

TEACHING ETHICS IN THE CRIMINAL LAW COURSE

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I. INTRODUCTION

“Could you defend a guilty client?” If this question is not already on the minds of first-year law students as they begin law school, it is certainly a question that most students face from family, friends, and acquaintances when students say they are studying Criminal Law. But what does the law student respond when faced with this basic question about lawyers’ ethics? Although she may be able to discuss *mens rea* and *actus reus* or the felony-murder rule by the end of the course, few first-year law students explore the defense lawyer’s role and other ethical issues in their first-year Criminal Law course. Why not?

There are several reasons why law professors teaching Criminal Law might choose to avoid discussions and the study of ethics issues arising from the practice of criminal law. Perhaps the biggest reason is the belief that it is someone else’s job. The criminal law professor teaches Criminal Law, and someone else teaches the course in legal ethics or professional responsibility. In some instances the criminal law professor might not have practiced criminal law, and therefore might feel ill-equipped to discuss the ethical obligations of defense lawyers or prosecutors because she has never experienced those ethical issues in practice. Or, the criminal law professor might feel that she has too little time to teach the basic Criminal Law course, as is, without taking valuable class time to explore ethical issues with her students. No matter what reason or combination of reasons results in a law professor’s choice not to explore ethical issues in the Criminal Law course, experience shows that some criminal law professors who do not currently incorporate ethical issues into their course would consider doing so if they just had some help or some suggestions on how to do it.¹

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1. In 1991-1992, I developed a set of legal ethics problems that became part of the first-year course materials at Case Western Reserve University School of Law. See Peter A. Joy, Professional Responsibility Problems (1992) [hereinafter Joy, Professional Responsibility Problems] (copy on file with author). I developed the problems in collaboration with the faculty teaching first-year courses, and each professor selected the issue or issues she wanted to discuss

In this article I address the subject of incorporating legal ethics issues into a Criminal Law course, and I divide the discussion into three related issues.² First, is it desirable for a Criminal Law teacher to address ethical issues? Second, at what points in the course is it appropriate to do so? Finally, how should criminal law professors go about including ethics in teaching criminal law? In connection with this third question, I focus on the ethical dimensions of the role of defense counsel in representing guilty clients to illustrate how ethics can become an integral part of teaching Criminal Law.

II. WHY ADDRESS ETHICS ISSUES IN A CRIMINAL LAW COURSE?

Imbedded in every law school course are ethics issues, and these same issues arise in every area of practice. To be a competent, ethical practitioner, every lawyer has to be able to identify and resolve ethics issues in practice. For this reason, there is a strong argument for incorporating ethics issues into every course. Indeed, commentators have argued that in addition to a legal ethics or professional responsibility course,³ law faculty teaching other subjects should also teach legal ethics through the pervasive method.⁴ By

in class. I designed each ethics issue problem to be examined along with the substantive material in the first-year courses. When I embarked on this project, I found my colleagues very open to integrating at least one ethics issue into their first-year courses provided someone assisted them in designing the problems and materials to be used with the problems. One commentator has described this approach to infusing ethics issues in the first-year curriculum as “probably the most realistic” because “[i]t does not require approval by the faculty” and “is done entirely by agreement” of the faculty teaching the courses. Dennis Turner, *Infusing Ethical, Moral, and Religious Values Into a Law School Curriculum: A Modest Proposal*, 24 U. DAYTON L. REV. 283, 295 n.70 (1999).

Although I believe that law professors should discuss legal ethics issues in every law school course, I do not believe that anyone should be compelled to do so. Even if there were no academic freedom concerns, I agree with the observations of Professor Paul Brest that “[i]f a professor does not want to teach ethics as part of his or her torts or criminal law or constitutional law course, the ways of subverting it are myriad. There is no worse message you can give to students than one faculty member did when he announced: ‘Here comes the sermon.’” Paul Brest, *The Alternative Dispute Resolution Grab Bag: Complementary Curriculum, Collaboration, and the Pervasive Method*, 50 FLA. L. REV. 753, 754 (1998).

