TARGETING LEGAL ADVICE*

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INTRODUCTION

Overcriminalization is often viewed as an issue about whether conduct should be punished criminally or whether it should be left to a civil adjudication of rights and remedies, including a governmental civil enforcement suit. The label "criminal" is a special one that connotes society's condemnation of certain conduct as deserving punishment, but it is also the community's moral judgment that certain conduct is wrongful. Professor Sanford H. Kadish asserted almost forty years ago "that the criminal law is a highly specialized tool of social control . . . that when improperly used it is capable of producing more evil than good."[1] When the legislature defines ever-wider forms of conduct as crimes, the effectiveness of criminal law as both a deterrent and a means of affixing moral blameworthiness may be substantially diminished. As such, overuse of the criminal law risks its utility to society.[2]

** Professor of Law, *Wayne State University Law School*. I appreciate the comments and suggestions provided by the *Wayne State University Law School* faculty at a presentation on the topic, and to Professor Ellen S. Podgor.

1. Sanford H. Kadish, *The Crisis of Overcriminalization*, 374 ANNALS AM. ACAD. POL. & SOC. SCI. 157, 169 (1967).

2. *See* Erik Luna, *The Overcriminalization Phenomenon*, 54 Am. U. L. Rev. 703, 713 (2005) (Overcriminalization Æencompasses a broad array of issues, including: what should be denominated a crime and when it should be enforced; who falls within the law's strictures or, conversely, avoids liability altogether; and what should be the boundaries of punishment and the proper sentence in specific cases.@); *see also* John C. Coffee, Jr., *Does "Unlawful"*

The primary focus of those who condemn overcriminalization is on the legislature's role in expanding the types of conduct that will be labeled criminal.[3] However, the role of the prosecutor in applying the law is also relevant to the overcriminalization debate.[4] Regardless of the scope of the laws enacted by legislatures, the prosecutor decides what charges to file, and whether the law should be applied in a mundane or novel manner. Professor William J. Stuntz argues that "the story of American criminal law is a story of tacit cooperation between prosecutors and legislators, each of whom benefits from more and broader crimes, and growing marginalization of judges, who alone are likely to opt for narrower liability rules rather than broader ones."[5] This is especially true at the federal level,

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Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law, 71 B.U. L. REV. 193, 193 (1991) (arguing that criminalizing negligent and intentional behavior blurs the distinction between tort and crime and, as a result, weakens the criminal law as a means of social control).

3. *See, e.g.*, Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS., Winter 1958, at 401, 417 (stating critically, "The statute books of the forty-nine states and the United States are filled with enactments carrying a criminal sanction which are obviously motivated by other ends, primarily, than that of training responsible citizenship."). *See generally* Sanford H. Kadish, *Some Observations on the Use of Criminal Sanctions to Enforce Economic Regulations*, 30 U. CHI. L. REV. 423 (1963) (outlining the problems inherent in a criminal justice approach to economic regulation).

4. *See* Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533, 1545-46 (1997) ("There are two senses in which criminal sanctions might be said to be 'overused.' One is that such sanctions are over-authorized by Congress and the state legislatures. The other is that, where authorized, they are over-applied by prosecutors and courts.").

5. William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 510 (2001). A parallel development exists involving the federalization of the criminal law. Certainly, the Supreme Court has, in some instances, criticized the extension of federal jurisdiction over common street crimes. See *United States v. Lopez*, 514 U.S. 549, 567-68 (1995), which struck down the Gun Free School Zones Act of 1990 as an improper use of Congress's Commerce Clause authority, and *United States v. Morrison*, 529 U.S. 598, 627 (2000), which struck down 42 U.S.C. § 13981 (1994), a part of the Violence Against Women Act of 1994, because it exceeded Congress's Commerce Clause authority.

However, there is a trend toward adding to the number of federal laws that can be used to punish conduct already subject to state prosecution. The effect of this coordination of prosecutions enhances the penalties that can be imposed. For example, this past year, Congress adopted a law making it a federal crime to murder a fetus, largely in response to the murder of Laci Peterson and her unborn child. *See* Unborn Victims of Violence Act of 2004 (Laci and Connor's Law), Pub. L. No. 108-212, 118 Stat. 568 (2004) (codified at 18 U.S.C. § 1841 (2004)). This is already a crime in most states. *See* Alan S. Wasserstrom, *Homicide Based on Killing Unborn Child*, 64 A.L.R. 671, 689-740 (5th ed. 2004) (detailing how various states prosecute the killing of unborn children). Similarly, a Department of Justice initiative called "Project Safe Neighborhoods" moves individuals charged with crimes in state court into the federal system when they have prior arrests and possessed a weapon at the time of their offense, which under federal sentencing laws triggers a significantly increased sentence. *See* Project Safe Neighborhoods, *Project Safe Neighborhood Initiative Launched On Long Island—Sixteen Prior Felony Offenders Face Federal Firearms Charges* (July 2, 2002), *at* http://www.psn.gov/Safer.asp?section=123 (on file with the American University Law Review). The federalization of law enforcement can be used as a tool to impose ever-increasing sentences on those who would normally be subject to prosecution only in a state court. *Id.*

where the Department of Justice ("DOJ") has been quite effective in getting Congress to approve legislation enacting broader crimes and—at least until recently—in shifting much of the power to set sentences to federal prosecutors.[6]

The recent spate of misconduct in large, publicly traded corporations has led to what can be viewed as a new form of overcriminalization—the targeting of legal advice as an obstacle in pursuing the investigation of corporate wrongdoing. This form of overcriminalization does not involve the adoption of new laws or an attempt to have courts adopt a new interpretation of an older statute to address changed circumstances. It is hardly the case that federal prosecutors need new criminal statutes to prosecute misconduct by corporations and their managers, as they already have mail/wire fraud,[7] securities fraud,[8] obstruction of justice,[9] and false statement[10] prohibitions.

The difficulty prosecutors face in prosecuting corporate misconduct and other types of white collar crimes is identifying the particular acts that violate the statute, and then amassing sufficient proof of intent to establish that a crime has occurred. White collar crime investigations frequently take months, even years, to complete, and prosecutors must dig through mounds of records to determine who is responsible for the misconduct.[11] Except for some narrow regulatory and environmental crimes that are strict liability offenses, corporate crimes almost always require proof of specific intent.[12] It is rare when prosecutors do not have to use circumstantial evidence to argue that the defendant(s)—both individual and organizational—had the requisite knowledge or purpose.

When a corporation's officers are the targets of the investigation, counsel will usually represent them, often paid by the corporation. The presence of

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6. *See* Stuntz, *supra* note 5, at 545 (observing Congress's willingness to give in to the demands of federal prosecutors even if their demands are inconsistent with the goals of the public).

7. *See* 18 U.S.C. §§ 1341, 1343 (2004).

8. 18 U.S.C. § 1348.

9. 18 U.S.C. §§ 1501-1518.

10. 18 U.S.C. § 1001.

11. For example, indictments of senior officers of Enron did not occur until over two years after the company's bankruptcy, and the first criminal trial involving an Enron transaction only began in September 2004.

12. *See, e.g.*, United States v. United States Gypsum Co., 438 U.S. 422, 435, 441-43 (1978) (refusing to hold that the Sherman Act imposes strict liability on corporations or corporate officials for anti-competitive behavior, in part because strict liability in the context of corporate crime could deter businesses from engaging in "salutary and procompetitive conduct lying close to the borderline of impermissible conduct" for fear of punishing good-faith mistakes of judgment). Noting that actors subjected to strict liability will exercise extraordinary care in their undertakings, the Court distinguished the antitrust context, in which over-regulation will discourage legitimate business activity to the public's detriment, from laws regulating food, in which "excessive" caution by producers will promote the public good. *Id.* at 441 n.17.

lawyers—frequently from large law firms with fairly sophisticated white collar crime practice groups that are stocked full of former federal prosecutors—makes the investigatory process much more complicated because skilled counsel know how to protect clients in these types of investigations and how to bargain for reduced charges and sentences.[13]

In 2003, the then-Deputy Attorney General Larry D. Thompson issued a memorandum with the title "Principles of Federal Prosecution of Business Organizations" (the "Thompson Memorandum"), which announced a set of principles to guide federal prosecutors in deciding whether to charge a corporation with a crime.[14] Among the principles federal prosecutors should consider are "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of corporate attorney-client and work product protection."[15] While most commentary about the Thompson Memorandum focused on the waiver issue, there is another aspect that discloses an even more disturbing view regarding legal advice. In assessing cooperation, the Thompson Memorandum states that the prosecutor should consider "whether the corporation appears to be protecting its culpable employees and agents" and can consider "the

13. *See* Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501, 516-17 (2004) ("Highly paid white collar criminal defense lawyers are more successful at almost every stage in the criminal justice process than their public defender counterparts. They do a better job of persuading prosecutors not to indict, preventing the prosecution from obtaining evidence needed to convict, keeping witnesses from talking to prosecutors, presenting their case in the media, obtaining favorable plea bargains, pursuing post-conviction appeals, and arguing mitigation in sentencing.").

