the law doesn’t fit, sometimes it just isn’t right. The ends don’t always justify the means.” Counsel then baldly said, “I’m standing up in front of you as Gary Harding’s attorney and asking you not to follow the law.” The trial court immediately interrupted and stated, “Counsel, that’s improper and I’ll instruct the jury to disregard, and if they do that, that’ll be a violation of your oath that you took when you were sworn in to try this case. I don’t want to hear another word about that.”³¹

Cases like *Harding* help to clarify the otherwise airy contentions surrounding nullification, while also providing valuable practice lessons for the student.

A final instance of lawyer misconduct arose when I taught duress. In situations of arguable duress, the prosecution occasionally seeks to convict both the threatener and the threatened, in separate proceedings of course.³² This may cause the state to take inconsistent positions regarding the influence of the threatener, as was the case in the separate homicide prosecutions of Deidre Hunt and her abusive boyfriend Konstantinos Fotopoulos.³³ Hunt, the shooter, was the second to be prosecuted; her lawyer quoted the prosecution’s statements in Fotopoulos’ trial about his “clear pattern of physical assault, abuse, intimidation, and coercion -- . . . the direct and primary cause of Deidre Hunt’s criminal activity.”³⁴ But the trial court refused to instruct Hunt’s jury on duress, and the appellate court agreed, because “duress is not a defense to homicide.”³⁵ So the case not only illustrates that hoary rule of duress law, but also instances what two justices of the state supreme court, writing in Fotopoulos’ appeal, considered a clear violation of due process: “[I]t is repugnant to the tenets of due process and fundamental fairness that the State would purposefully present differing renditions of the same factual scenario during separate proceedings, simply to obtain a particular result against codefendants.”³⁶ Cases

²⁸ *People v. Katzenberger*, 101 Cal. Rptr. 3d 122, 125 (Ct. App. 2009).

²⁹ *Id.* at 126.

³⁰ 736 So. 2d 1230 (Fla. Dist. Ct. App. 1999).

³¹ *Id.* at 1230. For a more permissive approach, see *United States v. Rosenthal*, 266 F. Supp. 2d 1068 (N.D. Cal. 2003).

³² See, e.g., *Fotopoulos v. State*, 838 So. 2d 1122, 1125-26 (Fla. 2003).

³³ Compare *id.* at 1128-29 (discussing the State’s assertion that Fotopoulos was dominating Hunt), with *Hunt v. State*, 753 So. 2d 609, 611-12 (Fla. Dist. Ct. App. 2000) (discussing State’s assertion that Hunt voluntarily murdered Ramsay without duress).

³⁴ *Hunt*, 753 So. 2d at 611.

³⁵ *Id.* at 613.

³⁶ *Fotopoulos*, 838 So. 2d at 1137 (Lewis, J., concurring in result only); accord *In re Sakarias*, 106 P.3d 931 (Cal. 2005) (ruling similarly in a non-duress case).

like these, and the others in this part, show that a professor can raise important ethical issues while teaching the basic rules of criminal law.

* * *

Theft law provides a particularly rich environment for examining lawyer ethics. Combining normal human avarice with the many opportunities attorneys have to separate others from their property produces a wealth of examples of criminal, or at least unethical, conduct.

The bottom line of my class on theft was that the complexity of the “common law” offenses has caused many jurisdictions to adopt remarkably broad consolidated theft statutes. To show the charging difficulties created by the old law of larceny, embezzlement, and false pretenses – as discussed in Joshua Dressler’s chapter on theft in *Understanding Criminal Law*,³⁷ portions of which were assigned for reading – I usually gave the students a streamlined version of *Graham v. United States*.³⁸ For example, A, a criminal lawyer, induces his client to give the lawyer \$2,200, telling the client that \$2,000 of this money is necessary to bribe a police officer into dropping the charges against the defendant. The officer drops the charges after talking to the lawyer, who keeps all the money. If you were the prosecutor under the old law of theft, with which crime would you charge A?

Most students would opt for larceny by trick, on the theory that A accepted the \$2,000 with the intent to defraud the client.³⁹ But this charge would be vulnerable to the contention that A decided to keep all the money only while talking to the officer, in which case the crime could only be embezzlement.⁴⁰ One could even contend that title to the \$2,000 passed to the attorney at that time (as title to the \$200 fee surely did), as payment for services legal and illegal, which would make A guilty of obtaining property by false pretenses.⁴¹ Conversely, if the court deemed A’s false promise to bribe the officer a promise of future conduct, A would be guilty of neither larceny, embezzlement, nor false pretenses.⁴² The point of the exercise was not to teach the distinctions between the “common law” theft offenses, but to demonstrate the need for reform through another instance of lawyer misconduct.⁴³

While some American jurisdictions took the Model Penal Code’s more measured approach to reforming the theft offenses (codifying each of the former crimes but granting

³⁷ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 543-65 (6th ed. 2012).