2. Professor Kevin McMunigal and I take the same organizational approach and address some of the same questions in an article on teaching ethics in Evidence. See Peter A. Joy & Kevin C. McMunigal, *Teaching Ethics in Evidence*, 21 QUINNIPIAC L. REV. 961 (2003).

3. The terms “legal ethics” and “professional responsibility” are often used interchangeably when discussing the legal profession’s ethical rules and conduct toward clients and others, and law school courses devoted to lawyer ethics are often called Legal Ethics, Professional Responsibility, or Legal Profession.

4. See, e.g., DEBORAH L. RHODE, PROFESSIONAL RESPONSIBILITY: ETHICS BY THE PERVASIVE METHOD (2d ed. 1998) [hereinafter RHODE, PROFESSIONAL RESPONSIBILITY]; Carrie Menkel-Meadow & Richard H. Sander, *The “Infusion” Method at UCLA: Teaching Ethics Pervasively*, 58 LAW & CONTEMP. PROBS. 129 (1995); Russell G. Pearce, *Teaching Ethics Seriously: Legal Ethics as the Most Important Subject in Law School*, 29 LOY. U. CHI. L.J. 719,

having professors raise and discuss ethics issues in courses outside of the legal ethics course, law schools will increase “student awareness of, and sensitivity to, ethical issues in the legal work they do.”⁵ Through teaching legal ethics pervasively, law professors help to teach students the “skills needed to identify and analyze issues in settings where ethics is not the primary focus of attention,”⁶ just as ethics issues arise in the practice of law.

The need for the pervasive teaching of ethics is perhaps more important in first-year law school courses than in those in the final two years of law school “because the first year courses signal what it means to think and act like a lawyer.”⁷ Commentators agree that the first year of law school serves a socializing function, and during their first year law students usually are less cynical and more ethically sensitive.⁸ The first year of law school is also the time when law students learn legal analysis, which they will use throughout the balance of law school and in practice. Thus, some discussion of ethical issues and ethics instruction in the first year of law school is important to shaping the ethical sensitivity of law students for the rest of their legal careers.

In addition, ignoring the ethics issues present in a course—such as the defense lawyer’s role in representing clients in the Criminal Law course—“sends a message that the ‘ethical dimensions’ of legal education and law practice are marginal.”⁹ For many law students, their law professors are the first lawyers they encounter outside of those in books, newspapers, television, or film. Thus, in some instances, a professor’s failure “to recognize and discuss ethics issues may mislead students into drawing an erroneous inference from the professor’s silence that ethical issues are not present.”¹⁰

Although most of the reasons listed above favor discussing legal ethics issues in all courses, and particularly first-year courses, there are some additional reasons for discussing ethics issues in Criminal Law. Criminal Law

730-31 (1998); Deborah L. Rhode, *Ethics by the Pervasive Method*, 42 J. LEGAL EDUC. 31 (1992).

5. Joy & McMunigal, *supra* note 2, at 961.

6. Pearce, *supra* note 4, at 737.

7. *Id.* at 736.

8. See, e.g., Howard Lesnick, *Infinity in a Grain of Sand: The World of Law and Lawyering as Portrayed in the Clinical Teaching Implicit in the Law School*, 37 UCLA L. REV. 1157, 1159 (1990) (“I believe that it is what is imprinted in that initial immersion [first year of law school], and not any broader message of the three years, that shapes students’ consciousness of what is important and not important to being a lawyer.”); Elizabeth D. Gee & James R. Elkins, *Resistance to Legal Ethics*, 12 J. LEGAL PROF. 29, 34 (1987) (“The first year is a socialization period in which a student’s ethical sensitivity and commitment are subject to influence.”); RHODE, PROFESSIONAL RESPONSIBILITY, *supra* note 4, at 51 (arguing that if legal ethics issues are not discussed until the second or third year of law school, “many students will be too cynical or preoccupied to give it full attention”).

