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## Introduction

Virtue ethics, inspired by Aristotle, acknowledges the complexity of the human condition and that a virtuous moral agent exercises the relevant virtue when appropriate to the circumstances.[1] Simply, an action is right if and only if the action is one that a virtuous moral agent would characteristically perform under the circumstances. St. Thomas Aquinas, the great thirteenth-century theologian, philosopher, and caretaker of the virtue ethics tradition, taught that "the natural law literally commands, in a sense, every act of virtue and prohibits every vice."[2] In legal contexts, the natural law is "law that determines what is right and wrong and that [which] has power or is valid by nature, inherently."[3] Legal ethics refers to the code of conduct that regulates and instructs the behavior of persons within the legal profession.[4] Virtue ethics tells one what kind of person he should be but often fails

1. Aristotle and Terence Irwin, Nicomachean Ethics, third Edition (2019).

2. Louis W. Hensler III, *A Modest Reading of St. Thomas Aquinas on the Connection between Natural Law and Human Law*, 43 Creighton L. Rev. 153, 154 (2009).

3. Bryan A. Garner, A Dictionary of Modern Legal Usage 581–82 (2d ed. 1995).

4. James M. Altman, *Considering the ABA's 1908 Canons of Ethics*, 71 Fordham L. Rev. 2395 (2003) (underlying the ABA's efforts was the idea that it is possible to articulate and maintain a level of lawyer conduct that is higher and better than the minimal normative standards imposed by the criminal law).

to provide a clear answer or action in response to a specific moral dilemma.[5] That specific aspect of virtue ethics is similar to the Model Rules of Professional Conduct (hereinafter Model Rules),[6] in that it presents ethical legal practice ideals with limited guidance on their application to a particular legal problem.

This chapter's focus will be on the failure of the enforcement of the Model Rules in order to combat the particular legal problem of ensuring adequacy of counsel. One way to address this failure is through therapeutic jurisprudence (TJ). TJ recognizes that the law can have therapeutic or antitherapeutic consequences and asks whether rules, procedures, and lawyer roles can be reshaped to enhance therapeutic potential without subordinating due process principles.[7] TJ "look[s] at law as it actually impacts people's lives" and supports "an ethic of care."[8] At the end of the chapter, some suggestions for reform, in line with TJ principles, are presented.

## Overseeing Legal Ethics

Aquinas's definition of law is "an ordinance of reason for the common good of a [complete] community, promulgated by the person or body responsible for looking after that community."[9] One body responsible for looking after the legal community is the American Bar Association (ABA), authors of the Model Rules. Overseeing organizational ethics and policing within the legal profession is crucial to assuring that lawyers remain diligent in their duties and responsibilities.[10] The ABA and state bar associations promulgate ethical rules to standardize attorney behavior and define an attorney's duties to her clients.[11] The preamble to the Model Rules states in part:

5. Rosalind Hursthouse, *Virtue Ethics*, Stanford Encyclopedia of Phil., at Pt. 3(i) (Mar. 8, 2012), http://plato.stanford.edu/archives/sum2012/entries/ethics-virtue (the "complaint that virtue ethics does not produce codifiable principles . . . nor provide action-guidance" is a commonly voiced criticism).

6. American Bar Association, Model Rules of Professional Conduct (2016), hereafter cited as Model Rules.

7. Michael L. Perlin, *"His Brain Has Been Mismanaged with Great Skill": How Will Jurors Respond to Neuroimaging Testimony in Insanity Defense Cases?* 42 Akron L. Rev. 885, 912 (2009).

8. Bruce J. Winick, *Foreword: Therapeutic Jurisprudence Perspectives on Dealing with Victims of Crime*, 33 Nova L. Rev. 535, 535 (2009).

9. John Finnis, *Aquinas and Natural Law Jurisprudence*, in The Cambridge Companion to Natural Law Jurisprudence 17, 37 (George Duke and Robert P. George eds., 2017).

10. *See* Warren E. Burger, *The Decline of Professionalism*, 63 Fordham L. Rev. 949, 949 (1995).

11. Each state is free to adopt their own legal ethics code. Almost all states except California have chosen to incorporate the ABA version. *See Alphabetical List of Jurisdictions Adopting Model Rules*, ABA, https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/alpha_list_state_adopting_model_rules.html.



