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## Candor, Zeal, and the Substitution of Judgment: Ethics and the Mentally Ill Criminal Defendant

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# CANDOR, ZEAL, AND THE SUBSTITUTION OF JUDGMENT: ETHICS AND THE MENTALLY ILL CRIMINAL DEFENDANT

JOHN D. KING\*

## TABLE OF CONTENTS

Introduction .....	208
I. Candor, Zeal, and Confidentiality .....	215
A. A Brief History of Candor .....	215
B. A Brief History of Zeal .....	219
C. The Obligation to Protect Confidences and Secrets .....	224
II. <i>Dusky</i> and Its Discontents: The Law of Competency and Its Limitations .....	226
III. Ethical Guidance in Defending a Mentally Impaired Client ..	233
IV. Theory and Practice: Two Real-World Examples .....	245
A. David Sherman .....	246
B. James Murphy .....	252
C. Substitution of Judgment: Reconciling the Choices .....	255
V. Toward a More Meaningful Ethical Framework .....	257
Conclusion .....	264

*You receive a call one day from a local judge, asking you to take a case that, the judge assures you, will not take up much of your time. The judge wants you to represent a man who has been arrested on a charge of possession of marijuana; there is nothing special about the case, the judge tells you, but the local public defender organization is unable to represent the man due to a conflict, and he has no money to hire an attorney. You agree to represent him, thinking that the case could not be too complex and, when you receive the discovery from the prosecution, it seems to be open-and-shut. Two police*

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*officers saw your new client smoking marijuana behind a shopping mall and arrested him. You know that the maximum penalty for a first-time offender—like your client—is sixty days in jail, and the judge to whom the case is assigned invariably gives first-time marijuana offenders a small fine and thirty days of probation.*

*When you meet your client, he tells you that he wants to put this case behind him as quickly as possible. As you begin to explain to him his options, he immediately tells you that he wants to plead guilty. He goes on to say to you that he knows that he must plead guilty because he saw devils in the courtroom when he was arraigned, and the devils told him that they would torture him if he went to trial. In describing this, your client begins to cry and insists that you arrange for him to plead guilty as soon as possible.*

*Not only do you know the relatively light consequences to your client if he pleads guilty to this charge, you also know the consequences of raising with the court doubts about your client's competency. The law in your state requires the judge to order a competency evaluation if there exists a reasonable possibility that a defendant is not competent to stand trial, and such evaluations are done at the state mental hospital, on an in-patient basis. If you raise the issue of competency, then you are certain that your client will be held at the state mental hospital for at least sixty days while the evaluation is completed, possibly longer. If your client is ultimately found incompetent, the law allows that he may be civilly committed to an indefinite period of confinement at the state mental hospital. You also remember learning in your professional responsibility class in law school that all lawyers are officers of the court and, as such, have an obligation of candor to the court and some responsibility to maintain the integrity of the legal system.*

*What do you do? Do you tell the court, heedless of the consequences to your client, that you believe your client is delusional and not competent to proceed? Do you keep your doubts to yourself and your fingers crossed that your client makes it through a guilty plea without talking about the devils that visit him? Now assume that, instead of insisting on a guilty plea, your client insists on a trial. Who decides on your theory of defense? Which witnesses to call? Whether to try your case to a jury or to a judge? Where do you turn for guidance? Do you do what your mentally impaired client tells you to do? What you think he would want if not for his mental illness? What you think is best for him? Can you be both a zealous advocate and an officer of the court? Of course, you are wondering why you ever agreed to take this case.*

#### INTRODUCTION

If there is one foundational principle of legal ethics about which scholars, practitioners, and the public might agree, it is that a lawyer should do no harm to her client. Upon examination, however, this

principle turns out to be shakier than it first appears. On some occasions, rules of ethics may force the lawyer to do just that. The obligations of acting as a zealous advocate for one's client and as an officer of the court do at times conflict, and that tension is most acutely felt in the case of the criminal defense lawyer.<sup>1</sup> The criminal defense lawyer's role as zealous partisan occupies a position unique in the legal profession. The duty of the criminal defense lawyer toward her client has been called "one of singular devotion; the lawyer is devoted to the client and the client only."<sup>2</sup> The United States Supreme Court eloquently articulated the unique role of the defense lawyer within the adversarial system: "[A] defense lawyer best serves the public, not by acting on behalf of the State or in concert with it, but rather by advancing 'the undivided interests of his client.'"<sup>3</sup> Given this uniquely partisan role,<sup>4</sup> in what sense is the defense lawyer an "officer of the court"? This uneasy positioning of the defense lawyer leads to difficult ethical decisions; in no situation is the tension more pronounced than in the context of representing a client who is mentally impaired.

Every criminal defendant has an absolute right to control certain aspects of her case. Decisions regarding whether to go to trial or enter a guilty plea, whether to testify, and whether to have her case decided by a judge or a jury ultimately belong exclusively to the defendant.<sup>5</sup> According to traditional legal ethics, while the defendant

1. See Deborah Rhode, *Ethical Perspectives on Legal Practice*, 37 STAN. L. REV. 589, 605 (1985) (stating that the criminal defense context is that in which "the case for undiluted partisanship is most compelling").

2. Abbe Smith, *The Bounds of Zeal in Criminal Defense: Some Thoughts on Lynne Stewart*, 44 S. TEX. L. REV. 31, 42 (2002). Smith also calls it a "sacred duty." *Id.* In support of this view of the lawyer-client relationship, Smith cites the work of Charles P. Curtis regarding legal ethics. Curtis described his view succinctly: "[The lawyer's] loyalty runs to his client. He has no other master." *Id.* at 42 n.91 (citing Charles P. Curtis, *The Ethics of Advocacy*, 4 STAN. L. REV. 3, 3 (1951-1952)).

3. *Polk County v. Dodson*, 454 U.S. 312, 318 (1981) (Powell, J.).

4. Justice Powell's understanding of the unique role of the defense lawyer is not universally shared. In *Nix v. Whiteside*, Chief Justice Burger opined that the defense lawyer's responsibilities and duties as an officer of the court are "equally solemn" as the defense lawyer's duty to advocate for her client. 475 U.S. 157, 168 (1986). Chief Justice Burger, like many judges, tended to privilege the lawyer's role as an officer of the court above the lawyer's role as advocate or partisan. See, e.g., *In re Griffiths*, 413 U.S. 717, 732 (1973) (Burger, C.J., dissenting) ("The role of a lawyer as an officer of the court predates the Constitution; it was carried over from the English system and became firmly embedded in our tradition. It included the obligation of first duty to client. But that duty never was and is not today an absolute or unqualified duty.").

5. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(a) (2002) (setting forth the general framework within which decisions are to be made during the scope of representation). That rule provides that:

[A] lawyer shall abide by a client's decisions concerning the objectives of representation . . . and shall consult with the client as to the means by which they are to be pursued . . . . In a criminal case, the lawyer shall abide by the

controls these core aspects of the litigation, the lawyer controls the strategic decisions.<sup>6</sup> Whether to call certain witnesses, for example, and whether and how to cross-examine the government's witnesses are traditionally considered to rest with the discretion of the lawyer.<sup>7</sup> These very general rules, however, are of limited utility to a defense lawyer who finds herself in disagreement with her client and caught in a dilemma between respecting her client's right to autonomous decision-making and her own desire to serve the best interests of her client.

A criminal defense lawyer who believes in a client-centered model of representation<sup>8</sup> must necessarily accept that she will at times take actions that will be harmful to her client. The competent, rational client has a right to make decisions that are counter-productive, harmful, and even disastrous.<sup>9</sup> The client-centered lawyer must

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client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

*Id.* The allocation of decisional power set forth in Rule 1.2(a) is, at least in the first instance, universally accepted and uncontroversial. A precise delineation between "objectives" and "tactics," however, can be elusive in practice. See DAVID BINDER & SUSAN PRICE, LEGAL INTERVIEWING AND COUNSELING: A CLIENT-CENTERED APPROACH 192 (1977) (emphasizing that client-centered decision-making is not always possible, for example, because of clients who are indecisive, or insist on following the lawyer's opinion, or insist on their own opinion regardless of the lawyer's advice).

6. See MODEL RULES OF PROFESSIONAL CONDUCT R. 1.2 cmt. 2 (2002) (explaining that, when in disagreement, clients will normally defer to their lawyer with respect to "tactical" matters).

7. *Id.*

8. For a nuanced description of the history and theoretical underpinnings of client-centered lawyering, see Katherine R. Kruse, *Fortress in the Sand: The Plural Values of Client-Centered Representation*, 12 CLINICAL L. REV. 369 (2006). Rodney Uphoff contrasts client-centered lawyering with the traditional lawyer-centered approach by locating the focus of ultimate decision-making power. Rodney J. Uphoff, *Who Should Control the Decision To Call a Witness: Respecting a Criminal Defendant's Tactical Choices*, 68 U. CIN. L. REV. 763 (2000). Client-centered lawyering, he writes:

[A]ssumes that clients often are in a better position to make case decisions because so many decisions actually turn on the client's values and priorities that the client alone best appreciates. The lawyer's role in this model, then, is to provide clients with meaningful information so as to empower clients to make informed choices about their cases.

*Id.* at 769; see also BINDER & PRICE, *supra* note 5, at 143 ("[T]he responsibility for identifying the probable legal consequences of any particular alternative must rest with the lawyer."); Stephen Ellman, *Lawyers and Clients*, 34 UCLA L. REV. 717, 728 (1987) (emphasizing the importance of client decision-making over unruly power and manipulation a lawyer often has over her client's case); Monroe H. Freedman, *Ethical Ends and Ethical Means*, 41 J. LEGAL EDUC. 55, 55-56 (1991) ("I think of lawyers' ethics as rooted in the Bill of Rights as expressed in our constitutionalized adversary system. My view of lawyers' ethics is, therefore, client-centered, emphasizing the lawyer's role in enhancing the client's autonomy as a free person in a free society.").

9. What of the rational, competent client who freely chooses to forego her only viable defense? A classic example is the story of "The Long Black Veil," a country ballad about a man who chooses to be executed for a crime he did not commit rather than to reveal his alibi. The song was originally recorded by Lefty Frizzell in

accept that her role is to assist her rational, competent client in achieving the client's goals, even if those goals are not what the lawyer would have chosen. Taken to its extreme, however, a model of absolute client-centered decision-making can devolve into an abdication of responsibility on the part of the defense lawyer. In cases involving criminal defendants suffering serious mental impairment, the very reasoning behind the model of client-centered representation and client autonomy<sup>10</sup> can fall apart, especially in cases involving defendants who, although competent to stand trial, are "decisionally incompetent"<sup>11</sup> and, therefore, unable meaningfully to assist in their own defenses.

A significant number of prisoners in state and federal jails and prison suffer from some form of severe mental illness.<sup>12</sup> Today, two of the nation's largest mental health providers are the Los Angeles

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1959 and made popular again by Johnny Cash in 1968. The innocent man chooses to die rather than reveal the truth:

Ten years ago, on a cold dark night  
 Someone was killed, 'neath the town hall light  
 There were few at the scene, but they all agreed  
 That the slayer who ran, looked a lot like me . . . .

The judge said son, what is your alibi  
 If you were somewhere else, then you won't have to die  
 I spoke not a word, though it meant my life  
 For I'd been in the arms of my best friend's wife

JOHNNY CASH, *The Long Black Veil, on AT FOLSOM PRISON* (Columbia Records 1968) (lyrics by Marijohn Wilkin and Danny Dill, 1959). David Luban addressed the "Long Black Veil" situation in terms of legal ethics in his excellent article, *Paternalism and the Legal Profession*, 1981 WIS. L. REV. 454, 456. Luban adopts Dennis Thompson's definition of paternalism: "the imposing of constraints on an individual's liberty for the purpose of promoting his or her own good." *Id.* at 461 (citing Dennis Thompson, *Paternalism in Medicine, Law, and Public Policy*, in *ETHICS TEACHING IN HIGHER EDUCATION* 246 (Daniel Callahan & Sissela Bok eds., 1980)).

10. On the question of autonomy as a motivating principle in the criminal justice system, see generally Robert E. Toone, *The Incoherence of Defendant Autonomy*, 83 N.C. L. REV. 621 (2005). Toone argues that the United States Supreme Court's reliance upon autonomy in *Faretta v. California*, 422 U.S. 806 (1975), and the subsequent constitutional procedural cases misplace defendant autonomy as a constitutional value. Toone, *supra*, at 650. Given the constraints under which any criminal defendant operates, argues Toone, it is meaningless to speak of criminal defendants as possessing any sort of meaningful "autonomy." *Id.* The illusory touchstone of "defendant autonomy," according to Toone, should not be allowed to hold sway over more meaningful principles of the criminal justice system like accuracy, efficiency, and fairness. *Id.* at 635.

11. See *infra* Part II (discussing the distinction between competency to waive counsel and competency to proceed to trial).

12. DORIS J. JAMES & LAUREN E. GLAZE, U.S. DEP'T OF JUSTICE, *MENTAL HEALTH PROBLEMS OF PRISON AND JAIL INMATES I* (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/mhppji.pdf>. Among all jail inmates, twenty-four percent reported at least one symptom of psychotic disorder, and sixty-four percent reported some degree of mental health problems. *Id.*

County Jail and the Cook County (Chicago) Jail.<sup>13</sup> The shift in the United States from the institutionalization of the mentally ill in mental hospitals to the incarceration of the mentally ill in jails and prisons has been well-documented.<sup>14</sup> In 1955, the institutionalization rate of people in mental hospitals was 339 per 100,000; today, the number is fewer than 20 people per 100,000.<sup>15</sup> Where did those vast populations of the mentally ill go? To jails and prisons.<sup>16</sup> As the institutionalization rate fell over the course of the last fifty years, the incarceration rate has risen accordingly.<sup>17</sup> While the national incarceration rate in the mid-1950s was approximately 162 per 100,000, it is currently over 700 per 100,000, nearly a five-fold increase.<sup>18</sup>

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13. See Jennifer Fischer, *The Americans with Disabilities Act: Correcting Discrimination of Persons with Mental Disabilities in the Arrest, Post-Arrest, and Pretrial Processes*, 23 LAW & INEQ. 157, 160–61 (2005) (stating that Cook County reported “1,000 out of 11,000 inmates as having a mental illness” and that Los Angeles County Jail houses about “2,800 persons with a mental illness” giving it the reputation as the “nation’s largest de facto psychiatric institution”); see also HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 16 (2003), <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf> (“Jails and prisons have become, in effect, the country’s front-line mental health providers.”).

14. See, e.g., Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 265–68 (2007) (detailing the problems in the criminal justice system with a rising incarceration rate); Bernard E. Harcourt, *From the Asylum to the Prison: Rethinking the Incarceration Revolution*, 84 TEX. L. REV. 1751 (2006) (arguing that mental hospitalization rates must be aggregated with incarceration rates to accurately reflect and interpret the rise of the incarceration rate in the United States).

15. See HUMAN RIGHTS WATCH, ILL-EQUIPPED: U.S. PRISONS AND OFFENDERS WITH MENTAL ILLNESS 19–20 (2003), available at <http://www.hrw.org/reports/2003/usa1003/usa1003.pdf> (stating that due to lack of funds from the federal and state government, mental hospitals and community-based mental health services were not able to adequately provide treatment for the mentally ill, which led to an increase in, among other things, the incarceration rate).

16. This shift has been described in vivid terms by one commentator: “Over the past 40 years, the United States dismantled a colossal mental health complex and rebuilt—bed by bed—an enormous prison.” Bernard E. Harcourt, Op-Ed, *The Mentally Ill, Behind Bars*, N.Y. TIMES, Jan. 15, 2007, at A15.

17. See *id.* (“[W]e now incarcerate more than two million people—resulting in the highest incarceration number and rate in the world, five times that of Britain and 12 times that of Japan.”). Indeed, Professor Harcourt points out that the total rate of institutionalization (including in mental hospitals, asylums, jails, and prisons) is actually lower today than in the 1940s and 1950s. See *id.* (explaining that we have been a culture that institutionalizes people since the 1940s and 1950s, but emphasizing that people that used to get mental health treatment are now “getting a one-way ticket to jail”).

18. PAIGE HARRISON & ALAN J. BECK, U.S. DEP’T OF JUSTICE, PRISON AND JAIL INMATES AT MID-YEAR 2005 2 (2006), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/pjim05.pdf>. Harrison and Beck included prison and jail inmates in both the federal and state systems and calculated that, as of June 30, 2005, 738 out of every 100,000 people in the United States were incarcerated. *Id.*; see HUMAN RIGHTS WATCH, *supra* note 15, at 19–20 (noting the incarceration rate in the 1950s); JUSTICE POLICY INSTITUTE, THE PUNISHING DECADE: PRISON AND JAIL ESTIMATES AT THE MILLENNIUM 1–2 (2000), available at <http://www.prisonpolicy.org/scans/>

Against this backdrop, defense lawyers for the indigent are placed in an untenable situation. As prisons and jails become the new “treatment” facilities for the nation’s mentally ill, criminal defense lawyers for the poor are increasingly asked to play various, often-conflicting roles in the service of their clients and the courts.<sup>19</sup> As mental illness has become an increasingly prominent and problematic factor in the representation of indigent criminal defendants, ethics have not caught up with the realities of day-to-day practice.<sup>20</sup> What is a well-meaning, client-centered defense lawyer to do when her client is making self-destructive and senseless decisions not as the result of rational thought, but because of a mental illness or impairment that prevents the client from making a rational decision? Before even reaching the questions of the proper allocation of decisional power within the context of an attorney-client relationship with a mentally impaired client, the lawyer has a preliminary determination to make: is the lawyer required to bring to the court’s attention her concerns regarding her client’s competency? This Article attempts to provide some guidance regarding decision-making, allocation of power, and evolving concepts of autonomy and paternalism in the context of criminal defense representation.

This Article addresses two related dilemmas facing the criminal defense lawyer who represents a client who—although arguably

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punishing.pdf (charting the rising incarceration rate in the United States over the course of the twentieth century).

19. See Richard E. Redding, *Why It Is Essential To Teach About Mental Health Issues in Criminal Law (and a Primer on How To Do It)*, 14 WASH. U. J.L. & POL’Y 407, 407 (2004) (arguing that the changing demographics of criminal defendants require that we change the way we train criminal defense lawyers).

20. Professor Stanley Herr has complained about the lack of meaningful guidance that existing ethical codes offer to lawyers attempting conscientiously to represent mentally impaired clients. Stanley Herr, *Representation of Clients with Disabilities: Issues of Ethics and Control*, 17 N.Y.U. REV. L. & SOC. CHANGE 609 (1991). Professor Herr writes that:

[T]he codes of the organized bar foster confusion about the lawyer’s proper roles and the scope of the aid lawyers should offer clients. Exacerbated by the disabled client’s poverty, physical isolation, or unusual legal problems, this lack of clear ethical guidance may lead some lawyers to shun mentally disabled clients. Even worse, such imprecision may contribute to substandard legal representation and a failure to attend to clients with mental disabilities.

*Id.* at 615. Herr criticizes both the Model Code of Professional Responsibility and the Model Rules of Professional Conduct as providing insufficient guidance to attorneys struggling with issues of ethical decision-making in their representation of clients with mental disability. “While sympathetic to the lawyer’s predicament,” he writes, “the drafters’ suggestion that the lawyer turn to ‘an appropriate diagnostician’ for guidance too narrowly conceives the dilemma. The problem is ethical and not clinical.” *Id.* at 620.



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competent to stand trial—has a mental impairment that prevents the client from making rational decisions about how to proceed with her case: first, whether to raise with the court her concerns that her client may be incompetent, and second, how to make strategic decisions about the case when faced with opposition by a mentally impaired client.

Part I of the Article examines the historical development of the concepts of candor, zeal, and the lawyer's obligation to protect confidences and secrets in the course of the representation. Part II addresses some fundamental legal principles surrounding competency to stand trial and the legal framework within which competency is assessed and litigated in a criminal case, as well as some of the critiques of the current legal paradigm of competency. Part III discusses the ethical rules guiding defense counsel in representing a mentally impaired client, and examines the shortcomings of that guidance. Part IV describes two real-life scenarios encountered by criminal defense lawyers and discusses the appropriate decision-making strategies that could be used in those actual examples. Part V argues first that a defense lawyer cannot ethically raise doubts regarding her client's competency when doing so would cause harm to her client, and goes on to propose a new framework within which a criminal defense lawyer can decide whether, to what extent, and how she may substitute her own judgment for that of her mentally impaired client.

Ultimately, this Article argues that the historic role of zeal as a guiding principle in the ethics of criminal defense requires that the criminal defense lawyer be endowed with significant discretion in determining first, whether to raise issues of competency and second, in how to engage in surrogate decision-making for her mentally impaired client. This Article rejects the view of some commentators and courts that the lawyer's role as officer of the court requires the lawyer to raise doubts about her client's competency<sup>21</sup> and argues, to the contrary, that the dignity and moral authority of the criminal justice system is best served by a defense lawyer being free to operate solely in the interest of her client.

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21. *E.g.*, *State v. Johnson*, 395 N.W.2d 176, 182 (Wis. 1986) (holding that where defense counsel has reason to doubt her client's competency, she is obligated to raise the issue with the trial court).

## I. CANDOR, ZEAL, AND CONFIDENTIALITY

Fundamentally, the dilemma faced by the criminal defense lawyer representing an arguably incompetent client is a dilemma of two conflicting duties: the lawyer's duty of candor toward the court<sup>22</sup> and the lawyer's duty of zealous representation.<sup>23</sup> As an officer of the court, some argue, a lawyer has a responsibility to protect and uphold the integrity of the process by which the system adjudicates those who come before it.<sup>24</sup> On the other hand, the defense lawyer, more than any other actor in the criminal justice process, has historically been seen as appropriately having different goals than the "system" generally; as a zealous advocate for her client, the defense lawyer need not concern herself with the search for the truth, or with the reliability of the process.<sup>25</sup> The duties of candor and zeal, then, inexorably conflict in the world of criminal defense; the lawyer's obligation to protect confidences and secrets learned in the course of the representation<sup>26</sup> adds another dimension to the debate about the appropriate role of the defense lawyer faced with conflicting duties.

A. *A Brief History of Candor*

A lawyer's obligation to "speak the truth" has, at least to some degree, been a fundamental principle of the legal profession for centuries.<sup>27</sup> Like the concept of zeal, however, the duty of candor is defined in the details. Lawyers in ancient Rome were required to swear an oath "to avoid artifice and circumlocution" and "to speak only that which he believes to be true."<sup>28</sup> By the thirteenth century, at

22. See *infra* Part I.A (describing the history of an attorney's duty of candor to the tribunal).

23. See *infra* Part I.B (recounting the history of an attorney's duty of zealous advocacy).

24. See Gerald F. Uelman, *Lord Brougham's Bromide: Good Lawyers as Bad Citizens*, 30 LOY. L.A. L. REV. 119, 122 (1996-1997) (arguing that the duty lawyers have to their country and their clients are the same—that is to zealously advocate for their client within the boundaries set by the law). Uelman adds that "[t]he premise of the adversary system is that the goal of fair adjudication is more likely to be served if lawyers function as zealous advocates for their clients." *Id.*

25. See *infra* note 198 and accompanying text.

26. See *infra* Part I.C (outlining an attorney's obligation to not disclose information communicated by her client in confidence).

27. See Carol Rice Andrews, *Standards of Conduct for Lawyers: An 800-Year Evolution*, 57 SMU L. REV. 1385, 1387 (2004) (arguing that six traditional primary duties of lawyers in medieval England—litigation fairness, competence, loyalty, confidentiality, reasonable fees, and public service—are still the central duties of modern lawyers).

28. See *id.* at 1392-93 (noting that oaths were one of the first methods used to enforce ethical standards of legal conduct with a central theme of fairness and honesty) (citing JOSIAH HENRY BENTON, *THE LAWYER'S OFFICIAL OATH AND OFFICE* 19 (1909) and Joseph Cox, *Legal Ethics*, 19 WKLY. L. BULL. & OHIO L.J. 47, 49 (1888)).

least certain English lawyers were subject to discipline for attempts to present false testimony “or to suppress the truth.”<sup>29</sup> The thread continues through English legal history; four centuries after the ecclesiastical oaths described above, Lord Commissioner Whitelocke explained the duties of a seventeenth-century English lawyer.<sup>30</sup> In a 1648 speech to new lawyers, Lord Whitelocke described the three “general” duties of the lawyer: secrecy, diligence, and fidelity.<sup>31</sup> He went on to discuss in more detail the lawyer’s duty to protect client confidences and secrets,<sup>32</sup> to maintain loyalty to the client,<sup>33</sup> and to be candid with the courts.<sup>34</sup>

Many of the American colonies adopted some version of the “do no falsehood” oaths from England, in which lawyers were required to swear to some version of a duty of candor toward the tribunal. A 1701 law required all lawyers in the colony of Massachusetts to swear a typical such oath:

You shall do no falsehood, nor consent to any to be done in the court, and if you know of any to be done you shall give knowledge thereof to the Justices of the Court, or some of them, that it may be

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According to Cox, the ancient Greek oath contained similar exhortations, requiring its adherents to “represent the bare truth, without any ornament or figure of rhetoric, or insinuating means to win the favor or more the affection of the judges.” *Id.* at 1393 n.54 (citing Joseph Cox, *Legal Ethics*, 19 WKLY. L. BULL. & OHIO L.J. 47, 49 (1888)).

29. See Andrews, *supra* note 27, at 1393 (“The decree also warned that advocates who . . . ‘suppress the truth’ would be suspended from office and subjected to additional punishment for repeated violations.”).

30. *Id.* at 1400–01.

31. See *id.* (citing WHITELOCKE’S MEMORIALS 352 (1732)) (noting that lawyers were not only subject to formal standards, but also oaths and academic speeches that contributed to the meaning of their duties as advocates to their community). Lord Whitelocke was addressing a group of men who were becoming “serjeants,” considered to be the elite of the English legal profession, trained in common law and pleading. See *id.* at 1391–92 (noting that serjeants often represented the king and were considered the best of the profession). Lord Whitelocke’s three basic duties of a serjeant—secrecy, diligence, and fidelity—have been referred to as “the pegs for an exposition of the central rules of professional responsibility.” ROSS CRANSTON, *LEGAL ETHICS AND PROFESSIONAL RESPONSIBILITY* 6 (1995).

32. See Andrews, *supra* note 27, at 1400 n.117 (“For secrecy: advocates are a king of confessors, and ought to be such, to whom the client may with confidence lay open his evidences, and the naked truth of his case, sub sigillo, and he ought not to discover them to his client’s prejudice; nor will the law compel him to it.” (quoting WHITELOCKE’S MEMORIALS 355 (1732))).

33. See *id.* at 1400 n.119 (“For fidelity: it is accounted vinculum societatis. The name of unfaithfulness is hateful in all; and more in advocates than others, whom the client trusts with his livelihood, without which his life is irksome; and the unfaithfulness or fraud of the one is the ruin of the other.” (quoting WHITELOCKE’S MEMORIALS 355 (1732))).

34. See *id.* at 1400 n.116 (“An advocate owes to the court a just and true information. The zeal of his client’s cause, as it must not transport him to irreverence, so it must not mislead him to untruths in his information of the court.” (quoting WHITELOCKE’S MEMORIALS 355 (1732))).

reformed. You shall not wittingly and willingly promote, sue or procure to be sued any false or unlawful suit, nor give aid or consent to the same. You shall delay no man for lucre or malice, but you shall use yourself in the office of an attorney within the court according to the best of your learning and discretion, and with all good fidelity as well to the courts as to your clients. So help you God.<sup>35</sup>

Codes of conduct and lawyers' oaths in pre-Revolutionary and early America did not stress the duty of zeal or confidentiality to the extent that earlier English precedent had.<sup>36</sup>

Rule 3.3 of the Model Rules of Professional Conduct ("Model Rules") sets forth a modern articulation of the lawyer's duty of candor toward the tribunal.<sup>37</sup> Rule 3.3 would impose upon lawyers a broad obligation of disclosure toward the court that will inevitably

35. *Id.* at 1415 n.206 (citing HARRIS R. BAILEY, ATTORNEYS AND THEIR ADMISSION TO THE BAR IN MASSACHUSETTS 16 (1907)).

36. *Id.* at 1422-23 (noting the duty of confidentiality did not appear in colonial and early American regulations regarding lawyers' conduct).

37. Rule 3.3 directs:

(a) A lawyer shall not knowingly:

(1) make a false statement of material fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;

(2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or

(3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

(b) A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.

(c) The duties stated in paragraph (a) and (b) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6 [Confidentiality of Information].

(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer that will enable the tribunal to make an informed decision, whether or not the facts are adverse.

MODEL RULES OF PROF'L CONDUCT R. 3.3 (2002). Interestingly, with regard to the attorney's obligation to disclose adverse legal authority pursuant to Rule 3.3(a)(3), a 1972 survey of attorneys in Washington, D.C., found that only seven percent would disclose adverse legal authority, while ninety-three percent would not. Monroe H. Freedman, *Arguing the Law in an Adversary System*, 16 GA. L. REV. 833, 837 (1982). Freedman correctly argues that we should not overlook the overwhelming weight of this practical viewpoint in crafting ethical rules to guide the profession. *Id.*

conflict with the lawyers' duties as advocate.<sup>38</sup> As made explicit in Rule 3.3(b), the Model Rules reject the view that, at least in certain cases, preserving the sanctity of client confidences should trump the lawyer's duty of candor toward the tribunal.<sup>39</sup> Put another way, the Model Rules resolve quite facilely the dilemma between the criminal defense lawyer's competing roles, and simply declare that the lawyer's duty of candor toward the tribunal trumps the lawyer's role as zealous advocate for her client.<sup>40</sup>

The commentary to Rule 3.3 makes clear that the lawyer's obligation of candor toward the tribunal is premised on the lawyer's role as an "officer of the court" and, as such, on an idea of the lawyer as having a responsibility to uphold the "integrity of the adjudicative process."<sup>41</sup> The commentary to Rule 3.3 recognizes that the attorney has a professional responsibility—as an advocate—both to present her client's case with "persuasive force" and to maintain client confidences, but swiftly moves to qualify these advocacy-based duties.

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38. When the Model Rules were under consideration, one area of significant disagreement had to do with whether the arguably broadened duty of candor would interfere with the attorney's historic role as zealous advocate. See Freedman, *supra* note 37, at 837–39 (arguing that it should not be required for lawyers to cite adverse authority when overlooked by opposing counsel because of the lawyers duty of loyalty and zealous representation, as discussed in Canons 5 and 7 of the Model Code of Professional Responsibility); see also Daisy Hurst Floyd, Note, *Candor Versus Advocacy: Courts' Use of Sanctions To Enforce the Duty of Candor Toward the Tribunal*, 29 GA. L. REV. 1035, 1039–40 & n.19 (1995) (arguing that the duty of candor is so narrowly drawn in the Model Rules as to render it meaningless).

39. See MODEL RULES OF PROF'L CONDUCT R. 3.3(b) (2002) ("A lawyer who represents a client in an adjudicative proceeding and who knows that a person intends to engage, is engaging or has engaged in criminal or fraudulent conduct related to the proceeding shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal.").

40. See RONALD D. ROTUNDA, LEGAL ETHICS: THE LAWYER'S DESKBOOK ON PROFESSIONAL RESPONSIBILITY 441 (2000) (noting that although the consequences of disclosing criminal behavior or false testimony can be "grave" to the client, the alternative—subverting the advocacy process and possibly the attorney being a party to fraud—is worse). Rotunda agrees with the approach of the Model Rules but points out that the view is not universally held. *Id.* An outspoken opponent of this approach is Monroe Freedman. See, e.g., MONROE FREEDMAN, LAWYERS' ETHICS IN AN ADVERSARY SYSTEM 2–8 (1975) [hereinafter FREEDMAN, ADVERSARY SYSTEM] (emphasizing complete confidentiality between the attorney and her client, except for very narrow exceptions); MONROE FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 71 (3d ed. 2004) [hereinafter FREEDMAN & SMITH, UNDERSTANDING LAWYERS' ETHICS] ("The ethic of zeal is, therefore, pervasive in lawyers' professional responsibilities because it informs all of the lawyer's other ethical obligations with entire devotion to the interest of the client.") (internal quotation marks omitted).

41. See MODEL RULES OF PROF'L CONDUCT R. 3.3 cmt. 2 (noting that advocacy for one's client is "qualified" by candor to the process); see also *id.* at 3.3 cmt. 12 (noting that criminal or fraudulent conduct related to the proceeding must be disclosed to the tribunal in order to preserve the integrity of adjudicative process).

The lawyer's role as advocate "is qualified by the advocate's duty of candor toward the tribunal."<sup>42</sup>

The obligation of candor is often-cited and ill-defined. In almost no factual context is there a consensus on what the defense lawyer is (and is not) required to do in order to fulfill this obligation of candor. As noted by Monroe Freedman, the Model Rules continue to dodge the irreconcilable conflict between this "obligation" and other mandatory duties of the lawyer: "[One way] of avoiding the difficult questions has been by issuing statements or codifications of rules of conduct in such a way as to give lip service to basic systemic values, while ignoring the fact that some of those values are fundamentally at odds with each other."<sup>43</sup> To understand what meaning candor has and what limitations it places upon the defense lawyer, one must look at the concept alongside the other ethical concepts that guide the lawyer.

### B. *A Brief History of Zeal*

Like the lawyer's duty of candor toward the tribunal, the concept of zeal in the lawyer's representation of her client has antecedents in early Roman law.<sup>44</sup> Charles Wolfram has described zeal as central to the role of the lawyer in our legal system: "[T]he American lawyer's professional model is that of zeal: a lawyer is expected to devote energy, intelligence, skill, and personal commitment to the single goal of furthering the client's interests as those are ultimately defined by the client."<sup>45</sup> Wolfram goes on to cite Canon 15 of the 1908 American Bar Association ("ABA") Canons of Professional Ethics:

The lawyer owes "entire devotion to the interest of the client, warm zeal in the maintenance and defense of his rights and the exertion of his utmost learning and ability," to the end that nothing be taken or be withheld from him save by the rules of law,

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42. *Id.* at 3.3 cmt. 2.

43. FREEDMAN, ADVERSARY SYSTEM, *supra* note 40, at vii.

44. See ROSCOE POUND, THE LAWYER FROM ANTIQUITY TO MODERN TIMES 54 (1953) (describing Roman laws from the third century that prohibited, for example, a lawyer from accepting a fee and not thereafter pursuing a case, or a lawyer accepting fees from opposing sides in a case); see also Andrews, *supra* note 27, at 1389-1408 (describing standards of professional conduct in England before the nineteenth century, emphasizing its impact of the standards in the United States).

45. CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 578 (1986); see Abbe Smith, *Burdening the Least of Us: 'Race-Conscious' Ethics in Criminal Defense*, 77 TEX. L. REV. 1585, 1589 (1999) (describing the requirement of zealous advocacy "the central ethical mandate for criminal lawyers").

legally applied. No fear of judicial disfavor or public unpopularity should restrain him from the full discharge of his duty.<sup>46</sup>

The concept of zeal as a guiding principle for any lawyer in the Anglo-American legal system is uncontroversial.<sup>47</sup> By the end of the thirteenth century, all English lawyers practicing in the ecclesiastical courts were required to swear that they would “diligently and faithfully serve their clients.”<sup>48</sup>

As deeply ingrained in our legal culture as the principle of zealous representation, similarly accepted is the fact that the principle of zealous representation is not absolute and is, in fact, well-qualified.<sup>49</sup> A lawyer, to use the most obvious example, is not permitted to commit a crime in order to benefit her client. Anita Bernstein charts the waxing and waning of the bounds of zeal in her article, *The Zeal Shortage*, and suggests that the *ideal* of zeal, if perhaps not the practice of zeal, “may have hit its peak in ‘vigor’ about a hundred years ago.”<sup>50</sup> Bernstein laments the demise of zeal as a lawyerly ideal, and calls for a return to “this great ideal . . . up there in the professional-responsibility pantheon next to loyalty and competence.”<sup>51</sup> Unfortunately, zeal today may be faring no better in practice than in

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46. WOLFRAM, *supra* note 45, at 578. According to Wolfram, the quotation in Canon 15 is attributable to George Sharswood. *Id.* (citing GEORGE SHARSWOOD, AN ESSAY ON PROFESSIONAL ETHICS 24 (2d ed. 1860)). Alabama was the first state to adopt a code of ethics for lawyers in 1887. Carol Rice Andrews, *The Lasting Legacy of the 1887 Code of Ethics of the Alabama State Bar Association*, in CAROL RICE ANDREWS ET AL., *GILDED AGE LEGAL ETHICS: ESSAYS ON THOMAS GOODE JONES' 1887 CODE AND THE REGULATION OF THE PROFESSION* 7, 7 (2003) [hereinafter ANDREWS, *GILDED AGE LEGAL ETHICS*]. The 1887 Alabama Code of Ethics provided that “[a]n attorney ‘owes entire devotion to the interest of his client, warm zeal in the maintenance and defense of his cause, and the exertion of the utmost skill and ability,’ to the end, that nothing may be taken or withheld from him.” CODE OF ETHICS para. 10 (Ala. State Bar Ass’n 1887), *reprinted in* ANDREWS, *GILDED AGE LEGAL ETHICS*, *supra*, at 45, 50.

47. *See generally* MODEL RULES OF PROF’L CONDUCT pmbl. (2002) (explaining that the lawyer has many roles in society, one of which is being a zealous advocate for her client).

48. The history of the development of ethics oaths and the evolution of ethical requirements for advocates in thirteenth-century England are detailed in Andrews, *supra* note 27, at 1387. Notably, the same regulations, promulgated in 1295, that required this early version of the duty of zeal to one’s client also provided for appointment of counsel at no cost to indigent litigants. *See id.* at 1394 (explaining that the regulations provided, besides “appointment of counsel for indigent litigants,” other standards, such as litigation fairness, candor, and reasonable fees (citing PAUL BRAND, *THE ORIGINS OF THE LEGAL PROFESSION* 154 (1992))). By 1312, lawyers in the ecclesiastical courts were required to represent the poor at no cost. *See id.* at 1394 & n.69 (explaining that the duty to serve the poor was documented as early as the twelfth century).

49. *See* WOLFRAM, *supra* note 45, at 579 (“Indeed, the approach of most discourses on the work of lawyers—as of all of the lawyer codes and treatises such as this—is to postulate a principle of zeal and then move quickly and more voluminously to hedge it about with necessary restrictions and qualifications.”).

50. Anita Bernstein, *The Zeal Shortage*, 34 HOFSTRA L. REV. 1165, 1165 (2006).

51. *Id.* at 1169.

theory; the perception and reality of underzealous representation continues to plague the world of indigent criminal defense.<sup>52</sup> No discussion of zeal in lawyering would be complete without a look at the classic articulation in defense of zeal: Lord Henry Brougham's statement regarding his defense of Queen Caroline in 1820.<sup>53</sup> Lord Brougham had evidence that, if presented publicly, would, at a minimum, embarrass King George IV and, at worst, could have led to the monarch being forced from the throne.<sup>54</sup> Speaking before the House of Lords, Lord Brougham explained in no uncertain terms that, if the case against Queen Caroline went forward, he would be bound only to achieve the interests of his client, without regard for the consequences to king or to country:

[A]n advocate, in the discharge of his duty, knows but one person in all the world, and that person is his client. To save that client by all means and expedients, and at all hazards and costs to other persons, and amongst them, to himself, is his first and only duty; and in performing this duty he must not regard the alarm, the torments, the destruction which he may ring upon others. Separating the duty of the patriot from that of an advocate, he must go on reckless of the consequences, though it should be his unhappy fate to involve his country in confusion.<sup>55</sup>

Lord Brougham's statement is widely—although not universally<sup>56</sup>—accepted today as an accurate articulation of the role of the lawyer within the American adversarial system of justice.<sup>57</sup>

52. See ALAN DERSHOWITZ, *THE BEST DEFENSE* 410 (1982) (“I have been accused several times of overzealousness. I confess my guilt. In a world full of underzealous, lazy, and incompetent defense lawyers, I am proud to be regarded as overzealous on behalf of my clients.”).

53. See Abbe Smith, *When Ideology and Duty Conflict*, in *ETHICAL PROBLEMS FACING THE CRIMINAL DEFENSE LAWYER* 18, 26 (Rodney Uphoff ed., 1995) (citing BROUGHAM, *LIFE AND TIMES OF LORD BROUGHAM* 405–07 (n.d.)).

54. *Id.*

55. *Id.* The evidence to which Brougham was referring involved general gossip regarding King George IV's “indiscretions,” but also specific evidence that the king had contracted a marriage with a Roman Catholic, a charge that, if proven, would have resulted in the king automatically being stripped of his crown. WOLFRAM, *supra* note 45, at 580 n.82 (citing DAVID MELLINKOFF, *THE CONSCIENCE OF A LAWYER* 188–89 (1973)).

56. See, e.g., Albert W. Alschuler, *How To Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 *MCGEORGE L. REV.* 291, 320–21 (1998) (urging a retreat from Brougham-style zeal and a return to “civility, trust, and fair dealing”).

57. More than 150 years later, the Mississippi Supreme Court provided its own version of Lord Brougham's defense of zeal. Declining to pre-emptively enjoin an attorney's anticipated breach of the Mississippi State Bar's Code of Professional Responsibility, the court explored the principle of zeal in a modern context:

A lawyer is and must be the ultimate advocate. He speaks for and in the interest of his client . . . And when his client is on the ropes, the lawyer, standing alone if need be, is that one person who, in the interest of his



Zeal is a crucial component of client-centered representation and is at the heart of meaningful lawyering. The client-centered approach promotes values of autonomy and dignity of the client and, therefore, of the system generally.<sup>58</sup> The recognition of zeal as a paramount principle is especially pronounced in the criminal defense context, where the stakes are such that the lawyer for the accused must adopt her client's cause as her own.<sup>59</sup> The Model Rules, however, consign zeal to the preamble, and effectively subordinate it to the principle of candor.<sup>60</sup>

Any good criminal defense lawyer begins from a presumption of zealous representation. Although sometimes criticized by scholars,<sup>61</sup> it is an article of faith among good defense lawyers—and

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client, skillfully defies the state, the opposing litigant, or whoever threatens.

The lawyer is prepared to stand against the forces of hell though others see that as his client's just desert. He assures all adversaries, in the vernacular of the streets, "You may get my client but you've got to come through me first."

*Thornton v. Breland*, 441 So. 2d 1348, 1350 (Miss. 1983). As colorfully as Lord Brougham, the Mississippi Supreme Court recognizes the sanctity of the role of lawyer as zealous advocate and the unique nature of that relationship. *See id.* at 1350 ("We regard the lawyer's right and responsibility of zealous advocacy on behalf of his client among the most precious forms of speech."). The question in *Thornton* was whether a court could enjoin the participation in a case of a lawyer who appeared to be in the process of violating one of the canons of that state bar's canons of ethics, or whether the appropriate course of action was to wait until after the violation had occurred before imposing any discipline on the attorney. *See id.* at 1348 ("In our view it is ordinarily inappropriate for this Court, or any other court of this state for that matter, to restrain or enjoin in advance threatened or anticipated violations of our Disciplinary Rules.").

58. *See* Kruse, *supra* note 8, at 369 (explaining the tension between lawyer neutrality and methods of lawyering based on the basic tenants of client-centered representation, and further describing various "autonomy-enhancing intervention[s]" that aid lawyers in knowing how and when to intervene in the client decision-making process); Charles Ogletree, *Beyond Justifications: Seeking Motivations To Sustain Public Defenders*, 106 HARV. L. REV. 1239, 1251 (1993) (arguing that the moral implications upon a criminal defense lawyer interfere with client autonomy when society holds the lawyer morally responsible in zealously advocating for the client's goals; however, "autonomy and equality suggest that . . . the client's conscience should be superior to the lawyer's." (quoting Stephen L. Pepper, *The Lawyer's Amoral Ethical Role: A Defense, a Problem, and Some Possibilities*, 1986 AM. B. FOUND. RES. J. 613, 617-18)).

59. *See* Bernstein, *supra* note 50, at 1166 (noting the contentions between zeal and ethics in writing and codes of professional conduct); Monroe H. Freedman, *In Praise of Overzealous Representation—Lying to Judges, Deceiving Third Parties, and Other Ethical Conduct*, 34 HOFSTRA L. REV. 771, 771 (2006) (arguing that zealous representation sometimes requires breaking disciplinary rules, but not unethically); Abbe Smith, *The Difference in Criminal Defense and the Difference It Makes*, 11 WASH. U. J.L. & POL'Y 83, 89-91 (2003) (discussing the interaction of zealous advocacy with other fundamental principles of law, and arguing that the former should trump other rules and principles).

60. Indeed, the preamble to the rules states that "[a]s advocate, a lawyer zealously asserts the client's position under the rules of the adversary system." MODERN RULES OF PROF'L CONDUCT pmb1. (2002).

61. *See* Alschuler, *supra* note 56, at 320-21 (citing scholars' declarations that zealous representation has changed the legal profession "for the worse").

appropriately so—that in the service of her client, a defense lawyer must pursue any avenue available within the bounds of the law. The zealous defense lawyer is bound to use any strategy not forbidden by law or ethics.<sup>62</sup> The promise of zealous representation, as embodied by Lord Brougham,<sup>63</sup> John Adams,<sup>64</sup> and other defense attorneys, depends upon a commitment to the client above any other loyalty.<sup>65</sup> Moreover, this “pervasive ideal”<sup>66</sup> has long been held to excuse the defense lawyer from other goals of the system, notably the search for truth and reliable outcomes at trial. Justice White explained that truth and reliable outcomes cannot be the goals of the defense lawyer:

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62. See ALAN DERSHOWITZ, *REASONABLE DOUBTS: THE O.J. SIMPSON CASE AND THE CRIMINAL JUSTICE SYSTEM* 145 (1996) (“What a defense attorney ‘may’ do, he *must* do, if it is necessary to defend his client. A zealous defense attorney has a professional obligation to take every legal and ethically permissible step that will serve the client’s best interest—even if the attorney finds the step personally distasteful.”). Abbe Smith has written extensively in defense of this notion of zeal and against the idea of the lawyer as having divided or conflicting loyalties. See, e.g., Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 HOFSTRA L. REV. 925, 958 (2000) (arguing that an attorney has an obligation to do whatever possible to successfully defend her client, by doing what is best for the client, and not what is best for the lawyer or the community at large); Smith, *supra* note 45, at 1589–91 (arguing that criminal defense lawyers are protectors of individuals, not communities, and that favoring a softer approach to zealous advocacy disadvantages the poor, black, and imprisoned). For a contrary position, see Anthony Alfieri, *Defending Racial Violence*, 95 COLUM. L. REV. 1301, 1306 (1995) (arguing against the practice of criminal defense lawyers using “racialized” defense theories on the grounds that the practice perpetuates racial stereotypes and arguing that criminal defense lawyers have a duty not only to their individual clients but to the communities to which those clients belong).

63. See *supra* notes 49–50 and accompanying text (surveying the development of zealous advocacy as an ethical canon).

64. In 1770, future-President Adams agreed to represent the British soldiers accused of murdering colonists in what came to be known as the Boston Massacre. His representation of the British soldiers, in the environment of pre-revolutionary Boston, was seen by many as something approaching treason. At trial, Adams won acquittals for the British officer and six of the eight soldiers who had been charged with murder. For an account of Adams’s involvement in the case within the context of criminal defense ethics, see Smith, *supra* note 2, at 38–43 (describing the history of John Adams as both a patriot and a defender of individual rights and concluding that although his practice suffered as a result of his defense work for the British, he was eventually more respected for his integrity and advocacy). See also DAVID McCULLOUGH, *JOHN ADAMS* 66 (2001) (noting John Adams’s belief that “no man in a free country should be denied the right to counsel and a fair trial”).

65. See Uelmen, *supra* note 24, at 122 (“I would take this position a step beyond simply rejecting the suggestion that lawyers owe some higher duty to their country. I would argue that it would be unethical for a lawyer who felt some higher duty to act upon it to the detriment of the client.”).

66. See FREEDMAN & SMITH, *UNDERSTANDING LAWYERS’ ETHICS*, *supra* note 40, at 71–127 (stating that zeal conditions all the other ethical obligations of an attorney by demanding entire devotion to the client’s best interests, and discussing zeal in the context of choosing clients, earning a living, moral limits, ethical rules, and the courtroom).

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[D]efense counsel has no . . . obligation to ascertain or present the truth. Our system assigns him a different mission. . . . Defense counsel need present nothing, even if he knows what the truth is. He need not furnish any witnesses to the police, or reveal any confidences of his client, or furnish any other information to help the prosecution's case. . . . In this respect, . . . 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.<sup>67</sup>

If the defense lawyer is not engaged in a search for the truth, as the other actors in the criminal justice system are, in what sense can she be obligated to uphold the moral integrity of the proceedings? Fundamentally, it is through fulfilling her obligation of zealous representation that she can maintain the integrity and dignity of the process.

### C. *The Obligation to Protect Confidences and Secrets*

For centuries, Anglo-American law has provided for both a privilege regarding confidential communications between attorney and client and a conceptually distinct, but related, principle that attorneys have a responsibility to protect the "confidences and secrets" of their clients.<sup>68</sup> Roman law contained the basis for a privilege for confidential communications between lawyer and client.<sup>69</sup> At least since the time of Elizabethan England, the principle

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

68. It is important to note the distinction between the attorney-client privilege and the much broader ethical requirement that the lawyer protect confidences and secrets obtained during the course of the representation. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (2002) (describing the instances when it is appropriate for an attorney to reveal information about her client, such as to prevent death or to comply with laws and court orders). Whereas the privilege applies to private communications between lawyer and client, the confidentiality rule applies to those communications, as well as any other information relating to the representation, regardless of the source of the information or the manner in which the information was obtained, as long as the information, if revealed, could be detrimental or embarrassing to the client. *See id.* 1.6 cmt. 3 ("The confidentiality rule . . . applies not only to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source. A lawyer may not disclose such information except as authorized or required by the Rules of Professional Conduct or other law."); *see also* FREEDMAN & SMITH, UNDERSTANDING LAWYERS' ETHICS, *supra* note 40, at 131 (explaining the differences between "confidence" and "secrets," the former referring to information protected by the attorney-client privilege and the latter, information that, if disclosed, would be "embarrassing or detrimental to the client"); *infra* note 74 (noting the ethical obligation against disclosing confidential information applies even if the information is known by others).

69. *See* Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487 (1928) (detailing the development of the attorney-client

of confidentiality—at least in broad contour—has been accepted without question in the English and American systems of justice.<sup>70</sup> Notwithstanding the regular critiques of the privileges as detracting from the search for truth in the legal system,<sup>71</sup> both the “confidential communication” privilege and the protection against revealing “confidences and secrets” are firmly embedded in the legal system and are under no threat of extinction.

The ABA’s Model Code of Professional Responsibility (“Model Code”) discusses the need for a broad rule prohibiting the disclosure of client confidences and secrets by an attorney.<sup>72</sup> “Both the fiduciary relationship existing between lawyer and client *and the proper functioning of the legal system* require the preservation by the lawyer of confidences and secrets of one who has employed or sought to employ him.”<sup>73</sup> A strict prohibition against disclosure of confidences and secrets, then, serves a broader purpose than simply aiding in an instrumental way a contractual or agency-based relationship; it is central to the integrity of the legal system. Endorsing the view that the attorney-client relationship is a “sacred trust,” the Model Code recognizes that the ethical obligation of an attorney to guard against disclosure of client confidences and secrets is much broader than the attorney-client privilege<sup>74</sup> and argues that public policy favors a very protective rule.<sup>75</sup>

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privilege and the idea of confidentiality between the two, starting with the Roman law and the relationship between servant and master in that society, and noting how Roman law was a foundation for the English rule, although its precedent is not documented).

70. 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290 (John T. McNaughton ed., rev. ed. 1961) (charting the history of the attorney-client privilege back to the reign of Elizabeth I). The improper revelation of client confidences or secrets was grounds for imprisonment by the fourteenth century in England. See Jonathan Rose, *The Ambidextrous Lawyer: Conflict of Interest and the Medieval and Early Modern Legal Profession*, 7 U. CHI. L. SCH. ROUNDTABLE 137, 194–95 (2000) (explaining cases where the lawyer was disloyal fall generally into two types: either the lawyer (1) uses the information to benefit himself or a third party or (2) discloses the information to the client’s adversary); see also Andrews, *supra* note 27, at 1395–96 (explaining that cases involving an attorney’s breach of client confidentiality were described as cases of deceit and disloyalty).

71. See, e.g., Albert W. Alschuler, *The Search for Truth Continued, the Privilege Retained: A Response to Judge Frankel*, 54 U. COLO. L. REV. 67, 67–68 (1982) (discussing Judge Frankel’s proposal of a rule to require disclosure of all relevant information in civil litigation to avoid privilege disputes).

72. See MODEL CODE OF PROF’L RESPONSIBILITY EC 4-1 (1983) (discussing the importance of a client to be able to openly discuss anything with her lawyer and the lawyer must also be able to use this trust to obtain information she needs to advocate on the client’s behalf).

73. *Id.* (emphasis added).

74. See *id.* (“The attorney-client privilege is more limited than the ethical obligation of a lawyer to guard the confidence and secrets of his client. This ethical

The obligation to protect confidences and secrets is clear, unambiguous, and mandatory: the lawyer must protect those confidences and secrets obtained in the course of the representation, the revelation of which could prove detrimental or embarrassing to her client. The clarity of this obligation stands in stark contrast to the more ethereal concepts of candor and zeal. Although the duties of candor and zeal must inform the actions and decisions of the lawyer, the “confidences and secrets” requirement provides more concrete guidance. By upholding its mandate, the defense lawyer fulfills both her obligation as an officer of the court and her obligation to provide zealous representation.

## II. *DUSKY* AND ITS DISCONTENTS: THE LAW OF COMPETENCY AND ITS LIMITATIONS

No person can be required to stand trial unless that person is legally competent,<sup>76</sup> and the conviction of a legally incompetent criminal defendant violates due process.<sup>77</sup> The federal constitutional baseline for legal competency to stand trial in a criminal case was articulated by the Supreme Court in *Dusky v. United States*:<sup>78</sup> a criminal defendant is competent to stand trial only if that person

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precept, unlike the evidentiary privilege, exists without regard to the nature or source of information or the fact that others share the knowledge.”).

75. MODEL CODE OF PROF'L RESPONSIBILITY Canon 4 (1983); *see also id.* at EC 4-1 n.1 (“To permit the attorney to reveal to others what is so disclosed, would be not only a gross violation of a sacred trust upon his part, but it would utterly destroy and prevent the usefulness and benefits to be derived from professional assistance.”). Courts have also endorsed a broad prohibition against disclosure of client confidences and secrets because of the “peculiarly intimate relationship” existing between attorney and client. *Id.* (quoting *Ellis-Foster v. Union Carbide & Carbon Corp.*, 159 F. Supp. 917, 919 (D.N.J. 1958)).

76. *See Drope v. Missouri*, 420 U.S. 162, 180 (1975) (“[E]vidence of a defendant’s irrational behavior, his demeanor at trial, and any prior medical opinion on competence to stand trial are all relevant in determining whether further inquiry [of a defendant’s competency to stand trial] is required.”); *Pate v. Robinson*, 383 U.S. 375, 385 (1966) (holding that defendant’s right not to be tried while incompetent was violated when adequate procedures were not adhered to, depriving defendant’s due process right to a fair trial). In the same way that the Due Process Clause of the Fifth Amendment forbids the trial of an incompetent defendant in a criminal case, the adjudication of an incompetent juvenile in a delinquency proceeding violates that child’s right to due process. *See, e.g., In re W.A.F.*, 573 A.2d 1264, 1267 (D.C. 1990) (holding that the procedures in place to ensure competency in an adult criminal trial apply equally to juvenile delinquency proceedings).

77. *See, e.g., Godinez v. Moran*, 509 U.S. 389, 412 (1993) (noting that it is well established that “criminal prosecution of an incompetent defendant” violates due process); *Medina v. California*, 505 U.S. 437, 453 (1992) (holding that the criminal trial of an incompetent defendant violates due process); *Pate*, 383 U.S. at 378 (stating that “conviction of an accused person while he is legally incompetent violates due process.”).

78. 362 U.S. 402 (1960) (per curiam).

possesses both a factual and a rational understanding of the proceedings against her and has the present ability to consult with her lawyer with a reasonable degree of rational understanding.<sup>79</sup> The Supreme Court has repeatedly affirmed that this requirement that any defendant be competent to understand and assist in the proceedings is central to the American criminal justice system,<sup>80</sup> and the prohibition against trying an incompetent accused is deeply embedded in common law.<sup>81</sup> The reasons for the prohibition are premised both on the rights of the individual and, more broadly, on the moral integrity of the criminal justice system.<sup>82</sup> A system that tolerates the trial of a person who is essentially defenseless and, perhaps, morally blameless cannot be said to have integrity; further, trial of such a person would offend deeply held social notions of the dignity of the individual.<sup>83</sup>

*Dusky* dealt specifically with the competency of a defendant to stand trial and left open the issue of how courts were to evaluate the competency of defendants to make other decisions or to waive

79. *Id.*

80. See, e.g., *Drope*, 420 U.S. at 172 (“The prohibition [against trying a criminal defendant who is mentally incompetent] is fundamental to an adversary system of justice.”); *Cooper v. Oklahoma*, 517 U.S. 348, 356 (1996) (describing cases from the eighteenth century in which court required juries to consider the competency of defendants); *Pate*, 383 U.S. at 384 (rejecting the argument of the government that the defendant had waived the issue of competence by failing to raise it, because such a failure could not constitute a knowing and intelligent waiver).

81. See *Drope*, 420 U.S. at 171 (noting that the common law competency requirement is necessary because a mentally incompetent defendant is “in reality afforded no opportunity to defend himself”) (internal quotation marks omitted).

82. The question of competency to stand trial is, of course, a separate analytical question from whether a defendant is criminally responsible for her actions. A defendant may have a valid defense of diminished capacity or insanity and still be perfectly competent to stand trial and, conversely, a defendant may have been entirely lucid during the commission of an offense but later become incompetent, by reason of mental illness, injury, or disease. The constitutional requirement that a criminal defendant be legally competent stands entirely apart from the question of availability of any “mental health” defenses that may mitigate criminal culpability. Blackstone wrote that:

[I]f a man in his sound memory commits a capital offence, and before arraignment for it he becomes mad, he ought not to be arraigned for it, because he is not able to plead to it with that advice and caution that he ought. And if, after he has pleaded, the prisoner becomes mad, he shall not be tried; for how can he make his defence?

WILLIAM BLACKSTONE, 4 COMMENTARIES \*24.

83. See Brief of the American Ass’n on Mental Retardation et al. as Amici Curiae Supporting Petitioner at 13, *Penry v. Johnson*, 532 U.S. 782 (2001) (No. 00-6677), 2001 WL 30662, at \*13 (observing that “[c]ompetence to stand trial is a unique issue at the intersection of law and mental disability” and stating that preventing the trial of incompetent individuals provides important protections for both the defendant and court).

particular rights in connection with their cases.<sup>84</sup> In *Godinez v. Moran*,<sup>85</sup> the Supreme Court held that the standard for competency to stand trial is identical to the standard of competency to waive constitutional rights, such as the right to counsel and the right to trial.<sup>86</sup> The extremely low standard of competency articulated in *Dusky* has become the sole test that courts use in determining whether a defendant is or is not competent to proceed in a criminal case.<sup>87</sup> Criticisms of this unitary approach to competency were anticipated by Justice Blackmun, who argued in dissent that “[c]ompetency for one purpose does not necessarily translate to competency for another purpose.”<sup>88</sup> Blackmun opposed the adoption of one unitary standard for competency and argued instead that the competency standard should vary depending on the particular question facing the putatively incompetent defendant.<sup>89</sup> Since *Godinez*, the majority’s adoption of the “all or nothing” unitary standard has been widely criticized by practitioners, academics, and mental health professionals, as being overly simplistic and unworkable.<sup>90</sup> Indeed, the Court recently retreated from the notion of a unitary standard of competency and held, in *Indiana v. Edwards*,<sup>91</sup> that a defendant who is competent to proceed to trial is not necessarily competent to waive counsel.<sup>92</sup> Although the *Edwards* Court stopped short of repudiating the logic of *Godinez*, the decision refers approvingly to the existence of differing degrees of “adjudicative competence” and certainly seems to undercut the

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84. *Dusky v. United States*, 362 U.S. 402, 403 (1960) (per curiam); see *Indiana v. Edwards*, 128 S. Ct. 2379, 2380 (2008) (explaining that *Dusky* did not consider the relation of the mental competence standard to the self-representation right).

85. 509 U.S. 389 (1993).

86. *Id.* at 396–99.

87. Of course, *Dusky* and *Godinez* establish a federal constitutional minimum for determination of competency. States remain free to require a showing of competency by a higher standard, which would be more protective of due process concerns. *Id.* at 402.

88. *Id.* at 413 (Blackmun, J., dissenting).

89. See *id.* (arguing that Supreme Court cases have always recognized that a defendant’s mental condition may be relevant to more than one legal issue, each governed by distinct rules reflecting quite different policies) (internal quotations omitted).

90. See, e.g., JOHN PARRY & ERIC Y. DROGIN, *MENTAL DISABILITY LAW, EVIDENCE, AND TESTIMONY* 8–9 (2007) (discussing the MacArthur Adjudicative Competence Study which found, inter alia, that defendants may be incompetent for one legal purpose but not for another); Sara Longtain, *The Twilight of Competency and Mental Illness: A Conciliatory Conception of Competency and Insanity*, 43 HOUS. L. REV. 1563, 1575–78 (2007) (denoting that several scholars support splitting the determination of competency into two: competence to assist counsel and decisional competence).

91. 128 S. Ct. 2379 (2008).

92. See *id.* at 2394 (holding only that lack of mental competence can, under some circumstances, form a basis for denying the right to proceed pro se).

holding of *Godinez*.<sup>93</sup> Both substantively and procedurally, the doctrine of competency in the criminal context is ripe for fresh theorizing and development.

Procedurally, the question of which party bears the burden of proof on the question of competency varies based on jurisdiction and, in many jurisdictions, there is no clear answer.<sup>94</sup> Because there is often no clear allocation of burden of proof<sup>95</sup> and no clear

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93. *See id.* at 2386 (explaining that within each domain of adjudicative competence—competence to assist counsel and decisional competence—the data indicate that understanding, reasoning, and appreciation of the charges against a defendant are separable and somewhat independent aspects of functional legal ability).

94. *Compare* *Smith v. State*, 918 A.2d 1144, 1148 (Del. 2007) (asserting that the government bears the burden of proof by a preponderance of the evidence, regardless of whether the defendant is a juvenile or an adult), *Commonwealth v. Brown*, 872 N.E.2d 711, 722 (Mass. 2007) (stating that the government bears the burden of proving competency by a preponderance of the evidence), *and State v. Ganpat*, 732 N.W.2d 232, 238 (Minn. 2007) (noting that under state rules of criminal procedure the government must show the defendant's competency by a "fair preponderance of the evidence"), *with Velazquez v. State*, 655 S.E.2d 806, 809 (Ga. 2008) (declaring that the defendant bears the burden of proving incompetency by a preponderance of the evidence), *Ross v. State*, 98-DP-01038-SCT (¶ 90) (Miss. 2007), 954 So. 2d 968, 1007 (expressing that where there is a serious question about the sanity or competency of a defendant to stand trial, it naturally falls upon the defendant to go forward with the evidence to show her probable incapacity to make a rational defense), *and Commonwealth v. Rainey*, 928 A.2d 215, 236 (Pa. 2007) (indicating that the burden is on the defendant to prove, by a preponderance of the evidence, that she was incompetent to stand trial).

95. The federal statute dealing with the competency of criminal defendants does not explicitly allocate a burden of proof on the issue. *See* 18 U.S.C. § 4241 (2006) (allowing either the defendant or government attorney to file a motion for a competency hearing). Notably, in *Cooper v. Oklahoma*, the Court, in dicta, cited this provision and stated: "Congress has directed that the accused in a federal prosecution must prove incompetence by a preponderance of the evidence." 517 U.S. 348, 362 (1996). This appears, however, to be a mistake, because nothing in the text of § 4241 allocates the burden in this manner, and the vast majority of federal cases construing the statute place the burden on the *government*, rather than on the accused. Indeed, virtually every federal circuit to address the issue has construed the statute to place the burden of proof on the prosecution. *See, e.g., United States v. Hoskie*, 950 F.2d 1388, 1392 (9th Cir. 1991) (asserting that the government has the burden of demonstrating by a preponderance of the evidence that the defendant is competent to stand trial); *United States v. Hutson*, 821 F.2d 1015, 1018 (5th Cir. 1987) (stating that the state must prove by a preponderance of evidence that the defendant was competent to stand trial); *Brown v. Warden, Great Meadow Corr. Facility*, 682 F.2d 348, 349 (2d Cir. 1982) (citing cases supporting the view that once a defendant's competency has been called into question, the burden rests on the prosecution to prove the defendant is competent to stand trial); *United States v. Hollis*, 569 F.2d 199, 205 (3d Cir. 1977) ("[N]o burden of proof rests on a defendant to demonstrate his own incompetency."); *United States v. Makris*, 535 F.2d 899, 906 (5th Cir. 1976) ("There can be no question that in federal criminal cases the government has the burden of proving defendant competent to stand trial."); *United States v. Mason*, 935 F. Supp. 745, 759–60 (W.D.N.C. 1996), *aff'd*, 121 F.3d 701 (4th Cir. 1997) (stating that the government has the burden of proof to show by a preponderance of the evidence the defendant's competency). In addition, federal law explicitly places the burden on the accused to establish an insanity defense. *See* 18 U.S.C. § 17(b) (asserting that the defendant has the burden of proving her



articulation of the standard of proof in this area,<sup>96</sup> the opinion and arguments of the defendant's own lawyer are often extremely significant in the determination of competency. The most common approach (and the most sensible) is a burden-shifting mechanism by which the party placing competency in question bears the burden of production on the issue of competency, but the prosecution bears the burden of persuasion.<sup>97</sup> In the typical case, then, the defendant will bear the burden of production,<sup>98</sup> while the government bears the burden of persuasion on the ultimate issue.<sup>99</sup>

insanity defense by clear and convincing evidence). The fact that Congress does not similarly allocate the burden of proof with regard to competency suggests that Congress did not intend to force the incompetent accused to bear such a burden.

96. In *Cooper*, the Court declined to articulate a bright-line rule regarding the appropriate standard of proof—or even to place the burden of proof squarely on the government. 517 U.S. at 348. The Supreme Court recognized, however, the extraordinary interest that an incompetent accused has in not being tried. *Id.* at 364 (citing *Santosky v. Kramer*, 455 U.S. 745, 756 (1982)). The Court reasoned: “By comparison to the defendant’s interest [in not being forced to trial while incompetent], the injury to the State of the opposite error—a conclusion that the defendant is incompetent when he is in fact malingering—is modest.” *Id.* at 365. Notwithstanding the Supreme Court’s assessment of the relative potential injuries in such a proceeding, however, the Court has declined to fashion a rule that placed the burden of proof invariably with the prosecution. States are free to place that burden on either the prosecution or the accused, subject to certain limitations, without violating due process. See *Medina v. California*, 505 U.S. 437, 449–52 (1992) (finding no violation of due process where the state legislature had statutorily imposed on the defendant the burden to prove her own incompetency by a preponderance of the evidence). Due process does require that a defendant not be compelled to prove her incompetency by any standard of proof higher than a preponderance of the evidence. *Cooper*, 517 U.S. at 358–62 (finding a violation of due process where the state’s statute created a presumption of competency and placed the burden on the accused to prove incompetency by clear and convincing evidence).

97. One can think of this burden-shifting scheme as beginning with a presumption of competency that is overcome by *some* evidence of incompetency.

98. See, e.g., *United States v. Riggin*, 732 F. Supp. 958, 963 (S.D. Ind. 1990) (“On principles of fundamental fairness and due process, courts have appropriately refused to place the burden of proving incompetency on the defendant. Thus the burden of proving competency . . . would implicitly fall on the government.”); see also *Diaz v. State*, 508 A.2d 861, 863 (Del. 1986) (asserting that the prosecution must prove the defendant’s competence); *People v. McCullum*, 362 N.E.2d 307, 309 (Ill. 1977) (finding that it was not the defendant’s burden to prove fitness to stand trial when she was the one to initially raise the competency issue); *Commonwealth v. L’Abbe*, 656 N.E.2d 1242, 1244 (Mass. 1995) (explaining that the defendant claimed he was not competent to stand trial, thereby placing the burden on the Commonwealth to prove his competency); *State v. Champagne*, 497 A.2d 1242, 1245 (N.H. 1985) (holding that, as a matter of law “the State . . . did not meet its burden of proving . . . that the defendant [had] the ability to consult with his lawyer with a reasonable degree of rational understanding”); *State v. Chapman*, 684 P.2d 1143, 1144 (N.M. 1984) (deciding whether the court of appeals erroneously substituted its judgment for that of the jury in finding that the facts did not support the defendant’s competence); *State v. Heger*, 326 N.W.2d 855, 858 (N.D. 1982) (“We agree with the majority of courts that the prosecution has the burden to establish a defendant’s capacity to stand trial.”); *State v. Garfoot*, 558 N.W.2d 626, 628 (Wis. 1997) (indicating that the defense attorney requested a competency hearing for his client); *Engle v. State*, 821 P.2d 1285, 1287–88 (Wyo. 1991) (“The party seeking to show

Placing the burden of proof on the government makes sense because of the well-settled and fundamental presumption against trying an incompetent person.<sup>100</sup> It is preferable for courts to err on the side of competent defendants not being tried by means of a criminal trial (and rather treated, if appropriate, through means of civil commitment) than on the side of incompetent defendants, unable to understand the proceedings against them or to assist in their own defense, being forced to trial. By placing the burden of proof on the government, courts prevent the obvious unfairness of calling upon an accused to somehow prove his competency, which is the very thing that is genuinely in question.<sup>101</sup>

But for all this talk of competency, what does it require? In *Riggins v. Nevada*,<sup>102</sup> Justice Kennedy, in a concurring opinion, described competency as follows:

Competence to stand trial is rudimentary, for upon it depends the main part of those rights deemed essential to a fair trial, including the right to effective assistance of counsel, the rights to summon, to confront, and to cross-examine witnesses, and the right to testify on one's own behalf or to remain silent without penalty for doing so.<sup>103</sup>

Obviously, the competency *vel non* of a defendant is not fixed for all time once a determination is made.<sup>104</sup> Defendants can become

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competence to stand trial has the burden to show it. . . . Thus, the State had the burden of proof at the competency hearing.” (internal citation omitted).

99. The United States Court of Appeals for the Second Circuit, in *Brown v. Warden, Great Meadow Correctional Facility*, set out this standard clearly:

In the absence of any indications to the contrary, a defendant charged with criminal behavior is presumed to be mentally competent to stand trial. However, once a defendant's competency has been called into question, either by the defendant or the prosecution expressly raising the issue, or through the presence of “warning signals” which cause the court to raise the question *sua sponte*, the burden is placed on the prosecution to prove that the defendant is mentally competent to stand trial.

682 F.2d 348, 349 (2d Cir. 1982). To say that there is initially a “presumption of competency” is only to say that, in the ordinary case, the trial of the person charged with a crime will follow in the normal course of events. Only if there is some reason to doubt the competency of the accused, then does it become an issue. See *United States v. DiGillo*, 538 F.2d 972, 988 (3d Cir. 1976) (finding that evidence showing competency must be more persuasive than that showing incompetency which necessitates that the burden of proof cannot be placed on the defendant).

100. *Cooper*, 517 U.S. at 353.

101. See *Riffin*, 732 F. Supp. at 963 (citing *DiGillo*, 538 F.2d at 972) (listing principles of fundamental fairness and due process as the key reasons for refusing to place the burden of proving incompetency on the defendant).

102. 504 U.S. 127 (1992).

103. *Id.* at 139–40 (citing *Drope v. Missouri*, 420 U.S. 162, 171–72 (1975)).

104. See *Indiana v. Edwards*, 128 S. Ct. 2379, 2386 (2008) (“Mental illness itself is not a unitary concept. It varies in degree. It can vary over time. It interferes with an individual's functioning at different times in different ways.”).

competent to stand trial after having been found incompetent, and the opposite can occur as well. Due process requires that an accused must be competent at all stages of the proceedings against her.<sup>105</sup> Notwithstanding the Supreme Court's holding in *Godinez*, competency—as a logical matter—is much more than simply competency to stand trial. A defendant must, for example, possess a rational and a factual understanding of the advantages and disadvantages of pleading guilty, of choosing between a jury trial and a bench trial, or of choosing between different defense theories. Depending on the circumstances of the case, this understanding may require a higher level of sophistication than an understanding of the trial process itself.

Complicating the issue of competency is the level of complexity of charges the defendant is facing. The ABA's Criminal Justice Mental Health Standards state that any evaluation of competency must consider, *inter alia*, whether the accused's ability to understand the process is proportional to the relative complexity and severity of the case.<sup>106</sup> If this is true, then the same person at the same mental stage might be competent to proceed to trial in a drug possession case but be incompetent to stand trial in a complex conspiracy case, for example. *Dusky* seems to anticipate this "sliding scale" of competency by focusing on the defendant's ability to possess a reasonable degree of rational understanding of the proceedings against her, suggesting that the standard for competency could vary based upon the nature of the proceedings the defendant faces.<sup>107</sup> Approaching "decisional competency" as the ability to make a rational choice on a particular

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105. See WILLIAM BLACKSTONE, 4 COMMENTARIES \*24 (stating that a defendant must be competent throughout all phases of the criminal process such that, if the defendant "loses his senses" after conviction but before judgment is entered, judgment will be stayed; or if the defendant becomes incompetent after judgment but prior to its execution, then execution of the judgment will be stayed); see also GARY B. MELTON ET AL., PSYCHOLOGICAL EVALUATIONS FOR THE COURTS: A HANDBOOK FOR MENTAL HEALTH PROFESSIONALS AND LAWYERS 126–27 (3d ed. 2007) (tracing the common law roots of the principle that an accused must be competent throughout every part of the court proceedings against him).

106. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.1, 7-152, 7-154 (1989); see Richard J. Bonnie, *The Competence of Criminal Defendants: Beyond Dusky and Drope*, 47 U. MIAMI L. REV. 539, 548 (1993) (distinguishing between competency to proceed and "decisional competency").

107. See *Dusky v. United States*, 362 U.S. 402, 402–03 (1960) (per curiam) (agreeing that the test for competence is whether the defendant has "sufficient present ability to consult with his lawyer with a reasonable degree of rational understanding – and whether he has a rational as well as factual understanding of the proceedings against him").

question in furtherance of a defense strategy is more nuanced and useful than the unitary approach of *Godinez*.<sup>108</sup>

The traditional *Dusky* competency test calls for far too narrow an inquiry into the mental capacity of the accused and, accordingly, allows defendants who lack the ability to meaningfully assist in their own defense to be put on trial.<sup>109</sup> A meaningful alternative test would focus more broadly on the critical faculties of the accused—i.e., the ability of the accused to exercise “basic rationality and self-regard.”<sup>110</sup> To be considered competent, according to this broader and more meaningful inquiry, a criminal defendant would have to possess: (1) a rudimentary understanding of the criminal process; (2) the ability to give non-delusional reasons for making the proposed decision; and (3) sufficient self-regard to consider alternative reasons.<sup>111</sup> This proposal is an improvement over the *Dusky* test because it allows for a more nuanced understanding of competency and allows for an understanding of different levels of decisional competency. The “basic rationality and self-regard” test draws heavily on Bonnie’s concept of “decisional competency.”<sup>112</sup> Either proposal would constitute a significantly higher—and more accurate—standard of determining competency of a criminal defendant to meaningfully take part in her own defense.

### III. ETHICAL GUIDANCE IN DEFENDING A MENTALLY IMPAIRED CLIENT

The Model Rules of Professional Conduct are not helpful in guiding a criminal defense lawyer representing a client with mental

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108. Richard Bonnie divides the competency inquiry into two parts: competency to assist counsel and decisional competency. Bonnie, *supra* note 106, at 548. While he posits the ability to assist counsel as a “foundational requirement” to adjudication, he argues that decisional competency is a “contextualized concept,” that should be assessed in the context of the decisions, if any, that a defendant is called upon to make during the course of a trial or a case. *Id.* One of the “cognitive tasks” that Bonnie believes is a necessary component of “decisional competency” is the ability “to understand and choose among alternative courses of action.” *Id.* at 556.

109. Christopher Slobogin & Amy Mashburn, *The Criminal Defense Lawyer’s Fiduciary Duty to Clients with Mental Disability*, 68 *FORDHAM L. REV.* 1581, 1590–94 (2000).

110. *See id.* at 1584 (explaining that this test is probably more demanding than the Supreme Court’s test but significantly less stringent than some lower courts).

111. *Id.*

112. *See Bonnie, supra* note 106, at 555 (characterizing “decisional competence” as independently significant if and only if defendant is competent to assist counsel; as required only when a decision must be made by the defendant; promoting interest in autonomous decision-making by defendant; as understanding that the abilities required, and legal test, vary according to decision-making; and as incompetence not precluding adjudication).

impairment.<sup>113</sup> Rule 1.14, entitled “Client with Diminished Capacity,” offers no substantive guidance to the lawyer other than to maintain that “as far as reasonably possible . . . a normal client-lawyer relationship with the client.”<sup>114</sup> The Rule goes on to provide for the taking of “reasonably necessary protective action” to prevent harm to a client, including consultation with others who “have the ability to take action to protect the client and, in appropriate cases, seeking the appointment of a guardian *ad litem*, conservator or guardian.”<sup>115</sup> Finally, the Rule deals with the intersection of the lawyer’s duty to protect client confidences and secrets, and the lawyer’s duty to protect a client with diminished capacity. While acknowledging that the rule against disclosure of confidential information applies to information relating to the representation of a client with diminished capacity, the Rule qualifies this by clarifying that the lawyer is impliedly authorized to reveal information about a client with diminished capacity, “but only to the extent reasonably necessary to protect the client’s interests.”<sup>116</sup>

Model Rule 1.14 and its comments implicitly recognize the conflict between autonomy and paternalism. Comment 8 recognizes that a lawyer’s raising of the issue of diminished capacity could lead to her client being involuntarily committed: “The lawyer’s position in such cases is an unavoidably difficult one.”<sup>117</sup> Comment 6 notes that “the lawyer may seek guidance from an appropriate diagnostician.”<sup>118</sup> Apart from recognizing the “unavoidably difficult” position of the lawyer in such a situation, however, the Model Rules provide no real help to the lawyer struggling with this issue.<sup>119</sup>

Most commentators place upon the defense attorney an obligation to raise the issue of competency of the defendant any time that the attorney believes that his client may not be competent.<sup>120</sup> Such an

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113. See Jan Ellen Rein, *Ethics and the Questionably Competent Client: What the Model Rules Say and Don't Say*, 9 STAN. L. & POL'Y REV. 241, 242 (1998) (“[N]one of the rules and authorities give the lawyer adequate guidance for assessing capacity or deciding how to proceed if doubts exist. Some rules are Delphic at best. The Model Rules place burdens on lawyers, but neglect to say how the attorney can meet those burdens without violating other *mandatory* rules of professional conduct.”).

114. MODEL RULES OF PROF'L CONDUCT R. 1.14(a) (2002).

115. *Id.* at 1.14(b).

116. *Id.* at 1.14(c).

117. *Id.* at 1.14 cmt. 8.

118. *Id.* at 1.14 cmt. 6.

119. See *supra* notes 20, 113 (commenting on the lack of meaningful guidance offered by existing ethical codes with respect to attorneys representing mentally impaired clients).

120. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(c) (1989) (prescribing that when defense counsel has a good-faith doubt about her client's competency, she should move for a competency evaluation, even if the client objects to such a

approach is not justified by history, necessity, or logic and undermines the integrity of the attorney-client relationship and, therefore, the integrity of the criminal justice system. Standard 7-4.2(c) of the ABA's Criminal Justice Mental Health Standards states:

Defense counsel should move for evaluation of the defendant's competence to stand trial whenever the defense counsel has a good faith doubt as to the defendant's competence. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection. In any event, counsel should make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.<sup>121</sup>

This proposal is outrageous for three reasons. First, it eradicates the role of the attorney as advocate for his or her client, in that it appears to require the attorney to raise the issue of competency without any regard for the potentially disastrous consequences for her client. Second, it obligates the attorney not only to advise the court of the potential issue of competency, but also to advise the prosecutor of her concerns. Finally, it requires defense counsel to reveal not only her good-faith doubt about her client's competency but also the facts that underlie that belief. Such a proposal contravenes the ethical requirement that a defense attorney zealously represent her client and that the defense attorney protect client confidences and secrets. Nevertheless, this standard has been substantially adopted by the Wisconsin Supreme Court,<sup>122</sup> the Wyoming Supreme Court,<sup>123</sup> the Washington Supreme Court,<sup>124</sup> as well as the United States Court of Appeals for the Tenth Circuit.<sup>125</sup>

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motion); *see also* Richard J. Bonnie, *The Competence of Criminal Defendants with Mental Retardation To Participate in Their Own Defense*, 81 J. CRIM. L. & CRIMINOLOGY 419, 419–20 (1990) (explaining that the obligation of the trial judge to hold a competency hearing arises at all stages of the proceeding and whether or not the defense has requested one); James A. Cohen, *The Attorney-Client Privilege, Ethical Rules, and the Impaired Criminal Defendant*, 52 U. MIAMI L. REV. 529, 532 (1998) (contrasting that while a defense attorney is required to alert the court of the possibility that her defendant is incompetent, ethical rules do not allow her to disclose that information if the attorney received it in confidence).

121. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(c) (1989).

122. *See State v. Johnson*, 395 N.W.2d 176, 182 (Wis. 1986) (holding that where defense counsel has reason to doubt her client's competency, she is obligated to raise the issue with the trial court).

123. *See DeShazer v. State*, 74 P.3d 1240, 1248 (Wyo. 2003) (observing that Wyoming law is in accordance with the ABA's Criminal Justice Mental Health Standard 7-4.2).

124. *See In re Fleming*, 16 P.3d 610, 611 (Wash. 2001) (en banc) (finding ineffective assistance of counsel when counsel knew there was an expert opinion that the defendant was incompetent to stand trial but failed to raise the issue at any point during the proceedings).

125. *See United States v. Boigegrain*, 155 F.3d 1181, 1187 (10th Cir. 1998) (holding that when a lawyer has reason to believe that her client may not be mentally

The scholarship on the ethics of criminal defense routinely cites this “obligation” as though it were uncontroversial.<sup>126</sup>

The commentary to Standard 7-4.2 addresses the “apparent conflict” that can befall a defense lawyer representing a potentially incompetent client “between the obligations . . . (1) effectively to represent a client’s best interests and (2) to reflect candor toward the tribunal.”<sup>127</sup> The commentary recognizes the various situations in which the defense counsel’s decision to raise the spectre of incompetency could harm the potentially incompetent client but indicates that the risk of negative outcomes in such situations is outweighed by the need to maintain the integrity of the proceedings as well as due process concerns.<sup>128</sup> Ultimately, the commentary makes explicit what the Standard suggests: that in situations involving a potentially incompetent client, the defense lawyer’s duty of zealous advocacy must yield to the defense lawyer’s duty of candor toward the tribunal. The commentary reads: “Standard 7-4.2(c) recommends a clear requirement that defense counsel raise the issue of a defendant’s present mental incompetency whenever counsel has a good faith doubt about competence. It resolves the difficult conflict of concerns inherent in such circumstances . . . in favor of counsel’s obligation to the court.”<sup>129</sup>

The additional guidance provided by the commentary to defense counsel will certainly be of cold comfort to the individual defendants

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competent to stand trial, she does not render ineffective assistance of counsel by making her concerns known to the court).

126. See Slobogin & Mashburn, *supra* note 109, at 119 (arguing that the attorney has an ethical obligation to ensure the client receives treatment to restore competency, even if that obligation requires raising the incompetency issue in court).

127. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(c) cmt. (1989). Of course, the defense lawyer is under no obligation to represent the client’s “best interests,” but, rather, the client’s stated desires.

128. *Id.*; Norma Schrock, *Defense Counsel’s Role in Determining Competency To Stand Trial*, 9 GEO. J. LEGAL ETHICS 639, 639 (1996). Schrock proposes that all attorneys be required to present to the court any reasonable doubts of a criminal defendant’s competency and that defense attorneys could testify at competency hearings, even if testifying is against her client’s wishes. *Id.* at 655, 663. Schrock’s proposal would deprive the defense lawyer of any discretion when representing a marginally competent client, regardless of the seriousness of the charge or the actual consequences to the client of a finding of incompetency. Her proposal is based on a neat distinction between the “moral judgment of the criminal trial” on the one hand and the “protective intervention in lives of the mentally ill” on the other hand. *Id.* at 664. What her proposal fails to account for, however, is the real-world manifestation of a finding of incompetency. Although her proposal is premised on a defense of personal autonomy, its actual result could well have the exact opposite effect, depriving marginally competent defendants—or those acting on their behalf—of the ability to choose between different courses of action, and different consequences.

129. CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(c) cmt. (1989).

being harmed by their lawyers' compliance with Standard 7-4.2(c). The commentary advises that if compliance with the requirement of notifying the court to a good-faith doubt about a client's competency would cause harm to that client, counsel should work to reform the system so that future similar defendants will not face such a dilemma:

The conflict, if it exists, arises from a perceived pragmatic failure of the criminal justice system to live up to its promise, in that the deficiencies in the system of incompetence evaluation and treatment implicitly threaten excessive or inappropriate sanctions against defendants. The standard takes the position that, if such problems exist, the thrust should be to correct the problems not to permit a pragmatic but philosophically unsound mechanism to avoid them. If elements of unfairness are eliminated from the system, defendants will have little reason to prefer a pragmatic avoidance of the competence issue in favor of trial on the merits.<sup>130</sup>

No mention is made in the commentary about how the individual defendant or lawyer is to achieve such systemic reform, or what the defendant should do while awaiting such reform.

An example of the harm that can be done by a lawyer adhering to the advice of Standard 7-4.2(c) can be seen in the case of *O'Beirne v. Overholser*.<sup>131</sup> Herbert O'Beirne faced a charge of petty larceny, in the Municipal Court for the District of Columbia, for stealing three watches and two rings valued at less than one-hundred dollars.<sup>132</sup> The maximum penalty for petty larceny at the time of O'Beirne's case was a term of imprisonment for one year.<sup>133</sup> O'Beirne's lawyer "interjected the issue of insanity" prior to trial and succeeded in having his client found not guilty by reason of insanity.<sup>134</sup> In what can only be described as a "lawyer's victory," O'Beirne was then committed to the local mental hospital, St. Elizabeths, for an indefinite term.<sup>135</sup> Almost four years later, O'Beirne—still

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130. *Id.* (internal citations omitted).

131. 193 F. Supp. 652 (D.D.C.), *rev'd on other grounds*, 302 F.2d 852 (D.C. Cir. 1961). *O'Beirne* predates the promulgation of the ABA's Criminal Justice Mental Health Standards.

132. *Id.* at 657.

133. *Id.* at 654.

134. *Id.* Procedurally, the case was somewhat more complicated. O'Beirne had initially entered a plea of guilty to the charge of petty larceny and received a one year sentence. *Id.* at 657. Through counsel, he then successfully moved to withdraw his guilty plea and vacate the judgment against him. *Id.* Upon his withdrawal of the guilty plea, O'Beirne remained incarcerated but in a pre-trial posture, and was moved between St. Elizabeths Hospital, the District of Columbia Jail, and the psychiatric ward of the District of Columbia General Hospital. *Id.* Only after almost a year of mental examinations and pre-trial detention was O'Beirne finally brought to trial, in which he was found not guilty by reason of insanity. *Id.* at 658.

135. *Id.* at 657.



involuntarily confined at St. Elizabeths—filed a petition for a writ of habeas corpus, seeking his release from the mental hospital.<sup>136</sup> In granting his petition—a decision that was later reversed by the United States Court of Appeals for the District of Columbia Circuit<sup>137</sup>—the district judge criticized the lawyer's decision to raise the issue of his client's mental health:

It may not be inappropriate to observe that counsel for defendants in borderline cases in which the offense is of a type that would carry at most a short term of imprisonment, frequently do their clients a disservice when they request a mental examination. Often the outcome of the examination is that the defendant is found competent and yet he will have been incarcerated for several months in the criminal ward of a mental hospital amidst madmen while the study of his mental state is being conducted; and if he is eventually convicted and sentenced to imprisonment, his incarceration is prolonged that much longer. On the other hand, if he is acquitted on the ground of insanity, he runs the risk of being incarcerated for a much longer period than might have been the case if he were sentenced to a short term in jail. Counsel for defendants are advocates and must have the courage to represent their clients' best interests within the orbit of ethical practice. They must not be deterred by fear of criticism if they would act according to the highest traditions of the bar. It is not their function to vindicate the public interest. This is the duty of the [prosecutor], whose position is not that of a partisan advocate. . . . Mental examinations and the defense of insanity are better reserved for capital cases, as well as for cases in which the defendant runs the risk of being sentenced to imprisonment for a long term.<sup>138</sup>

The observations of the district judge in *O'Beirne* are unremarkable to any lawyer who has wrestled with the consequences of choosing whether to raise the issue of competency.

As a practical matter, this decision is one like any other of the myriad of strategic decisions that defense counsel must make and involves the same considerations: do the potential benefits from this proposed move outweigh the potential harm to my client, and what

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136. *Id.* at 654.

137. *See* *Overholser v. O'Beirne*, 302 F.2d 858 (D.C. Cir. 1961). In a fact-intensive opinion, the Court of Appeals for the District of Columbia Circuit reversed the district court, holding that O'Beirne failed to present sufficient evidence that he would not be dangerous in the future if released from the mental hospital.

138. *O'Beirne v. Overholser*, 193 F. Supp. 652, 661 (D.D.C.), *rev'd on other grounds*, 302 F.2d 852 (D.C. Cir. 1961).

are the relative likelihoods of both the benefit and the harm?<sup>139</sup> What is absent from the *O'Beirne* opinion—and from some of the more “practical” advice on the issue—is an attempt to harmonize or reconcile this pragmatic approach with the attorney’s ethical duty of candor toward the tribunal. As this Article demonstrates, an attorney who takes the advice of the judge in *O'Beirne*—that is, the attorney who makes her decision based on a reasoned analysis of the benefits and detriments and of how her decisions will actually affect her client—is acting not only as a zealous advocate for her client but also in an entirely professional and ethical manner.

The duty of the defense attorney representing a mentally impaired client cannot be as simple as Standard 7-4.2(c) proposes. The potentially disastrous consequences that flow from a finding of incompetency to stand trial—or, sometimes, from a defendant’s mere involvement in the evaluation process—must be taken into account when the defense attorney is weighing which course of action to take. If, for example, the defendant is charged with a very minor offense for which the maximum term of incarceration is short, the defense attorney’s acquiescence to or assistance in having her client institutionalized for incompetency would, in most cases, be unacceptable, and incompatible with the historical understanding of the defense lawyer as a partisan.<sup>140</sup> In this scenario, the lawyer finds

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139. See ANTHONY AMSTERDAM, TRIAL MANUAL 5 FOR THE DEFENSE OF CRIMINAL CASES 311 (5th ed. 1988). Professor Amsterdam cautions defense counsel on the potential negative consequences of raising doubts about client competency, and advises against doing so unless it is in the client’s interest:

“[T]he interjection of psychiatric issues into any criminal case involves substantial dangers that may offset its contemplated benefits. Its possibly harmful consequences to the defendant should caution counsel ordinarily not to bring psychiatric inquiries to the attention of the prosecution and the court unless the charges against the defendant are serious ones, carrying heavy penalties, and the prosecutor’s evidence of guilt appears strong.”

*Id.* Professor Amsterdam approaches the issue from a purely pragmatic angle—as a question of strategy—and does not address the existence vel non of an ethical obligation to raise the issue of competency. Professor Amsterdam’s advice is directly contrary to the relevant ABA Standard, CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(c) (1989), and is a far preferable approach.

140. The analysis, however, is never easy. An argument can be made that a lawyer’s duty to her client extends beyond the specific case in which the lawyer is involved; if the client would benefit from treatment, would the defense lawyer fulfill her role as zealous advocate for getting her that treatment, even if it must happen within the structures of the criminal justice system? In *Autonomy Versus a Client’s Best Interests: The Defense Lawyer’s Dilemma When Mentally Ill Clients Seek To Control Their Defense*, 35 AM. CRIM. L. REV. 1343 (1997–1998), author Josephine Ross describes her decision to raise the issue of her client’s competency in such a situation, guided by what she terms an “ethic of care.” *Id.* at 1346. Although Ross thoughtfully defends her approach and her decision in that case, the “ethic of care” is too broad a principle to meaningfully guide the discretion of well-intentioned lawyers and invites the lawyer to meddle too much in her client’s life. Ross does address the breadth of

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herself utterly unable to fulfill her ethical obligation zealously to represent her client and, indeed, is uniquely positioned to harm her client precisely because of the attorney-client relationship.

If no absolute rule can govern what defense counsel is to do when representing a mentally impaired (and possibly incompetent) client, how is the attorney to be guided in deciding what to do? The American Lawyer's Code of Conduct drafted by the American Trial Lawyers Association, provides:

Once a lawyer is committed to represent a client . . . the lawyer has no discretion, short of withdrawal, to fail to provide the client with every legal recourse that is . . . in the client's interests as the client perceives them. When there is inadequate opportunity for consultation regarding the client's interests, the lawyer shall act in accordance with the lawyer's reasonable belief as to what the client would perceive to be in the client's interest.<sup>141</sup>

This approach, though providing less clarity than that proposed by the ABA, provides more realistic and useful guidance on how a defense attorney should fulfill her ethical obligation to a client with whom she is unable to fully communicate. As with the example of a person accused of a minor offense, for which she faces the prospect of little or no incarceration if convicted, the conscientious defense lawyer should evaluate strategically how the client would perceive her own interest if the client were able. This approach, while trusting much power to the individual defense lawyer, favors the real-world consequences to the individual client over the formalistic adherence to principles of due process that are embodied in the ABA proposal.

The position that a defense lawyer's primary obligation is to her client's interests, as opposed to the integrity of the tribunal or to the purely formalistic vindication of her client's rights, is embodied in the Restatement (Third) of the Law Governing Lawyers, which provides:

A lawyer representing a client with diminished capacity . . . and for whom no guardian or other representative is available to act, must, with respect to a matter within the scope of the representation, pursue the lawyer's reasonable view of the client's objectives or interests as the client would define them if able to

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the approach, cautioning that "[a]ny time a lawyer considers using substituted judgment, some soul searching is required on the part of the lawyer." *Id.* at 1372.

141. THE AMERICAN LAWYER'S CODE OF CONDUCT, ch. 3, cmt., reprinted in JOHN M. BURKOFF, CRIMINAL DEFENSE ETHICS app. C (rev. ed. 2001).

make adequately considered decisions on the matter, even if the client expresses no wishes or gives contrary instructions.<sup>142</sup>

Just as the ABA's approach is remarkably restrictive in allowing the defense attorney to use discretion in pursuing what she perceives would be in her mentally impaired client's interest, the Restatement is remarkably broad. Not only may a defense lawyer employ her own judgment in the absence of direction from her client, under the Restatement, she may actually substitute her judgment for that of her mentally impaired client. The comment to section 24 of the Restatement more explicitly contradicts the ABA Standard discussed above regarding a defense lawyer's obligation *vel non* of bringing her client's diminished capacity to the attention of the court.<sup>143</sup> Indeed, the comment uses discretionary rather than mandatory language in describing a lawyer's role in this regard: "A lawyer may bring the client's diminished capacity before a tribunal when doing so is reasonably calculated to advance the client's objectives or interests as the client would define them if able to do so rationally."<sup>144</sup> The more nuanced approach of the Restatement allows a conscientious defense lawyer to avoid causing harm to her client and to make a decision based on a broader understanding of what is in the client's best interests—or, more accurately, what the client would have wanted if not for the mental impairment.

The issue of whether defense counsel has an ethical obligation to inform the court of her doubts regarding her client's competency to be tried has not been the sole domain of scholars and writers of ethical codes; courts have weighed in as well, though less frequently than one might guess.<sup>145</sup> Almost uniformly, courts that have considered the question have come down on the side of candor as opposed to zeal.<sup>146</sup> This orientation is not surprising, given that the judges have an institutional interest in being as fully informed as possible about the defendants they face and that the judicial perspective generally may over-value the procedural principle of the

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142. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24(2) (2000). The Restatement also provides that a lawyer representing a client with diminished capacity "may seek the appointment of a guardian or take other protective action," but only if doing so "will advance the client's objectives or interests" as the client would define them if able to make adequately considered decisions. *Id.* § 24(4).

143. *Id.* § 24 cmt. d.

144. *Id.*

145. See generally *O'Beirne v. Overholser*, 193 F. Supp. 652, 661 (D.D.C.), *rev'd on other grounds*, 302 F.2d 852 (D.C. Cir. 1961) (opining on legal strategy for counsel representing defendants in borderline cases).

146. See *infra* notes 148–164, 166–171 and accompanying text (discussing two cases in which candor prevailed over zeal).

“integrity of the system” and under-value principles of advocacy, zeal, and substantive result.<sup>147</sup>

In *In re Fleming*,<sup>148</sup> the Washington Supreme Court dealt with this issue and concluded that defense counsel’s failure to raise his doubts about his client’s competency constituted ineffective assistance of counsel.<sup>149</sup> While delusional, Fleming armed himself with a gun and forced his way into a neighbor’s house, where he was shot in the stomach by the homeowner and then arrested.<sup>150</sup> Fleming was charged with a litany of offenses, including first-degree burglary and unlawful possession of a firearm.<sup>151</sup>

Early in the proceedings, his lawyer obtained a psychological evaluation of Fleming, in which the examiner concluded that he was “marginally competent” to stand trial.<sup>152</sup> Several months later, Fleming’s new attorney<sup>153</sup> obtained a separate psychological evaluation from another psychologist, who concluded that Fleming was “unable to cooperate in a rational manner with counsel in presenting a defense and is not able to prepare and conduct his own defense in a rational manner without counsel and therefore is judged presently mentally *incompetent to stand trial*.”<sup>154</sup> Neither counsel ever showed either of these evaluations to the trial judge or the prosecutor, and no mention was ever made of the concerns about Fleming’s competency until after he had entered a plea of guilty.<sup>155</sup>

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147. Courts that have considered the issue are not, by any means, uniform in their conclusions. Compare *Enriquez v. Procnier*, 752 F.2d 111, 114 (5th Cir. 1984) (finding that the trial counsel’s failure to raise the competency issue was a “reasonable tactical decision” where petitioner claimed counsel had been ineffective for not raising concerns of incompetency prior to trial on first-degree murder), with *Overholser v. O’Beirne*, 302 F.2d 852, 861 (D.C. Cir. 1961) (reversing decision of lower court, asserting that the judge in the lower court failed to even consider the question of competency raised by the defendant, nor did the defendant’s counsel properly raise the issue).

148. 16 P.3d 610 (Wash. 2001) (en banc).

149. *Id.* at 616–17.

150. *Id.* at 612–13.

151. *Id.* at 612.

152. See *id.* (adding that Fleming had been psychotic at the time of the incident in question and that he had been “unable to distinguish right from wrong and [had been] incapable of appreciating the nature and quality of his conduct due to his paranoid and borderline personality characteristics, as well as his amphetamine psychosis”).

153. See *id.* (noting that Fleming’s first attorney withdrew from the case due to her inability to communicate with Fleming).

154. *Id.* at 612–13.

155. See *id.* at 615. Although no mention was specifically made regarding doubts about Fleming’s competency, his second counsel did give notice that he would be relying at trial on a diminished capacity defense. *Id.* at 858–59. Notwithstanding this red flag having to do with Fleming’s mental capacity (and the fact that two separate lawyers had separately petitioned the judge for funds to obtain psychological

Fleming entered an *Alford* plea<sup>156</sup> to three of the charges against him pursuant to a plea bargain.<sup>157</sup> Fleming attempted unsuccessfully to withdraw his plea prior to sentencing and then unsuccessfully appealed his conviction.<sup>158</sup> At no time throughout the proceedings did either of Fleming's lawyers raise any doubts about their client's competency to stand trial or to enter a guilty plea, and no mention was ever made of the two psychologists' reports.<sup>159</sup>

Fleming then filed a petition for state post-conviction relief, arguing that he had been incompetent to enter a plea of guilty.<sup>160</sup> When he appealed the denial of his petition, the Washington Supreme Court found no abuse of discretion on the part of the trial court for failing to conduct a competency hearing because the judge had not been apprised of any doubts or concerns regarding Fleming's competency to stand trial or to plead guilty.<sup>161</sup> Troubled by the course of the proceedings, however, the court found that Fleming's plea was invalid because his lawyers had failed to provide effective assistance of counsel.<sup>162</sup> While acknowledging the government's arguments that defense counsel's failure to raise the issue of competency or to raise their doubts about Fleming's competency a strategic decision, the court issued a blanket ruling that, as a matter of law, such a tactic—if that is what it was—does not fall within the bounds of effective assistance of counsel.<sup>163</sup> The court concluded broadly and categorically: “When defense counsel knows or has reason to know of a defendant's incompetency, tactics cannot excuse failure to raise competency at any time so long as such incapacity continues.”<sup>164</sup>

The *Fleming* court, however, made no effort to justify or even to explain its conclusion that the failure to raise doubts about competency can never be an acceptable strategy in defense of a client. One wonders if a harder case would have produced a

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evaluations), the trial judge apparently conducted no inquiry into Fleming's competency prior to accepting his plea.

156. In *North Carolina v. Alford*, the Supreme Court held that a criminal defendant may plead guilty without actually admitting guilt, as long as the decision to plead guilty is a knowing, voluntary, and understanding choice from among the options available to the defendant. 400 U.S. 25, 37 (1970).

157. *Fleming*, 16 P.3d at 613.

158. *Id.* at 613–14.

159. *Id.*

160. *Id.* The procedural vehicle by which Fleming sought state post-conviction relief is called a personal restraint petition, or a PRP.

161. *Id.* at 615.

162. *Id.*

163. *Id.* at 616–17.

164. *Id.* at 617 (citations and internal quotations omitted).

different result: a defendant charged, not with a litany of serious offenses, but with one count of shoplifting, for which little or no jail time would result from a conviction. The *Fleming* decision, frustratingly devoid of analysis or discussion of the sometimes competing obligations of the criminal defense attorney, is cited for the proposition that a defense attorney must always raise the issue of competency if she has any doubts about whether her client is competent to proceed.<sup>165</sup> The case is an example of the summary and uncritical fashion in which courts deal with the conflict between a lawyer's role as an officer of the court and as a zealous advocate for her client.

Other courts have referred uncritically to defense attorneys' "obligation" to raise the issue of competency if counsel has good-faith doubts. In *United States v. Jackson*,<sup>166</sup> the United States Court of Appeals for the Sixth Circuit made reference to this issue in its consideration of whether the trial court erred in granting a competency evaluation at the request of defense counsel.<sup>167</sup> In affirming the decision of the trial court to grant a competency evaluation (and applauding the defense lawyer for raising the issue), the Sixth Circuit stated that the defense lawyer "was discharging his 'professional duty' as an officer of the court to raise the issue if counsel has a good faith doubt as to the defendant's competence."<sup>168</sup> Similarly, in *State v. Johnson*,<sup>169</sup> the Wisconsin Supreme Court held that an attorney has an affirmative obligation to raise the competency issue, stating in a conclusory fashion "that considerations of strategy are inappropriate in mental competency situations."<sup>170</sup> Other courts that have applied this mandatory disclosure obligation to defense

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165. See, e.g., *Duty To Alert Court of Client's Mental Problems*, 8 CRIM. PRAC. GUIDE No. 4, at 25, 25 (2007) (providing background on how different jurisdictions deal with the ethical problems surrounding disclosure of client competency).

166. 2006 FED App. 0312N, 179 F. App'x 921 (6th Cir. 2006) (unpublished).

167. *Id.* at 19–20, 179 F. App'x at 933.

168. *Id.* at 19, 179 F. App'x at 933.

169. 395 N.W.2d 176 (Wis. 1986).

170. *Id.* at 183. Interestingly, seventeen years later, the Wisconsin Supreme Court held that an attorney's testimony at a competency hearing about her "opinions, perceptions, and impressions" of her client's mental competency fell within the definition of a confidential communication and, therefore, violated the client's statutory right to prevent her lawyer from disclosing those communications. *State v. Meeks*, 2003 WI 104, ¶¶ 43–46, 263 Wis. 2d 794, ¶¶ 43–46, 666 N.W.2d 859, ¶¶ 43–46. Despite the *Meeks* court's attempt to reconcile the two decisions, and despite the *Meeks* court's protestations to the contrary, it appears to be a retreat from the *Johnson* rule, or at least a significant limitation of that rule.

attorneys have done so without either analytical or precedential argument.<sup>171</sup>

The different approaches proposed by commentators and courts to address the problem of zealously representing a mentally impaired client can form a continuum from vindication of formal rights to pragmatic assistance of a client. The formalistic approach of the ABA's Criminal Justice Mental Health Standards provides clarity and is founded upon a belief that criminal defendants *generally* are best served by an absolute prohibition on the trial of incompetent defendants and the concomitant vindication of those clients' right to due process and fundamental fairness. On a systemic level, this approach might make sense; similarly, under this approach, the privileging of the defense lawyer's obligation to the tribunal as an officer of the court above the lawyer's obligation to zealously represent his client is explained by the focus on systemic integrity. Because, arguably, a lawyer owes some duty—albeit nebulous and ill-defined—to the proper functioning of the legal system, it would be an abdication of the lawyer's role as officer of the court *not* to bring such information to the attention of the judge. All of this, however, would be difficult to explain to that single client who has been confined for months or years in a mental hospital awaiting trial on a minor offense, having been found incompetent after his own lawyer raised the issue of competency before the court.

#### IV. THEORY AND PRACTICE: TWO REAL-WORLD EXAMPLES

In an effort to explore both the theoretical soundness and the practicality of various theories of what the defense lawyer is obligated (and allowed) to do when faced with the difficult job of representing a mentally impaired client, I offer two cases that I handled as a criminal defense lawyer. Testing theory through the crucible of practice leads necessarily to both a more nuanced theory and more useful guidance.<sup>172</sup> One of the limitations of the existing scholarship

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171. See, e.g., *State v. Smith*, 252 P.2d 922, 923 (Kan. 1953) (referring to the state's "well-settled rule . . . that whenever counsel for the defendant or the state becomes possessed of knowledge of a defendant's lack of mental capacity to comprehend his situation or to properly make his defense, it becomes the duty of each to promptly bring the matter to the attention of the court"); *Hajrusi v. State*, No. A03-261, 2003 WL 22481300, at \*1 (Minn. Ct. App. Nov. 4, 2003) ("If the prosecutor, defense attorney, or the court has reason to doubt the competency of the defendant, they are obligated to raise the issue, even over the defendant's objection.") (citing MINN. R. CRIM. P. 20.01).

172. See Ross, *supra* note 140, at 1345 (noting that there is "a growing body of clinical scholarship that recognizes that theory is more likely to be right when it emerges out of the practice of law"); see also Alexis Anderson, Lynn Barenberg & Paul



on this issue is that it remains unconnected to practice and to the actual consequences to clients.<sup>173</sup> Anthony Amsterdam famously described existing canons of ethics as “vaporous platitudes” that “have somewhat less usefulness as guides to lawyers in the predicaments of the real world than do valentine cards as guides to heart surgeons in the operating room.”<sup>174</sup> My goal in applying the theory of ethics to actual cases is to be slightly more helpful than that.

A. *David Sherman*<sup>175</sup>

David Sherman had no criminal record when he was arrested at his home and charged with several counts of kidnapping and second-degree child sexual abuse. According to the government, Mr. Sherman had taken two twelve-year-old children into a vacant apartment in their apartment building and forced them to touch each other sexually. Although he was not charged with having molested the children in any way himself, he was facing the possibility of many years in prison.<sup>176</sup>

When I spoke with Mr. Sherman for the first time, at the jail, it was immediately apparent to me that he was cognitively very slow. Speaking to him about the case was like speaking to a child. Through a series of painstaking meetings with him, he eventually came to understand exactly what he was charged with and how the criminal justice system functioned. Mr. Sherman and I spent many hours discussing his case and various aspects of the criminal justice system.

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R. Tremblay, *Professional Ethics in Interdisciplinary Collaboratives: Zeal, Paternalism, and Mandated Reporting*, 13 CLINICAL L. REV. 659 (2007) (supporting a theoretical discussion of the different ethical requirements of lawyers and social workers with two factual scenarios drawing on the authors' experiences).

173. In addition to Professor Ross's valuable article critically analyzing her experiences representing a mentally impaired client, Rodney Uphoff uses a similar approach in attempting to test theory through the crucible of actual practice, although not through the lens of his own experience. See Rodney J. Uphoff, *The Role of the Criminal Defense Lawyer in Representing the Mentally Impaired Client: Zealous Advocate or Officer of the Court?*, 1988 WIS. L. REV. 65, 77-83 (detailing the tactical considerations and ethical dilemmas surrounding one lawyer's decision to withhold concerns about her client's competency).

174. Monroe H. Freedman, *Getting Honest About Client Perjury*, 21 GEO. J. LEGAL ETHICS 133, 138 (2008) (citing *The Law: Professional Ethics*, TIME, May 13, 1966, at 81).

175. The names “David Sherman” and “James Murphy” are pseudonyms that are used only for purposes of this Article. In addition, I have slightly altered the accounts of their cases in order to protect their anonymity.

176. At that time, second-degree child sexual abuse carried a maximum penalty of imprisonment for ten years and kidnapping carried a maximum penalty of imprisonment for thirty years. The penalties are the same under current statutes. D.C. CODE ANN. §§ 22-2001, 22-3009 (LexisNexis 2001). Had Mr. Sherman been convicted of the counts, it is possible that each of the sentences would have been run consecutively. *Id.* § 23-112.

I spoke many times with his mother, who filled me in on details of Mr. Sherman's childhood and adolescence and who gave me valuable insights into his history and level of functioning.<sup>177</sup> Mr. Sherman had never been diagnosed with a mental illness, but it certainly seemed likely that he had some pre-existing mental health problems that had worsened recently.

In addition to learning about Mr. Sherman and spending time explaining the system to him, I also set out to investigate the case against him. When my investigator and I talked to the two children, they appeared to be credible. Nothing about their stories was unbelievable, and their versions of what happened did not contradict each other. To make matters worse, the prosecutor gave me a videotape in which Mr. Sherman was questioned about the accusations and admitted to forcing the children to touch each other sexually in the apartment building. The prospects of acquittal did not look good.

Throughout the pre-trial period, Mr. Sherman's competency was in question. Because of the nature of the allegations and Mr. Sherman's bizarre behavior on his first day in court, the judge had ordered a competency evaluation. After the initial evaluation, Mr. Sherman was—surprisingly to me—found competent to stand trial, although the evaluation suggested that he was suffering from mental illness. Because Mr. Sherman had no prior criminal record, and because he seemed to be suffering from an untreated mental illness, the prosecutor made a generous offer to Mr. Sherman: in exchange for a plea to a greatly reduced charge, the prosecutor would not ask for more than one year of incarceration and would recommend that the court then place him on a period of probation, on the condition that Mr. Sherman receive treatment for his mental illness. Weighed against the likelihood of a much harsher sentence if we were to lose at trial and the strong evidence against him, this offer was a good one. I advised Mr. Sherman to accept this plea offer, and he agreed that it made sense. Relatively early in the case, Mr. Sherman entered a plea of guilty to the reduced charge.

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177. Much of the literature on surrogate decision-making for mentally impaired client advises that the lawyer consult closely with family members and others close to the client and attempt through those inquiries to determine what the client would want if not for the mental impairment. *See, e.g.*, RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. c (2000) (“The lawyer should take reasonable steps to elicit the client’s own views on decisions necessary to the representation. Sometimes the use of a relative, therapist, or other intermediary may facilitate communication.”). The reality of the lives of indigent mentally ill criminal defendants, unfortunately, is that no family or other support structures exist for the lawyer to consult. Mr. Sherman was lucky in this regard.

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Because Mr. Sherman had been found competent to stand trial, he was detained in the jail, rather than in the mental hospital for pre-trial detainees whose competency has been questioned or who have been found incompetent. At the jail, he received no treatment and no medication for his mental illness. As a result, while he was awaiting sentencing in the case, Mr. Sherman's mental illness spiraled out of control. During a visit a few weeks after he had pled guilty, Mr. Sherman appeared disheveled and disoriented; he told me he wanted a trial and he knew that God would protect him. I explained to him that it was possible to withdraw his guilty plea if he wanted to do that, and that the judge would probably allow him to do so because it was still soon after he took the plea. I also advised him, however, that it still would be a bad idea to withdraw his guilty plea, for all of the reasons that made him accept the offer in the first place. Mr. Sherman was adamant that he wanted a trial and adamant that he wanted to testify. When I asked him what sort of defense he wanted to present, all he would tell me was that his God was "a mighty God" and that God would tell him what to say.

Mr. Sherman's case demonstrates why a simplistic understanding of competency is unworkable and could do real harm to mentally impaired criminal defendants without meaningfully vindicating any real principle of client autonomy. If I had simply done what Mr. Sherman told me he wanted me to do, I would have been listening only to the mental illness, rather than the person. Not only would such an approach have failed to promote Mr. Sherman's autonomy in any meaningful sense of the word but it would also have caused irreparable damage to Mr. Sherman, who would very likely have been convicted at trial and received a lengthy prison sentence. Under *Dusky*, Mr. Sherman may well have been considered competent even in the throes of his mental illness.<sup>178</sup> He understood factually what he was charged with; he could explain the roles of the various players involved in his case; and he had some degree of rational understanding of the charges against him and the defenses available to him. When I asked him to describe for me what a trial was, he was able to articulate that it was something where people came in and said what happened, and the jury decided who to believe. Mr. Sherman was able to tell me that the prosecutor's job was to put him in jail and that my job was to keep him out of jail. He understood that he would go to jail if the jury thought he had grabbed the

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178. See *Dusky v. United States*, 362 U.S. 402, 402 (1960) (requiring that a defendant have a rational and factual understanding of the proceedings against her and the ability to communicate rationally with her lawyer).

children off of the street and made them touch each other. Under the traditional standard of competency, therefore, he would probably be found competent.

It was obvious to me, however, that Mr. Sherman was not thinking rationally about his situation or about his options. In coming to this conclusion, of course, I had the advantage of having talked extensively with Mr. Sherman while he was far more lucid. I was also able to see the contrast between the more rational Mr. Sherman and the more delusional Mr. Sherman. He knew he had a right to testify and insisted on speaking to the jury, but he would only tell me that God would protect him. He refused to talk about specific witnesses, pieces of evidence, or defense theories, but he insisted on going to trial. When I spoke to Mr. Sherman about his mental illness and whether we should raise that issue with the court, he told me that he did not want to do that because it would delay his trial. Unlike *Dusky*, Slobogin and Mashburn's test for competency focuses on "basic rationality and self-regard."<sup>179</sup> Mr. Sherman would have to be considered incompetent under this standard because he was—in my opinion—unable to give non-delusional reasons for his decision to withdraw his guilty plea and because he lacked sufficient self-regard to consider alternative reasons and courses of action. The question was, in Mr. Sherman's case, whether to (1) move to withdraw his guilty plea without raising any issue of competency; (2) indicate to the court his expressed desire to withdraw his guilty plea but also indicate my own opinion that Mr. Sherman had become incompetent; or (3) not say anything to the court about Mr. Sherman's desire to withdraw his guilty plea. The difficulty of this decision was compounded by the knowledge that one of the factors a court considers in deciding whether to allow a defendant to withdraw a guilty plea is how promptly the desire to withdraw the plea is made known to the court. In other words, the longer I waited in determining our next move, the less likely it was that the judge would allow Mr. Sherman to withdraw his plea.

After much consultation and discussion about what to do in Mr. Sherman's case, I went against his expressed wishes and raised the issue of competency. I told the court that Mr. Sherman had expressed his desire to withdraw his plea and go to trial. However, I went on to explain that, in my opinion, though he had been

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179. See Slobogin & Mashburn, *supra* note 109, at 1641 (proposing a test for competency that focuses on the client's (1) understanding of the criminal process, (2) ability to make decisions based on non-delusional reasoning, and (3) consideration of alternative decisions).

competent to plead guilty, his mental state had deteriorated to a point where he was no longer competent to make such a decision. At the time, Mr. Sherman was lucid enough to understand what I had done and was outraged by my actions. However, I believed that the motivation behind Mr. Sherman's decision to withdraw his plea was only his mental illness, rather than a rational belief that either that we could win the trial or that he was actually innocent.<sup>180</sup> Ultimately, the fact that Mr. Sherman was unable to articulate any rational reason for his desire to withdraw his guilty plea and proceed to trial made me somewhat comfortable in acting against his expressed interest.

The course of action I chose in Mr. Sherman's case was well within my ethical obligations. Under the ABA's Criminal Justice Mental Health Standards, I was required to raise the issue of Mr. Sherman's competency.<sup>181</sup> Under the American Lawyer's Code of Conduct and the Restatement, I was required to act in accordance with what Mr. Sherman's wishes would have been if not for the mental illness that made his rational consideration impossible.<sup>182</sup> In this unique case, I believed Mr. Sherman expressed his true interests to me and I acted on them by entering his initial guilty plea. On these occasions, Mr. Sherman appeared competent enough to understand his situation. Still, even though I believed that I was well within my ethical obligations to Mr. Sherman and also believed that I was preventing him from harming himself, was I not also doing some violence to the principle of autonomy and betraying the concept of client-centered lawyering?

The concept of client autonomy and the principle of client-centered lawyering have meaning only to the extent that the client in question has the ability to think rationally. If the voice that is speaking is not that of the client but rather of the mental illness that has control of the client, then it would be irresponsible for the lawyer to follow the commands of the voice simply out of "principle."<sup>183</sup> To

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180. Of course, another rational reason that one could choose to plead guilty is to accept responsibility and "pay one's debt to society." As with the other rational reasons for making such a choice, I was confident that this was not Mr. Sherman's motivation.

181. See CRIMINAL JUSTICE MENTAL HEALTH STANDARDS 7-4.2(c) (1989) (explaining when defense counsel has a reasonable belief that the defendant is incompetent, counsel must make the issue known to the court).

182. See *supra* notes 141-144 and accompanying text (discussing the flexible approaches in the American Lawyers' Code of Conduct and Restatement and noting how both approaches are realistic and emphasize that the defense lawyer's primary obligation is to her client's best interest).

183. To illustrate this principle, Slobogin and Mashburn use the extreme example of a person who is unable to speak and, when asked a question, involuntarily and randomly either nods her head "yes" or shakes her head "no." Nobody would argue

the extent that there exists a continuum between a “client autonomy” model of lawyering and a “paternalistic” model of lawyering, the first model depends upon the assumption of a client who is able to make rational choices.<sup>184</sup>

Because of the concerns I raised about Mr. Sherman’s competency, the judge would not allow him to withdraw the plea. She told Mr. Sherman that she was going to send him from the jail to the mental hospital for forty-five days to see how he did. The judge also explained to him that, at the end of that period, if she thought he was competent and if he still wanted to withdraw his plea, she would allow him to do so. Once he was prescribed and began taking medication at the mental hospital, Mr. Sherman’s condition improved remarkably. Within a few weeks, he seemed like his old self—still suffering from mental illness but able to make decisions with some degree of rationality and to articulate the reasons behind his desires. When I explained his options again, Mr. Sherman seemed not to remember clearly that he had wanted to withdraw his plea and go to trial, and he was very sure that he did not want to withdraw his guilty plea. Some time later, we proceeded to sentencing, and the judge placed Mr. Sherman on probation, ordering that he receive counseling and ongoing medication. Two years later, when I was working at the Public Defender Service for the District of Columbia, Mr. Sherman called me and asked if he could stop by. We met in my office and he told me that he was doing great on probation, had gotten a job, and was thinking about getting married. In the end, it seems to have been a good idea to go against the desires that Mr. Sherman had expressed while he was mentally impaired. Had we gone to trial, it is likely that Mr. Sherman would have been convicted of kidnapping and other serious charges, and would have received a lengthy prison sentence. By substituting my own judgment for that of the psychotic Mr. Sherman (and depriving him temporarily of his

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that taking some important action on the basis of her head nods or shakes would be appropriate or that doing so would vindicate any principle of autonomy. Slobogin & Mashburn, *supra* note 109, at 1587.

184. See William H. Simon, *Lawyer Advice and Client Autonomy: Mrs. Jones’ Case*, 50 MD. L. REV. 213, 224–25 (1991) (noting the similarities between the refined paternalist and autonomy approaches and the failure of each approach to be fully grounded in the value of autonomy); cf. Ross, *supra* note 140, at 1377 (“I valued Ms. Teplinski’s choice and autonomy less than I valued it in my other clients because I believed that she was a woman in mental anguish. Choice and autonomy have little meaning to a person in the convulsions of a mental disease.”).

autonomy), I believe that I was able to both serve his best interests and protect his true autonomy in a more meaningful sense.<sup>185</sup>

*B. James Murphy*

James Murphy had been awaiting trial at St. Elizabeths Hospital<sup>186</sup> for eight months when I met him. Mr. Murphy had no criminal record whatsoever and was charged with a non-violent, low-level crime. Mr. Murphy, who had a history of addiction to prescription medication, had been charged with fraudulently attempting to obtain prescription medication by pretending to be a doctor.

Because of his erratic behavior during his arrest and in court, Mr. Murphy was ordered detained for a mental evaluation. Not surprisingly, the evaluation indicated that Mr. Murphy was not competent to stand trial. Although the judge had the option to allow Mr. Murphy to remain at liberty pending a full competency hearing, he decided to send him to St. Elizabeths. Notwithstanding the fact that he had no history of violence or any criminal record, Mr.

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185. In his discussion of paternalism and autonomy, David Luban tells the story of Benedict Spinoza being saved from an angry mob by his landlord and friend, Van der Spyck. David Luban, *supra* note 9, at 461. In 1672, an enraged royalist mob burst into a Dutch prison and killed two men suspected of disloyalty to the Prince of Orange. *Id.* Spinoza, who had been a friend of the men, heard the news of their deaths and immediately set out to confront the mob, having prepared a sign that read “Ultimi Barbarorum.” (The Latin phrase translates roughly as “you are the greatest of all barbarians.”) *Id.* However, before he had a chance to confront the mob, Van der Spyck locked Spinoza in his house, saving his life in the process. Three years later, Spinoza published his classic treatise, “Ethics.” *Id.* Luban cites the Spinoza story as an example of justifiable paternalism. *See id.* at 461–62 (commenting that where a subject’s judgment is obviously impaired and the actor is convinced that the subject will approve of the actions when he regains his senses, actions in depriving liberty and free will—like those of Van der Spyck—may be justifiable).

186. Commissioned by Congress in 1852 as the Government Hospital for the Insane, St. Elizabeths is still the public mental hospital that serves the District of Columbia. *See* Joe Holley, *Tussle Over St. Elizabeths*, WASH. POST, June 17, 2007, at C1 (reporting on the opposition to the proposed use of the St. Elizabeths property as the new home of the Department of Homeland Security). The most famous former resident of St. Elizabeths was the poet Ezra Pound, who was confined there from 1946–1958 after having been found incompetent to stand trial on a charge of treason. Pound’s case, however, is anything but the usual tale of an incompetent defendant languishing in pre-trial institutional confinement while he waits to be restored to competency. According to at least one account, every doctor who examined Pound found him to be perfectly sane, but the superintendent of the hospital, Dr. Winfred Overholser, Sr., allowed Pound to remain at the hospital indefinitely in order to escape criminal prosecution on the capital charge of treason. Ben A. Franklin, *Hospital Once ‘Home’ for Ezra Pound*, N.Y. TIMES, June 23, 1982, at B6. During his twelve years at St. Elizabeths, Pound was allowed to stay in his own private room overlooking the U.S. Capitol, was brought books from the Library of Congress upon request, received special food, and was allowed regularly to meet with visitors. *Id.*

Murphy was detained at St. Elizabeths for eight months while his competency to stand trial remained in question.

Before I met Mr. Murphy, I reviewed his file. I was struck by the fact that he had been detained for so long on such a minor charge. Even if he had been convicted of the charge, he probably would have received a probationary sentence. Even before having met my client, I was struck by the apparent injustice of his situation, and I proceeded on the assumption that the most important thing to do right away was to get him released from the mental hospital.

When I met Mr. Murphy, he clearly and unequivocally told me he wanted to be back on the streets and never to have a felony conviction. He also told me that President Bush had personally orchestrated his arrest and incarceration and that operatives from the Republican National Committee had tried to kidnap him and were now trying to have him killed. As he continued to explain his story, it became clear that Mr. Murphy was severely mentally ill and that his understanding about what was happening to him had absolutely no basis in reality.

Shortly after that visit with Mr. Murphy, I was able to persuade the judge to release him. I told the judge that—speaking as Mr. Murphy’s counsel—I had no concerns with Mr. Murphy proceeding to trial and that I saw no reason for him to remain incarcerated at the mental hospital prior to his court date. In truth, the question of whether he was competent to stand trial was a close call. Mr. Murphy certainly had a factual understanding of who the various players were in court and what their roles were. He knew, for example, that I was the defense attorney and that it was my job to help him. However, he also thought that I was covertly working for George W. Bush and, therefore, secretly planning to convict, silence, and ultimately kill him. He also believed that the government witnesses were receiving payments from the Republican National Committee in order to convict him and further claimed firsthand knowledge that the President had ordered the trial judge to obtain a conviction. As such, it could certainly be argued that Mr. Murphy lacked a rational understanding of the case against him.

During the entire course of my representation of Mr. Murphy, his mental illness (and his lack of a *rational* understanding of the case) clouded his thinking. He demanded that I call as character witnesses various United States Senators, Supreme Court Justices, and White



House staffers.<sup>187</sup> During trial, Mr. Murphy repeatedly told the judge that I was a part of the conspiracy against him and that he wanted a new lawyer. Each time, the judge refused.

Throughout most of the pre-trial proceedings, Mr. Murphy wanted to fire me and to represent himself. For reasons that were never clear, the judge refused to grant this request and instead told Mr. Murphy that if he still wanted to represent himself on the day of trial, he would be allowed to do so.<sup>188</sup> Until then, however, the judge refused to allow Mr. Murphy to represent himself and refused to allow me to withdraw as counsel. Although the judge may have been motivated by a desire to help Mr. Murphy, his ruling had the effect of placing limitations on Mr. Murphy's autonomy in an inappropriate and damaging way. In essence, the judge was denying Mr. Murphy the dignity of representing himself, instead forcing him to deal with a lawyer he believed to be actively working against him.<sup>189</sup>

Just before trial, Mr. Murphy decided that he wanted me to represent him, and I pursued a strategy of convincing the jury to convict him only of the lesser included offense of misdemeanor attempted possession of a controlled substance, arguing that there had been no fraudulent conduct. Throughout the trial, Mr. Murphy publicly and privately railed against the Bushes, the trial judge, me, the Public Defender Service, and others that he thought were conspiring to label him a felon and thereby silence him. He never wavered in his belief that prominent members of the Republican Party were conspiring behind the scenes to convict him. Surprisingly,

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187. After doing some investigation and confirming that none of them had ever heard of Mr. Murphy, I told him that I would not call them as witnesses.

188. Every criminal defendant has a constitutional right of self-representation, and the Sixth and Fourteenth Amendments forbid state and federal governments from forcing counsel on a defendant who knowingly and voluntarily waives her right to counsel. *See Faretta v. California*, 422 U.S. 806, 819 (1975) ("The Sixth Amendment does not provide merely that a defense shall be made for the accused; it grants to the accused personally the right to make his defense."). *But see Indiana v. Edwards*, 128 S. Ct. 2379, 2386-87 (2008) (stating that the right to self-representation is not absolute in that a criminal defendant may be constitutionally competent to proceed to trial but incompetent to waive counsel).

189. On a more mundane level, Mr. Murphy was unable to subpoena the witnesses he wanted for trial. When the character witnesses he wanted to call informed my investigator and me that they did not know Mr. Murphy, I told him that I refused to call them. Had Mr. Murphy been representing himself, he could have had the witnesses placed under subpoena himself. *See D.C. SUPER. CT. R. CRIM. P. 17(b)(2)* (allowing defendants not represented by counsel to make ex parte applications for subpoenas). Because he was represented by counsel, however, Mr. Murphy was deprived of the right to make that strategic decision. *See id.* at 17(b)(1) (detailing the requirements that defense counsel—rather than the defendant—must fulfill in requesting a subpoena).

neither the judge nor the prosecutor ever re-visited the issue of Mr. Murphy's competency. For strategic reasons, neither did I.

After some colorful testimony from Mr. Murphy and an unforgettable trial, the jury acquitted him of the felony charges, finding him guilty of only a single lesser charge, a misdemeanor, for which he received a sentence of the time that he had already served. As a result, Mr. Murphy retains his right to vote and remains free from the stigma of having ever been convicted of a felony.

*C. Substitution of Judgment: Reconciling the Choices*

Why did I feel equally comfortable raising the issue of competency in Mr. Sherman's case (and indeed, arguing strenuously against my client's expressed wishes) and *not* raising my doubts about competency in Mr. Murphy's case?<sup>190</sup> The answer, of course, is that the potential consequences were very different for each client. I knew that, even if Mr. Murphy were convicted of the felony charges, he would almost certainly not have received any additional jail time. In contrast, a conviction in Mr. Sherman's case would have meant many years of incarceration. Although there are ways to distinguish the cases and justify my actions based on the different characteristics of the clients and the different complexities of the cases,<sup>191</sup> such

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190. A lack of candor is one thing and affirmatively lying to the court is—or might be—another. *See, e.g.*, Freedman, *supra* note 59, at 771 (arguing that lawyers are permitted—and at times are ethically required—to lie to judges). This view, to say the least, has proven controversial. Although I find Freedman's arguments on this issue persuasive, Mr. Sherman's situation did not put me in the position of having to decide whether to apply Freedman's theory in practice. If the judge asked me specifically whether I had any doubts about my client's competency, one approach would have been to refuse to answer. To do so, of course, would have been tantamount to an affirmative answer and, I believe, as much a violation of my obligation to protect confidences and secrets as would an affirmative answer. *See id.* at 773 (contending that to remain silent when a judge inquires as to the likelihood of a client's guilt, an attorney may lead a judge to infer guilt).

191. Legally, there is no sliding scale of competency that is based on the seriousness of the case or the potentially serious consequences that may flow from a conviction. *See Godinez v. Moran*, 509 U.S. 389, 397–98 (1993) (holding that one uniform standard of competency should be applied to defendants at all phases of the criminal process). The examples of Mr. Sherman and Mr. Murphy, however, illustrate why a model of “decisional competency” is a more meaningful construct to determine whether a defendant is competent to proceed in the case against him. Mr. Sherman's situation was significantly more complicated than Mr. Murphy's, at the time Mr. Sherman became incompetent. To make an informed, rational decision, after already admitting guilt, Mr. Sherman had to be able to understand what it meant to withdraw a guilty plea, the likelihood of success both in convincing the judge to allow him to withdraw his plea and then in winning the trial, the potential that he would—if convicted at trial—be sentenced by a judge far more punitive than the judge he had been assigned, and the ins and outs of what would be a fairly long and somewhat complicated trial. Because the nature of his charge and his pre-trial posture were simpler, however, Mr. Murphy had a much simpler decision

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justifications would be disingenuous. The truth is that I believed my ethical obligation to both clients was informed by the actual likely consequences of my actions. My relative lack of candor to the court in Mr. Murphy's case was justified by the harm that I would have caused him had I been entirely candid with the court.

In Mr. Murphy's case, I substituted my judgment for his in many ways, but not in any of those areas reserved for defendants themselves. I agreed with Mr. Murphy's decisions to reject the government's plea offer and to demand a jury trial. On the other hand, I strongly disagreed with his decision to testify. Mr. Murphy insisted on calling as character witnesses many nationally prominent Democratic politicians who he claimed would vouch for him. After I investigated his claims and none of these figures claimed to know anything about Mr. Murphy, he still insisted that I call them as witnesses and ask them under oath if they were friends of Mr. Murphy. When I explained to him that this approach would be counter-productive and I refused to do it, Mr. Murphy took that as proof that I was a member of the conspiracy against him.

Throughout the time that I represented him, Mr. Murphy consistently lacked a rational understanding of the charges against him, in my opinion. Just as Mr. Sherman's inability to give rational reasons for his decisions rendered him incompetent to withdraw his plea, Mr. Murphy's inability to give rational explanations for why he was being prosecuted probably rendered him incompetent to stand trial and unable to assist his counsel in any meaningful way. I believed throughout the time that I represented Mr. Murphy that his understanding of the charges against him, although factually correct, was irrational. Because of his delusions, he was also utterly unable to assist me in preparing his defense. Under the ABA's Criminal Justice Mental Health Standards, therefore, I should have informed the Court not only of my belief that Mr. Murphy may be incompetent, but also of those facts that led me to question Mr. Murphy's competency.<sup>192</sup> This requirement would presumably include facts and

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to make. It is possible to argue, then, that a criminal defendant facing serious and complex charges must possess a greater degree of rational understanding than a defendant facing a simple charge. For this logical reason, a sliding scale of decisional competency for criminal defendants based on the nature of the allegations against them would serve the values of dignity and autonomy far more than the simplistic unitary standard endorsed by *Godinez*.

192. Interestingly, Slobogin and Mashburn also take the position that I should have been required to disclose my doubts about Mr. Murphy's competency to the trial judge. See Slobogin & Mashburn, *supra* note 109, at 1622 (arguing that defense attorneys should be ethically bound to inform the court of possible incompetency

beliefs that Mr. Murphy had told me in confidence during the course of my representation of him.

The example of Mr. Murphy demonstrates why the approach endorsed in the ABA's Criminal Justice Mental Health Standards is unworkable and incompatible with the criminal defense lawyer's duty of zealous representation. It is as dramatically demonstrated every day when mentally impaired people are charged with misdemeanors, for which little or no jail time would be imposed even in the event of a conviction. A lawyer should not be required to take action that affirmatively hurts her client. Were I to bring up my doubts about Mr. Murphy's competency, the result would have been a swift return to the locked ward at the mental hospital for an indeterminate and potentially endless stay.<sup>193</sup> The duties of zealous representation and protection of client confidences should trump any rule that requires a criminal defense lawyer to raise her doubts about her client's competency, without regard to the consequences of such action.

#### V. TOWARD A MORE MEANINGFUL ETHICAL FRAMEWORK

Its limitations notwithstanding, the *Dusky* test remains the federal constitutional standard, and there is no indication that courts are likely to revisit the issue and institute a more meaningful or useful standard.<sup>194</sup> How, then, does a criminal defense lawyer to go about

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based on the primacy of their obligation to seek appropriate medical treatment for their clients).

193. To be sure, the analysis in Mr. Murphy's case would be very different if the criminal justice system provided more meaningful, humane, and palatable mental health treatment. Because he was an indigent defendant in a crowded urban jurisdiction, however, his only option within the criminal justice system was what Rodney Uphoff has called "maximum security . . . with minimum treatment." Uphoff, *supra* note 173, at 71–72; *see also* Ross, *supra* note 140, at 1384 ("Were incompetent clients not routinely institutionalized, my dilemma would have been lessened. Imagine if a finding of incompetence meant treatment in an outpatient setting. Instead of being a threat, a finding of incompetence would then be a viable alternative. If the hospital to which she was sent was a good place to be, . . . that too would have lessened my dilemma.").

194. Bruce Winick and Richard Bonnie have engaged in a spirited debate about changing the law on adjudication of incompetent defendants, and reforming the legal regime under which competency is evaluated. *See, e.g.*, Bonnie, *supra* note 106, at 543 (noting that Winick fails to recognize that the bar against adjudication of incompetent defendants serves the interests of the defendant and society); Bonnie, *supra* note 120, at 444–45 (proposing that judges actively use clinical evaluation to assess a defendant's guilty plea, and that third-party representatives of the defendant involve themselves in the attorney-client relationship to assist in communication and ensure adequate legal representation); Bruce J. Winick, *Reforming Incompetency To Stand Trial and Plead Guilty: A Restated Proposal and a Response to Professor Bonnie*, 85 J. CRIM. L. & CRIMINOLOGY 571, 586 (1995) (responding to Bonnie's criticism by declaring that the alleged "societal interests" of the incompetency doctrine may be more theoretical than real); Bruce J. Winick, *Incompetency To Stand Trial: An Assessment of Costs and Benefits, and a Proposal for Reform*, 39 RUTGERS L. REV. 243, 245

evaluating her client about whose competency she has doubts, either in determining whether to raise the issue of competency against client wishes, or in evaluating whether (and to what extent) to defer to her client's decisions about how to conduct the litigation. In short, how does the defense lawyer determine how much decisional power to allocate to her questionably competent client?

I propose that, regardless of the court's adjudication of a defendant as competent under the *Dusky/Godinez* standard, a defense lawyer should conduct a separate analysis of her client's decisional competency. If the client does not possess the ability to make a rational decision, then the defense lawyer should consider herself free to engage in surrogate decision-making in the interests of protecting her client from harm. At least five factors should be considered: (1) the client's ability to give rational reasons for the proposed course of action; (2) the client's ability to rationally consider the negative consequences of the proposed action; (3) the client's ability to consider alternative courses of action; (4) the vehemence with which the client holds the preference for the proposed course of action; and (5) the irreversibility of the proposed course of action.<sup>195</sup> Built into these factors and underlying the analysis is the seriousness of the underlying charges against the client. A lawyer should undertake a consequentialist analysis of the

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(1987) (arguing that defendants and defense counsel should be permitted to waive incompetency status in favor of trial or a guilty plea rather than being bound by the court's pre-trial determination). The concern of Winick and Bonnie in this exchange has been proposing reforms for courts in dealing with putatively incompetent criminal defendants. By contrast, the focus of this Article is not primarily systemic reform, but on the ethics of decision-making of the criminal defense lawyer within the current legal and ethical framework.

195. This test obviously builds on Slobogin and Mashburn's "basic rationality and self-regard" model. It also draws on the work of the Fordham Conference Capacity Working Group ("the Group"), which examined issues of client capacity and autonomy with the context of older clients. The Group attempted to provide some needed guidance for the lawyer dealing with a marginally competent or questionably competent client, and to expand upon Model Rule 1.14. The Group endorsed a guideline stating that whenever a lawyer questions her client's capacity for any specific purpose, the lawyer should, *inter alia*:

[c]onsider and balance factors including but not limited to the following: (a) The client's ability to articulate reasoning behind the decision; (b) The variability of the client's state of mind; (c) The client's ability to appreciate consequences of the decision; (d) The irreversibility of the decision; (e) The substantive fairness of the decision; and (f) The consistency of the decision with lifetime commitments of the client.

*Report of Working Group on Client Capacity*, 62 *FORDHAM L. REV.* 1003, 1007 (1994).

situation,<sup>196</sup> and be guided by a flexible rather than a formalistic approach.

On a case-by-case and decision-by-decision basis, the defense lawyer dealing with a questionably competent client should engage in this analysis and make the determination whether her client is decisionally competent to make the decision in question. Only if the lawyer determines that the client is decisionally incompetent should the lawyer pursue a course of action at odds with the wishes of her client. In conducting this inquiry, the lawyer should obviously err on the side of doing what her client wishes, and the lawyer must be careful not to simply substitute her own values and judgments whenever she disagrees with her client.<sup>197</sup>

The goals of the criminal justice system are not the same as the goals of the criminal defense attorney. They never have been and they never should be.<sup>198</sup> A criminal defense attorney who lists among her professional goals “the search for truth” will not (and should not) last long, either as a matter of ethics or as a matter of practice. The defense attorney owes loyalty to one person—her client. And in the same way that the defense attorney cannot principally be concerned with the system’s “truth-seeking” function, she cannot be concerned primarily with upholding the integrity of the system. If upholding the integrity or moral authority of the system happens to coincide with the interests of her client—or, more precisely, if she can act in the service of the system without causing harm to her client—then she should act in her role as an officer of the court. But if doing so would cause any harm to her client, then her role as officer of the court must yield to the duty she owes her client. While the criminal

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196. See generally Slobogin & Mashburn, *supra* note 109, at 1616 (“Consequentialism posits that the appropriateness of a lawyer’s advice, decisions and actions should be judged by their consequences.”).

197. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. c (2000) (“Lawyers . . . should be careful not to construe as proof of disability a client’s insistence on a view of the client’s welfare that a lawyer considers unwise or otherwise at variance with the lawyer’s own views.”).

198. Justice White acknowledged the different, and conflicting, goals of the defense lawyer and the criminal justice system in his concurring opinion in *United States v. Wade*:

If [the criminal defense lawyer] can confuse a witness, even a truthful one . . . that will be his normal course. . . . [M]ore often than not, defense counsel will cross-examine a prosecution witness, and impeach him if he can, even if he thinks the witness is telling the truth, just as he will attempt to destroy a witness who he thinks is lying. In this respect, as part of our modified adversary system, and as part of the duty imposed on the most honorable defense counsel, we countenance or require conduct which in many instances has little, if any, relation to the search for truth.  
388 U.S. 218, 257–58 (1967) (White, J., dissenting in part and concurring in part).

justice system must be concerned with protecting the integrity of the system and the dignity of its participants, the defense attorney must neither dilute the principle of zeal that is central to her role nor irreparably harm the “sacred duty” that she owes her client.

To restore zeal to its rightful place among the pantheon of principles for the defense attorney,<sup>199</sup> courts should recognize that attorneys must be endowed with the discretion to make choices that serve the interests of their clients, as long as those choices comport with the applicable law and the binding rules of ethics. Undoubtedly, those players in the system who do not owe any such duty to a client—the prosecutor and the judge—should be bound by their roles to raise the issue of competency whenever they have a good-faith doubt. But those courts that have uncritically placed a similar obligation on defense attorneys<sup>200</sup> need to consider the irreparable harm that such a rule inflicts on the attorney-client relationship and the historic principle of zealous advocacy.

Faced with a conflict between the mandatory duties of loyalty and zeal to her client, as well as a mandatory duty to protect client confidences and secrets, on one hand, and the nebulous idea of the lawyer as an “officer of the court” on the other, the ethical criminal defense lawyer must resolve the conflict in favor of her client’s interest. Subordinating the lawyer’s general duties as officer of the court in this situation is the only meaningful way to give effect to the values of dignity and autonomy that are the goals of the adversarial system.

The ABA should amend Standard 7-4.2(c) of its Criminal Justice Mental Health Standards to allow for more nuanced decision-making<sup>201</sup> by defense lawyers.<sup>202</sup> Specifically, amended Standard 7-4.2(c) should read as follows (with my proposed changes underlined and proposed deletions line-stricken):

Defense counsel should move for evaluation of the defendant’s competence to stand trial whenever the defense counsel has a good

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199. Bernstein, *supra* note 50, at 1165.

200. *E.g.*, *In re Fleming*, 16 P.3d 610, 617 (Wash. 2001) (en banc) (stating that defense counsel must raise the issue of client competency).

201. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 24 cmt. d (“A lawyer may bring the client’s diminished capacity before a tribunal when doing so is reasonably calculated to advance the client’s objectives or interests as the client would define them if able to do so rationally.”).

202. Obviously, those jurisdictions that have adopted Standard 7-4.2(c) and currently impose an obligation on defense lawyers to alert the court to any doubts about their client’s competency should amend those ethical rules to permit, rather than require, disclosure. *E.g.*, MINN. R. CRIM. P. 20.01 (requiring defense attorneys who doubt the competency of their clients to raise this issue with the court).

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faith doubt as to the defendant's competence, unless doing so would be contrary to the interests of the defendant. If the client objects to such a motion being made, counsel may move for evaluation over the client's objection, only if defense counsel has a reasonable belief (a) that doing so would be in the interests of the client and (b) that the client's objection is a product of mental illness or impairment. If defense counsel believes that the client has a mental illness or impairment that is preventing the client from making a reasoned decision on this issue, defense counsel should make such a motion only if doing so would be in the interests of the client, as the client would define her interests in the absence of the mental illness or impairment. ~~In any event, If counsel determines that such motion is in the interests of the client,~~ counsel ~~should~~ may make known to the court and to the prosecutor those facts known to counsel which raise the good faith doubt of competence.

This proposal begs the question: how does the conscientious, zealous, client-centered defense lawyer determine what her client's interests would be in the absence of mental illness or impairment?

To make such a determination, lawyers should be encouraged to use a model of substituted judgment, but to do so in a way that guides the discretion of the lawyer. Before raising the issue of client competency, a defense lawyer should balance the following factors: (1) the likely consequences of a finding of incompetency;<sup>203</sup> (2) the likelihood of success at trial or benefits of a plea if counsel does not raise the issue of competency; (3) the tactical or strategic advantages and disadvantages to having an evidentiary hearing on the issue of competency;<sup>204</sup> (4) the degree of perceived mental impairment; (5) the seriousness of the charges facing the client; and (6) the client's wishes and ability to give reasoned decisions either for raising or not raising the issue of competency. In addition, counsel in this

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203. This factor will obviously vary greatly by jurisdiction. Before raising the issue of competency, it is imperative that defense know the statutes that govern the likelihood and the duration of any civil commitment at a mental health facility, as well as the actual practice of what happens with criminal defendants who have been adjudicated incompetent. In addition to these consequences, counsel needs to also consider the potential stigma attached to a finding of incompetency, and the likely impact of such a finding on her particular client. On the other hand, a finding of incompetency obviously precludes a criminal conviction.

204. Just as an evidentiary hearing on competency could reveal aspects of the defense case to the prosecution (psychiatric experts, disclosure of information about the defendant, etc.), a competency hearing can be a strategic opportunity to learn about the prosecution's case and to preserve an early record of the defendant's psychiatric problems for possible use as defenses at trial. Additionally, it can provide an early opportunity to gain the sympathy of the judge who may later preside over a trial and/or impose sentence. AMSTERDAM, *supra* note 139, at 314-18.



situation should be encouraged to consult other lawyers, who can act as a check on the lawyer simply imposing her own values and beliefs on her client.<sup>205</sup>

A similar framework can and should be employed beyond the issue of whether or not to raise competency. Whatever the lawyer decides to do on that issue, most defense lawyers are faced at some point with a client who had been found competent (or in whose case the issue of competency has not been raised) but who is unable meaningfully to assist in the decision-making that attends a criminal case. As in the case of Mr. Sherman, the mentally impaired client presents a challenge to a defense lawyer who is trying simultaneously to honor the principle of client-centered representation and to zealously advocate for her client. To simply listen to the mental illness neither honors the autonomy of the client nor advances the true interests of the client.<sup>206</sup>

In the absence of a rule specifically requiring disclosure of a lawyer's doubts about her client's competency to proceed, the appropriate conclusion for a lawyer or a court to draw is that the lawyer's duties of confidentiality and zeal prohibit her from revealing such doubts if they are adverse to her client's interests.<sup>207</sup> Rule 1.6 of

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205. This is the approach taken by the lawyers for John Salvi, who was charged with murdering two women at a women's clinic in Brookline, Massachusetts. Salvi's lawyers believed that their client was incompetent, but the judge ruled otherwise. Ross, *supra* note 140, at 1363 n.83. After having been found competent, Salvi forbade his lawyers to pursue an insanity defense, which they believed to be his only viable defense. *Id.* Salvi's lawyers assembled a team of experienced defense lawyers to help them decide how to proceed, and they concluded that they could ethically raise an insanity defense against their client's wishes. *Id.*

206. In many cases involving mentally impaired defendants, it is not at all clear—even to the diligent, zealous, and conscientious lawyer—which course of action would “help” her client and which would “hurt” her client. The lawyers for Russell Weston faced just such an unenviable dilemma. Weston was charged with murdering two federal police officers and attempting to murder a third at the U.S. Capitol. Suffering from schizophrenia and driven by severe delusions, Weston forced his way into the U.S. Capitol and opened fire. The trial judge found Weston incompetent to stand trial because of his psychosis and schizophrenia. The only possibility of restoring his competency was anti-psychotic medication. His lawyers found themselves having to decide between two courses of action: resisting the anti-psychotic medication (which their delusional client was instructing them to do) or arguing contrary to their client's wishes in favor of the medication. They were forced, therefore, to decide between advocating their client's continued slide into deeper and deeper mental illness or, on the other hand, forcible medication that would have led to their client's execution. For an interesting discussion of the Weston case and a critique of the trial judge's refusal to appoint Weston a guardian ad litem (which his lawyers had requested), see Sarah E. Wolf, *The Mentally Incompetent Criminal Defendant: United States v. Weston and the Need for a Guardian Ad Litem*, 10 GEO. MASON L. REV. 1071 (2002).

207. Professor Fortune offers a similar analysis in a slightly different context. See William H. Fortune, *A Proposal To Require Lawyers To Disclose Information About Procedural Matters*, 87 KY. L.J. 1099 (1999) (arguing that in the absence of a rule

the Model Rules, the more specific provision, should control. In Rule 1.6, the default position is protection of client confidences, and the exception is candor.<sup>208</sup>

The attempt to create a standard for decision-making (or substitution of judgment) for mentally impaired clients has led to a variety of theories. Josephine Ross argues for an “ethic of care” approach, in which she would “emphasize[] peoples’ interconnection and responsibility rather than their independence and autonomy.”<sup>209</sup> On the other end of the spectrum would be an “ethic of autonomy” approach, which would all but preclude a lawyer from substituting her own judgment for that of the client, regardless of mental impairment. Additionally, there is what could be described as an “ethic of integrity” approach, which would focus on the formal right of a person not to be judged while incompetent (as well as the societal value in the integrity of the criminal justice process) and would value the lawyer’s role as an officer of the court over the lawyer’s role as an advocate for her client.

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requiring a defense attorney’s disclosure upon discovering a court’s procedural error, the duties of confidentiality and zeal require the attorney to remain silent).

208. Rule 1.6 provides:

(a) A lawyer shall not reveal information relating to the representation of a client unless the client gives informed consent, the disclosure is impliedly authorized in order to carry out the representation or the disclosure is permitted by paragraph (b).

(b) A lawyer may reveal information relating to the representation of a client to the extent the lawyer reasonably believes necessary:

(1) to prevent reasonably certain death or substantial bodily harm;

(2) to prevent the client from committing a crime or fraud that is reasonably certain to result in substantial injury to the financial interests or property of another and in furtherance of which the client has used or is using the lawyer’s services;

(3) to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client’s commission of a crime or fraud in furtherance of which the client has used the lawyer’s services;

(4) to secure legal advice about the lawyer’s compliance with these Rules;

(5) to establish a claim or defense on behalf of the lawyer in a controversy between the lawyer and the client, to establish a defense to a criminal charge or civil claim against the lawyer based upon conduct in which the client was involved, or to respond to allegations in any proceeding concerning the lawyer’s representation of the client; or

(6) to comply with other law or a court order.

MODEL RULES OF PROF’L CONDUCT R. 1.6 (2002). The broad duty of confidentiality is premised upon a belief that “the public interest is usually best served by a strict rule requiring lawyers to preserve the confidentiality of information relating to the representation of their clients,” *id.* at 1.6 cmt. 6, and that a strict rule of confidentiality will encourage people “to seek legal assistance and to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter,” *id.* at 1.6 cmt. 4.

209. Ross, *supra* note 140, at 1372.

None of these approaches alone captures the nuance and difficulty of a criminal defense lawyer trying to figure out how to best represent a mentally impaired client. The approaches that focus on the integrity of the system or on an abstract right of an individual not to undergo any sort of court proceeding while incompetent lead to a system in which the lawyer acts as a judge of her client and is required to subordinate her role as advocate to that of a guardian of the system. Moreover, it requires the defense lawyer to take actions that would affirmatively cause harm to her client, including potentially indefinite confinement in a mental hospital for even very minor charges. The “ethic of care” approach comes closer to an acceptable, client-centered model of lawyer decision-making for mentally impaired clients. Its paternalistic bent, however, assumes a complete substitution of judgment in which the lawyer acts as a concerned parent might act, rather than as the client would act if competent, lucid, and rational. Although these approaches are overlapping and interconnected, I propose that the conscientious defense lawyer should attempt not to do necessarily what is “best” for the mentally impaired client, but attempt to discern what the client’s wishes would be absent the mental impairment that prevents the client from making a rational decision. This approach could include consultations not only with the client but also with family members and others who are close with the defendant.<sup>210</sup> Such an approach may be cumbersome and is certainly easier in theory than in practice. It has, however, the virtues of imposing some sort of check on the discretion of the defense lawyer and of honoring the true autonomy of the client.

#### CONCLUSION

We return to the fundamental principle: a lawyer should do no harm to her client.<sup>211</sup> Although there are situations in which a lawyer

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210. Obviously, one of the complications with this approach arises from the lawyer’s need to protect client confidences. *See* MODEL RULES OF PROF’L CONDUCT R. 1.6 (prohibiting an attorney from revealing information relating to the client’s representation except in certain scenarios, such as when the client gives informed consent).

211. It is a widely held misconception that the phrase “first, do no harm” originated in the Hippocratic Oath. In fact, those words do not appear in the Hippocratic Oath and never have. In his book *Epidemics*, Hippocrates gave the following advice: “As to diseases, make a habit of two things: to help, or at least to do no harm.” HIPPOCRATES, *EPIDEMICS*, BOOK I 165 (W. H. S. Jones trans., Harvard Univ. Press 1957).

is compelled to do just that,<sup>212</sup> those situations are extremely rare, and even then, the lawyer is duty-bound to proceed in a manner that causes as little harm as possible, consistent with the laws and the rules of ethics.

One of the most frequently offered justifications for a rule requiring attorneys to disclose any doubts about the competency of a client is a defense of the integrity of the system.<sup>213</sup> A legal system that tolerates even the possibility of putting an incompetent defendant on trial, the argument goes, is necessarily an illegitimate system unworthy of respect. The argument, however, is not so neat, and not so clearly on the side of mandating disclosure. The dignity of a system that uses the attorney-client relationship to potentially consign mentally impaired criminal defendants to months or even years of pre-trial institutionalization solely by reason of their impairment is very much in question. A marginally competent (or incompetent) defendant whose lawyer reveals to the court and opposing counsel her doubts about her client's competency and the reasons for those doubts would certainly agree with this assertion. As Monroe Freedman has argued, "Before we will permit the state to deprive any person of life, liberty, or property, we require that certain processes which ensure regard for the dignity of the individual be followed, irrespective of their impact on the determination of truth."<sup>214</sup> The relevant question, then, in the context of potentially incompetent criminal defendants, is not *whether* the system should contain protections for the dignity of those individuals, but *which* rule would more effectively serve that purpose.

The unique nature of the attorney-client relationship is the aspect of the criminal justice system that most effectively protects the dignity of the individual and, necessarily, the moral authority of the system.<sup>215</sup> An adversarial system in which the attorney-client relationship is as close to sacrosanct as possible, and in which the attorney is empowered to advocate for her client as aggressively as possible, is the best way to ensure that the accused's dignity interests are protected in a meaningful, rather than purely a theoretical or

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212. In some situations, a lawyer may well feel justified in causing harm to her client. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) ("A lawyer may reveal information relating to the representation of a client . . . to prevent the client from committing a crime . . .").

213. See Bonnie, *supra* note 120, at 426-28 (identifying dignity, reliability, and autonomy as three reasons the system does not tolerate forcing the incompetent accused to trial).

214. Monroe H. Freedman, *Judge Frankel's Search for Truth*, 123 U. PA. L. REV. 1060, 1065 (1975).

215. FREEDMAN & SMITH, UNDERSTANDING LAWYERS' ETHICS, *supra* note 40, at 2-8.

formalistic, sense.<sup>216</sup> Overemphasis on the lawyer's duty of candor toward the tribunal creates an "affirmative duty of betrayal"<sup>217</sup> and destroys many of the values and protections that the American criminal justice system values. Allowing the defense lawyer to fulfill her role as zealous advocate, and necessarily subordinating to that principle any obligation as an officer of the court, upholds the dignity of the system more than a regime of mandatory disclosure or strict candor. Although a system that endows a defense lawyer with the discretion to substitute her judgment for that of her mentally impaired client has perils of its own, such substitution is the only way, when representing certain mentally impaired criminal defendants, to meaningfully vindicate the ideals of zeal and dignity that should define the practice of criminal defense.

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216. *Id.*

217. H. Richard Uviller, *The Advocate, the Truth, and Judicial Hackles: A Reaction to Judge Frankel's Idea*, 123 U. PA. L. REV. 1067, 1073-74 (1975).