9. Pearce, *supra* note 4, at 738.

10. Joy & McMunigal, *supra* note 2, at 962.

is the initial public law course for most law students and the first time they study the state's relationship to individuals as opposed to private relationships between individuals such as those in Contracts, Property, and Torts. As a result, students confront for the first time concepts of the state's power regarding the individual, the lawyer's role in representing and protecting an individual's rights against the state, and the prosecutor's special role to seek justice. In addition, the attorney-client dynamic in criminal law often involves the state providing attorneys for clients unable to afford legal counsel.¹¹ When a court-appointed lawyer or public defender is involved, the client does not have the same ability to discharge a lawyer when disagreements arise during the handling of the case. Additionally, appointed lawyers and public defenders have less control over whom they represent than do lawyers in private civil or criminal law practice. Thus, the cases in the Criminal Law course involve lawyers fulfilling special roles, and students often have questions about these lawyer roles.

III. WHEN TO ADDRESS ETHICS ISSUES IN A CRIMINAL LAW COURSE

Every law professor should discuss legal ethics in class in at least three instances. "The first, and perhaps most important, time is whenever a law student raises an ethical issue regardless of the subject matter of the class."¹² If the professor is comfortable with the question, she should discuss the issue with the class. If the professor is unsure of the underlying policies and ethical rules implicated by the question, she should acknowledge the issue and perhaps identify resources for researching ethics issues such as the American Bar Association (ABA) Model Rules of Professional Conduct (Model Rules),¹³

11. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that due process "cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him"); *Argersinger v. Hamlin*, 407 U.S. 25, 30-31 (1972) (guaranteeing the right to appointed counsel in any case, including misdemeanors, where a person may be jailed for the offense). There are some limited circumstances where a lawyer may be provided in matters that are not criminal cases. See, e.g., *United States v. Bobart Travel Agency, Inc.*, 699 F.2d 618, 620-21 (2d Cir. 1983) (requiring the appointment of counsel for civil contempt charges that may result in imprisonment); *Salas v. Cortez*, 593 P.2d 226, 239 (Cal. 1979) (holding that a man facing a paternity charge is entitled to a lawyer), *cert. denied*, 444 U.S. 900 (1979). In order to qualify for an appointed lawyer in a non-criminal matter, a person must demonstrate substantial individual interests and lesser governmental interests and establish the risk that lack of a publicly provided lawyer will lead to an erroneous result. See *Lassiter v. Dep't of Soc. Servs.*, 452 U.S. 18, 32-34 (1981).

12. Joy & McMunigal, *supra* note 2, at 963.

13. MODEL RULES OF PROF'L CONDUCT (2003) [hereinafter MODEL RULES]. The American Bar Association (ABA) adopted the Model Rules of Professional Conduct in 1983 and has amended them frequently—most recently in 2003. The Model Rules replaced the ABA Code of Professional Responsibility, which the ABA adopted in 1969 and last amended in 1980. MODEL CODE OF PROFESSIONAL RESPONSIBILITY (1980) [hereinafter MODEL CODE]. "Forty-four states

the *Restatement of the Law Governing Lawyers*,¹⁴ an ethics practice manual,¹⁵ or ethics Web sites.¹⁶ The professor also could ask for a volunteer or team of volunteers to look up the issue and “to report back” to the class with a suggested answer or approaches for resolving the issue.

Second, the teacher can discuss ethics issues when she encounters them in her textbook or in cases even if the textbook author has not identified them. For example, the criminal law textbook by Professors Sanford Kadish and Stephen Schulhofer contains a section on the role of defense counsel,¹⁷ which includes ethics problems and a discussion of defense counsel, client perjury,¹⁸ and representing factually guilty clients.¹⁹ In addition, the teacher’s manual to a forthcoming criminal law textbook by Professors Kate Bloch and Kevin McMunigal will include cases and materials on the role of defense counsel, client confidentiality, and client perjury.²⁰ The professor encountering these ethics problems in her casebook or other obvious ethical aspects of cases should explore them with her students rather than skipping them. This is important, because what the professor emphasizes or ignores regarding ethical issues and lawyer conduct helps to shape the image of the “good lawyer” in students’ minds.²¹