> The legal profession is largely self-governing. Although other professions also have been granted powers of self-government, the legal profession is unique in this respect because of the close relationship between the profession and the processes of government and law enforcement. This connection is manifested in the fact that ultimate authority over the legal profession is vested largely in the courts. The legal profession's relative autonomy carries with it special responsibilities of self-government.[12]

In the United States, each jurisdiction's highest court typically is the regulatory body that has the overarching responsibility for lawyer regulation.[13] Yet what and who are they regulating? We often think about professional responsibility as something that lawyers owe to their clients, but it in fact is much greater than that narrow view.[14] There is no consensus on how to define professional responsibility, but attempts are usually found at the center of debates on whether the legal profession is adequately meeting its public purpose and following its core values and ideals.[15] Professional responsibility implies a duty to society at large that is clearly outlined in the Model Rules: "Lawyers play a vital role in the preservation of society."[16] In that ultimate objective of playing a vital role in the preservation of society, overseers of the legal profession have a daunting yet necessary role in protecting the morals of society, some of which can be listed as universal constitutional protections and preventing discrimination on the basis of race, gender, socioeconomic class, and disability.[17]

12. Model Rules, *supra* note 6 at pmbl. para. 10. *See also* William Shakespeare. The Second Part of King Henry the Sixth, act 4, sc. 2., when Dick, "the Butcher," says to the traitorous Jack Cade, "The first thing we do, let's kill all the lawyers" as the first step to overthrow of the government.

13. Jared K. Carter, *A Reflection on Law, Legal Education, and Pandemic*, Vt. B.J., at 24 (2020).

14. *See, e.g.*, Model Rules *supra* note 6 at pmbl. para. 9 ("Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.").

15. Alberto Bernabe, *Ahead of His Time: Cardozo and the Current Debates on Professional Responsibility*, 34 Touro L. Rev. 63, 64 (2018) (professionalism is an elastic concept).

16. Model Rules, *supra* note 6 at pmbl. para. 13.

17. In Theard v. United States, 354 U.S. 278, 281 (1956), the U.S. Supreme Court stated, "Membership in the bar is a privilege burdened with conditions . . . [it's an] ancient fellowship for more than private gain." As an officer of the court, appellant is an instrument "to advance

## Failure of the Judiciary to Mandate Competent Counsel

Unfortunately, these ideals are not always maintained and fall particularly short in the area of competency of counsel.[18] One of the most detrimental ethical violations is the failure to provide effective assistance of counsel in criminal cases.[19] Pursuant to the Supreme Court's opinion in *Strickland v. Washington*, a defendant proves an ineffective assistance of counsel claim by establishing (1) that counsel's performance "fell below an objective standard of reasonableness" as measured by "prevailing professional norms," and (2) prejudice, that is, "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[20] *Strickland* sets a low bar for attorney competence, and *Strickland* claims are almost always rejected by the courts.[21] Although the court subsequently extended the *Strickland* standard to apply in practically all critical stages of a criminal case, "it has fallen far short of ensuring that counsel is truly adequate: that she investigate the case, provide the defendant with all the information necessary for the defendant to make informed choices, and mount a vigorous defense at trial."[22] Courts conducting *Strickland* analyses need not consider both prongs of the inquiry "if the defendant makes an insufficient showing on one."[23] In particular, a court can examine prejudice without first considering counsel's deficient performance.[24] This reflects the court's efficiency concerns: "If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed."[25]

The failure of the *Strickland* standard, coupled with a lack of reporting and sanctions, has culminated in an overwhelming number of attorneys who are "walking violations of the Sixth Amendment"[26] yet are still allowed to practice in the criminal courts. In fairness, "many ineffective assistance problems are systemic problems: poor appointment systems, weak and underfinanced public defender and defense support systems, a weak defense bar, and undertrained attorneys."[27] But regardless, the excuse of lack of resources can only extend so far and does not negate the contributory role of the courts and the legal oversight committees in furthering ineffective assistance.[28] There are countless examples of cases where lawyers knowingly provided subpar representation and detrimentally impacted the client's case.[29] That failure in criminal cases can be the difference between life or death—literally. There is little evidence disputing *Strickland*'s failure to ensure adequate assistance of counsel for capital defendants.[30] Examples of affirmed trial decisions rejecting *Strickland* arguments are, in some circum-

the ends of justice." *See also* Hon. Christopher C. Cross, *The Role of an Attorney in Society: A Higher Calling*, 91 DENV. U.L. REV. ONLINE 75 (2014) (a lawyer must ignite the passion in others to address human rights issues of today and tomorrow).

18. Mark W. Bennett, *Reflections on Judicial Regrets*, LITIGATION, at 5, 6 (2015) ("I have encountered far too many lawyers who lack the passion for the privilege of representing a client—lawyers who fail to internalize the extraordinary effort it takes to advocate to the best of one's ability.").

19. *See* 1 NEW YORK STATE JUDICIAL COMM'N ON MINORITIES, REPORT OF THE NEW YORK STATE JUDICIAL COMMISSION ON MINORITIES (1991).

> *A panel of judges, attorneys, and law professors found that there are two justice systems at work in the courts of New York State; one for whites, and a very different one for minorities and the poor. The panel found inequality, disparate treatment, and injustice based on race. It reported that many minorities received 'basement justice' in that court facilities were infested with rats and cockroaches . . . and racist graffiti appeared on the walls of court facilities. . . . Minority cases often take only 4 or 5 minutes in court, suggesting a form of assembly line justice, and that black defendants outside of [N.Y.C.] frequently have their cases heard by an all-white jury.*

20. 466 U.S. 668, 686 (1984).

21. John M. Burkoff and Nancy M. Burkoff, *Judicial Reluctance to Find Ineffective Assistance—Pervasiveness of Ineffectiveness* INEFFECTIVE ASSIST. OF COUNSEL § 1:7 (2020):

> *Unfortunately, albeit candidly, the reason some judges may be reluctant to find ineffective assistance readily is their belief that if they were totally honest in so finding on every actual occasion of ineffectiveness, too many cases would be reversed.*

22. Heather Ellis Cucolo and Michael L. Perlin, *"Far from the Turbulent Space": Considering the Adequacy of Counsel in the Representation of Individuals Accused of Being Sexually Violent Predators*, 18 U. PA. J.L. & SOC. CHANGE 125, 126 (2015).

23. *Strickland*, 466 U.S. at 697.

24. *Id. See also* United States v. Cronic, 466 U.S. 648 (1984). In *Cronic*, the Supreme Court held that in those instances where the absence, actions, or inactions of counsel compromise the very reliability of the trial process, ineffective assistance of counsel may be presumed, requiring a reversal without meeting the prejudice prong of the *Strickland* test.

25. *Id. See* Pamela R. Metzger, *Confrontation Control*, 45 TEX. TECH L. REV. 83, 92 (2012).

26. David Bazelon, *The Defective Assistance of Counsel*, 42 U. CIN. L. REV. 1, 2, 22–23 (1973).

27. Gary Goodpaster, *The Adversary System, Advocacy, and Effective Assistance of Counsel in Criminal Cases*, 14 N.Y.U. REV. L. & SOC. CHANGE 59, 66, 75 (1986).

28. Shaun Ossei-Owusu, *The Sixth Amendment Facade: The Racial Evolution of the Right to Counsel*, 167 U. PA. L. REV. 1161, 1223 (2019).

29. Warren E. Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 FORDHAM L. REV. 227, 230 (1973) (according to Chief Justice Burger, between one-third and one-half of lawyers in serious trials were not qualified to represent their clients).

30. Michael L. Perlin, *"The Executioner's Face Is Always Well-Hidden": The Role of Counsel and the Courts in Determining Who Dies*, 41 N.Y.L. SCH. L. REV. 201, 205–6 (1996).

stances, jaw-dropping. In one case, counsel was found to be effective even though he "failed to introduce ballistics evidence to show that the gun taken from [the defendant] when he was arrested was not the murder weapon."[31] In another case, an attorney who had been admitted to the bar for only six months and had never tried a jury case was found constitutionally adequate to provide representation to a death-eligible defendant.[32] Another lawyer found constitutionally adequate was so intoxicated at defendant's trial, he was held in contempt and spent the night in jail.[33]

In 2019, Justice Clarence Thomas held in a dissent in *Garza v. Idaho*[34] that defendants have a right to a lawyer, but not to any degree of reliability in that attorney's performance. Essentially, Thomas said defendants have a right to counsel but not effective assistance from that attorney.[35]

## Inherent Failures in Enforcing Ethical Practice and the Interplay between Strickland and the Model Rules

Thus, the *Strickland* standard has neglected to hold lawyers accountable for their detrimental inadequacies, but what about accountability through state sanctioned ethics violations? There are three major barriers that prevent attorneys from being sanctioned for ethics violations. The first barrier to accountability is the lack of reporting, which has serious implications and undercuts the integrity of the legal profession. Rule 8.3, Reporting Professional Misconduct, states, "A lawyer who knows that another lawyer has committed a violation of the Rules . . . that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority."[36] It is commonly accepted that a substantial amount of lawyer misconduct goes unreported to disciplinary authorities.[37] Reasons for such underreporting are directly related to the systemic problems within the self-policing model, such as the following:

1. Those most likely to witness and recognize lawyer misconduct by virtue of their training are the lawyers and judges themselves who have a general reluctance to report despite their ethical duty[38]
2. An "anti-snitch" culture that fosters a societal attitude toward reporting the misconduct of others, "reinforced by the potential negative ramifications of reporting, including soured professional relations and possible retaliatory actions"[39]
3. The standards that impose the duty to report are muddled with discretionary calls and loopholes that, in effect, obviate the requirement to report[40]
4. Lawyer conduct often is seen in isolation[41]
5. Concern that reporting would lead to minimal or no sanctions and thus not worth the time and energy[42]

Even when reporting occurs, there is a strong sentiment among the legal community that no real repercussions or remedies exist against the constitutionally ineffective attorney.[43] As one scholar has noted:

> Assuming the criminal defendant succeeds in securing a new trial, having shown that the lawyer was so negligent that even *Strickland*'s presumptions could not whitewash the incompetence, how do the courts deal with the lawyer? Is malpractice presumed? Is the lawyer automatically subject to some disciplinary action? Is the attorney required to undergo continuing peer review and supervision? Is the

31. Graham v. Collins, 829 F. Supp. 204, 209 (S.D. Tex. 1993), *vacated on other grounds sub nom.* Graham v. Johnson, 94 F.3d 958 (5th Cir. 1996).

32. Paradis v. Arave, 954 F.2d 1483, 1490–92 (9th Cir. 1992), *vacated*, 507 U.S. 1026 (1993), *aff'd on remand*, 20 F.3d 950 (9th Cir. 1994).

33. Haney v. State, 603 So. 2d 368, 377–78 (Ala. Crim. App. 1991). *See* Cucolo & Perlin, *supra* note 22, at 126.

34. Garza v. Idaho, 139 S. Ct. 738 (2019) (Thomas, C. dissenting).

35. *Id.* at 756.

36. Model Rules, *supra* note 6, r. 8.3(a); Lonnie T. Brown Jr., *Ending Illegitimate Advocacy: Reinvigorating Rule 11 through Enhancement of the Ethical Duty to Report*, 62 Ohio St. L.J. 1555, 1600–1603 (2001) (noting that the ambiguities in reporting and reporting exemptions lead to "a large segment of reportable offenses [that] likely go unreported with the textual blessing of Rule 8.3").

37. Arthur F. Greenbaum, *The Automatic Reporting of Lawyer Misconduct to Disciplinary Authorities: Filling the Reporting Gap*, 73 Ohio St. L.J. 437, 439 (2012).

38. *Id. See also* Geoffrey C. Hazard Jr. and Dana A. Remus, *Advocacy Revalued*, 159 U. Pa. L. Rev. 751, 774 (2011) (noting that "lawyers rarely report each other's misconduct" and "judges are similarly reluctant").

39. Greenbaum, *supra* note 37 at 440.

40. *See Brown, supra* note 36.

41. *See* Greenbaum, *supra* note 37 at 441.

42. Leslie C. Levin, *The Case for Less Secrecy in Lawyer Discipline*, 20 Geo. J. Legal Ethics 1, 3 (2007) (limited available data suggests "the rate of recidivism among lawyers who receive public sanctions is fairly high").

43. Joseph H. Ricks, *Raising the Bar: Establishing an Effective Remedy Against Ineffective Counsel*, 2015 B.Y.U. L. Rev. 1115, 1122.

lawyer barred from handling criminal cases or required to attend classes? Anything? No.[44]

A second barrier is that the unethical conduct is often hidden and only known to the client during the handling of the case, or it is discovered post-adjudication. The largest category of complaints that disciplinary authorities receive are by clients who often lack the skill to be able to assess the propriety of lawyer conduct and identify when "less than blatantly obvious" misconduct occurs.[45] Failure to comply with certain Model Rules often fall under the radar, such as: Rule 1.1, "Competence," that requires an attorney to have the necessary knowledge of a field of law to represent a client and, if not, to study the field until she can competently represent a client;[46] Rule 1.3, "Diligence," that requires that an attorney diligently advocate for her client's interests despite opposition or inconvenience;[47] and Rule 1.4, "Communication," that requires an attorney to communicate with her client to understand the client's interests, jointly decide how to achieve those interests, and explain legal considerations so that the client can make informed decisions about legal representation and strategy.[48]

A third barrier to holding attorneys accountable is the interplay between *Strickland* and the Model Rules and the classification of trial strategy versus client autonomy. The U.S. Supreme Court has clearly stated that tactical decisions that make up an attorney's trial strategy cannot form the basis for an ineffective assistance of counsel claim.[49] The Model Rules, specifically Rule 1.2(a), provides that a defendant can request counsel to assert a particular defense, but he cannot interfere with how counsel chooses to present

44. Susan P. Koniak, *Through the Looking Glass of Ethics and the Wrong with Rights We Find There*, 9 GEO. J. LEGAL ETHICS 1, 9 (1995).

45. *See, e.g.*, DEBORAH L. RHODE AND GEOFFREY C. HAZARD JR., PROFESSIONAL RESPONSIBILITY AND REGULATION 264 (2d ed. 2007) (noting that unsophisticated clients have little way of knowing whether they are victims of incompetence or ethical violations).

46. MODEL RULES, *supra* note 6, r. 1.1.

47. *Id.* r. 1.3. Outside the confines of this chapter is the concern over racial and socioeconomic discrimination that is notoriously known to be hidden and underlies a lawyer's failure to provide competent representation, directly implicating Rule 8.4, Misconduct. In 2016, after twenty years of failed attempts, the ABA moved language prohibiting discrimination from a comment on Rule 8.4 to the rule itself, affirmatively defining professional misconduct as any "conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law." *Id.* at r.8.4(g).

48. *Id.* r. 1.4.

49. Wainwright v. Sykes, 433 U.S. 72 (1977). *See Strickland*, 466 U.S. at 690–91 (1984).



the defense.[50] Comment 1 to Rule 1.2(a) explains that the client has the ultimate authority to determine the purposes to be served by legal representation and the right to consult counsel about the means to be used in pursuing those objectives.[51] While Comment 2 also provides that "clients normally defer to the special knowledge and skill of their lawyer with respect to the means to be used to accomplish their objectives, particularly with respect to technical, legal and tactical matters. . . . Because of the varied nature of the matters about which a lawyer and client might disagree and because the actions in question may implicate the interests of a tribunal or other persons, this Rule does not prescribe how such disagreements are to be resolved."[52] As the means used to present a client's theory of defense are the strategic and tactical decisions normally viewed as within the lawyer's control (i.e., what witnesses to call, whether and how to conduct cross-examination, what jurors to accept or strike, what trial motions should be made, and what evidence should be introduced),[53] the Model Rules can be interpreted rather easily to support the attorney who presents the client's theory of defense.[54]

When the *Strickland* test and the Model Rules are viewed in tandem, they can have the effect of cancelling each other out. Under *Strickland*, "breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel."[55] Defendants bear a high burden to prevail on a *Strickland* claim because "judicial scrutiny of counsel's performance must be highly deferential," and "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." The objectively reasonable standard of *Strickland* looks to "prevailing professional norms."[56] With regard to criminal practice, the ABA did promulgate standards specifically for criminal defense attorneys: the Criminal Justice Standards for the Defense Func-

50. MODEL RULES r. 1.2 (a) (2016).

51. *Id.* at cm. 1

52. *Id.* at cm. 2.

53. For the interplay between strategy and defendant's autonomy, *see* McCoy v Louisiana, 138 S.Ct. 1500 (2018) (the U.S. Supreme Court held that the Sixth Amendment guarantees criminal defendants the "autonomy to decide . . . to assert innocence" as their defense. This includes the defendant's right to insist that his attorney refrain from admitting guilt, even when counsel's experience advises that confessing guilt provides the best opportunity to avoid the death penalty.).

54. Jean K. Gilles Phillips and Joshua Allen, *Who Decides: The Allocation of Powers between the Lawyer and the Client in a Criminal Case?* 71 J. KAN. B. ASS'N 8, at 28, 33 (2002).

55. Nix v. Whiteside, 475 U.S. 157, 165 (1986)(citing *Strickland*); *see also* Mickens v. Taylor, 535 U.S. 162, 176 (2002) (quoting *Nix*).

56. *Strickland*, 466 U.S. at 688.

tion (hereafter referred to as Standards).[57] The Standards "describe 'best practices,' but are not intended to serve as the basis for the imposition of professional discipline, to create substantive or procedural rights for clients, or to create a standard of care for civil liability."[58]

The Supreme Court in *Strickland* referenced the Standards as reflecting "prevailing norms of practice," emphasizing that they are only guides to determining what is reasonable.[59] Courts continue to use and cite the Standards in determining whether defense counsel has provided effective assistance.[60] However, the procedure to hold lawyers accountable under the Model Rules/Standards can be drastically different from the procedure in *Strickland*. For instance, in some states, the standard of proof at a disciplinary hearing may be higher. In Arizona, the defendant must establish by a preponderance of the evidence that a constitutional defect has occurred, and then the state has the burden of proving that the defect was harmless beyond a reasonable doubt.[61] But Arizona's grounds for discipline require bar counsel to establish allegations by clear and convincing evidence.[62] Thus, if a defendant is unsuccessful in meeting her burden on a *Strickland* ineffective assistance of counsel claim, she will most likely be unable to meet the burden of showing that her attorney's conduct fell below the "prevailing norms of practice" as defined within the Model Rules and Standards.[63]

Despite strong public interest in effectively regulating lawyers, neither state nor federal courts have developed adequate policies and practices to ensure that misconduct during litigation proceedings is consistently reported to state disciplinary agencies. In practice, rarely if ever, are attorneys sanctioned after being found constitutionally deficient.[64] Lawyers can be

57. American Bar Association, Criminal Justice Standards for the Def. Function (2016).

58. *Id.* § 4–1.1(b).

59. *Strickland*, 466 U.S. at 688.

60. *See* Martin Marcus, *The Making of the ABA Criminal Justice Standards: Forty Years of Excellence*, Crim. Just., at 10, 14 (2009).

61. Ariz. R. Crim. P. 32.8(c).

62. *In re* Wolfram, 847 P.2d 94, 98 n. 4 (Ariz. 1993).

63. *Nix*, 475 U.S. at 165 (1986). *But see In re Warren*, 321 F. App'x 369, 370 (5th Cir. 2009) (the court issued sanctions after granting relief on ineffective assistance of counsel grounds).

64. *See* Stephen B. Bright, *Independence of Counsel: An Essential Requirement for Competent Counsel and a Working Adversary System*, 55 Hous. L. Rev. 853 (2018), discussing violations in Texas:

> *[There are] egregious instances of malpractice such as lawyers sleeping during death penalty trials, filing briefs that were incomprehensible or did not apply to the case in which they were submitted, and abandoning clients and turning against them. Neither judges nor the Texas Bar have taken action to prevent such malpractice from occurring again. Judges have continued to appoint those lawyers to represent defendants and the Bar has taken no disciplinary action. The Texas Court of Criminal Appeals has sanctioned lawyers for failing to file pleadings a full seven days before an execution but has not punished those who slept during trials or those who submitted incomprehensible or irrelevant briefs—the convictions and death sentences were upheld in those cases. Id. at 854.*



disciplined for any breach of ethical rules, yet only about 5 percent of all complaints result in any sanction against lawyers, and among the 5 percent, the great majority receive private sanctions, the lightest possible punishment.[65] About .08 percent of attorneys are disbarred, and only about 1 percent of lawyers accused of misconduct are suspended from practice.[66] Very few states employ sanctions as a remedy in criminal proceedings, but that does not make them any less effective.[67]

## Therapeutic Jurisprudence and Suggestions for Reform

So how might we bolster violation reporting, accountability and remediate ineffective assistance of counsel? As mentioned, TJ may provide some assistance in at least four ways. TJ necessitates the use of the community as a whole in its application and should not be limited to the worlds of the small circle of lawyers and judges. Thus, first we may want to rely on entities outside the legal profession that interact with lawyers in significant ways, to assist in reporting misconduct.[68] Second, TJ requires us to consider the perspective of clients and involve them and their insights into how the therapeutic or antitherapeutic aspects of the justice system actually play out.[69] To make sure that clients are protected and on notice of prior disciplinary conduct, we might want to consider requiring courts to automatically report certain kinds of conduct to disciplinary authorities. Findings of contempt, imposition of significant sanctions, and other matters would be reported automatically to disciplinary authorities. In furtherance of this requirement, it has been suggested that state and federal court systems create electronic databases, accompanied and supported by uniform court procedural

65. Leslie C. Levin, *The Emperor's Clothes and Other Tales about the Standards for Imposing Lawyer Discipline Sanctions*, 48 Am. U. L. Rev. 1, 8–9 (1998).

66. Richard L. Abel, *United States: The Contradictions of Professionalism*, in Lawyers in Society 186, 219–20 (Richard L. Abel and Philip S. C. Lewis eds., 1988).

67. Altimease Lowe, *Criminal Law—The Call for an Adequate Remedy: The Lack of Deterrence and Judicial Consequences for Prosecutors Who Habitually Violate Batson*, 43 U. Ark. Little Rock L. Rev. 261, 275 (2020) (suggesting imposing monetary sanctions on prosecutors who repeatedly employ racially discriminatory peremptory challenges).

68. *See* Greenbaum, *supra* note 37 at 453. California and Florida require malpractice insurers to report certain actions against lawyers to state officials.

69. Michael L. Perlin, *A Law of Healing*, 68 U. Cin. L. Rev. 407, 413 (2000).

rules and policies, to receive and store judicial reports of litigation-related lawyer misconduct.[70] Third, TJ can be a powerful interpretive tool to make vivid the "stories" of individuals who would otherwise remain anonymous.[71] Requiring attorneys to self-report to disciplinary authorities whether the lawyers were convicted of a crime in any court or had disciplinary penalties entered against them in another state would help achieve that end.[72] The purpose is not to shame or punish the lawyer but to hold her accountable for past violations to prevent further violations going forward. Finally, TJ can be employed as a servant of law reform, by illuminating the therapeutic and antitherapeutic effects of rules that drive behavior.[73] To that end, rigorous legal education must continue to focus on moral and ethical responsibility in practice. Law students are going to become lawyers and will assume the responsibility of the gatekeepers of justice.

Lawyers dominate the public's access to legal services and thus have a responsibility to ensure the fair application of justice to everyone. Every member of the bar must do what he or she can to support and develop solutions that guarantee competent counsel at all stages of all criminal cases, from misdemeanors to death penalty. We—as judges, lawyers, and legal academics—are the caretakers of liberty; to maintain and uphold the integrity of the legal profession, we must combine virtue ethics with action and accountability to better protect the constitutional and human rights of all persons within the criminal justice system.

70. Michael S. McGinniss, *Sending the Message: Using Technology to Support Judicial Reporting of Lawyer Misconduct to State Disciplinary Agencies*, PROF. LAW., 2013, at 37.

71. Perlin, *supra* note 69 at 416.

72. *See* Greenbaum, *supra* note 37 at 444 (California adopted much of these recommendations in response to a major scandal concerning the bar).

73. Perlin, *supra* note 69 at 415.