³⁸ 187 F. 2d 87, 88 (D.C. Cir. 1950), discussed in DRESSLER, *supra* note 37, at 562.

³⁹ See DRESSLER, *supra* note 37, at 550. The court in *Graham* accepted this reasoning. See 187 F.2d at 88-89.

⁴⁰ See DRESSLER, *supra* note 37, at 560-61. The defendant in *Graham* unsuccessfully argued that the trial judge’s charge to the jury did not sufficiently distinguish larceny from embezzlement. 187 F.2d at 89-90.

⁴¹ See DRESSLER, *supra* note 37, at 561-64. *Graham*’s primary contention was that the prosecution should have charged him with obtaining property by false pretenses. See 187 F.2d at 88.

⁴² See DRESSLER, *supra* note 37, at 564.

⁴³ A more recent lawyer case, *Durie v. State*, can be used to make the same point. 751 So. 2d 685 (Fla. Dist. Ct. App. 2000). *Durie*, a plaintiff’s attorney representing two men injured in a bar fight, attempted to avoid a Medicaid lien on the amount recovered by one of his clients, by telling the insurance company that only 0.5% of the \$100,000 coming from the bar’s liability insurance policy would be going to the client with the Medicaid lien, when in actuality that client was slated to receive 80% of the money. *Id.* Larceny (and of whom)? Embezzlement? Obtaining property by false pretenses? None of the above? Another example is *Winters v. Mulholland*, in which a disgruntled 15-year associate copied and stored some client files without authorization from his firm, and through an accomplice, tampered with client contact data in the firm’s computer system. Upon leaving the firm, the associate took client files with him and lied to some of those clients about the firm’s ability to continue to represent them. 33 So. 3d 54 (Fla. Dist. Ct. App. 2010). Which “common law” theft offense is the taking of the files? Are the associate’s other actions any form of theft?

the court the right to conform the charge to the proof at trial),⁴⁴ others have chosen to create a single consolidated crime, usually denominated theft.⁴⁵ Florida's theft statute is on such law, modeled on a proposal by Professor G. Robert Blakey and a coauthor.⁴⁶ I usually walked the students through its remarkably broad provisions:

A person commits theft if he or she knowingly obtains or uses, or endeavors to obtain or to use, the property of another with intent to, either temporarily or permanently:

- (a) Deprive the other person of a right to the property or a benefit from the property.
- (b) Appropriate the property to his or her own use or to the use of any person not entitled to the use of the property.⁴⁷

Breadth continues in the statute's definition of key terms. "Property" means anything of value," including "services," which are defined as "anything of value resulting from a person's physical or mental labor or skill"⁴⁸; "property of another" is defined to include property in which the defendant "has an interest" as long as someone else has an interest in the property upon which the defendant "is not privileged to infringe without consent."⁴⁹ But the broadest provision of all is the definition of "obtains or uses":

[A]ny manner of:

- (a) Taking or exercising control over property.
- (b) Making any unauthorized use, disposition, or transfer of property.
- (c) Obtaining property by fraud, willful misrepresentation of a future act, or false promise.
- (d) (1) Conduct previously known as stealing; larceny; purloining; abstracting; embezzlement; misapplication; misappropriation; conversion; or obtaining property by false pretenses, fraud, or deception; or
(2) Other conduct similar in nature.⁵⁰

Despite the "kitchen sink" approach of this definition, the Florida Supreme Court rather summarily rejected a vagueness challenge to it.⁵¹

⁴⁴ See DRESSLER, *supra* note 37, at 565 (discussing MODEL PENAL CODE § 223.1(1) (Proposed Official Draft 1962)).

⁴⁵ See generally Sherry A. Moore, *Nevada's Comprehensive Theft Statute: Consolidation or Confusion?*, 8 NEV. L.J. 672, 673-74 & n.11 (2008).

⁴⁶ See *Goddard v. State*, 458 So.2d 230, 234 (Fla. 1984). See also G. Robert Blakey & Michael Goldsmith, *Criminal Redistribution of Stolen Property: The Need for Law Reform*, 74 MICH. L. REV. 1511, 1620-26 (1974) (including a model statute). When one of my former colleagues contacted Professor Blakey by telephone, he seemed surprised that Florida had enacted his proposal and implied that it might need some revision.

⁴⁷ FLA. STAT. ANN. § 812.014(1) (West 2013).

⁴⁸ *Id.* § 812.012(4), (6).

⁴⁹ *Id.* § 812.012(5). This provision, meant to deal with the question (among others) of whether a partner could be guilty of stealing partnership property (famously raised in the classic case of *People v. Sobiek*, 106 Cal. Rptr. 519 (Cal. Ct. App. 1973)), should have been used to decide *Rigal v. State*, in which a lawyer in dispute with other lawyers at his firm pocketed checks meant for the firm. 2000 WL 348109 (Fla. Dist. Ct. App. Apr. 5, 2000), *superseded by* 780 So. 2d 256 (Fla. Dist. Ct. App. 2001). The appellate court first decided that Rigal could not be prosecuted for theft because a partner could not steal partnership property, but then changed its mind, holding that Rigal was never a partner. *Id.* Neither opinion uses the definition of "property of another," which would have reached the eventual result with far greater ease.

⁵⁰ § 812.012(3).

⁵¹ *Dunnigan v. State*, 364 So. 2d 1217, 1218 (Fla. 1978).

To better understand the comprehensiveness of this statute and to return to the theme of ethical conduct, the students were required to prepare oral answers to three hypotheticals:

- 1) X, a lawyer, holds a client's retainer in a trust account. Unable to meet payroll one month, the lawyer takes money from the trust account for this purpose (in violation of the Model Rules of Professional Conduct), intending to put it back into the trust account within a month. Is X guilty of theft under Florida's theft statute? Why or why not?
- 2) Y, an upper-class law student authorized to use a computer legal research program, but for educational purposes only, uses the program for compensated research for a local lawyer for whom the lawyer is clerking. Is Y guilty of theft under Florida's theft statute? Why or why not?
- 3) Z, a first year law student taking an exam, copies from the student sitting next to him the answers to several multiple choice questions, without that student's knowledge. Is Z guilty of theft under Florida's theft statute? Why or why not?

Most students had little problem with the first hypothetical. X, whose actions would at the least jeopardize his license to practice law, also made an unauthorized use of the money.⁵² Even though he had a trustee's interest in the money, the client also had an interest on which the lawyer was not privileged to infringe. He might not have an intent to deprive the client of any benefit from the property (as Florida is an IOTA state, with the interest on most trust accounts going to a charitable fund that among other things provides grants to law schools⁵³), X does intend to temporarily appropriate the property to his own use.⁵⁴

Usually only a few students failed to see the guilt of Y (whose actions also would violate her law school's contract with Westlaw or Lexis and thus risk suspension of that contract, triggering serious consequences for her law school and her⁵⁵). She knowingly made unauthorized use of a service – the definition of which includes “[p]rivate . . . communication . . . services,”⁵⁶ and she intended both to deprive the company providing the computer research program of the fees her employer would otherwise have had to pay, and to appropriate the computer service to the use of another.

While acknowledging that Z has violated his law school's honor code, some students typically balked at criminal liability for him. Z knowingly made unauthorized use of the other student's answers, they would say, but are those answers property? Well, yes, if property includes services and services are defined as “anything of value resulting from a person's . . . mental labor or skill.”⁵⁷ But, they would follow up, doesn't their value

⁵² Note that the statute does not even require an unauthorized use, but that seems the only sensible way to read its language.

⁵³ *Interest on Trust Accounts (IOTA)*, FLA. BAR, <http://www.floridabar.org/DIVCOM/PI/BIPS2001.nsf/1119bd38ae090a748525676f0053b606/b33301c604dd6bd a8525669e004f836c!OpenDocument> (last updated Nov. 30, 2012).

⁵⁴ Florida's theft statute does not indicate whether its two intent requirements are conjunctive or disjunctive, but courts appear to have read an “or” into the statute.

⁵⁵ See, e.g., Pace Law, *Lexis and Westlaw*, <http://www.law.pace.edu/lexis-and-westlaw> (last visited Feb. 11, 2014).

⁵⁶ FLA. STAT. ANN. § 812.012(6)(c) (West 2001).

⁵⁷ *Id.* § 812.012(6).

depend on whether the answers are correct? Not under the statute's definition of value, which refers to "market value . . . at the time and place of the event."⁵⁸ They would finally complain, Z had no intent to deprive the other student of the value of her answer, as she would get credit (or not) regardless of Z's answer. At this point, other students who understood the curving of grades would begin to howl, while the calmer members of the class would point out that in any event Z did have the intent to appropriate the answers to her own use.

I would usually finish the class by pointing out that prosecution of persons like X, Y, and Z are exceedingly rare; it is not the language of the statute that prohibits them, but prosecutorial discretion.⁵⁹ Fear of the courts' reaction to a prosecutor's pushing the edges of the theft envelope, by strictly construing the statute or raising anew the question of its vagueness, may explain some of this reticence. In addition to striking these by now familiar chords, and teaching the tedious process of applying the elements of a criminal statute to particular facts, this class also reminded students of the ethical burdens they already bear and of greater ones in their future.

Just to drive the point home, I usually finished by giving the class a bouquet of recent cautionary headlines. Here is the last batch: "Punishing Lawyers in Corporate Frauds,"⁶⁰ "Disbarred Attorney Pleads Guilty to Guardian Account Thefts,"⁶¹ "2 Lawyers Charged in Claimed \$1.1M Client Embezzlement Scheme,"⁶² "Fla. Lawyer in \$83M Real Estate Fraud: I Didn't Think It Was Criminal,"⁶³ "Chicago Lawyer Sentenced to 7 Years in Prison,"⁶⁴ "Former Boston Lawyer Sentenced to Four Years for Mortgage Fraud,"⁶⁵ "Attorney Gets Four Years for Stealing."⁶⁶ These headlines, plus the other uses of legal chicanery in the theft class, tend to break down the distance that law students typically feel from criminal defendants, reminding the class how easy it is to slip from attorney to client.

* * *

My most serious foray into legal ethics in the first-year Criminal Law class resulted from a student comment. I was rather blithely using variations on the facts of *United States v. Short*⁶⁷ to teach the differences between the common law and Model Penal Code approaches to mistake of fact. Specifically, under what circumstances would

⁵⁸ *Id.* § 812.012(10)(a)(1).

⁵⁹ See SANFORD H. KADISH ET AL., CRIMINAL LAW AND ITS PROCESSES 1114-15 (9th ed. 2012).

⁶⁰ Peter J. Henning, *Punishing Lawyers in Corporate Frauds*, N.Y. TIMES DEALBOOK, (Jan. 10, 2010), <http://dealbook.nytimes.com/2010/01/19/punishing-lawyers-in-corporate-frauds/>.

⁶¹ Vesselin Mitev, *Disbarred Attorney Pleads Guilty to Guardian Account Thefts*, LAW.COM (Nov. 6, 2009), <http://www.law.com/jsp/article.jsp?id=L202435221538>.

⁶² Martha Neil, *2 Lawyers Charged in Claimed \$1.1M Client Embezzlement Scheme*, ABA J. LAW NEWS NOW (Nov. 5, 2009, 3:29 PM),

<http://www.abajournal.com/news/article/2-lawyers-charged-in-claimed-1.1m-client-embezzlement-scheme/>.

⁶³ Martha Neil, *Fla. Lawyer in \$83M Real Estate Fraud: I Didn't Think It Was Criminal*, ABA J. LAW NEWS NOW (Feb. 18, 2009, 2:09 PM),

<http://www.abajournal.com/news/article/fla-lawyer-in-83m-real-estate-fraud-i-didnt-think-it-was-criminal>.

⁶⁴ Larry Neumeister, *Chicago Lawyer Sentenced to 7 Years in Prison*, U-T SAN DIEGO (Jan. 14, 2010, 11:54 AM), <http://www.utsandiego.com/news/2010/jan/14/chicago-lawyer-sentenced-to-7-years-in-prison/>.

⁶⁵ Sheri Qualters, *Former Boston Lawyer Sentenced to Four Years for Mortgage Fraud*, LAW.COM (May 18, 2011),

http://www.law.com/jsp/law/article.jsp?id=L202494381380&Former_Boston_Lawyer_Sentenced_to_4_Years_for_Mortgage_Fraud.

⁶⁶ Todd Ruger, *Attorney Gets Four Years for Stealing*, SARASOTA HERALD-TRIB., Jan. 27, 2011, at BN1, available at <http://www.heraldtribune.com/article/20110127/ARTICLE/101271047?p=2&tc=pg>.

⁶⁷ 4 U.S.C.M.A. 437 (1954) (deciding case of drunken soldier in occupied Japan who physically accosts a young Japanese woman, claiming to believe she was a prostitute and that he was trying to agree with her on a price).

Short's mistaken belief in consent be a defense if Short were charged with assault with intent to rape at common law (the actual case)? If Short were charged with rape at common law (assuming contrary to the actual case that penetration did occur)? If Short were charged with rape under the Model Penal Code (again assuming penetration)? Discussing the last hypothetical, I drew out the answer that his mistake would be a defense if it negated the consciousness of risk necessary for recklessness, the minimum required culpability for rape under the Code,⁶⁸ at the end of which I said something careless like, "What would you say to your client?" The naïve reply I got from a very good student was, "I would tell Short to say that it never occurred to him that Tomobe was not consenting to his actions." I knew in a flash that I had to include a class on the ethical perils of client perjury.

I would set up that class by asking the students to prepare an answer to a somewhat more careful version of my client advice question,⁶⁹ but I also required them to read the relevant portions of the Model Rules of Professional Conduct⁷⁰ as well as an excerpted version of "Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions"⁷¹ before answering. Thus primed, I began the class by cautioning the students not to follow what I consider natural human behavior – to be as helpful to the client as possible, by telling him about the legal significance of his lack of consciousness of the risk of non-consent. Both ethical considerations and the law regarding subornation of perjury require criminal defense attorneys to behave in a much less straightforward way.

To illustrate the point, I showed clips from Otto Preminger's great trial film *Anatomy of a Murder*.⁷² First, the discussion between the defense attorney (James Stewart) and his disbarred friend (Arthur O'Connell) about their prospective client (Ben Gazzara), an Air Force officer accused of murdering the man who had allegedly raped the officer's wife (Lee Remick) some hours before the killing. In the discussion the friend suggests that the lawyer give his client "a chance" to find a defense by describing the relevant law to him. Second, a subsequent discussion with the would-be client, in which the lawyer nudges⁷³ the client toward facts that would support an insanity plea (punctuated by the client's hilarious question, "Am I getting warmer?"). Third, a later brief conference in

⁶⁸ See MODEL PENAL CODE §§ 2.02(3), 2.04(1)(a), 213(1)(a) (Proposed Official Draft 1962).

⁶⁹ "If you were the defense attorney for Short in [my third hypothetical], speaking to your client before he has told his side of the story to anyone, how would you advise him?"

⁷⁰ I used excerpts from Florida's versions of rules. See FLA. STAT. ANN. Bar Ch. 4 - 1.1 (West 2013) (Competence), 1.2 (Scope of Representation), 1.6 (Confidentiality of Information), 2.1 (Advisor), 3.3 (Candor toward the Tribunal), 3.8 (Special Responsibilities of a Prosecutor), and 4.4 (Respect for Rights of Third Persons) and from Florida's comments to rules 1.6 and 3.3. For additional excerpts I should have included, see *infra* note 91.

⁷¹ See Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966). This brief article needs only minor excerpting: a reference to the supersession of the Canons of Ethics, on which Freedman relies, by first the Model Code of Professional Responsibility and then the Model Rules of Professional Conduct; removal of Freedman's discussions of the defense attorney unwilling on ethical grounds to enter a guilty plea for a client whom the lawyer believes innocent, made irrelevant by the Supreme Court's implicit approval of such behavior in *North Carolina v. Alford*, 400 U.S. 25 (1970); and deletion of the postscript, which replies to criticisms from other members of the symposium in which the article appeared.

⁷² See ANATOMY OF A MURDER (Columbia Pictures 1959). Freedman's article discusses the novel on which the movie is based. See Freedman, *supra* note 71, at 1481-82 (citing Robert TRAVER, ANATOMY OF A MURDER (1958)). A far more brief discussion of this movie appears in Robert Batey, *Literature in a Criminal Law Course: Aeschylus, Burgess, Oates, Camus, Poe, and Melville*, 22 LEGAL STUDS. F. 45, 75-76 (1998).

⁷³ The lawyer in the novel is more direct than the one in the movie, see Traver, *supra* note 72, at 20-49, though not as direct as Freedman's paraphrase of the novel, see Freedman, *supra* note 71, at 1481.

which the now well-schooled client describes his irresistible-impulse state of mind, causing the lawyer to (finally) accept his case.⁷⁴

Film almost always captures the students' attention, and the novelty of a rather grainy black-and-white video helps. Turning the students to a discussion of Freedman's article, I began with a basic question – if a criminal trial is a search for truth, what obligation does the defendant have to participate in that search? The answer Freedman provides is clear. None at all.⁷⁵ If even a guilty defendant has the right to force the state to prove her guilt, the defense lawyer's duty of competent representation requires a zealous challenge to that proof.⁷⁶ This makes the answer to Freedman's first "hard" question rather easy. It is "proper to cross-examine for the purpose of discrediting the reliability or credibility of an adverse witness whom you know to be telling the truth."⁷⁷

The defendant's sole obligation to the search for truth in a criminal trial is not to commit perjury.⁷⁸ Not only may the client be guilty, but anyone who counsels the client to commit perjury, including her defense attorney, may be prosecuted for subornation of perjury.⁷⁹ The natural-human-behavior response in advising a client like Short, as well as my good student's naïve response to my careless question, could be a path to prison. Having made this point, I shifted to Freedman's more complicated issue, the problem of the criminal defense attorney who merely knows, rather than suggests, that his client (or some other defense witness) is about to commit perjury.⁸⁰

In 1966, Freedman argued that a defense lawyer who knows⁸¹ a witness is committing perjury should not suffer ethical punishment for calling that witness and questioning her like any other witness.⁸² He reasoned that the duty of maintaining client confidentiality requires this conduct⁸³ because the knowledge that perjury is being committed almost always comes from a confidential disclosure by the client.⁸⁴ For even making this radical suggestion (in a speech to some members of the District of Columbia

⁷⁴ ANATOMY OF A MURDER, *supra* note 72.

⁷⁵ See Freedman, *supra* note 71, at 1471.

⁷⁶ See MODEL RULES OF PROF'L CONDUCT R. 1.1 (2004). Freedman's reliance on the now superseded Canons of Ethics is helpful, because they explicitly include the obligation of "warm zeal," which the Model Rules now subsume in the concept of "competent representation." See Freedman, *supra* note 71, at 1470 (*quoting* CANONS OF PROF'L ETHICS Canon 15 (1908)).

⁷⁷ Freedman, *supra* note 71, at 1469, 1474-75. The requirement of zealous advocacy thus trumps Model Rule of Professional Conduct 4.4, entitled "Respect for the Rights of Third Persons." For another perspective on this question, see Eleanor W. Myers & Edward D. Ohlbaum, *Discrediting the Truthful Witness: Demonstrating the Reality of Adversary Advocacy*, 69 FORDHAM L. REV. 1055 (2000).

⁷⁸ See Freedman, *supra* note 71, at 1471.

⁷⁹ See generally GEOFFREY C. HAZARD, JR. ET AL., *THE LAW AND ETHICS OF LAWYERING* 69-79 (3d ed. 1999). As a few previous examples indicate, prosecutors seem especially interested in going after defense attorneys, even to the point of making plea deals with the client in exchange for testimony against the defense attorney. See also *supra* text accompanying notes 11 & 20.

⁸⁰ "Is it proper to put a witness on the stand when you know he will commit perjury?" Freedman, *supra* note 71, at 1469.

⁸¹ Freedman rightly rejects the "how can you ever really know anything?" copout that some defense lawyers use. See *id.* at 1472. Interest in the mysteries of epistemology is not a common trait among a very practical lot of criminal defense attorneys, so its popping up at this point raises doubts. For some cases dealing with the knowledge issue, see *United States v. Midgett*, 342 F.3d 321 (4th Cir. 2003); *Farnbaugh v. State*, 778 So. 2d 369 (Fla. Dist. Ct. App. 2001); *State v. McDowell*, 669 N.W.2d 204 (Wis. Ct. App. 2003). See generally J. Vincent Aprile II, *Client Perjury: When Do You Know the Client Is Lying?*, 19 CRIM. JUST. 14, 15 (2004) (offering more examples of the criminal lawyer's dilemma).

⁸² See Freedman, *supra* note 71, at 1475-78.

⁸³ See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2004).

⁸⁴ Freedman, *supra* note 71, at 1475.

bar), several Washington-area judges (including Supreme Court Chief Justice-to-be Warren Burger) wanted Freedman disbarred or suspended from practice.⁸⁵

Every state rejected Freedman's contention, instead adopting some version of Model Rule of Professional Conduct 3.3.⁸⁶ That rule and its comments outline a three-step process for the lawyer who knows of potential perjury.⁸⁷ First the lawyer should remonstrate⁸⁸ with the potential witness about the impropriety and danger of committing perjury,⁸⁹ including the likelihood of being exposed by a prosecutor well trained in the art of cross-examination.⁹⁰ If the remonstration fails, the lawyer should seek to withdraw from the case,⁹¹ though as Freedman notes judges are usually quite unwilling (for reasons both practical and ethical) to allow lawyers, especially appointed lawyers, to take this second step.⁹² If withdrawal is not a possibility, the lawyer faces disclosure of the perjury to the court.⁹³

In the words of the official commentary to rule 3.3, "The disclosure of a client's false testimony can result in grave consequences to the client, including not only a sense of betrayal but also loss of the case and perhaps a prosecution for perjury."⁹⁴ So lawyers seek at all costs to avoid the knowledge of client perjury that will place them at the top of rule 3.3's three-step slippery slope, and thus behave like the defense attorney in *Anatomy of a Murder*, who advised the client about the law before hearing his version of the facts. This tactic raises the third of Freedman's hard questions: "Is it 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?"⁹⁵

⁸⁵ The proceedings against Freedman were ultimately dropped. See Freedman, *supra* note 71, at 1469 n.1. Regarding Burger's participation, see Paul R. Tremblay, *Moral Activism Manque*, 44 S. TEX. L. REV. 127, 138 n.24 (2002).

⁸⁶ See, e.g., *Variations of the ABA Model Rules of Professional Conduct Rule: 3.3: Candor Toward the Tribunal*, A.B.A., http://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/mrpc_3_3_authcheckdam.pdf (last updated Aug. 16, 2013).

⁸⁷ See generally MODEL RULES OF PROF. CONDUCT R. 3.3.

⁸⁸ I would pointedly define this word in class and then made sure to use it in a multiple-choice question on the final exam.

⁸⁹ See MODEL RULES OF PROF. CONDUCT R. 3.3 cmt. 6.

⁹⁰ See Freedman, *supra* note 71, at 1478. As Freedman notes in another context, such remonstration is particularly likely to cause any client, but especially an indigent one with appointed counsel, to wonder whose side her lawyer is really on. See *id.* at 1473.

⁹¹ See MODEL RULES PROF'L CONDUCT R. 1.16 cmt. 2; *cf. id.* 3.3 cmt.10 (mentioning withdrawal in passing). I probably should have included parts of rule 1.16 and its comments in the assigned reading for the class on criminal defense ethics. See *supra* note 70.

⁹² See Freedman, *supra* note 71, at 1475-76; see *infra* note 94. Some cases cast doubt on the withdrawal option. See *State v. Hischke*, 639 N.W.2d 6 (Iowa 2002); *Commonwealth v. Mitchell*, 781 N.E.2d 1237 (Mass. 2003); *People v. DePallo*, 714 N.Y.S.2d 755 (App. Div. 2000), *aff'd*, 754 N.E.2d 751 (N.Y. 2001).

⁹³ See MODEL RULES PROF'L CONDUCT R. 3.3 cmt. 10.

⁹⁴ *Id.* cmt. 11. For an example of how bad things can get, see *State v. Chambers*, 994 A.2d 1248 (Conn. 2010). Chambers' lawyer disclosed and attempted to withdraw, but the judge instead allowed Chambers to testify in narrative form and limited the defense's right to object during Chambers' cross-examination. During cross Chambers admitted several times that he was lying. Prior to closing arguments, the defense attorney again attempted to withdraw, because he could not ethically comment on Chambers' testimony in the defense's closing. Again the judge refused, instead giving both the defense attorney and Chambers himself the right to make closing arguments. Apparently throwing in the towel, the defense attorney gave no closing and convinced his client to remain silent too. Chambers was convicted, and the state supreme court affirmed. See also *Brown v. Commonwealth*, 226 S.W.3d 74 (Ky. 2007) (judge allowed defense attorney to leave the courtroom during defendant's testimony; conviction reversed on grounds of ineffective assistance).

⁹⁵ Freedman, *supra* note 71, at 1469.

As Freedman points out, giving such advice “creates the appearance that the attorney is encouraging or condoning perjury.”⁹⁶ Nevertheless, this conduct is widely condoned.⁹⁷ In support of this contention I show excerpts from “To Defend a Killer,” one installment of the 1988 PBS series *Ethics in America*.⁹⁸ It consists of a roundtable discussion in which Professor Charles Ogletree poses dilemmas for experts ranging from Justice Scalia to several prominent criminal defense lawyers (at least one of whom was subsequently disbarred).⁹⁹

Ogletree portrays a man who has killed his girlfriend, but his role in Wendy’s murder likely will not be discovered.¹⁰⁰ He confesses to a clergyman and a psychiatrist (two panel members), both of whom suggest that he turn himself in.¹⁰¹ I would begin rolling the tape as he approaches James Neal, who won fame both as a criminal defense attorney and as a Watergate prosecutor.¹⁰² Neal drolly advises that he wants to tell Ogletree about the law before the lawyer hears Ogletree’s version of the facts. Neal’s brief rendition of the law includes the statements, “If you tell me that you stabbed Wendy, I can’t put you on the stand and have you deny that you stabbed Wendy,” and “don’t go around talking to any more preachers or psychiatrists.”¹⁰³ “There are very few deaf and dumb people in the penitentiary.”¹⁰⁴

I would usually let the tape roll, as Professor Stephen Gillers, another panel member, defends the conception of criminal defense that condones Neal’s invitation to perjury¹⁰⁵ while acknowledging its “psychic toll,”¹⁰⁶ followed by a philosopher who seems horrified by that conception, which sparks stirring advocacy from defense attorney Jack Litman.¹⁰⁷ Stopping the video at this point, I would usually ask the students to ponder whether they want to live with this psychic toll,¹⁰⁸ before commenting briefly on the much

⁹⁶ *Id.* at 1478.

⁹⁷ One might even argue that it is required. See MODEL RULES OF PROF’L. CONDUCT 2.1 (“In representing a client, a lawyer shall . . . render candid advice.”).

⁹⁸ ETHICS IN AMERICA: TO DEFEND A KILLER (Columbia University Seminars on Media and Society 1989) (on file with Annenberg Learner) available at http://www.learner.org/vod/vod_window.html?pid=192.

⁹⁹ See C. Vernon Mason, WIKIPEDIA, http://en.wikipedia.org/wiki/C._Vernon_Mason (last modified Dec. 12, 2013).

¹⁰⁰ ETHICS IN AMERICA: TO DEFEND A KILLER, *supra* note 98.

¹⁰¹ *Id.* at 3:00-14:20.

¹⁰² See James F. Neal, WIKIPEDIA, http://en.wikipedia.org/wiki/James_F._Neal (last visited Feb. 8, 2014).

¹⁰³ ETHICS IN AMERICA: TO DEFEND A KILLER, *supra* note 98, at 23:40-25:15.

¹⁰⁴ *Id.* See Robert Batey, *Commentary: Symposium: Criminal Law Defense, Ethics, and the Client Who Plans to Lie*, 7 OHIO ST. J. CRIM. L. 637, 637-38 (2010) for another hypothetical of client perjury, this time in the sentencing context.

¹⁰⁵ ETHICS IN AMERICA: TO DEFEND A KILLER, *supra* note 98. But note that Gillers disagrees rather vehemently with Freedman’s resolution of his second hard question. 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, 823 (2006).

¹⁰⁶ ETHICS IN AMERICA: TO DEFEND A KILLER, *supra* note 98. For a fuller version of Gillers’ comment, see Robert Batey, *Alienation by Contract in Paris Trout*, 35 S. Tex. L. Rev. 289, 302 n.67 (1994).

¹⁰⁷ TO DEFEND A KILLER, *supra* note 98 at 25:15-28:30. In an attempt to balance this exchange (compared to Litman, the philosopher blusters a great deal, but is undone mostly by an egregious toupee), I usually noted Litman’s much-criticized defense of the “preppie killer” Robert Chambers, Jr., with its many variations on “blame the victim.” See Jack Litman, WIKIPEDIA, http://en.wikipedia.org/wiki/Jack_Litman (last updated Dec. 2, 2013) (describing Litman’s criminal defense strategies).

¹⁰⁸ Demonstrating the psychic toll is a quote, included in the reading assignment for this class, from the protagonist of *The Lincoln Lawyer*:

I headed back to the door, my steps quick. I hate being inside a jail. I’m not sure why. I guess it’s because sometimes the line seems so thin. The line between being a criminal attorney and a criminal attorney. Sometimes I’m not sure which side of the bars I am on. To me it’s always a dead-bang miracle that I get to walk out the way I walked in.

different ethical rules that apply to prosecutors.¹⁰⁹ I would end the class by using this asymmetry in the professional responsibilities of prosecutors and criminal defense attorneys as another example of the bias for liberty in American criminal law.¹¹⁰

I have never taught the Professional Responsibility course nor do I pretend to be an expert in any of its topics.¹¹¹ However, I did feel the obligation as a teacher of Criminal Law to at least alert future lawyers about the ethical issues they do and will confront. Cases and hypotheticals involving wayward lawyers, especially in the area of theft, and the foregoing brief foray into the problem of client perjury were my ways of trying to meet this obligation.

MICHAEL CONNELLY, *THE LINCOLN LAWYER* 15 (2005).

¹⁰⁹ See MODEL RULES OF PROF'L CONDUCT R. 3.8 (2004) (explaining that the prosecutor should not pursue a case if she knows probable cause is lacking; prosecutor must turn over all information favorable to the defense). The reading for this class also included citations to a few cases and several articles discussing prosecutorial improprieties, most notably the Duke lacrosse rape prosecution, which resulted in the disbarment of district attorney Michael B. Nifong. See, e.g., *Prosecutor in Duke Lacrosse Rape Case is Disbarred for Intentional Misconduct*, 81 Crim. L. Rep. 470 (2007).

¹¹⁰ See SCOTT TUROW, *ONE L* 311 (Penguin Books 2010) (1977), explaining that while initially frustrated as a prosecutor by "the manifold ways in which the truth becomes distorted in a criminal courtroom," Turow became "like Saul on the road . . . converted . . . [T]here was a moral vision at work here . . . [W]e could not safely deprive any human being of his or her liberty without first knowing that the provable facts could not be contorted into a shape reasonably consistent with innocence."

¹¹¹ For that reason, I cited students to a number of articles discussing client perjury. See Monroe H. Friedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133 (2008); Peter J. Henning, *Lawyers, Truth, and Honesty in Representing Clients*, 20 NOTRE DAME J.L. ETHICS & PUB. POL'Y 209 (2006); Evan A. Jenness, *Ethics and Advocacy Dilemmas—Possessing Evidence of a Client's Crime*, 34 CHAMPION, Dec. 2010, at 16; Peter A. Joy & Kevin C. McMunigal, *Deceit in Defense Investigations*, 25 CRIM. JUST., Fall 2010, at 36; L. Timothy Perrin, *The Perplexing Problem of Client Perjury*, 76 FORDHAM L. REV. 1707 (2007). See also Michael Asimow & Richard Weisberg, *When the Lawyer Knows the Client Is Guilty: Client Confessions in Legal Ethics, Popular Culture, and Literature*, 18 S. CAL. INTERDISC. L.J. 229 (2009). I also referred them to a broader perspective on legal ethics. See Douglas Ammar & Tosha Downey, *Transformative Criminal Defense Practice: Truth, Love, and Individual Rights—The Innovative Approach of the Georgia Justice Project*, 31 FORDHAM URB. L.J. 49 (2003). But see Cheryl G. Bader, "Forgive Me Victim for I Have Sinned": *Why Repentance and the Criminal Justice System Do Not Mix—A Lesson from Jewish Law*, 31 FORDHAM URB. L.J. 69 (2003).