14. Memorandum from Larry Thompson, Deputy Attorney General, U.S. Dep't of Justice, to Heads of Department Components and United States Attorneys (Jan. 20, 2003) [hereinafter Thompson Memorandum], *available at* http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm. Deputy Attorney General Eric Holder, Thomson's predecessor, issued a similar memorandum in 1999. *See* Memorandum from Eric H. Holder, Jr., Deputy Attorney General, U.S. Dep't of Justice, to All Heads of Department Components and United States Attorneys (June 16, 1999) (discussing the bringing of criminal charges against corporations), *available at* http://www.usdoj.gov:80/criminal/fraud/policy/Chargingcorps.html. The Thompson Memorandum sought to explain in greater detail the DOJ's position on the issue of charging corporations:

> The main focus of the revisions is increased emphasis on and scrutiny of the authenticity of a corporation's cooperation. Too often business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation. The revisions make clear that such conduct should weigh in favor of a corporate prosecution. The revisions also address the efficacy of the corporate governance mechanisms in place within a corporation, to ensure that these measures are truly effective rather than mere paper programs.

Thompson Memorandum, *supra*, at Introduction.

15. *Id.* at II.

advancing of attorneys [sic] fees" and sharing information pursuant to a joint defense agreement.[16]

The payment of attorney's fees by a corporation is not a failure of cooperation unless one views the presence of a lawyer for a corporate officer as an impediment to an investigation. A lawyer is unlikely to recommend that a client, who is the target of an investigation, cooperate with the government, or at least, not without the protection of an immunity agreement or plea bargain. This does not mean the lawyer's advice is wrongful or designed to obstruct justice.

Similarly, a joint defense agreement[17] facilitates the pooling of information and representational tasks among lawyers representing different parties who share a common interest. Courts recognize the propriety of joint defense agreements as an extension of the attorney-client privilege,[18] and therefore, any discussions pursuant to these agreements will not be available to the government without a waiver by every participant in the agreement.[19] Although the privilege makes it more difficult to gather information, one of the foundations of our legal system is that the government cannot compel disclosure of privileged communications absent proof that they were made to further a crime or fraud.[20]

Defense lawyers representing individual officers certainly can make it more difficult for the government to investigate corporate misconduct. However, that alone is hardly a justification for viewing the payment of attorney's fees or a joint defense agreement—both of which are completely legal and reasonable decisions by the lawyer—as a sign that a corporation is not cooperating with an investigation.[21]

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16. *Id.* at VI.B.

17. *See* The Corporate Counsel Section of the New York State Bar Association, *Legal Development: Report on Cost-Effective Management of Corporate Litigation*, 59 ALB. L. REV. 263, 310 (defining a joint defense agreement as a written agreement between multiple defendants who have, at a minimum, a willingness to cooperate on the case by sharing litigation costs and by preserving confidential information and may include an agreement to delegate particular responsibilities to certain defendants).

18. *See, e.g.*, *infra* note 142.

19. *See* Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 113 (2003) (citing *United States v. Almeida*, 341 F.3d 1318, 1324 (11th Cir. 2003), for the proposition that even though federal prosecutors dislike the use of joint defense agreements, it is highly unusual for the government to threaten prosecution for merely participating in a joint defense agreement).

20. *See, e.g.*, United States v. Zolin, 491 U.S. 554, 562-63 (1989) (noting the existence of a crime-fraud exception to the attorney-client privilege).

21. *See* John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 Am. U. L. Rev. 579, 584 (2005) (noting that business people "have contractual, as well as informal customary obligations to their employees, customers, and suppliers. Further, they have their ordinary ethical obligations as human beings to honor their commitments and to deal honestly with others. These obligations can, and to an increasing extent do, conflict with the obligation to take the most effective steps to comply with federal law. When the law

The drive to prosecute corporate misconduct, which frequently involves questionable but not obviously criminal conduct, has led the DOJ to adopt a position that views its ability to prosecute corporate crime as being hamstrung by the presence of lawyers.[22] More than a nuisance, the DOJ views lawyers as a roadblock to criminal prosecution that, apparently, now requires the government to take a more aggressive approach to limit, if not eliminate, the protections afforded to the targets of an investigation.

This new tack is symptomatic of the DOJ's broader push against lawyers. I do not assert that there is a "war on defense lawyers" that is part of a hitherto undisclosed plan to drive lawyers away from representing corporate officers.[23] There is, however, a trend towards using the criminal law and the government's investigatory tools against lawyers because of what appears to be a deep-seated suspicion of legal advice as something harmful or inappropriate. Lawyers commit crimes, and there is no claim that they should be exempt from the application of the criminal law. But, at the same time, the presence of a lawyer is not a red flag or in any way nefarious. Prosecutors need to show greater respect for the attorney-client relationship, including privileged communications. Efforts to enforce criminal law, which make legal advice a target of prosecution and an indicator of guilt, are a sure sign of overcriminalization.

Part I of the Article considers why prosecutors mistrust lawyers by looking at cases involving lawyer misconduct that obstructs justice, and how even acting ethically means that a lawyer can act to frustrate a criminal prosecution. While lawyers are viewed with mistrust, cases involving outright obstruction are rare and do not reflect the true role of lawyers in representing clients in criminal cases. Part II assesses recent cases in which federal prosecutors have targeted lawyers for prosecution,

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provides incentives to violate one's ethical duties to others, business people face a difficult choice. Federal prosecutors do not. Business people must decide the extent to which they can ethically expose their firm to the risk of legal liability in order to meet their other obligations. Federal prosecutors, whose only obligation is to the law, need only judge the level of the firm's legal compliance. Simply expressed, business people's ethical dilemmas are not federal prosecutors' problem.").

22. *See generally* Thompson Memorandum, *supra* note 14 (providing guidance for lawyers working with cooperating corporations during a corporate fraud investigation and noting that corporations may purport to be cooperating with a DOJ investigation, while simultaneously trying to impede the DOJ's discovery of the scope of the corporation's wrongdoing).

23. *But see* Finder, *supra* note 19, at 113 (contending that because of an increased emphasis on corporate cooperation and indictment avoidance, companies essentially become an investigatory arm of the government); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000) (arguing that the government prefers turning corporations into arms of law enforcement by emphasizing cooperation instead of preserving principles at the heart of our adversarial system). The emphasis on cooperation creates divisive relationships between senior management and employees because of senior management's rush to cooperate. *Id.*

and asks whether the practice of law is starting to be viewed as potentially criminal. Part III looks at the government=s most recent approach as shown in pronouncements regarding legal advice as potentially obstructing investigations of corporate misconduct. In my view, the Department of Justice=s determination that a corporation providing a lawyer to an employee in connection with a criminal investigation can be considered obstructive. This approach denigrates legal advice and moves beyond mere lawyer misconduct to seeking improperly the elimination of lawyers to further the government=s own interests, at a significant cost to the targets of corporate crime investigations.

I. CAN'T WE TRUST LAWYERS?

The DOJ's approach to legal advice reflects a broader mistrust of the legal profession. At least as reflected in television police programs, for which there is no shortage of fictional valorous officers solving complex crimes, lawyers (sometimes including prosecutors) are obstacles to be avoided or their legal advice is an unfortunate nuisance. More importantly, it is assumed that a person—invariably the guilty suspect—who is advised by a lawyer will never cooperate or provide valuable information. The job of the lawyer, apparently, is to make it much more difficult for the police to obtain information while shielding the guilty party from justice.[24]

The phrase "lawyering up" has entered the popular lexicon as meaning that a person suspected of a crime will listen to the lawyer's advice and will not cooperate in the investigation, thus thwarting a successful prosecution.[25] Professors Bandes and Beermann described how, on the television program *NYPD Blue*, the prospect of a lawyer advising an investigatory target had significant ramifications:

> The detectives understand that if the guy they like lawyers up, they won't get a confession. The relentless pursuit of the confession is driven by the detectives' assessment that they are unlikely to obtain a conviction without one. In one episode, after Andy Sipowicz threatens to beat up a suspect in the sexual assault and killing of a young girl unless he confesses, another detective (not one of the regulars) criticizes Sipowicz because the technique might have jeopardized the case by scaring the suspect into lawyering up. It is not that coerced confessions are wrong, it is that coercion, improperly employed, may result in a fate

24. The media assumption is incorrect at least in drug cases in which significant mandatory minimum sentences create a powerful incentive for lawyers to engage in plea discussions early on in an investigation and provide valuable information to prosecutors to gain the government=s support for a departure from the required term of imprisonment.

25. *See* Adam Hanft, *Neolawisms*, LEGAL AFFAIRS, Feb. 2003, at 17 (explaining that *NYPD Blue* popularized the term "lawyering up" when referring to the difficulty of interrogating a suspect represented by a lawyer).

worse than death, the appearance of a lawyer.[26]

There is no question that advising a person suspected of a crime to decline an invitation to cooperate in an investigation, at least by not speaking with the police before charges are filed, is proper and, indeed, sound legal advice. It hardly needs to be said that the most damning evidence in a criminal trial is the statement of the defendant admitting the misconduct, regardless of any excuses or explanations that may be offered for the conduct. Counseling a suspect to remain silent may frustrate the police, but the criminal justice system imposes upon lawyers the absolute duty to represent their clients within the bounds of the law.

For white collar and corporate crime investigations, the presence of lawyers for targets, subjects, and witnesses is commonplace. It is rare when a case does not involve an extended grand jury investigation, subpoenas for large volumes of records, and witness proffers—all mediated by lawyers for the company and individuals. Yet, even in these types of investigations, prosecutors lament the presence of lawyers who slow down the process.[27]

If lawyers only delayed investigations, there would be little reason to be concerned by the presence of a lawyer except for the increased cost and energy necessary to complete an investigation. However, there is more at issue than just dilatory tactics by defense counsel. The fear must be that lawyers, by their nature, *obstruct* criminal investigations. One example of how lawyers are more than just an impediment is the notorious e-mail sent by an Arthur Andersen lawyer to the audit partner on the Enron engagement, seeking the removal of references to the involvement of the firm's in-house counsel from a memorandum regarding whether Enron's disclosures had been misleading.[28] This single e-mail turned out to be the

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26. Susan Bandes & Jack Beermann, *Lawyering Up*, 2 GREEN BAG 5, 9 (1998).

27. *See* Roscoe C. Howard, Jr., *Wearing a Bull's Eye: Observations on the Differences Between Prosecuting for a United States Attorney's Office and an Office of Independent Counsel*, 29 STETSON L. REV. 95, 146 (1999) (noting that, in the context of Independent Counsel investigations of wrongdoing by high level officials, "lawyering up" increases the duration of investigations due to the presence of lawyers). Similarly, Professor John Barrett, another former Associate Independent Counsel, criticized the attorney's fee provision of the now-expired Independent Counsel Act for inviting individuals to hire lawyers:

> It has become a trough that lawyers seek to feed in. And the prospect of this ultimate reimbursement from the government seems to have encouraged all kinds of "lawyering up," often orchestrated by White House Counsel. It prolongs and complicates Independent Counsel investigations when even the most minor potential witnesses are represented by counsel who look forward to reimbursement. And this provision obviously increases the public tab for an Independent Counsel's work.

John Q. Barrett, *Independent Counsel Law Improvements for the Next Five Years*, 51 ADMIN. L. REV. 631, 649 (1999).

28. *See* Green, *supra* note 13, at 504 ("Among the pieces of evidence that jurors found most incriminating was an email from in-house Andersen lawyer, Nancy Temple, instructing Andersen partner, David Duncan, to remove language from an internal Andersen

crucial piece of evidence showing Arthur Andersen's corrupt intent to obstruct justice.[29] The lawyer's complicity was only emphasized when she asserted her Fifth Amendment right and refused to testify at trial.[30]

How far can defense counsel go? In *Nix v. Whiteside*,[31] the Supreme Court made it clear that a defendant has no right to testify falsely, and that a defense lawyer who knows that the client will commit perjury does not violate the Sixth Amendment—or the ethical duties of the profession—by threatening to disclose that fact to the court, even though the information is privileged.[32] The Court noted that "the legal profession has accepted that an [sic] lawyer's ethical duty to advance the interests of his client is limited by an equally solemn duty to comply with the law and standards of professional conduct; it specifically ensures that the client may not use false evidence."[33] In *Maness v. Meyers*,[34] the Court recognized that a lawyer cannot be held in contempt for advising a client to assert the Fifth Amendment right against self-incrimination and for refusing to turn over documents protected by the privilege because of the effect it would have on the provision of legal services.[35] It rationalized, "If performance of a lawyer's duty to advise a client that a privilege is available exposes a lawyer to the threat of contempt for giving honest advice, it is hardly debatable that some advocates may lose their zeal for forthrightness and independence."[36]

The zealous defense lawyer can, and perhaps must, make it more difficult for the government to obtain a conviction,[37] but there is a limit to the lawyer's ability to secure an acquittal for the client. Can defense lawyers cross over the line and obstruct justice in their representation of

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memo suggesting that Andersen had concluded that an earlier Enron final disclosure had been misleading. The email also advised Duncan to remove any reference to consultations with Andersen's in-house legal team, saying it could be considered a waiver of attorney-client privilege.").

29. *See* United States v. Arthur Andersen, LLP, 374 F.3d 281, 286 (5th Cir. 2004), *cert. granted*, 125 S. Ct. 823 (2005) (noting Temple's reminder that Andersen staff should be in compliance with the company's document retention policy in the face of an upcoming government investigation).

30. *See* Stephan Landsman, *Death of an Accountant: The Jury Convicts Arthur Andersen of Obstruction of Justice*, 78 CHI.-KENT L. REV. 1203, 1217 (2003) (noting a heightened sense of suspicion after Temple and others invoked their Fifth Amendment rights).

31. 475 U.S. 157 (1986).

32. *Id.* at 173. The Court reasoned that the right to testify, at a minimum, does not permit a person to testify falsely. *Id.*

33. *Id.* at 168.

34. 419 U.S. 449 (1975).

35. *Id.* at 470.

36. *Id.* at 466.

37. *See* MODEL RULES OF PROF'L CONDUCT R. 3.1 (2003) (stating that a lawyer for a defendant in a criminal case may require the prosecution to prove every element of the case).

criminal defendants? The sad truth is that there are more than a few examples to feed the perception that lawyers for criminal defendants will actively mislead prosecutors and judges in seeking an acquittal for their clients. In *In re Foley*,[38] a defense lawyer's dealings with an undercover agent were captured on tape, including his persistent recommendation to the "client" about concocting a defense to a weapons possession charge.[39] In suspending the lawyer, the Massachusetts Supreme Judicial Court stated, "What is unusual about this case is our ability to perceive with full clarity the depth of that misconduct and the ready ease with which the respondent engaged in it. The respondent's own words repeatedly reflect complete disregard, if not utter contempt, for the fundamental ethical obligations of an officer of the court."[40]

One recurrent example of defense lawyer misconduct involving deception involves substituting a different person for the defendant at the defense table during trial to have a prosecution witness make an incorrect identification of the person sitting next to the defense counsel as the perpetrator of the crime.[41] Once the misidentification occurs, the defendant has a powerful argument that the witness' testimony should not be credited by the jury or court.

In *People v. Simac*,[42] the Illinois Supreme Court upheld a criminal contempt conviction of a defense lawyer who had a clerical worker from his office sit next to him at the defense table while the defendant sat in the back of the courtroom.[43] He dressed one of them in a blue striped shirt and the other in a red striped shirt.[44] In arguing that the evidence did not support the contempt charge, Simac asserted that he did not make any affirmative misrepresentation to the court regarding the identity of the clerical worker, as he carefully avoided any reference to him as the defendant or his client.[45] Rejecting that argument, the court stated that "an

38. 787 N.E.2d 561 (Mass. 2003).
39. *Id.* at 563-64.
40. *Id.* at 568.
41. JOHN WESLEY HALL, JR., PROFESSIONAL RESPONSIBILITY OF THE CRIMINAL LAWYER § 34:23, at 1178 (2d ed. 1996) (warning that a court may hold a lawyer in contempt of court for substituting another person, without the court's approval, to cause a misidentification of the defendant). In *In re* Gross, 759 N.E.2d 288, 289, 294 (Mass. 2001), the Massachusetts Supreme Judicial Court imposed an eighteen-month suspension on a lawyer who "concocted a plan" to have an alibi witness, who had a similar appearance to the defendant, impersonate the defendant at the second call of the case in the hope that it would induce the victim to misidentify the person who left the scene of an accident.
42. 641 N.E.2d 416 (Ill. 1994).
43. *Id.* at 417-18.
44. *Id.* at 418. After the police officer identified the clerical worker as the person involved in the automobile accident, Simac called the clerical worker to testify to his true identity. *Id.*
45. *Id.* at 419. When the officer identified the clerical worker as the person involved in the accident, the trial judge stated for the record that the officer had identified "the defendant." *Id.* The Illinois Supreme Court found that Simac's failure to take any action to

attorney must not deceive the court as to the defendant's identity despite the attorney's obligation to vigorously represent his client. Such a deception prevents the court from fulfilling its obligation and derogates from the court's dignity and authority."[46] This is not an isolated example of this tactic, which has been tried over the years and which, when spotted, results in punishment for the defense lawyer.[47]

The question of whether a lawyer's effort to deceive the court constitutes obstruction of justice, rather than just an ethical violation or contempt of court, arose in *United States v. Kloess*.[48] Kloess, a defense lawyer, failed to alert a state court that his client gave a false name when stopped for a traffic violation and when found to be in possession of a firearm.[49] The client was on probation for a federal crime and could not possess a weapon, so Kloess' failure to reveal his client's true identity to the state court avoided having the client jailed for a federal probation violation.[50] Kloess was charged with obstruction of justice[51] by federal prosecutors for his conduct in state court.[52] The charge required the government to prove that he engaged in "misleading conduct" with the intent to "hinder, delay, or prevent" information from being communicated to a federal judge about a crime or probation violation."[53]

In 18 U.S.C. § 1515(c), Congress provides lawyers with a defense to an obstruction charge. The statute provides, "This chapter does not prohibit or

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correct the judge's misunderstanding was a deception. *Id.* at 422.

46. *Id.*

47. *See* United States v. Sabater, 830 F.2d 7, 9 (2d Cir. 1987) (maintaining that substituting another person for the defendant at the defense table violated the *Model Code of Professional Responsibility*); United States v. Thoreen, 653 F.2d 1332, 1343 (9th Cir. 1981) (upholding a contempt conviction against an attorney who substituted another person for his client at the counsel table to cause a misidentification); Miskovsky v. State *ex rel.* Jones, 586 P.2d 1104, 1109-10 (Okla. Crim. App. 1978) (ruling that a lower court properly found an attorney in contempt for substituting another person for his client at the defense table, but finding the $500 fine excessive). In *Attorney Grievance Comm'n v. Rohrback*, 591 A.2d 488, 498-99 (Md. Ct. App. 1991), a defense lawyer was suspended for forty-five days for not informing a probation officer that his client had given a different name to avoid the discovery of prior convictions likely to have resulted in the imposition of a term of imprisonment rather than a suspended sentence. A particularly egregious impersonation case is *Office of Disciplinary Counsel v. Raiford*, 687 A.2d 1118, 1119-20 (Pa. 1997), in which a lawyer was disbarred when he had someone impersonate one of his clients and plead guilty to the possession of drugs found in a car owned by another of the lawyer's clients. The lawyer misled the impersonated client about the status of the charges so that the client would not learn of the scheme. *Id.* at 1119. The defense lawyer was eventually convicted of criminal charges for obstruction of justice, and, in upholding his disbarment, the Pennsylvania Supreme Court noted that for a lawyer "[t]o engineer a criminal conviction of his own client without her knowledge is so outrageously unethical as to require no further comment." *Id.* at 1120.

48. 251 F.3d 941 (11th Cir. 2001).

49. *Id.* at 943.

50. *Id.*

51. *See* 18 U.S.C. § 1515 (2002).

52. *Kloess*, 251 F.3d at 943.

53. *Id.* (quoting 18 U.S.C. § 1515(c)).

punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding."[54] In *Kloess*, the Eleventh Circuit found that this provision "provides a complete defense to the statute because one who is performing bona fide legal representation does not have an improper purpose. His purpose, to zealously represent his client, is fully protected by the law."[55]

Section 1515(c) is consistent with the requirements of the ethics rules, which recognize that defense lawyers in criminal cases can test the strength of the government's cases even when counsel believes the evidence is sufficient to convict.[56] This duty of zealous advocacy permits a defense lawyer to seek to undermine the credibility of government witnesses, regardless of whether their testimony is truthful, and to advance a defense that the client is not guilty even if the lawyer knows that the defendant committed the crime.[57]

A lawyer's use of the legal system's tools to assist a client can become the basis for an obstruction of justice charge if the jury finds that the lawyer crossed the line between legitimate advocacy and a corrupt purpose. In *United States v. Cueto*,[58] the Seventh Circuit upheld the conviction of a lawyer for obstruction based in part on his filing for a restraining order against an undercover informant. The government advanced a theory that the lawyer sought to protect his personal financial interests in his client's illegal gambling business.[59] The government argued that the litigation-related conduct, while not illegal itself, was for the purpose of obstructing the government's criminal investigation of the client.[60] In finding the requisite intent to act corruptly, the Seventh Circuit stated, "As a lawyer, [defendant] possessed a *heightened awareness* of the law and its scope, and he cannot claim lack of fair notice as to what conduct is proscribed by § 1503 to shield himself from criminal liability, particularly when he was already 'bent on serious wrongdoing.'"[61] While bona fide legal services fall outside the scope of the obstruction of justice statute, the lawyer's

54. 18 U.S.C. § 1515(c).

55. 251 F.3d at 948. The court held that once a defendant fairly raises a defense under § 1515(c), the government must prove beyond a reasonable doubt that the conduct did not constitute bona fide, lawful legal representation. *Id.* at 949.

56. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2002).

57. *See* MONROE H. FREEDMAN & ABBE SMITH, UNDERSTANDING LAWYERS' ETHICS 213 (2d ed. 2002) ("Is it ever proper for a lawyer to cross-examine an adverse witness who has testified accurately and truthfully in order to make the witness appear to be mistaken or lying? Our answer is yes—but the same answer is also given by almost every other commentator on lawyers' ethics."); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 587 (1986) ("Once the lawyer undertakes the defense, he or she may not refuse to take steps on behalf of the accused because of the lawyer's belief in the guilt of the accused.").

58. 151 F.3d 620 (7th Cir. 1998).

59. *Id.* at 627-28.

60. *Id.* at 626.

61. *Id.* at 631 (emphasis added).

knowledge of the law and his client can be used to prove the corrupt intent necessary to obviate any protection provided to the lawyer under § 1515(c).[62] The responsibility of the lawyer to know the client and to communicate regularly in the course of the representation may in fact be the basis to demonstrate the intent to obstruct justice.

Moreover, *Cueto* and *Kloess* show the precarious position of the lawyer whose legal representation of the client brings the lawyer in close proximity to the client's misconduct.[63] Although a lawyer may believe that his conduct is innocent, a lawyer may run afoul of the obstruction of justice statute while assisting the client. In *United States v. Kellington*,[64] Kellington, a civil lawyer, accommodated his client's request to assist in disposing of certain property, which landed him in the middle of an obstruction of justice indictment.[65] After arrest, the client, a fugitive from a federal drug conviction who had been represented by Kellington in a civil case under an assumed name, asked Kellington to remove certain items that were hidden in his house.[66] Complying with this request, Kellington, who professed ignorance of the nature of the materials and the extent of his client's involvement in any misconduct, asked another person to destroy items that appeared to be evidence of criminal conduct, including cash and

62. The intent requirement for an obstruction of justice charge under 18 U.S.C. § 1512 is subject to dispute as to what constitutes "corruptly." A majority of courts employ the "improper purpose" analysis of "corruptly," requiring only that the government show that the defendant acted with an improper purpose when engaged in the conduct alleged to have obstructed justice but not requiring that the conduct be wrongful in itself. *See* United States v. Arthur Andersen, 374 F.3d 271, 295 (5th Cir. 2004) ("Congress knew that courts had uniformly defined 'corruptly' in 18 U.S.C. § 1503 as 'motivated by an improper purpose,' and it is logical to give the word 'corruptly' in § 1512 the same meaning that it has in § 1503."); United States v. Schotts, 145 F.3d 1289, 1300 (11th Cir. 1998) (noting that the language used in § 1512 has been interpreted as meaning with an "improper purpose"); United States v. Thompson, 76 F.3d 442, 452 (2d Cir. 1996) (construing that the use of the term "corrupt" in § 1512 requires that the government must prove that the defendant was motivated by an "improper purpose"); United States v. Cintolo, 818 F.2d 980, 991 (1st Cir. 1987) (explaining that "§ 1503 criminalizes conduct which obstructs or impedes the due administration of justice, provided such conduct is undertaken with a corrupt or improper purpose"). The Third Circuit requires greater proof of intent than just an attempt to hinder an investigation, stating that "an individual can 'persuade' another not to disclose information to a law enforcement official with the intent of hindering an investigation without violating the statute, i.e., without doing so 'corruptly.'" United States v. Farrell, 126 F.3d 484, 489 (3d Cir. 1997). The Supreme Court granted certiorari in the *Arthur Andersen* case to review the meaning of "corruptly." Arthur Andersen, LLP v. United States, 125 S. Ct. 823 (2005).

63. *See* Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 386 (1998) ("[T]he very nature of this pursuit places lawyers at risk because they deal more often than others with individuals who are themselves engaged in wrongdoing, and, especially in the case of criminal defense lawyers, an aspect of the risk is that the lawyer's conduct or intentions may be misperceived.").

64. 217 F.3d 1084 (9th Cir. 2000).

65. *Id.* at 1088-89.

66. *Id.* at 1088.

fake identity documents.[67] The trial court refused to permit the jury to consider whether Kellington acted in a manner consistent with the ethics rules, which would establish a defense under 18 U.S.C. § 1515(c).[68] The Ninth Circuit held this decision in error because

> Kellington was unable to frame and give content to the core of his defense—that Kellington was attempting (however imprudently in hindsight) to provide his client with bona fide legal representation, and that much of the conduct from which the government would have the jury infer criminal intent can be explained by his ethical obligations to [his client] . . . .[69]

In *Kellington*, the lawyer professed ignorance of his client's misconduct and testified that he would not have complied with the request had he known more about the client's circumstances.[70] What about the situation where a lawyer defends a client whom the lawyer knows is guilty? Can the lawyer create a false impression of the client's innocence to win an acquittal?

An ethics opinion issued by the State Bar of Michigan considered whether a lawyer could call friends of the defendant as alibi witnesses to testify that the defendant was with them at the time the victim stated the robbery took place.[71] The defense lawyer learned from his client that the victim's recollection of when the robbery took place was later than the time when the crime actually occurred, due to the fact that the defendant had rendered the victim unconscious before robbing him.[72] The alibi witnesses would testify truthfully that the defendant was with them at the time the victim said the crime occurred, thus creating a false impression with the court and the jury that the defendant had not committed the crime when, in fact, he had.[73] The State Bar of Michigan opined that "[t]he situation with the friends as alibi witnesses in the instant case does not involve tampering with evidence. One cannot suborn the truth."[74] Therefore, the defense lawyer had a *duty* to call the witnesses because the requirement of zealous representation of the client meant that "where truthful testimony will be offered, it seems axiomatic that a defendant is entitled to the effective assistance of counsel in presenting evidence, even though the defendant has made inculpatory statements to his counsel."[75]

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67. *Id.*
68. *Id.* at 1099-1100.
69. *Id.* at 1101.
70. *Id.* at 1089.
71. Michigan Ethics Opinion CI-1164 (1987), *available at* http://www.michbar.org/opinions/ethics/numbered_opinions/ci-1164.html.
72. *Id.*
73. *Id.*
74. *Id.*
75. *Id.*

If a lawyer can create a false impression with the judge and jury, is that a deception that could violate a criminal law? While the State Bar of Michigan urged the lawyer to call the witnesses, in contrast, the state of Minnesota has a statute that may prohibit such conduct.[76] The statute provides, "Every attorney or counselor at law who shall be guilty of deceit or collusion . . . with intent to deceive the court or any party . . . shall be guilty of a misdemeanor."[77] In *State v. Casby*,[78] the Minnesota Supreme Court upheld the conviction of a lawyer for violating the statute by not informing the court that her client gave his brother's name when arrested for speeding and littering and then when pleading guilty to the charges.[79] The court stated that "the client was embarked on a course of continuing deceit. The sixth amendment does not expect an attorney to assist a client in furthering fraud on the court."[80]

If the defense lawyer's ethical obligation is to take advantage of any weakness in the government's case, even if it requires the lawyer to create a false impression with the jury about the defendant's innocence, then the defense lawyer is indeed more than just a minor hindrance in the criminal process, but a veritable obstruction to obtaining a conviction. From the prosecutor's point of view, the defense lawyer is something more than an embodiment of the constitutional right to the assistance of counsel when that assistance can obfuscate rather than illuminate the truth. But it is not an obstruction of justice when the system depends on the defense lawyer, who protects the client by attempting, within the confines of the ethical rules, to obtain a result that may be contradictory to the defendant's guilt. The defense lawyer is not a fate worse than death for the prosecution but a necessary component of the criminal justice system. The fact that some defense lawyers may cross the line into improper conduct does not mean that lawyers as a rule obstruct justice or otherwise act improperly.

II. TARGETING LAWYERS

The fact that lawyers are prosecuted for crimes is nothing new. Lawyers have been prosecuted for embezzlement of client trust funds,[81] insider trading, and the use of confidential information for their own personal

76. 2004 MINN. LAWS § 481.071.
77. *Id.*
78. 348 N.W.2d 736 (Minn. 1984).
79. *Id.* at 738-39.
80. *Id.* at 739. Casby received a public reprimand and two years supervised probation for her conduct. *See In re* Application for the Discipline of Camelia J. Casby, 355 N.W.2d 704, 705 (Minn. 1984).
81. *See, e.g.*, *In re* Ford, 44 Cal. 3d 810 (1988) (disbarring an attorney due to his admitted misappropriation of client funds held in trust); *In re* Lyons, 15 Cal. 3d 322 (1975) (ordering that an attorney be disbarred as a result of misappropriation of funds entrusted to the attorney).

benefit.[82] These are clear abuses of lawyers' positions of trust. In recent years, prosecutions of lawyers have occurred for money laundering related to the payment of legal fees[83] and for providing money generated by drug sales to arrested drug cartel couriers to maintain their silence and to avoid the implication of the cartel's leader.[84] In *United States v. Gellene*,[85] the government successfully prosecuted a prominent New York City bankruptcy lawyer from a distinguished law firm for bankruptcy fraud. The government prosecuted him because of his failure to fully disclose his representation of other claimants in the bankruptcy proceeding, even though the government never alleged that his legal work was affected by the undisclosed conflicts.[86] What is rather unnerving is that, throughout these criminal investigations, prosecutors have used lawyers as sources of information about the wrongdoing of their clients.[87]

If lawyers are untrustworthy when they represent clients in criminal investigations, then does it follow that they engage in criminal conduct, constituting assistance in criminal schemes, when they provide legal advice

82. *See, e.g.*, United States v. O'Hagan, 521 U.S. 642, 647 (1997) (upholding the conviction of a lawyer who used confidential information from a client when considering a hostile takeover to purchase securities of the target corporation); United States v. ReBrook, 837 F. Supp. 162, 171 (S.D. W. Va. 1993) (finding that a lawyer charged with insider trading and mail fraud for using confidential information from a client to purchase shares in companies owed a duty to the public and to his employer not to improperly use such information), *rev'd*, 58 F.3d 961 (4th Cir. 1995); SEC v. Singer, 786 F. Supp. 1158, 1168-69 (S.D.N.Y. 1992) (hearing the SEC's argument that a lawyer traded securities of a company based upon information received from a corporate director about a possible leveraged buy-out).

83. *See* United States v. Tarkoff, 242 F.3d 991 (11th Cir. 2001) (convicting defense lawyers for money laundering in a case involving transfers of funds from a client's United States account, comprised of proceeds from Medicare fraud, through a financial institution in Curaçao to accounts in Israel).

84. *See* United States v. Abbell, 271 F.3d 1286, 1297 (11th Cir. 2001) ("[T]he evidence supported a jury finding beyond a reasonable doubt that, to the extent Rodriguez-Orejuela had other business interests, Abbell knew that those business interests were so intertwined with Rodriguez-Orejuela's narcotics trafficking that money paid by Rodriguez-Orejuela came, at a minimum, from commingled funds.").

85. 182 F.3d 578 (7th Cir. 1999).

86. *Id.* at 588 ("We have no doubt that a misstatement in a Rule 2014 [disclosure] statement by an attorney about other affiliations constitutes a material misstatement. . . . This requirement goes to the heart of the integrity of the administration of the bankruptcy estate.").

87. *See, e.g.*, United States v. White, 970 F.2d 328 (7th Cir. 1992) (discussing the government's obtainment of documents from a lawyer who had been convicted of bankruptcy fraud and who decided to cooperate with a government investigation by providing information about another client investigated in a separate bankruptcy fraud); United States v. Ofshe, 817 F.2d 1508 (11th Cir. 1987) (affirming the admission of evidence gained by the use of a listening device by a lawyer who was a target of a corruption investigation and who agreed to wear a listening device in meetings with his client regarding possible drug transactions); *cf.* United States v. Knoll, 16 F.3d 1313 (2d Cir. 1994) (remanding the case for an evidentiary hearing concerning whether the theft of documents from a lawyer's office used to convict that lawyer for aiding bankruptcy fraud was under the direction of a government agent).

in everyday business transactions? Lawyers are much more involved in advising clients about how to conduct their business than ever before due to the pervasiveness of the regulation of economic activity.[88] When the lawyer moves from the courtroom to the boardroom, the possibility of a lawyer becoming enmeshed in questionable conduct increases substantially.

Many prosecutions of lawyers stem from their conduct in a personal capacity or from their dealings with a court. In recent years, however, there has been a substantial increase in the number of criminal prosecutions of lawyers based on their legal advice to businesses—far removed from the courtroom and the representation of criminal defendants. As the government targets lawyers for how they practice their profession, the question arises as to whether the government views legal advice as another form of criminality in much the same way that a conspiratorial agreement is subject to prosecution.

The First Circuit's decision in *United States v. Cintolo*[89] highlights the view that legal representation is simply another form of potential misconduct. In *Cintolo*, the defendant-lawyer represented a witness in a grand jury investigation of racketeering while he acted at the direction of the criminal organization leader, who used Cintolo to ensure that the witnesses did not testify.[90] Cintolo counseled his "client" to assert the Fifth Amendment and, when granted immunity, to refuse to testify and to suffer a contempt charge.[91] Unknown to the participants in the scheme, the government taped conversations regarding Cintolo's representation, which made it clear that Cintolo was not working in his client's best interest.[92]

Cintolo was convicted of conspiracy to obstruct justice.[93] On appeal, he argued that he did not have the requisite "corrupt" intent because the legal advice was not itself criminal.[94] He also argued that the jury should be instructed that a legitimate explanation by a lawyer for his conduct in advising a client cannot obstruct justice.[95] The First Circuit rejected the

88. *See* Richard W. Painter, *The Moral Interdependence of Corporate Lawyers and Their Clients*, 67 S. CAL. L. REV. 507, 525 (1994) ("Today, corporations depend more than ever on lawyers to advise management and to lobby government concerning regulation. Just as the creation of railroads and a banking system in the nineteenth century was a legal as well as a business enterprise, legal risks in many of today's highly regulated industries like banking, insurance, airlines, and waste management have become business risks. Even apart from industry-specific regulation, regulation of almost every aspect of economic life such as the environment, health and safety, employment, and securities ensures that legal and business components of corporate decisions are often intertwined.").

89. 818 F.2d 980 (1st Cir. 1987).

90. *Id.* at 984.

91. *Id.* at 984-87.

92. *Id.* at 984-88.

93. *Id.* at 992, 1005.

94. *Id.* at 990.

95. *Id.*

arguments because "the acceptance of a retainer by a lawyer in a criminal case cannot become functionally equivalent to the lawyer's acceptance of a roving commission to flout the criminal law with impunity."[96]

While the court was correct that a lawyer could obstruct justice by advising a client, *Cintolo* denigrated the nature of legal advice as being different from other types of criminal conduct. The court noted that giving a person a ride to the airport or buying a chisel from a hardware store is not illegal unless it is a part of a larger scheme to engage in misconduct, thereby converting legal acts into illegal conduct.[97] According to the First Circuit, legal advice is just the same: "In the most fundamental sense, the 'advice' given by Cintolo in the manipulation of his own client was a commodity no different than the chisel or the free ride. It was legal to traffic in the wares, but illegal corruptly to put them to felonious use."[98]

However, legal advice is not a "ware" fetched off a shelf or a fungible commodity available for the taking by paying the going rate. The First Circuit misapprehended the nature of legal advice, which is designed to assist a client to adhere to the law. Unlike the chisel or free ride, legal advice involves the very possibility that the conduct at issue will be illegal; otherwise, there would be no need to consult a lawyer. When legal advice is provided to a client accused of a crime, the role of the criminal defense lawyer is, at least in part, to frustrate the system to ensure that only the guilty are convicted of a crime. The lawyer may ethically obstruct the criminal justice system by seeking an acquittal of a client, even a guilty one. In a business setting, the lines are less clear because the legal advice is prospective and ostensibly designed to avoid a violation rather than how to deal with the consequences of one.

The conviction of Cintolo is certainly justifiable because lawyers can cross the line from giving proper legal advice to misusing the tools of the criminal justice system to defeat its very purpose.[99] Under the obstruction of justice statute, it is doubtful Cintolo provided bona fide, legal representation services when he sought to shield one person's criminality by manipulating his client. To call his conduct ethical would be an absurdity. Yet, the view that legal advice is simply a commodity that can be misused as easily as any other physical device to commit a crime denigrates the importance of the lawyer in the criminal justice system. If legal advice is merely another tool to be misused, then lawyers are as guilty as any other person when they defend clients by seeking to avoid their

96. *Id.*
97. *Id.* at 993.
98. *Id.*
99. *See* United States v. Cueto, 151 F.3d 620, 632 (7th Cir. 1998) (reasoning that the adversarial system, and its goal of seeking justice, would be undermined if lawyers were not reprimanded for criminal and manipulative conduct).

conviction.

If legal advice is essentially fungible, then targeting lawyers for prosecution is a short step to take in expanding the scope of the criminal law. Under this view, the presence of the lawyer is another sign of criminality, and so, prosecutors can regard the lawyer as criminally liable for giving legal advice that does not prevent others from engaging in misconduct. It is this gatekeeper role of lawyers advising businesses that makes legal advice particularly vulnerable to a charge of assisting a client's fraud because the lawyer's role may be so close to the misconduct that prosecutors consider them facilitators of the crime. For example, in *United States v. Anderson*,[100] the government brought a large-scale Medicare fraud indictment that included two lawyers in addition to the doctors and hospital administrators charged with an array of fraud and conspiracy offenses.[101] The lawyers represented several hospitals in trying to create a legal means of compensating two doctors who referred a large number of patients from nursing homes to the hospitals.[102] The government alleged that the lawyers, together with the other defendants whose activities were more directly involved in the misconduct, sought to erect a system to provide kickbacks to the doctors by disguising illegal referral fees as consulting arrangements.[103]

Throughout the negotiation process, the lawyers sought to effectuate a business arrangement between the hospitals and the doctors in a legal manner while operating in an area whose rules are arcane and subject to frequent, and often confusing, changes.[104] In dismissing the charges against the lawyers, the trial judge stated:

> It is undisputed from the evidence that all the lawyers who dealt with or reviewed these transactions . . . held good faith beliefs that it was possible to facilitate some business relationship between the hospitals and [the doctors] . . . . [T]he reversals of field by the OIG [Office of Inspector General, United States Department of Health and Human Services] concerning its own interpretation, the checkered history of the *Hanlester* [*Network v. Shalala*, 51 F.3d 1390 (9th Cir. 1995)] case and the reservation by Congress of a safe harbor provision in the act (the promulgation of regulations concerning which were delayed for a considerable time) all invite lawyers to attempt to devise legal ways for parties to have a relationship which has as a component hoped-for and anticipated referrals . . . .

100. 85 F. Supp. 2d 1047 (D. Kan. 1999), *rev'd by* United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000).
101. *Id.* at 1051.
102. *Id.* at 1055-56.
103. *Id.*
104. *Id.* at 1060.

> There were no decisions from the U.S. Supreme Court or from the Eighth or Tenth Circuits, where the activities in question were going on, to guide them. What the evidence unassailably demonstrated is that [the lawyers] steadfastly maintained to their clients that if fair market value were paid for the doctors' practice or for legitimate consulting services, the relationship passed legal scrutiny. Nothing in the evidence or the law suggests otherwise.[105]

The lawyers prosecuted in *Anderson* were trying to craft a legal solution for their client to achieve a legitimate business purpose. The fact that they were in an area heavily regulated by the government, and that they provided advice regarding conduct that, if done improperly, could have resulted in criminal prosecution, put the lawyers at risk of being labeled as co-conspirators and participants in a scheme to defraud—even though their legal work sought to avoid such an appellation.

One of the usual accouterments of fraud is that there is an illegal benefit derived from the misstatements or omissions used to deceive the victims and that the benefit usually comes from the victim, although not always.[106] When the lawyer's services are part of the scheme, a special payment or benefit to the lawyer will be a hallmark of the lawyer's participation in the misconduct, in addition to the provided legal advice, whatever its considered worth.[107] The mail fraud statute,[108] however, has been applied to ethical breaches that deprive a client of the lawyer's undivided loyalty in representation, even where a lawyer does not gain any special benefit.

In *United States v. Bronston*,[109] the government charged a lawyer, who was also a state senator, with mail fraud for secretly representing a company seeking a city bus shelter contract when his firm already represented a competitor seeking the same contract.[110] The lawyer's breach of the duty of loyalty owed to his firm's client constituted fraud.[111] The Second Circuit found itself "faced with a straight-forward economic fraud in which the object of the scheme was not merely to deprive the victims of a law firm's undivided loyalty, for which they paid $52,000, but to deprive

105. *Id.* at 1064-65.

106. Stephen Fraidin & Laura B. Mutterperl, *Advice for Lawyers: Navigating the New Realm of Federal Regulation of Legal Ethics*, 72 U. CIN. L. REV. 609, 615 (2003) (noting that lawyers have been prosecuted for their involvement in fraudulent schemes, insider trading, and market manipulation).

107. *See* Sylvia E. Stevens, *A Fine Line: When Does Giving Legal Advice Become Assisting a Client with Fraud?*, 63 OR. ST. B. BULL. 29, 30-32 (listing and describing a number of cases in which lawyers were found to have assisted their clients in the perpetration of a fraud).

108. 18 U.S.C. § 1341 (2002).

109. 658 F.2d 920 (2d Cir. 1981).

110. *Id.* at 922-26.

111. *Id.* at 922.

[the client] and its minority investors of the [client's] franchise."[112] In criticizing the decision, Professor John Coffee argued that,

> [H]owever rare the *Bronston* facts may seem, conflicts of interest are as inevitable as death and taxes. Current law appears to be approaching the point of criminalizing a conflict of interest whenever the fiduciary knowingly fails to disclose its existence and thereby deprives his beneficiary of his "honest and faithful services."[113]

Bronston's actions likely deprived the firm's client of the right of honest services, at least to the extent that it could count on the lawyers in the firm to refrain from helping a competitor. Now, this type of intangible harm—the deprivation to the right of honest services—comes specifically within the scope of the mail fraud statute: a lawyer's ethical violation could be a basis for bringing criminal charges, although the client must suffer some harm from the breach of duty.[114] Because lawyers act as fiduciaries for their clients, the extent to which a lawyer acts unethically by not providing loyal service to a client could be seen as a scheme to defraud, at least when there is some improper benefit to the lawyer or economic loss to the client from the ethical breach.[115]

If the ethics rules can form the basis of a criminal prosecution, then the

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112. *Id.* at 929-30.

113. John C. Coffee, Jr., *The Metastasis of Mail Fraud: The Continuing Story of the "Evolution" of a White-Collar Crime*, 21 AM. CRIM. L. REV. 1, 13 (1983). In *United States v. Gellene*, 182 F.3d 578 (7th Cir. 1999), a bankruptcy lawyer's failure to disclose to the court that he had represented other parties with claims against the bankrupt company resulted in a conviction for bankruptcy fraud. Like *Bronston*, there was no evidence of an economic harm to the client, but unlike *Bronston*, the lawyer misled the court in connection with being appointed as counsel for the bankrupt company. *Id.* at 587-88. While both cases involved a conflict of interest, the real lesson of *Gellene* is that lawyers who actively mislead a court will be convicted, regardless of whether there is any direct economic harm.

In *United States v. Drury*, 687 F.2d 63 (5th Cir. 1982), the Fifth Circuit upheld a lawyer's conviction of mail fraud for not disclosing to his clients that he received a fifteen percent kickback of the medical fees from a physician to whom the lawyer referred his personal injury clients. The court found that the lawyer breached his fiduciary duty to his clients by concealing the financial arrangements with the physician "and consequently and surreptitiously pocket[ing] a larger fee than that he had agreed on with the client." *Id.* at 65. Unlike *Bronston*, the lawyer used his clients to enrich himself, not necessarily at their expense, but certainly without regard to their interest in paying the lowest fee possible for legal representation.

114. *See* 18 U.S.C. § 1346 (2002) ("For the purposes of this chapter, the term 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services.").

115. *See* Ellsworth A. Van Graafeiland, *The Proposed Model Rules of Professional Conduct and the Mail Fraud Statute*, 48 BROOK. L. REV. 653, 659 (1982) ("If the local leader of a political party, who is not a public officeholder, can be convicted of mail fraud for depriving citizens of their right to honest government, no major conceptual leap is required to argue that a lawyer who deprives the public of its right to the honest administration of justice should also be held liable. If the provisions of the proposed Model Rules do tilt toward a concern for society at large, an issue that will not be debated here, intentional violations of rules such as Rule 3.3 may well support future charges of mail fraud.").

next step may be the pursuit of lawyers for their representation of clients that, while not unethical, fails to prevent misconduct. A recent indictment of a lawyer for his representation of a corporate client by the Department of Justice may indicate this expansion of the scope of potential criminal liability for lawyers. In *United States v. Munson*,[116] the government indicted the executives of an energy trading subsidiary of a utility company along with Munson, the corporation's outside counsel, for securities and mail fraud for submitting false financial statements.[117] The indictment alleged that Munson helped the executives "pump up" the company's earnings by "stretching fiscal recognition of a $1.25 million settlement" over two fiscal years, thereby lowering the company's expenses and increasing its earnings.[118] Munson represented the subsidiary in the settlement, but the indictment does not discuss how his legal representation related to the fraudulent accounting of the settlement.[119] Moreover, while the executives received bonuses based on meeting certain financial goals, the indictment alleges only that Munson "sought to please a client . . . from whom he hoped to obtain additional legal business and eventual employment," including being appointed as general counsel for the subsidiary.[120]

The case is still in the pre-trial phase, and so, the government has not yet brought forth its proof. The indictment, however, contains no allegation that Munson's legal advice to the corporate client was relevant to the accounting treatment of the expense, nor does it contain an allegation that he breached any fiduciary obligation to the client.[121] Moreover, his gain from the fraudulent scheme, unlike the monetary benefits reaped by the company's executives, consists of the vague "hope[] to obtain additional legal business" and perhaps being hired as the client's in-house counsel.[122] It is axiomatic that lawyers seek to continue their representation of clients, either in the current matter or in future legal issues. Indeed, one of the benefits of retaining a lawyer on a long-term basis is the cost-savings for clients who then have a lawyer familiar with their legal needs and who establishes a good working relationship with the officers and managers of

116. No. 03 CR 1153, 03 CR 1154, 2004 WL 1672880 (N.D. Ill. July 28, 2004).

117. *See id.* at *1 (outlining Munson's manipulation of the company's earnings statements to make it appear more profitable than it truly was by violating accepted accounting principles when structuring the payment of a $1.25 million dollar settlement to another utility company).

118. *Id.*

119. *See* United States v. Stoffer, No. 03CR1153, 2003 WL 23145605 (N.D. Ill. Dec. 10, 2003) (focusing on how Munson worked with executives in an attempt to make the company appear more profitable through accounting principles as opposed to examining the impact Munson's legal advice had on the company).

120. *Id.* at ¶¶ 1.f, 3.

121. *See generally Stoffer*, 2003 WL 23145605.

122. *Id.* at ¶¶ 1.f, 3.

the company interacting with the lawyer on a regular basis.

There is nothing wrong with "hoping" for future legal business, as long as the lawyer provides competent representation and maintains the requisite independence from the client. Tellingly, the indictment of Munson does not make any reference to his shaping legal advice to curry favor with the client or his using information from the representation to favor his own position to the detriment of the client, which would be a breach of his ethical duties.[123] Unlike *Bronston*, in which the lawyer's ethical breach can be viewed as having harmed the client's interest by helping a competitor, in this case, the government appears to have indicted the lawyer because he did not prevent the wrongdoing from occurring. In this sense, the lawyer's failure to undertake a gatekeeper role, rather than any specific problem with the legal advice offered to the client, appears to be the criminal conduct. It may be that Munson conspired with the other executives to mislead the parent corporation or altered documents to conceal the fraudulent accounting, but the indictment contains no indication that such events occurred. Instead, it appears that the lawyer was not charged for misconduct in his role as counsel to the company, but rather, was charged with being at the scene of the crime and not doing anything to stop it, apparently with the "hope" of gaining future business.

III. TARGETING LEGAL ADVICE

Lawyers can be held accountable for the legal advice that they provide to clients in a number of ways. Malpractice suits provide clients with a means of redress when the lawyer was negligent in the representation. Similarly, even if the lawyer was not negligent, a breach of fiduciary duty can result in an award of damages or a return of the legal fees. Each state maintains an extensive disciplinary apparatus for reviewing complaints against lawyers and can impose sanctions against lawyers ranging from private admonitions to suspensions and even disbarment for serious misconduct. The Sarbanes-Oxley Act,[124] adopted in 2002 in the wake of spectacular corporate failures involving large corporations like Enron and Worldcom, empowered the Securities and Exchange Commission ("SEC") to impose an ethical obligation on lawyers of publicly-traded corporations to report wrongdoing within the corporation to senior management and to the board of directors.[125] Judges have not hesitated to hold lawyers in contempt for

123. *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(b) (2002) ("A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client gives informed consent . . . .").

124. Pub. L. No. 107-204, 116 Stat. 745 (2002) (codified in scattered sections of 11 U.S.C., 15 U.S.C., 18 U.S.C., 28 U.S.C., and 29 U.S.C.).

125. *See* 15 U.S.C. § 7245 (Supp. 2004). Section 7245 provides:

Not later than 180 days after July 30, 2002, the Commission shall issue rules, in the

misconduct during litigation, and lawyers are not shy about complaining about the conduct of opposing counsel by seeking disqualification.

While the effectiveness of these means to redress wrongdoing by lawyers is open to question, the profession does not operate without oversight by both administrative bodies and the judiciary. As prosecutors use the criminal law with greater frequency to pursue charges against lawyers for conduct that would have been the subject of a disciplinary or malpractice action in an earlier time, the issue becomes one of the appropriateness of the regulation of lawyers through the criminal process. As Professor Bruce Green notes, "The criminal law's regulatory role is most interesting, and potentially troubling, in situations where the criminal law points lawyers in one direction but other professional norms, such as those embodied in the lawyer codes, appear to point lawyers in the opposite direction."[126]

The issue now has expanded into whether legal advice has become an obstruction to criminal investigations and prosecutions such that the mere presence of a lawyer is indicia of guilt and a sign that the person is not cooperating with the government. The SEC's Director of Enforcement, Stephen Cutler, stated in a speech:

> One area of particular focus for us is the role of lawyers in internal investigations of their clients or companies. We are concerned that, in some instances, lawyers may have conducted investigations in such a manner as to help hide ongoing fraud, or may have taken actions to actively obstruct such investigations.[127]

A lawyer who orders the destruction of documents or removal of electronic files from a server to keep them from the government would clearly be guilty of obstruction of justice. Now, however, internal investigations are standard whenever there is even a hint of impropriety at a

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> public interest and for the protection of investors, setting forth minimum standards of professional conduct for attorneys appearing and practicing before the Commission in any way in the representation of issuers, including a rule—
>
> (1) requiring an attorney to report evidence of a material violation of securities law or breach of fiduciary duty or similar violation by the company or any agent thereof, to the chief legal counsel or the chief executive officer of the company (or the equivalent thereof); and
>
> (2) if the counsel or officer does not appropriately respond to the evidence (adopting, as necessary, appropriate remedial measures or sanctions with respect to the violation), requiring the attorney to report the evidence to the audit committee of the board of directors of the issuer or to another committee of the board of directors comprised solely of directors not employed directly or indirectly by the issuer, or to the board of directors.

126. Green, *supra* note 63, at 391-92.

127. Stephen M. Cutler, The Themes of Sarbanes-Oxley as Reflected in the Commission's Enforcement Program, Speech at the UCLA School of Law (Sept. 20, 2004), *at* http://www.sec.gov/news/speech/spch092004smc.htm (on file with the American University Law Review).

corporation. In such a situation, the lawyer's advice to the company and its employees could be to not respond to the government's request for interviews and to assert the Fifth Amendment privilege until corporate counsel completes an investigation. Would that directive obstruct an investigation?

While the destruction of documents is surely criminal, Mr. Cutler's statement may include more than what is prohibited already by criminal law because one would certainly hope that the SEC is vigilant regarding such flagrant misconduct. The question is whether legal advice, given to a corporation to not cooperate with the government and to resist a subpoena for records, or advice given to individual employees that they can assert their Fifth Amendment rights would be "obstruction" in the eyes of the SEC. There is nothing illegal about this advice, but once again, the lawyer's involvement may be viewed as inherently suspect, at least until the company agrees to cooperate fully. If there is a suspicion that lawyers act to obstruct justice without violating the ethical rules—indeed, when acting ethically—then the results of an internal investigation will not be trustworthy because it was tainted by a lawyer seeking to protect the corporate client who conducted the review.

The Thompson Memorandum takes that suspicion of lawyers to a higher level by making waivers of the attorney-client privilege and the work product protection a strong indicia of cooperation.[128] It has the following as a general principle:

> In determining whether to charge a corporation, that corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate with the government's investigation may be relevant factors. In gauging the extent of the corporation's cooperation, the prosecutor may consider the corporation's willingness to identify the culprits within the corporation, including senior executives; to make witnesses available; to disclose the complete results of its internal investigation; and to waive attorney-client and work product protection.[129]

The DOJ explains that waivers assist its investigations because they "permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements."[130] Those are the very agreements that lawyers for individuals would extract from the government as the price for the cooperation of an officer or employee. By having the corporation conduct at least the first phase of the investigation, the government can obtain statements that a lawyer would otherwise advise a client not to make

128. *See* Thompson Memorandum, *supra* note 14, at VI.A.
129. *Id.*
130. *Id.* at VI.B.

without the protection of an immunity agreement or plea bargain.

Some have criticized the "waiver" as hardly voluntary because of the coercive effect of the Federal Sentencing Guidelines[131] and the ease with which a corporation can be proven guilty under the principle of respondeat superior.[132] A Comment to the Thompson Memorandum states that the DOJ "does not, however, consider waiver of a corporation's attorney-client and work product protection an absolute requirement."[133] However, this provides cold comfort to corporate counsel assessing whether to waive the protections afforded to lawyers conducting internal investigations, because the determination of whether a corporation has sufficiently cooperated is completely within the DOJ's discretion.[134] Moreover, corporate counsel have questioned whether they will receive complete cooperation from employees if it is known that what is said or provided in the internal investigation will be turned over to the government and, in all likelihood, to private litigants.

The government simply is not lazy by seeking the waiver to obtain the complete results of the internal investigation. It is, instead, symptomatic of the DOJ's mistrust of lawyers, who can use the shield of the attorney-client privilege and the work product protection to safeguard the content of their internal investigation and, potentially, make it more difficult for the government to fully investigate corporate misconduct. If lawyers tell their clients not to cooperate with the government without some protection—either a grant of immunity or a plea agreement—then perhaps the corporation will obtain the statements that will spare the government from having to pay the price for such cooperation. However, it is unlikely that the government will accept the conclusions of an internal investigation uncritically or forego its own investigation simply because the

131. *See* Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 537-38 (2002) (claiming that the Corporate Sentencing Guidelines pressure companies to cooperate with the government to receive a lower culpability score); *see also* U.S. SENTENCING GUIDELINES MANUAL, app. § 8C2.5(g) (2003) (outlining the mitigating effect of a corporation's self-reporting, cooperation, and acceptance of responsibility). *But see* Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 608 (2004) (noting that Application Note 12 to § 8C2.5 was recently amended to clarify that a waiver is not always a prerequisite to a lower culpability score).

132. *See* Cole, *supra* note 131, at 543 (arguing that allowing prosecutors to consider a corporation's willingness to waive the attorney-client privilege and the work product protection "go[es] quite far toward effectively forcing a corporation to waive privilege protections if it hopes to obtain favorable charging treatment at the hands of DOJ prosecutors").

133. Thompson Memorandum, *supra* note 14, at VI.B.

134. *But see* Buchanan, *supra* note 131, at 597 ("[C]laims that the sanctity of the attorney-client privilege is being undermined by the Department's assessment of cooperation by organizational defendants are greatly overstated. In any case, the decision to waive the privilege must be made by the corporation.").

corporation's lawyers have already conducted one. Nonetheless, the waiver gives prosecutors some assurance that they have not missed anything protected by the attorney-client privilege or the work product protection. It allows them to consider charges without having to make deals with officers or employees to obtain information.

This fear of legal advice is further shown by a Comment to the Thompson Memorandum where the DOJ identifies conduct that can demonstrate a lack of cooperation from an organization that "appears to be protecting its culpable employees and agents:"

> [A] corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.[135]

The Comment contains a footnote acknowledging that some states require the payment of attorney's fees and that "a corporation's compliance with governing law should not be considered a failure to cooperate."[136] What the footnote does not address is whether a contractual obligation to provide attorney's fees that is authorized, but not compelled, by a state's corporate law, would be considered inappropriate support.[137]

Ethics rules require that a lawyer may not represent multiple clients when a potential conflict of interest between their positions exists, or if the lawyer's representation of one client would limit the representation of a second.[138] An investigation of a corporation and its officers and employees

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135. Thompson Memorandum, *supra* note 14, at VI.B.

136. *Id.* at VI.B n.4.

137. For example, Delaware law allows a corporation to enter into agreements for the payment of expenses beyond what is required by its law. DEL. CODE ANN. tit. 8, § 145(f) (2001). Another provision permits a corporation to advance the attorney's fees of an officer or director in a criminal investigation or prosecution "upon receipt of an undertaking by or on behalf of such director or officer to repay such amount if it shall ultimately be determined that such person is not entitled" to receive attorney's fees from the company. *Id.* § 145(e). Would a contract or by-law provision requiring the advancement of attorney's fees to an officer show that the corporation is not cooperating with the government?

138. *See* MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2002). It provides:

> Notwithstanding the existence of a concurrent conflict of interest . . ., a lawyer may represent a client if:
>
> (1) the lawyer reasonably believes that the lawyer will be able to provide competent and diligent representation to each affected client;
>
> (2) the representation is not prohibited by law;
>
> (3) the representation does not involve the assertion of a claim by one client against another client represented by the lawyer in the same litigation or other proceeding before a tribunal; and
>
> (4) each affected client gives informed consent, confirmed in writing.

Id.

will almost certainly require that each individual be represented by separate counsel, especially if the government plans to seek the cooperation of one or more of the investigative targets to testify against the others. Payment of the attorney's fees of an officer or employee during an investigation may well be in the corporation's best interest because its own culpability will be based on the conduct of the officers. The presence of the lawyers will, however, frustrate the government's investigation, which the Thompson Memorandum views as a basis for seeking to have the corporation waive its privileges.[139]

By discouraging corporations from paying for separate counsel, the government uses the ethical prohibition on conflicts of interest to obtain information from individuals that it might not otherwise be able to get. Counsel for the corporation cannot give legal advice to individual officers without running afoul of the conflict rules, and, if paying for a separate lawyer will be a sign of non-cooperation, the corporation is unlikely to suggest that the employee obtain his or her own lawyer before cooperating in the investigation, lest it appear to be shielding the employee. This puts corporate counsel in a precarious position under the ethics rules if the employee thinks the lawyer represents the individual, and the lawyer fails to correct that misperception.[140]

If the government requires corporate counsel to ensure that individuals cooperate with internal investigations as a condition to finding that the corporation itself cooperated, then the Thompson Memorandum seeks to take advantage of an individual's lack of knowledge and willingness to help an employer. Proof of corporate cooperation may be contingent on showing that no lawyers other than the corporation's were present and that all privilege and work product claims can be waived. This approach views lawyers, who are not subject to the government's coercive power over the corporation, as likely to frustrate investigations. Therefore, they must not be present if the government wishes to accomplish its goal.

The premise of the DOJ's view that the payment of attorney's fees signals a lack of cooperation is that the corporation may be shielding a "culpable" employee.[141] Apparently, providing a lawyer to a person who is guilty seems to be sure indicia of an uncooperative organization. The

139. *See generally* Thompson Memorandum, *supra* note 14, at VI.A.

140. *See* MODEL RULES OF PROF'L CONDUCT R. 1.13(d) (2002) ("In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing."); MODEL RULES OF PROF'L CONDUCT R. 4.3 (2002) ("When a lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.").

141. *See* Thompson Memorandum, *supra* note 14, at VI.B.

problem is that "culpable" is not defined anywhere, and surely it cannot mean "guilty" because there has not been any adjudication of criminal liability at the point when the DOJ considers whether to charge the corporation with a crime. The Thompson Memorandum seems to include any person who the government believes engaged in wrongdoing as "culpable," and therefore, not worthy of receiving any benefit from the corporation, regardless of the phase of the investigation.

An inquiry into possible corporate misconduct occurs before, not after, charges are filed because it is not clear whether a crime occurred. Any determination of culpability, therefore, must wait at least until the government has probable cause that a person committed an offense and files an indictment. Yet, the Thompson Memorandum treats virtually any employee who might be involved in misconduct as culpable well before the investigation is complete. This turns the presumption of innocence on its head because a corporation that does not immediately turn on a potentially culpable employee has not cooperated and may suffer an indictment itself.

The government's suspicion of the corporation's cooperative spirit is further heightened if there is a joint defense agreement. Generally, courts have been supportive of these types of agreements as a means to share information among those with a common interest to facilitate their legal defense without risking the complete loss of the attorney-client privilege.[142] Yet, the Thompson Memorandum views these agreements as a sign that the corporation is not cooperative in the government's investigation.[143] The internal investigation becomes much more difficult if conducted in an atmosphere of distrust, yet the government seeks to take advantage of the corporation's presumed authority over its employees to obtain statements it might otherwise be unable to access.[144]

A joint defense agreement allows lawyers for individuals to monitor the investigation and makes it easier to formulate a common defense, thereby making the government's investigation more difficult. Like the payment of attorney's fees, the joint defense agreement enhances the ability of the lawyer to defend the client, and therefore, is something the DOJ views with great suspicion.

The rationale for the Thompson Memorandum is that "[t]oo often

142. *See* United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989) ("The joint defense privilege, more properly identified as the 'common interest rule,' . . . has been described as 'an extension of the attorney client privilege,' . . . . It serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel.").

143. *See* Thompson Memorandum, *supra* note 14, at VI.

144. *See* Finder, *supra* note 19, at 112 (remarking that a company facing an internal investigation now considers it problematic for relationships among employees, management, and the board of directors).

business organizations, while purporting to cooperate with a Department investigation, in fact take steps to impede the quick and effective exposure of the complete scope of wrongdoing under investigation."[145] This presupposes, of course, that criminal conduct has taken place and that the corporation and its employees are responsible, so that the only issue for the government is to identify the culprits and bring them to justice. Corporations certainly commit crimes, but it is not always immediately apparent that criminal conduct has taken place at the start of an investigation. