

MONROE FREEDMAN'S SOLUTION TO THE CRIMINAL DEFENSE LAWYER'S TRILEMMA IS WRONG AS A MATTER OF POLICY AND CONSTITUTIONAL LAW*

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I. INTRODUCTION

Monroe Freedman has argued, most recently in the third edition of *Understanding Lawyers' Ethics*, co-authored with Abbe Smith, that criminal defense lawyers have a "trilemma" because the rules of their profession give them potentially contradictory instructions.¹ First, competence requires lawyers to seek all information that can aid a client's matter.² Second, lawyers have a duty of confidentiality that generally forbids them to use a client's information except for the client's benefit.³ Third, lawyers have a duty of candor to the court that may require them to reveal a client's confidential information in order to prevent or correct fraud on the court (which perjury would be).⁴ Freedman believes that these three obligations cannot always co-exist,⁵ and that is certainly true. Sometimes, a lawyer will have to sacrifice one obligation to fulfill another obligation. This trilemma is not limited to criminal defense lawyers, but *Understanding Lawyers' Ethics* addresses only the criminal defense lawyer. Freedman argues that where the lawyer is defending a person accused of a crime, the ethics rules should subordinate the third obligation, candor to the court, to the other two obligations.⁶ The upshot is that if a defense lawyer cannot dissuade a client from giving false testimony and cannot avoid aiding the perjury by

* But we are indebted to him for raising the issue and making us think hard about the answer.

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1. MONROE H. FREEDMAN & ABBE SMITH, *UNDERSTANDING LAWYERS' ETHICS* 159-95 (3d ed. 2004). In addressing the arguments in the book, I will ascribe them to "Freedman" as a shorthand, but not without some historical justification. The conception of the trilemma as discussed here first appeared forty years ago in Freedman's important article, Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469 (1966), and Freedman has continued to advance it in prior editions of the book without a co-author. Now, of course, he is joined by Professor Smith. Further, the conference of which this paper is a part was in honor of Professor Freedman's work.

2. FREEDMAN & SMITH, *supra* note 1, at 161.

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

getting the court to let him withdraw from the matter, ethics rules should allow the lawyer to introduce the client's false testimony in the usual way and to argue it in summation to the jury.⁷ Freedman would not, however, allow the lawyer to prepare the client to give the false testimony by, for example, rehearsing questions in advance or suggesting how the client might most persuasively answer them.⁸ Nor presumably could the lawyer help the client anticipate and respond to cross-examination about the planned perjury.⁹ The client would take the stand cold. Freedman would also allow the criminal defense lawyer to introduce the perjury of persons close to the defendant.¹⁰ A spouse, partner and parent are specifically mentioned.¹¹ Children and siblings are not.¹² Freedman thereby limits his solution to the trilemma by permitting the lawyer to introduce and argue the perjury.¹³ Other frauds on a court, for example, introducing a false document, are not mentioned. Under Freedman's solution, the lawyer who knowingly elicits perjury could not be disciplined for doing so, nor presumably prosecuted, but the witness who knowingly lies would still be exposed to a perjury prosecution or to a sentence harsher than he might otherwise have received.¹⁴ Where the perjury is discovered only after the client testifies, Freedman would allow a lawyer to argue it in summation as discussed below.¹⁵

Freedman defends his argument by citing both the Constitution and

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If the lawyer learns that the client is contemplating perjury, she should make continuing, good faith efforts to dissuade the client from that course. The lawyer is permitted to withdraw, as long as withdrawal would not prejudice the client

. . . .

In the relatively small number of cases in which the client who has contemplated perjury rejects the lawyer's advice and decides to proceed to trial, to take the stand, and to give false testimony, the lawyer should go forward in the ordinary way. That is, the lawyer should examine the client in a normal professional manner and should argue the client's testimony to the jury in summation to the extent that sound tactics justify doing so.

Id. at 170. Despite the word "should," Freedman's position is that ethics rules must require that lawyers do this. *See id.* at 177.

8. *Id.* at 173 (coaching the client to give the perjury "would be a violation of the plain meaning of a disciplinary rule (and very likely unlawful) to do so") (footnote omitted).

9. *See id.*

10. *See id.* at 173-74.

11. *Id.*

12. *Id.*

13. *See id.* at 170.

14. *See id.* at 161 (acknowledging that "one of the three duties must give way," which implicitly means that the lawyer is no longer held to that obligation and will, therefore, not be punished for lack of compliance).

15. *See infra* Part III.

policy.¹⁶ I will say more about the constitutional argument shortly.¹⁷ On policy, Freedman posits that a rule that would forbid the defense lawyer to let the client testify where the lawyer knows the client will lie, or one that would require the defense lawyer to reveal completed client perjury where the lawyer first comes to know of the client's lie only after the testimony—which I will collectively call a duty of candor to the court—will have two consequences more harmful to the values of the criminal justice system and constitutional jurisprudence than any harm caused by permitting defense lawyers to introduce and argue perjury.

If the lawyer has a duty of candor to the court, Freedman argues, then, first, clients will not be forthcoming with their lawyers, who may then remain ignorant of information that can aid their clients' cause.¹⁸ In fact, Freedman argues that in a regime requiring candor to the court, lawyers would (and should) warn clients of this duty at the first interview, thereby increasing the likelihood that clients will withhold information.¹⁹ Second, a duty of candor will encourage lawyers to maintain intentional ignorance. Lawyers, wishing to avoid the knowledge that will trigger the duty of candor, will be circumspect in how they go about interviewing their clients.²⁰ In either event, the duty of competent representation suffers. Further, where the lawyer, in compliance with a duty of candor, is required to inform the court that his client will lie or has lied, the duty of confidentiality is compromised as well.

All in all, then, Freedman argues, one of the duties in the trilemma will sometimes have to yield to another duty in the trilemma, and it is best as a matter of policy (and sometimes required as a matter of law) that it be the duty of candor where the lawyer is defending a person charged with a crime.²¹ But the qualification on the duty of candor goes no further than allowing the lawyer, who can neither dissuade the client nor withdraw without prejudicing the client, to introduce false testimony of an (uncoached) client or the client's parent, spouse, or partner and then to argue the truth of that testimony to the jury.²²

16. Freedman relies mainly on the Fifth Amendment's privilege against self-incrimination. FREEDMAN & SMITH, *supra* note 1, at 183-90. In passing, Freedman also relies on the Sixth Amendment's guarantee of counsel. *See id.* at 184, 192.

17. *See infra* Part III.

18. FREEDMAN & SMITH, *supra* note 1, at 161-63.

19. *Id.* at 159.

20. *Id.*

21. *Id.* at 161.

22. Freedman also argues that lawyers, if fully informed, will be in a position to discourage clients from committing perjury and suggests that "there is good reason to believe that there would be more perjury, not less, if lawyers did not know about it and were not in a position to discourage

Analysis of these issues must begin with temporal snapshots of when they may arise. Three situations are possible. First, the perjury can be anticipated. For example, a client may say she wants to testify to a false alibi and insist on her right to be called. Second, the perjury may occur by surprise. The lawyer may call the client anticipating truthful testimony (or at least testimony the lawyer does not know is false), but the client then lies while testifying, and the lawyer knows it. Third, the perjury may be concluded. The lawyer may learn only after the testimony has been given but before the conclusion of the representation that the client lied. The second situation (surprise perjury) and the third (concluded perjury) are the same in so far as the lawyer knows of the perjury only after it is committed. In either situation, a rule may require the lawyer to reveal confidential information to correct the perjury and forbid the lawyer to argue it in summation.²³ In the case of concluded perjury, the lawyer has finished his questioning when he learns the client lied, while surprise perjury envisions that the client is still on the stand when the perjury occurs, but these differences are not significant for purposes of the policy or constitutional analysis. However, surprise and concluded perjury differ from anticipated perjury in a critical way. If the perjury is anticipated, no crime has yet been committed. If the lawyer is permitted to refuse to call the client to testify before the perjury occurs, no crime will ever be committed. By definition, perjury has already occurred in the case of surprise perjury and completed perjury, and the lawyer's knowledge of it may then impose a duty of candor to the court, one prong in the trilemma.

It should be obvious that Freedman's solution to the trilemma is partial, and I suggest that some of his distinctions or limitations are hard to defend. They might be defended on the ground that at times it is better to have a partial solution to a problem than a complete one, even if it is not really possible to justify the scope of the partial solution as a matter of principle. In this essay, I will mostly limit myself to a critique of the partial solution in light of Freedman's own justifications, but it is necessary to identify why I call the solution partial.

First, as stated, Freedman does not explain why he limits his solution to calling only the accused or his parent, spouse or partner. What about a sibling or a child? A close friend? Second, why does Freedman not go further and allow the lawyer caught in the trilemma to introduce a false document, perhaps one prepared by the client and that,

it." *Id.* at 160 (footnote omitted).

23. The American Bar Association's Model Rules would require the lawyer to do this if there were no other way to remedy the situation. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2004).

for example, tends to support a false alibi? Given the pressure on the two prongs of the trilemma Freedman wants to protect—competence and confidentiality—one would think that he would also allow the lawyer to introduce a fraudulent document and argue its authenticity—or to conceal the fact that he has done so if the lawyer only learns that the document is fraudulent after introducing it. The same dynamic is at play. That is, if the lawyer may not introduce, for example, a backdated document, or must inform the court after doing so if the lawyer then learns of the fraud, would we not face the same risk of a lawyer's intentional ignorance or the same unwillingness of clients to tell lawyers all? Third, why limit Freedman's solution to the trilemma to the criminal defense lawyer? The conflicts that inhere in Freedman's trilemma will confront trial lawyers in civil matters as well. One answer might be that it is only the criminal accused who has a Sixth Amendment right to counsel. Other litigants, however, may have a statutory right and may even have a due process right to counsel. But does the source of the right really matter? Freedman would allow a lawyer representing a man charged with a misdemeanor to introduce perjury and rely on it in summation even if the maximum sentence is a \$250 fine, but the solution to the trilemma as argued in *Understanding Lawyers' Ethics* would not extend to the lawyer representing a client fighting to maintain parental rights, an interest that is surely more profound than avoidance of a modest fine.

This is not the place to pursue these questions except to recognize that they are among the legitimate questions that any defense of Freedman's position must address as a matter of both doctrine and policy. However, the balance of my consideration of the trilemma will focus on what Freedman proposes, not on what he leaves unanswered. Because the analysis partly differs depending on whether the perjury is anticipated or concluded, I will discuss the two situations separately.

II. ANTICIPATED PERJURY

Freedman does not claim that a client has a constitutional right to testify falsely. His solution to the trilemma in the case of anticipated perjury is based on the policy arguments identified above, and I will add another. But we should take note of the fact that there is no suggestion that the right to counsel, or due process, or any other constitutional right would be compromised if a state adopted an ethics rule that said simply: A lawyer must not knowingly elicit false testimony from any witness.

Indeed, laws against aiding perjury would seem to do just that.²⁴

As stated, Freedman's solution to his trilemma in the case of anticipated perjury is to permit the criminal defense lawyer to elicit perjury from the defendant and certain persons close to the defendant if the lawyer is unable to change the client's mind or perhaps withdraw.²⁵ Doing so, he argues, helps insure that the client will be candid with counsel and that the lawyer will avoid intentional ignorance. Freedman's purpose here appears to be more utilitarian than normative. That is, he seems to assume that under his solution the amount and value of the information that is not lost will result in more accurate verdicts or resolutions than would result from threats to accuracy created by the perjury he would allow. Of course, we can never know.²⁶

I do not accept these policy arguments for relieving the lawyer of candor to the court and allowing him to call the defendant (or certain witnesses) he knows will lie, and then to argue their testimony. I do not believe that the failure to permit a lawyer to engage in this activity will dissuade clients from being candid with their lawyers (in order to deny them knowledge that their possible testimony will be false). There are many things lawyers cannot do if they have knowledge, and that is true even under Freedman's proposal.²⁷ The surmise that the limitation on calling the defendant to testify increases clients' recalcitrance over what it would be absent that limitation is not an acceptable basis for authorizing lawyers to assist perjury. I have no qualm about saying that clients who hold back so that they can commit perjury by keeping their lawyers in ignorance take their chances that the withheld information might have helped them. If the tactic enables perjury to get by on occasion, so be it. The client may also be worse off for it. Freedman quotes a prosecutor presented with the prospect of a perjurious witness: "Do me a favor. Let him try it."²⁸

I also reject the proposition that absent Freedman's solution a

24. See, e.g., N.Y. PENAL LAW § 210.15 (McKinney 2005) (making it a felony to give false testimony under oath if it is material to the action); *id.* § 20.00 (subjecting a person to criminal liability for the conduct of another if he "intentionally aids such person to engage in such conduct"). Together, these provisions would make it a crime for a lawyer to intentionally aid a witness's perjury.

25. See FREEDMAN & SMITH, *supra* note 1, at 161.

26. Freedman does make normative arguments as well, focusing on "the dignity of the individual and [how] dignity is respected in the American constitutional adversary system." *Id.* at 171.

27. As stated, Freedman would apparently not go so far as to let a lawyer introduce a forged document. He would not allow the lawyer to prepare the client to testify falsely. See *id.* at 173. Nor would he allow a lawyer to call a false alibi witness who was bribed to lie or who was not within a small circle of close relatives. *Id.* at 173-74.

28. *Id.* at 187.

lawyer is, in all fairness, required to alert his client to the fact that if the client says he “did it,” the lawyer will not be allowed to let him testify that he did not do it. A lawyer is no more obligated to do this than he is required to alert a client that if the client says he did it, the lawyer will not be able to call a witnesses who has been bribed to testify that the client was elsewhere (which Freedman’s solution to the trilemma would presumably not permit the lawyer to do); or that the lawyer will not be able to introduce a fraudulent document that tends to support a false alibi. In short, we can accept that clients understand that lawyers cannot break the law. There should be and is no need to warn them. Although Freedman’s solution to his trilemma does not go so far as to let a lawyer knowingly introduce a forged document or the testimony of a bribed witness—not even where the lawyer’s knowledge is based on a client interview—he does not require the lawyer to warn the client of these limits beforehand. Nor does Freedman warn the client that in the event the client decides to commit perjury, the lawyer will not help prepare the false testimony.

Elsewhere, Freedman acknowledges that there are three circumstances in which even he would violate confidentiality, although he would not tell the client about them in advance.²⁹ These include to protect human life, “to avoid having to go to trial before a corrupted judge or jury,” and “to defend [himself] against formalized charges of unlawful or unprofessional conduct,” though he recognizes that the last exception “is more difficult to defend than the first two.”³⁰ Freedman would not warn the client about these exceptions to the confidentiality pledge because “the likelihood of these contingencies occurring is so slight that the harm that would be done to the lawyer-client relationship by a *Miranda* warning on these particular issues far outweighs the marginal value of fairness to the exceptional client to whom the warning would be relevant.”³¹ Freedman is thus drawing an empirical inference. But one might ask why the empirical balance does not come out the same way for a fourth exception—that a lawyer will reveal confidential information to prevent or correct perjury.

I am also unpersuaded by Freedman’s focus on the second leg of the trilemma—the pressure that candor to the court puts on a lawyer’s willingness to learn as much information as possible, with the prospect of a lawyer’s intentional ignorance as one consequence. Certainly, intentional ignorance will hurt clients. Lawyers who indulge in it should

29. *Id.* at 171-72.

30. *Id.* at 172.

31. *Id.*

be disciplined where the proof is available. Their representations may also be viewed as constitutionally ineffective. But it is a non-sequitur, and akin to blackmail to my mind, to say that in order to keep lawyers doing their jobs properly and ethically, we must let them assist perjury. To put it another way, the prospect that some lawyers will seek to avoid candor to the court by avoiding knowledge, even at the expense of staying ignorant of their clients' stories, is a problem, however rare. But the problem is about these lawyers. I am not prepared to make so fundamental a change in the rules of criminal law and ethics in order to accommodate lawyers who would engage in the tactic.

Let me offer another argument in favor of Freedman's proposal with regard to anticipated perjury. Assume that a criminal defense lawyer may refuse to call a defendant if the lawyer knows that the defendant will commit perjury. A strong belief is not enough.³² Now imagine that a defense lawyer refuses to let a client testify because of what the lawyer thinks he knows. The defendant protests the lawyer's decision. He tells the court that the lawyer is wrong, that the lawyer does not know what he thinks he knows, and that the lawyer's mere belief that the client will lie cannot override his constitutional right to testify. What should the judge do?

The dilemma this presents for a judge is difficult. If the judge simply accepts the lawyer's conclusion, she makes the lawyer the judge of the client's credibility. Doing so on evidence short of a direct statement by the client to the lawyer that he will lie is not a comfortable solution. If the judge insists that the lawyer tell her the basis for his conclusion that the client will lie, the lawyer will likely have to reveal confidential information. That may not unduly concern us if the information the lawyer reveals is the client's express intention to lie, and the client has insisted on doing so after the lawyer warns of his obligation to the court. But rarely will that be the lawyer's evidence. Rather, the evidence will be circumstantial, with the lawyer drawing a particular inference, though we can assume a strong one. If the judge agrees with the lawyer's inference, she is also displacing the jury's credibility role.³³ If the judge disagrees with the lawyer, concluding that

32. See MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2004) ("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."); see also *United States v. Midgett*, 342 F.3d 321, 326 (4th Cir. 2003) ("Defense counsel's mere belief, albeit a strong one supported by other evidence, was not a sufficient basis to refuse Midgett's need for assistance in presenting his own testimony.").

33. And what burden of proof should the judge employ? Will it suffice that the judge concludes that as a matter of law no reasonable juror could fail to find that the defendant intended to commit perjury? We do not allow directed verdicts against the accused in a criminal case, but is that not what, in effect, would happen here?

the lawyer does not know what he thinks he knows, the case continues but at a price to the professional relationship.³⁴ And if a judge is presented with this issue, what process should she employ to resolve the competing claims? Does the defendant have a right to be heard? Have we not created the need for some kind of satellite proceeding? Should it be before the trial judge? Another judge? Does the defendant have a right to (different) counsel in that proceeding? These are messy questions. We should not be surprised, therefore, that to avoid them some courts have set a rather high standard for what constitutes “knowledge” in this situation.³⁵

Other courts have chosen a compromise that I find unsatisfactory. It is to permit the lawyer to call the client and have him provide in narrative fashion the testimony that the lawyer presumably “knows” is false.³⁶ The lawyer then ignores the testimony in summation. In this way, the lawyer does not assist perjury.³⁷

This solution has superficial appeal, but on closer examination it makes no sense. If the lawyer really does know that the client will lie, the client should not be allowed to testify in any fashion, at least not to the lies. But perhaps the narrative solution is meant to recognize that the lawyer may be wrong, and so, as a precaution, the defendant is permitted to give the jury her story. But if we set a standard of knowledge, we should be prepared to say that the lawyer either has it or does not have it. If we are tempted to allow the narrative because (or when) we do not have the necessary confidence to say that the lawyer knows the client will lie, then we do not have knowledge. As a result, we would be cheating the client of her right to testify in the usual fashion, with counsel’s preparation, and have her testimony argued in summation. It has to be one or the other. The compromise of narrative slights both values—the value of avoiding perjury and the value inherent in the constitutional right to testify with the aid of counsel.

34. See, e.g., *United States v. Litchfield*, 959 F.2d 1514, 1517, 1524 (10th Cir. 1992) (affirming the decision of the trial judge, who in rejecting the defense lawyer’s ex parte advice that the defendant would commit perjury, stated that the lawyer was “not in the best position, let’s put it that way, to decide what is true and not true,” and further, that he preferred “to let the jury listen to the evidence, weigh it, and arrive at its own conclusions”).

35. See, e.g., *State v. McDowell*, 681 N.W.2d 500 (Wis. 2004) That court held that “[a]bsent the most extraordinary circumstances, [the defense lawyer’s] knowledge must be based on the client’s expressed admission of intent to testify untruthfully. [It] must be unambiguous and directly made to the attorney.” *Id.* at 513. The court concluded that, if this burden is met, the defendant should be allowed to testify in narrative fashion. *Id.* I question the logic of the narrative solution. See *infra* text accompanying notes 36-39.

36. See, e.g., *Commonwealth v. Mitchell*, 781 N.E.2d 1237, 1249 (Mass. 2003); *People v. DePallo*, 754 N.E.2d 751, 754-55 (N.Y. 2001).

37. See *Mitchell*, 781 N.E.2d at 1249-50; *DePallo*, 754 N.E.2d at 753.

Furthermore, the narrative solution is also plagued by the prospect of a client who challenges a lawyer's prediction that the client will lie. She demands to testify in the usual way, pointing out, quite accurately, that a narrative is no substitute for the question and answer format in which the lawyer will question the other witnesses, and that she will suffer the additional harm of having her testimony ignored on summation. This demand puts the problem back in the lap of the judge, with the same process questions identified earlier.³⁸

Permitting lawyers to introduce and argue perjury is an extreme price to pay to avoid the dilemma created for a court when a lawyer concludes that he knows his client will lie but the client denies it. For one thing, that situation should be extraordinarily rare.³⁹ We can expect that lawyers will give clients the benefit of the doubt, as they should. At other times, the lawyer really will know and the client will not claim otherwise, eliminating the need for a trip to the judge. If the lawyer does know of intended perjury, the lawyer will often be able to discourage the client from asking to testify. This may be accomplished by warning the client about cross-examination, telling the client that he will not prepare her to give the false testimony, and informing the client that the judge might use the client's false testimony against her at sentencing. In the unusual circumstance where the client is adamant and the disagreement does surface and is then presented to the judge, a high threshold for knowledge should insure against the risk of false positives (which would occur if the judge sides with the lawyer erroneously).

38. See *supra* text accompanying notes 33-35. I disagree with the contrary suggestion in *People v. Johnson*, 72 Cal. Rptr. 2d 805 (Cal. Ct. App. 1998). *Johnson* concluded that the jury "may surmise" from narrative testimony that narrative is nothing more than an option available only to criminal defendants, not that the defendant is lying. *Id.* at 817. I doubt it, but even if that were so, the court does not deal with the negative inferences the jury is likely to draw from the fact that his lawyer's summation then omits reference to his testimony. The court also says that the alternatives to narrative are worse—"the attorney's active participation in presenting the perjured testimony or exclusion of the defendant's testimony, neither of which strikes a balance between the competing interests involved." *Id.* But if indeed the defendant will commit perjury, as the court assumes, what right does he have to testify at all, even in narrative? And if we don't know that the defendant will commit perjury, why should he be relegated to narrative over his objection? The court rejects the solution of not calling the defendant because, it says, doing so "substitutes defense counsel for the jury as the judge of witness credibility." *Id.* at 815. That, of course, is what happens anyway when defense counsel insists on narrative testimony. Furthermore, the court permits even greater encroachment on the jury's role by allowing counsel to choose narrative if he merely "suspects" client perjury. Knowledge is not required. *Id.* at 810.

39. See *supra* notes 29-31 and accompanying text. Freedman would violate a pledge of confidentiality in limited circumstances. He would not give clients *Miranda* warnings because he thinks those circumstances are unlikely to arise. My argument is that a lawyer's knowledge that his client is going to commit or has committed perjury will also be rare and does not require giving *Miranda* warnings, especially as we can expect clients to know that lawyers may not help them break the law without the need for a warning. See *supra* note 31 and accompanying text.

III. CONCLUDED OR SURPRISE PERJURY

While solutions to the prospect of anticipated perjury turn on policy considerations rather than legal ones—because no client has a legal right to commit perjury or to a lawyer's help in doing so (and Freedman does not argue otherwise)—the situation is said to be different where the client has already committed perjury.⁴⁰ That may happen in the middle of the client's testimony, as where the lawyer has called the client to offer legitimate testimony and is then surprised when the client interjects a fact, perhaps gratuitously, that is knowingly false. Or a lawyer may first learn after the client testifies and before the conclusion of the matter that some of the testimony was perjurious. I am going to focus on concluded perjury, but I think the legal issues are the same for surprise perjury because it is also concluded—i.e., past—when the lawyer must decide whether to take action. In addition to policy arguments, Freedman claims that revealing completed perjury (again assuming knowledge) violates the client's constitutional rights. He cites a number of cases in support of this claim, which he finds grounded in the Fifth Amendment's privilege against self-incrimination⁴¹ and the right to counsel guaranteed in the Sixth Amendment.⁴² But the cited cases and constitutional provisions do not in fact give the client a right to a lawyer's silence. Consequently, a jurisdiction may properly require the lawyer to correct the perjury even if it means implicit or explicit revelation of the client's confidential information.

Before coming to the constitutional analysis, I want to say a word about the policy considerations when dealing with completed perjury. They are in fact weaker than when perjury is only a future possibility. This is because the burden on the two values Freedman wishes to protect—encouraging clients to be candid with counsel and discouraging a lawyer's intentional ignorance—are less threatened in the case of completed perjury. Freedman's argument when dealing with anticipated perjury is that either or both values will suffer because the client who intends to commit perjury will not want to be stopped by a rule that

40. I realize that this may not always be so. Constitutional claims may arise in some anticipated perjury situations; these would seem to be the same as those that arise where the perjury is a surprise or concluded.

41. FREEDMAN & SMITH, *supra* note 1, at 183-90; *see also* U.S. CONST. amend. V.

42. FREEDMAN & SMITH, *supra* note 1, at 184. The Sixth Amendment cases are *United States v. Henry*, 447 U.S. 264 (1980), and *Nix v. Whiteside*, 475 U.S. 157 (1986). *Nix* concluded that a lawyer's threat to report a client's anticipated perjury to the court—a threat that dissuaded the client from offering the lie when he did testify—did not amount to ineffective assistance of counsel. *See Nix*, 475 U.S. at 176. Freedman emphasizes that the defense lawyer in *Nix* did not actually reveal client confidences, but only threatened to do so. Freedman believes that that fact reduces the value of *Nix* as authority against his arguments. *See* FREEDMAN & SMITH, *supra* note 1, at 182-83.

forbids the lawyer to assist that goal. The client will not be candid and the lawyer may try to remain ignorant of information that will limit his options. When dealing with completed perjury, this argument is attenuated to the point of being an indefensible basis on which to build policy. The argument would be: In the lawyer's investigation of the case, including conversations with the client, the lawyer will think this way:

It may happen that my client testifies and I will not then know that the testimony is false. But I may later learn that the testimony was false and if I do, I will have a duty to inform the court. I want to be sure that I will not have this duty to the court when and if I learn that testimony I have already introduced is false. So anticipating that possibility, I will not ask certain questions.

The client would supposedly go through an analogous reasoning process when deciding whether or not to be candid with the lawyer. I reject these predictions for the same reason I rejected them in the case of anticipated perjury but more emphatically now because of the greater attenuation.

I now turn to Freedman's claim that the Fifth and Sixth Amendments do not allow a jurisdiction to require lawyers to remedy completed client perjury.⁴³ Freedman assumes, and I agree, that any remedy will generally require the lawyer, directly or indirectly, to reveal client confidential information or to use confidential information to the client's disadvantage (whether or not the client is the source of the information).⁴⁴ It seems to me impossible to think of even a remotely realistic situation where a lawyer will know of a client's perjury except, at least in substantial part if not exclusively, based on client confidential information even if the information does not come exclusively from the client. However, the constitutional argument is not based solely on the use or revelation of confidential information. Information aside, we have the prospect of the lawyer doing something that harms his own client in

43. I think it is fair to say that Freedman's constitutional argument is built mainly around the Fifth Amendment. The Sixth Amendment comes up incidentally because some of the cases he cites analyze it. *See supra* notes 41-42 and accompanying text.

44. This is a point I have not developed but it bears mention. Freedman's argument that candor to the court will make the client less willing to be candid with counsel overlooks the fact that some, perhaps much, of what a lawyer learns, and which might form part of the basis for a lawyer's knowledge that testimony is perjurious, will come not from the client but from other sources. Of course, this information would still be confidential. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2004). But the fact that it comes from other sources and not the client creates the possibility, although perhaps remote, that a lawyer's knowledge of a witness's perjury can rely on sources who will not have the same presumed motive to dissemble as Freedman says we can expect from a client intent on perjury. Therefore, the sources' candor will not be compromised by the duty to correct perjury.

the very matter in which he represents the client.

I conclude, however, that constitutional jurisprudence does not support the argument Freedman makes. Requiring a defense lawyer to remedy client perjury, even through the use or revelation of confidential information, violates no constitutional rights of the accused as these are understood. Time and space do not permit a detailed examination of all cases Freedman cites in support of a contrary argument. I will here focus on three cases, from which I think he mainly claims support, and a fourth case he does not cite but which I believe undermines his interpretation of the cases he does cite.

The three cases Freedman mainly cites in support of his argument and which I will address are *New Jersey v. Portash*,⁴⁵ *United States v. Henry*,⁴⁶ and *Estelle v. Smith*.⁴⁷ In *Portash*, the defendant was granted use immunity for grand jury testimony.⁴⁸ He was indicted and his lawyer asked for a ruling that if Portash testified, his grand jury testimony could not be used to impeach his credibility.⁴⁹ The trial judge declined and Portash did not testify.⁵⁰ On appeal, the state court held that the trial court had erred.⁵¹ The grand jury testimony could not have been used to impeach Portash's testimony.⁵² The Supreme Court agreed. It distinguished a separate line of cases in which the Court had upheld the use of statements taken in violation of *Miranda v. Arizona*⁵³ to impeach the accused if he testified.⁵⁴ Those cases differed, the Court said, because the statements there were not involuntary.⁵⁵ The fact that they were elicited in violation of *Miranda* meant they could not be used to build the state's case, but because they were not involuntary, they could be used to impeach if the accused testified inconsistently with them.⁵⁶ By contrast, Portash's immunized testimony was involuntary because a refusal to testify would have put him in contempt of court and subjected him to incarceration.⁵⁷ The Court did not address where the truth might lie between the defendant's grand jury and proposed trial testimony.

45. 440 U.S. 450 (1979).

46. 447 U.S. 264 (1980).

47. 451 U.S. 454 (1981).

48. *See Portash*, 440 U.S. at 451.

49. *Id.* at 452.

50. *Id.*

51. *See id.* at 453.

52. *See id.*

53. 384 U.S. 436 (1966).

54. *Portash*, 440 U.S. at 458.

55. *Id.* at 458-59.

56. *Id.* The cases were *Harris v. New York*, 401 U.S. 222 (1971), and *Oregon v. Hass*, 420 U.S. 714 (1975).

57. *See Portash*, 440 U.S. at 459.

United States v. Henry and *Estelle v. Smith* can be discussed together. In both cases, the Sixth Amendment right to counsel of the accused had already attached.⁵⁸ In *Henry*, “incriminating statements [were] made by the accused to an . . . undercover Government informant while in custody and after indictment.”⁵⁹ The informant was a fellow prisoner whose assistance the government had secured. The informant testified to the defendant’s incriminating statements.⁶⁰ The Court held that Henry’s right to counsel had been violated, citing *Massiah v. United States*.⁶¹ The statements of the defendant in *Estelle v. Smith* were also made to a government agent, but here the agent was a government psychiatrist, who ostensibly examined the defendant only to determine if he was competent to stand trial.⁶² Unlike the witness in *Henry*, the defendant knew that he was speaking to a person working with the prosecutor.⁶³ The defendant did not challenge the state’s right to have its psychiatrist examine him for competency.⁶⁴ But the trial court then admitted the psychiatrist’s testimony at the penalty phase of Smith’s capital trial on a separate issue—Smith’s future dangerousness.⁶⁵ The Texas capital statute made future dangerousness a factor for the jury to evaluate in deciding whether the defendant should be sentenced to death, which Smith was.⁶⁶ The Court held that the psychiatrist’s testimony violated *Miranda*, explaining:

When Dr. Grigson went beyond simply reporting to the court on the issue of competence and testified for the prosecution at the penalty phase on the crucial issue of respondent’s future dangerousness, his role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting.⁶⁷

In addition, citing *Henry* and *Massiah*,⁶⁸ the Court held that the interview with Dr. Grigson was a “‘critical stage’ of the aggregate proceedings against respondent.”⁶⁹ Accordingly, the right to counsel had

58. *United States v. Henry*, 447 U.S. 264, 269-70 (1980); *Estelle v. Smith*, 451 U.S. 454, 469-71 (1981).

59. 447 U.S. at 269.

60. *Id.* at 267.

61. *Id.* at 273 (citing *Massiah v. United States*, 377 U.S. 201 (1964)).

62. 451 U.S. at 456-57.

63. *See id.*

64. *See id.*

65. *Id.* at 458-60.

66. *Id.* at 460.

67. *Id.* at 467.

68. *Id.* at 470.

69. *Id.*

attached, yet:

Defense counsel . . . were not notified in advance that the psychiatric examination would encompass the issue of their client's future dangerousness, and respondent was denied the assistance of his attorneys in making the significant decision of whether to submit to the examination and to what end the psychiatrist's findings could be employed.⁷⁰

None of these decisions bears on the distinctly different claim Freedman advances. In *Portash*, the statement the Court excluded was made on threat of imprisonment. The state compelled the statement; it was involuntary.⁷¹ However, a defendant's statements to counsel are neither involuntarily nor compelled by the state. The fact that the client has a motive to be candid with his lawyer and the fact that the lawyer has a professional duty to encourage candor does not make the statement involuntary in the Fifth Amendment sense. *Portash* would go to jail if he refused to talk after receiving immunity.⁷² The state does not imprison a defendant who refuses to talk to his lawyer. Furthermore, Freedman's argument cannot be limited to the criminal defendant. All individual litigants are protected by the Fifth Amendment. So if it violates the Fifth Amendment to require counsel to reveal an accused client's confidence in order to correct client perjury, that would also be so for civil litigants. In fact, I wonder how we could then distinguish transactional work. Wouldn't it follow that a state could not, consistent with the Fifth Amendment, require (or perhaps even authorize) a lawyer who has unwittingly helped a client commit criminal fraud, reveal client confidences in order to prevent harm from the fraud?⁷³ But we need not go down that road because *Portash* simply does not support Freedman's argument. In the different situation under discussion, unlike *Portash*, we have no use of officially compelled statements.⁷⁴

Nor are *United States v. Henry* and *Estelle v. Smith* of any use to Freedman's argument. In each case, after the right to counsel had

70. *Id.* at 470-71.

71. 440 U.S. 450, 459 (1979) ("Testimony given in response to a grant of legislative immunity is the essence of coerced testimony. In such cases there is no question whether physical or psychological pressures overrode the defendant's will; the witness is told to talk or face the government's coercive sanctions, notably, a conviction for contempt.").

72. See N.J. STAT. ANN § 52:9M-17(c) (West 2001).

73. MODEL RULES OF PROF'L CONDUCT R. 1.6(b)(2) and (3) give lawyers exactly this authority. Some states mandate revelation of confidential information in these circumstances. See, e.g., NEW JERSEY RULES OF PROF'L CONDUCT R. 1.6(b)(1) (2000).

74. *Portash* is also distinguishable because the Court has created an exception to it when the ensuing prosecution is for the crime of lying to the grand jury under a grant of immunity, as discussed at text accompanying note 97 *infra*.

attached and without *Miranda* warnings, a state agent elicited incriminatory statements from the accused which the Court held could not then be used against him.⁷⁵ The fact that the jailhouse informant and the psychiatrist were state agents was central to the Courts' *Miranda* analyses.⁷⁶ In the situation here, however, a lawyer for an accused is not a state agent, not even if the lawyer is appointed.⁷⁷ Appointed or retained, the state is not sending the lawyer to talk to the accused to obtain incriminating statements that it can then use in building its case. Furthermore, neither case would exclude use of the evidence to impeach. Statements obtained in violation of *Miranda* can be used to impeach,⁷⁸ as can statements taken in violation of the Sixth Amendment right to counsel.⁷⁹ In any event, in addition to not being an agent of the state, the lawyer who remedies completed perjury by revealing client confidences is not offering evidence at all, not even to impeach. He is simply undoing a fraud on the court, which he unwittingly aided, by revealing information to the court.

The weaknesses of the cases Freedman cites in support of his conclusion are underscored by a case he does not cite, namely, *United States v. Apfelbaum*.⁸⁰ The issue it resolved is expressly reserved in *Portash*.⁸¹ As described in *Portash*, the reserved issue is this: "[W]hether possibly . . . immunized testimony may be used in a subsequent false-declarations prosecution premised on an inconsistency between that testimony and later, nonimmunized testimony."⁸² Recall that in *Portash* the Court held that compelled testimony (given under a grant of immunity) could be used neither as evidence in chief nor to impeach in a later prosecution.⁸³ The issue the Court preserved was whether such testimony could be used as part of the government's case in chief if the later prosecution is for making a false statement. *Apfelbaum* was a prosecution for making false statements to a grand jury.⁸⁴ The government introduced the portions of the defendant's immunized grand

75. *Estelle v. Smith*, 451 U.S. 454, 463 (1981); *United States v. Henry*, 447 U.S. 264, 273 (1980).

76. *Estelle*, 451 U.S. at 463; *Henry*, 447 U.S. at 273.

77. *Polk County v. Dodson*, 454 U.S. 312, 325 (1981) ("[A] public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding.").

78. See *supra* notes 53-57 and accompanying text.

79. *Michigan v. Harvey*, 494 U.S. 344, 353 (1990).

80. 445 U.S. 115 (1980).

81. 440 U.S. 450, 459 n.9 (1979).

82. *Id.*

83. *Id.* at 459-60.

84. 445 U.S. at 115.

jury testimony it claimed were false.⁸⁵ There was no challenge to its right to do so. The grant of immunity did not entitle the defendant to lie under oath and the government was free to introduce the testimony it alleged was false. But the government also sought to introduce other testimony the defendant had given before the same grand jury.⁸⁶ The government did not claim that the other testimony was false. Rather, it offered this testimony “to put the charged statements in context and to show that respondent knew they were false.”⁸⁷ The question before the Court was whether the government could introduce this other testimony or whether the grant of immunity, which meant (as in *Portash*) that the testimony was involuntary, prevented the government from using the testimony for that purpose. The defendant claimed that both the immunity statute and the Fifth Amendment prevented introduction of any portion of the immunized testimony that the government did not allege was false.⁸⁸

The Court unanimously rejected both arguments.⁸⁹ The majority opinion held that the grant of immunity was meant to prevent use of the immunized testimony in a prosecution for the crimes the grand jury was then investigating (extortion, mail fraud, racketeering),⁹⁰ not for the perjury that the defendant, once immunized, might thereafter commit. The Court held that “in our jurisprudence there . . . is no doctrine of ‘anticipatory perjury.’”⁹¹ While it was logically true that the grant of immunity resulted in testimony that the government would not have had absent the grant (because the defendant would then have been able to remain silent), and that therefore the defendant was not in precisely the same position as he would have been in had he remained silent, the defendant had no Fifth Amendment right to be put in the same position as if he had remained silent.⁹² That was, of course, true with regard to that part of the testimony alleged to be false and which was the basis for the perjury prosecution.⁹³ Absent immunity, there would be no false statement to prosecute.⁹⁴ But the court held that it was also true with

85. This is the testimony that constituted the false statements, which the Court of Appeals called “the ‘*corpus delicti*’ or ‘core’ of the false-statements offense.” *Id.* at 117.

86. *Id.* at 115.

87. *Id.* at 119.

88. *Id.* at 123, 131.

89. Three justices concurred in the judgment, writing two opinions. *See id.* at 116.

90. *Id.* at 117.

91. *Id.* at 131 (Brennan, J. concurring); *see also* *Brogan v. United States*, 522 U.S. 398, 404 (1998) (“[N]either the text nor the spirit of the Fifth Amendment confers a privilege to lie.”).

92. *Apfelbaum*, 445 U.S. at 124-27.

93. *Id.* at 126.

94. *Id.* at 124.

regard to use of the defendant's other testimony to the grand jury.⁹⁵ Neither the immunity statute nor the Fifth Amendment protected the defendant from use of this testimony, if otherwise admissible and relevant, to prove the perjury.⁹⁶

Apfelbaum undermines Freedman's reliance on *Portash* because it reaches a contrary result where the crime on trial is false statement or perjury, the very subject of Freedman's trilemma. Even testimony that is truly compelled by the state, on pain of incarceration, is admissible in a trial alleging that other testimony given during the same grand jury appearance was false.⁹⁷ And here we are dealing only with a *charge*, and therefore only a determination of probable cause to believe that perjury was committed, not a lawyer's knowledge that it was committed. Nonetheless, the immunized testimony is admissible. Further, unlike a rule requiring a lawyer to remedy completed perjury only by communication with the court, *Apfelbaum* admitted the immunized testimony in evidence as part of the government's case in chief.

I am prepared to entertain (though I have not seen and have a difficult time imagining) a non-frivolous argument for the proposition that the Fifth or Sixth Amendments should be read to invalidate a rule that requires criminal defense lawyers to remedy completed client perjury, including by revealing confidential information. It is an argument, however, that has many problems, not least of all describing its limitations and the absence of authority or constitutional policy that can by any careful reading support it.

IV. CONCLUSION

Let me end with these words. I believe Professor Freedman's solution to the trilemma he describes is wrong. But I know to a moral certainty that he performed a valuable service forty years ago in identifying this issue (as well as many others then and thereafter) clearly and forcefully. At a time when legal ethics was a remote and largely unexamined backwater in legal scholarship and in the minds of lawyers and judges, Professor Freedman was one of a very few scholars to

95. *Id.* at 131.

96. *Id.* at 131-32; *see also* Brogan, 522 U.S. at 404.

97. "[W]e conclude that the Fifth Amendment does not prevent the use of respondent's immunized testimony at his trial for false swearing because, at the time he was granted immunity, the privilege would not have protected him against false testimony that he later might decide to give." *Apfelbaum*, 445 U.S. at 130. Likewise, a defense lawyer's representation that communications with an accused are confidential does not make the lawyer's later revelation of the client's confidential information, pursuant to the requirements of the state ethics rule, a violation of the defendant's Fifth Amendment rights.

identify serious issues in the field and to subject them to critical inquiry. That is work for which the legal profession and academy will forever be in his debt.

QUESTION & ANSWER

PROFESSOR SIMON: We invite people if you would like to comment and to ask questions.

PROFESSOR WECHSLER: Professor, I'm Steven Wechsler from Syracuse Law School. I want to pick up on your last point where the lawyer who calls for advice, and particularly, the completed perjury. I think of the New York lawyer who calls me for advice. I have always understood that the New York Code and DR 7-102(b)⁹⁸ is different from the Model Rule. That New York Code says when you call upon your client if he refuses or is unable, you should reveal perjury unless it protects the confidence or a secret, which we presume always will be there. Therefore, the exception eats up the rule. The Court of Appeals of New York decided the *DePallo*⁹⁹ case, which imparted past perjury and they spoke approvingly of their revelation of past perjury. I take the position *DePallo* has to be defined in its own peculiar facts that the lawyer reveals his argument on the record, but another very prominent scholar has said that *DePallo* changes the law in New York and brings us in line with the Model Rule. I want to ask you what you think the law in New York is about past perjury after *DePallo*.

PROFESSOR GILLERS: In *DePallo*, as I recall, the lawyer revealed the committed perjury. The client testified in a narrative and that was blessed by the Court of Appeals. The New York rules are different. I was constructing my talk around Model Rule 3.3.¹⁰⁰ What difference in the advice would I give based on the different New York rules, glossed by *DePallo*? I think preliminarily I would say that the lawyer would certainly be in harm's way if she argued the perjurious testimony. But because the New York rules preference confidentiality over correcting fraud on the court, there is a good argument that a lawyer is not permitted to reveal the perjury to the judge after it is committed.

PROFESSOR WECHSLER: I appreciate that. That's my own conclusion.

MR. ELDEIRY: Mark Eldeiry. I was wondering, Professor, if another possible suggestion from the attorney to the client in the case of anticipatory perjury would be to tell the client: "If you want to keep this

98. N.Y. CODE OF PROF'L RESP. DR 7-102(b) (2003).

99. *People v. DePallo*, 754 N.E.2d 751 (N.Y. 2001).

100. MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(3) (2004).

secret and not have it come out, you have to fire me. Go into the judge's chambers, we'll be there with the prosecutor. You tell the judge you don't like the way I'm handling your case. You don't get along with me, whatever, but it's your choice to fire me."

PROFESSOR GILLERS: I think that's a variation on two other responses to prospective perjury. In a way it commingles them. One is: "No, I won't do it, because I know you're going to lie, and you don't have a constitutional right to lie," and the other is: "Well, I'm going to seek to withdraw, rather than do that," without saying why. So "you have to fire me" collapses those two. "You can go in and tell the judge that I've made a strategic decision with which you violently disagree, and you want to get rid of me." I doubt very much, after the People's case has gone on for the last three and a half weeks, with the jury sitting there, the judge will agree.

MARK ELDEIRY: Thank you.

PROFESSOR FREEDMAN: Monroe Freedman. Thank you very much, Steve, for a very fair and interesting statement on my position. I'll only say briefly, you haven't quite persuaded me that I'm wrong. But the footnote I want to drop to your talk which I think is an important one, and one that I do impress on my students, when a lawyer calls me, whether in New York, under the New York rules or under any other rules, that lawyer is my client. That lawyer's client is not my client. My view of what the rules ought to be, is not my client. What I've written in a book is not my client. My job, when that lawyer calls me, is to represent zealously that client, that lawyer, and to keep that lawyer out of any potential trouble. This is a situation typically where the client has been giving the lawyer exculpatory information all along, and then at trial or close to trial says to the lawyer: "I have decided I'm going to say I didn't do it; I have an alibi," and so on. And the lawyer says: "What should I do?" My answer is that you must assume from this point on that your client has been talking to the prosecutor, who has turned the client, and that you are talking to not just to your client, but to the prosecutor through a body wire, and everything you say or do has to be calculated to protect yourself, not your client anymore, from disbarment or from criminal prosecution for supporting perjury or whatever else the prosecutor has in mind in trading up from your client to you. This is so, regardless of any disagreement we might have about what the rules are, what the rules ought to be, what the policy is and, certainly, we continue to have disagreements about the constitutional aspect of it. I think on that point, we probably agree, and it's an important thing to impress on our students.

PROFESSOR GILLERS: First, I want to say that when Monroe

saw the topic of my talk, I got a singled-spaced three-quarter page memo telling me exactly what I had to address giving page citation and case names to educate me about the substance of Monroe's many arguments, and I duly did read or reread the excerpts from the book and all the cases that have been cited, so I did my homework. Now, a question for you, Monroe. I want to change the hypothetical. That's one of my prerogatives as a law teacher. My hypothetical now is that the lawyer doesn't call you. The lawyer and you are co-counsel on the matter, and the lawyer says: "You know, Monroe, I really didn't think you would be very much help in this criminal case, but I'm really glad I have you now, because we got this defendant who testified, and we've just discovered that she lied. The case is going to be summed up. As private counsel, Professor Freedman, what do I do?" What do you say?

PROFESSOR FREEDMAN: Well, the answer to that candidly is going to depend a significant part on whether I think my client is being straight with me or whether I think I'm being set up. The concern of a prosecutor who is trading up through the defense lawyer is something that I would want to take into consideration. I do have a videotape from the Harvard Trial Advocacy Workshop from several years, that I did with Andy Kaufman. In fact, we've done the same thing repeatedly for a many number of years.

In the videotape, the defendant has repeatedly denied that he pushed the victim into the water; he was behind him six feet, eight feet. The defendant says to the lawyer: "Well, if you're talking about witness so and so, then I know he's going to testify against me, but he couldn't possibly have seen me when I pushed him in, because the dumpster was in between us." What I started to do on the videotape, but for the sake of the exercise, did not do, was to say: "I'm not sure what you're saying here. You testified before the grand jury that you were several feet behind him. You've consistently told my investigator that you were several feet behind him. You told me repeatedly over a period of months you were several feet behind him. I'm not sure exactly what it is you're saying now, whether you're contradicting that, but let me tell you before we go on any further what the rules are. If you are contradicting everything you have repeatedly said before, including under oath, then I would have to tell the judge if you're going to take the stand and lie. I'm not clear on what it was you did say, and certainly, I'm not clear on whether you are now contradicting everything you've been saying to me and to everybody else. Now, if you are not contradicting it, we have no problem. If you are, then if you take the stand and you testify that you were several feet behind him, I would then have to tell the judge. Now, let's back up. We were talking about Tomasso's testimony. What can

you tell me about Tomasso's testimony?" Then we start over again. If he says to me, well, what I was telling you was, I really pushed him in but Tomasso couldn't see me, I would assume that I'm talking to a body wire.

PROFESSOR GILLERS: But, you know, just to push it another square, since it's just us talking here; right?

PROFESSOR FREEDMAN: With nobody listening.

PROFESSOR GILLERS: No, so, Monroe, let me put to you that I understand that clients set up lawyers, because sometimes the lawyer becomes the focus of the prosecutor. You said: "Well, I would want to make sure that that's not happening here." Well, let's say, you made sure. You've learned about concluded perjury in the courtroom as part of the defense case, and you know that it was perjury. You're co-counsel. You satisfied yourself beyond a reasonable doubt that you're not being set up. It's the day after your client has testified. You now know it was false. What do you do?

PROFESSOR FREEDMAN: Well, one of the things that I would do, and I know you can take it to the next step—

PROFESSOR GILLERS: I'm not going to go into it any further.

PROFESSOR FREEDMAN: But one of the things that I would do, is to take advantage of what the ABA has repeatedly said in a number of different fora, and through a number of different spokespersons, including the reporter who drafted Rule 3.3. What I would do is take the ABA's advice, and recognize that I never really know, unless the client has told me in so many words. One can even refer to the rules of the British barristers who has been told that as long as your client has told you contradictory stories, including the incriminating version, as long as he has told you inconsistent stories, you don't know. So I would play the knowing game. You said at the beginning, that Model Rule 3.3 has rejected my position. Rule 3.3 appears to have rejected my position, but because of how they define "knowing," you never have to know.

PROFESSOR GILLERS: Well, you're taking away one part of my hypothetical. Or are you going to tell me you never know anything, which I don't think you're saying.

PROFESSOR FREEDMAN: I don't believe that, but the ABA tells me that I can believe that. The problem with Rule 3.3 is that every lawyer who has decided that he or she knew the client was committing perjury was a court-appointed lawyer or a public defender, and, typically, working for a member of a minority group. That is, we have a de facto denial of equal protection. The way it works in practice is that white people who pay their lawyers never lie. They never commit perjury. I mean, that's what we would infer from the evidence. So Rule

3.3 clearly does not mean what it says, except when the clients are poor people.

PROFESSOR GILLERS: So now we got a little too complicated, because we forced the lawyers to look at the rules. All right. Well, then there are—that would be part of the record and, you know, it depends upon the conversation—

PROFESSOR FREEDMAN: What I want to add—

PROFESSOR GILLERS: Yes?

PROFESSOR FREEDMAN: Is that *Strickland v. Washington*¹⁰¹ establishes a wide range of latitude to defense counsel to make trial judgments, I would argue that I fall within that very wide range of discretion. Perhaps you would have believed that he was lying, and it's a lie. I was there. I had that wide discretion that has no limit for practical purposes, and I didn't believe he was lying.

PROFESSOR GILLERS: Okay. [Applause]

PROFESSOR YAROSHEFSKY: Ellen Yaroshefsky. I'm from Cardozo Law School and I want to accept that your rendition is correct legally, and I know you will be surprised to hear me say that. I'm the advisor to National Association of the Criminal Defense Lawyers. As a group, I would say they are Monrovians. These are the people who take comfort, because as you say, did this question tell us who we are? I would say these questions tell us who we are, who we actually have as clients. And those are the people who also have clients. Those are the people when faced with this problem go to the Monrovia's point of view in fear that if there's any other point of view, all it does is drive underground the lawyers who actually are doing a great job and preventing them from doing their job, so I want to go a little further. I'm going to ask you what to do about the consequence of what we've done, all of you've done? What we've done with Rule 3.3, rewrite the Model Rule, which many criminal defense lawyers have—has not been written by them, not written in the interest of their clients, is to drive underground the concerns that Monroe raises, because the way I teach this these days, is that we love to talk about this question. In fact, it's hardly the main ethic question we ought to deal with. Ninety-five percent, ninety-eight percent of clients plead guilty. Of those that don't plead guilty, rarely does a defendant testify, and of the defendants who testify, most of them are not going to be in this position, so we're probably talking about an infinitesimal number of possible perjurious clients. Of those people, most of them are, as Monroe pointed out, represented either by public defenders, and I don't want to stand here

101. 466 U.S. 668 (1984).

and criticize public defenders that they do horrible jobs. People like in the *DePallo* case are the ones who are not doing a very good job. I teach *DePallo* as: “Judge, judge, my client is going to lie, my client is going to lie,” rather than what a competent defense lawyer would do, which is figure out a way to talk to that client, so that the client doesn’t take the stand and commit perjury.

My question, when I finally finish is, what do we do about these are the real life consequences and what the rules have created. What’s a good criminal defense lawyer if they are at odds with their client? We will not allow them to say, the client gives you the discretion when in that infinitesimal point we’ve reached. We’re going to give you the discretion there to use your best judgment. We’re going to encourage you to do the best that you can.

PROFESSOR GILLERS: Well, Ellen, I think there are a couple of answers to that first. Your argument focuses on the policy preference. And that’s where I think the debate should go on, and is going on. Your argument also identifies the disjuncture between practice and theory; right?

PROFESSOR YAROSHEFSKY: Yes.

PROFESSOR GILLERS: And there is a disjuncture, because I can get up and talk about this as a doctrinal issue, go to class and do the same, and then there are the armies of criminal defense lawyers having to deal with it in the real world, with mainly indigent criminal defendants who have chosen to go to trial. One never knows, but in the event of a more flexible policy, the opportunity, the license, if you will, to do what cannot now be done by way of anticipatory perjury, might result in more than now exists; i.e., empirically perhaps the criminal defense lawyer today urges the client not to get on the stand and lie, cognizant of Rule 3.3. If Rule 3.3 were not there, and lawyers were not at risk, they might see that as another legitimate tactic in the defense of a criminal accusation. They might not be as scrupulous or careful as you suggested they are in the Rule 3.3 regime. Last point, if you want to get theory to recognize what you’re defining as current practice, and what the practice would be after a change, you’ve got to explain the stopping places doctrinally. It seems to me you must do it. Why will you let the criminal defense lawyer call the client, but not the client’s friend, to buttress his own testimony about a false alibi. You have to explain why you would stop there. You have to explain to me why in a misdemeanor case where the possible realistic sentence is thirty days, we would allow a criminal defense lawyer to call a perjurious defendant, because it’s a criminal case, but we would not let a lawyer in a civil case concerning termination of parental rights do the same thing, or in a civil case which

could result in bankruptcy and loss of all assets of a middle class family with three children headed for college. Each of these clients may see the need for perjury as much more acute than would the client facing thirty days in jail. You have to explain that to me if you're going to talk about practicality. How do you limit the effect of the changes you purport to adopt?

PROFESSOR YAROSHEFSKY: I agree with that. I don't know that we want to do that. I agree.

PROFESSOR SIMON: Thank you very much. [Applause]