Third, the professor teaching Criminal Law might see ethical aspects of cases or problems in the textbooks that will not be readily apparent to her

and the District of Columbia have adopted the Model Rules numbering system and most of the language suggested by the Model Rules.” STEPHEN GILLERS & ROY D. SIMON, *REGULATION OF LAWYERS: STATUTES AND STANDARDS* 3 (2003). Iowa, Nebraska, New York, Ohio, and Oregon base their ethics rules on the Model Code, and California and Maine “have adopted their own unique rules.” *Id.* State ethics rules codes are available through an ABA Web site. American Bar Association, *Links to Other Legal Ethics and Professional Responsibility Pages*, at <http://www.abanet.org/cpr/links.html> (last visited Feb. 7, 2004). The ABA has produced an annotated version of the Model Rules that is a very good resource for commentary and cases interpreting the Model Rules. AMERICAN BAR ASSOCIATION, *ANNOTATED MODEL RULES OF PROFESSIONAL CONDUCT* (5th ed. 2003).

14. *RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS* (2000) [hereinafter *RESTATEMENT*].

15. *See, e.g., ABA/BNA LAWYERS’ MANUAL ON PROFESSIONAL CONDUCT* (2003).

16. *See, e.g.,* Cornell Law School, *Legal Information Institute*, at <http://www.law.cornell.edu>; LegalEthics.com, *Internet Legal Services*, at <http://www.legalethics.com>.

17. SANFORD H. KADISH & STEPHEN J. SCHULHOFER, *CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS* 73-93 (7th ed. 2001).

18. *Id.* at 78-85.

19. *Id.* at 87-93.

20. Telephone Interview with Kevin McMunigal, Professor of Law, Case Western Reserve University (Feb. 3, 2004).

21. *See* Peter A. Joy, *The MacCrate Report: Moving Toward Integrated Learning Experiences*, 1 *CLINICAL L. REV.* 401, 405 (1994).

students. "By raising the less obvious ethical issues, the professor gives permission to her students to raise them as well."²²

The criminal law professor can also be proactive and introduce an ethics issue that the professor knows is foremost on students' minds—such as the ethics of defending a guilty client. The professor can use almost any case to introduce this subject, and most students will have some general ideas about some of the reasons why the criminal justice system depends on every person having the assistance of legal counsel whether or not the person might be factually innocent. Introducing this subject early in the course might provide some context for students as they approach the cases and materials in their texts and consider the role of defense lawyers.

IV. HOW TO INCORPORATE ETHICS ISSUES IN A CRIMINAL LAW COURSE

If the textbook contains ethics issues and problems, the professor can address them just like she addresses other issues and problems in the text. Usually, ethics problems in a criminal law text will contain references to the relevant ethics rules and textual material to aid the students in their analysis.²³ If the text does not contain ethics issues or problems, the professor can raise one she identifies in covering material in the course or ask the class if they spot any ethics issues in an assigned case or material. The professor can then give a short explanation of the issue and discuss the acceptable approaches to resolve the issue.

If the criminal law text does not contain any explicit ethics issues and a professor wants to incorporate one or more, the professor can provide students with the ethics rule or rules, a case or cases, and commentary discussing or illustrating the ethics issue. One source for such materials is a book by Professor Deborah Rhode on teaching ethics by the pervasive method, and she includes materials geared for Criminal Law courses.²⁴ There is also an annotated bibliography on legal ethics materials, which has a section that lists ethics issues for Criminal Law and Criminal Procedure courses.²⁵

22. Joy & McMunigal, *supra* note 2, at 963.

23. *See, e.g.*, KADISH & SCHULHOFER, *supra* note 17, at 73-87 (discussing the role of defense counsel and client perjury and containing the text of the applicable ethical rules, case law, commentary, and questions).

24. RHODE, PROFESSIONAL RESPONSIBILITY, *supra* note 4. Rhode discusses the lawyer's role in criminal defense and includes ethics problems on the destruction of evidence, client perjury, and other issues concerning the ethical and effective representation of clients. *Id.* at 595-621. She also provides materials and problems concerning the role of the prosecutor, including issues such as prosecutorial discretion, selective enforcement, trial conduct, and the duty to seek justice and not just convictions. *Id.* at 621-45.

25. Deborah L. Rhode, *Annotated Bibliography of Educational Materials on Legal Ethics*, 11 GEO. J. LEGAL ETHICS 1029, 1059-60 (1998).

Additionally, at some law schools ethics professors can work with criminal law professors to develop ethics issues for incorporation into the Criminal Law course. I prepared one such problem in collaboration with criminal law professors, and a brief discussion of that problem, involving the ethical responsibilities of defense counsel in representing a client the lawyer believes to be guilty, illustrates how this might be done.²⁶

The problem revolves around *Johns v. Smyth*,²⁷ in which a court-appointed defense lawyer refused to argue his client's case to the jury because he believed his client to be guilty.²⁸ In considering the appeal, the court found that the client was denied due process and a fair trial because of the ineffective assistance of counsel.²⁹ In reaching this conclusion, the court noted that every client is entitled to "complete loyalty and service in good faith to the best of [the lawyer's] ability" and it reviewed the applicable ethics rule.³⁰ The court found that the defense lawyer was so prejudiced and convinced of his client's guilt that the trial "had the earmarks of an *ex parte* proceeding."³¹

The student materials accompanying this case discuss the presumption of innocence and the constitutional right to counsel, and they reference the applicable ABA Model Rules.³² Students are asked about their duties as lawyers to accept or decline representation of clients, and they are asked to be prepared to discuss the following questions in class:

1. Do you agree with the court's reasoning in *Johns v. Smyth*?
2. What do you think the lawyer for Raleigh Johns [the defendant] should have done in this case?
3. Do you think that it is fair for courts to appoint lawyers to represent people who are guilty?

26. Joy, Professional Responsibility Problems, *supra* note 1.

27. 176 F. Supp. 949 (E.D. Va. 1959).

28. *Id.* at 952-53.

29. *Id.* at 954.

30. *Id.* at 952. The court quotes Canon 5 of the ABA Canon of Ethics, which was the ethical standard at the time of the trial in 1942. *See id.* Canon 5 provides:

It is the right of the lawyer to undertake the defense of a person accused of crime, regardless of his personal opinion as to the guilt of the accused; otherwise innocent persons, victims only of suspicious circumstances, might be denied proper defense. Having undertaken such defense, the lawyer is bound by all fair and honorable means, to present every defense that the law of the land permits, to the end that no person may be deprived of life or liberty, but by due process of law.

CANONS OF PROFESSIONAL ETHICS Canon 5 (1908).

31. *Johns*, 176 F. Supp. at 953.

32. Joy, Professional Responsibility Problems, *supra* note 1. *See also* MODEL RULES, *supra* note 13, at R. 1.1, 1.2, 3.1, 6.2 (rules discussing competence, scope of representation, meritorious claims and contentions, and accepting appointments, respectively).

4. What is the proper role for defense counsel when the lawyer believes a client is guilty? Does it differ when defense counsel believes the client is innocent?
5. Do a lawyer's duties differ when a client is extremely unpopular, or when the client advocates unpopular views?³³

Faculty notes for this problem discuss the fact that our legal system allows for an incongruence “between a moral or factual concept of guilt and a legal finding of guilty,” and that not all students enter law school with this understanding.³⁴ The faculty notes also contain a short discussion of the most common arguments for a defense lawyer to represent a client the lawyer might believe to be guilty, which include the systemic,³⁵ epistemological,³⁶ and intrinsic rights arguments justifying the defense lawyer's role.³⁷

33. Joy, Professional Responsibility Problems, *supra* note 1.

34. *Id.*

35. The faculty notes state:

The most common argument is a systemic argument. In short, representation by lawyers of guilty defendants is necessary for our system of justice to function and for its various safeguards to operate. It maintains that our adversary system requires a division of function: the lawyer's role is one of advocate for clients while the determination of guilt is the function of the jury or the judge. This argument is grounded in the proposition that it is impractical and undesirable to attempt to punish every person who commits a crime. Rather, we should punish only those proven guilty beyond a reasonable doubt after they are afforded a fair trial. Representation by lawyers assures that the proof is beyond a reasonable doubt and the trial is fair.

If lawyers did not represent clients unless they were convinced of their innocence, there would no longer be a presumption of innocence nor would many persons have representation. Lawyers would become *de facto* judges and juries, and the American notion of a fair trial would be drastically changed. Our system of justice prohibits a lawyer from presenting false evidence or lying to the court, but it expects the lawyer to ensure that the rights of the accused are preserved.

Id.

36. The faculty notes state:

The second argument is more metaphysical and it assumes that it is difficult, if not impossible, for lawyers to always “know” the truth about a client's guilt or innocence. Even when a client declares guilt to a lawyer the client may be lying, mistaken, or mentally disturbed. A client who does not understand available defenses, such as self-defense or perhaps provocation, may profess guilt and thereafter possible defenses may never be fully explored. If one would adopt a system requiring lawyers to believe clients who admit guilt, would lawyers also be required to believe clients who claim innocence? Under such a system some guilty would still receive representation and some innocent would be denied representation.

Id.

37. The faculty notes state:

The final argument contends that representation of the guilty is not appropriate simply because it is useful—as the systemic argument maintains—but because it is intrinsically right for a lawyer to represent persons who may be guilty. This argument

Justice White also provides the following useful description of the distinct and necessary role of defense counsel:

Law enforcement officers have the obligation to convict the guilty and to make sure they do not convict the innocent. They must be dedicated to making the criminal trial a procedure for the ascertainment of the true facts surrounding the commission of the crime. To this extent, our so-called adversary system is not adversary at all; nor should it be. But defense counsel has no comparable obligation to ascertain or present the truth. Our system assigns him a different mission. He must be and is interested in preventing the conviction of the innocent, but, absent a voluntary plea of guilty, we also insist that he defend his client whether he is innocent or guilty. . . . In this respect, as part of our modified adversary system and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.³⁸

Thus, this ethics problem discusses issues such as every lawyer's obligation, whether the lawyer is a criminal defense lawyer, tort lawyer, or business transactional lawyer, to provide competent, diligent, and effective representation for clients. The problem also deals with the criminal lawyer's ethical duties when representing a client the lawyer believes to be guilty. These are fundamental issues about what it means to be a lawyer, and these are issues that many first-year students in Criminal Law confront for the first time. By raising these issues in class, professors acknowledge that discussing professional values and legal ethics is essential to understanding the material students study.

maintains that lawyers have the right to choose the persons upon whom they will bestow the benefit of representation as an extension of their own individual rights. This argument maintains that a moral society permits parents to favor their own children over other children, or for individuals to favor or do more for family and friends than for others in society. This right of personal preference and choice should also extend into the legal system of a society, and such a right has an intrinsic morality. It might be argued that the defendant has an intrinsic right to receive such representation.

Id.

Professor Barbara Babcock describes five reasons for defending the guilty: (1) the garbage collector's reason (it's dirty work but someone must do it); (2) legalistic or positivist reason (truth cannot be known); (3) political activist's reason (most committing crimes have suffered injustice); (4) social worker's reason (most committing crimes are disadvantaged and need to be treated with respect), and (5) the egoist's reason (defense work is more interesting and winning more challenging). Barbara Allen Babcock, *Defending the Guilty*, 32 CLEV. ST. L. REV. 175, 177-78 (1983). Professor William Simon provides a critique for many of the justifications for the defense lawyer's role in defending the guilty. See generally William H. Simon, *The Ethics of Criminal Defense*, 91 MICH. L. REV. 1703 (1993).

38. United States v. Wade, 388 U.S. 218, 256-58 (1967) (White, J., concurring in part and dissenting in part).

V. CONCLUSION

The duty to defend guilty clients is just one example of the type of ethical problems a professor can integrate into the Criminal Law course. In raising such issues, the professor can create a richer dialogue infused with both ethical and doctrinal considerations. By discussing ethical issues and professional considerations, the professor also becomes a model of a thoughtful, ethical lawyer.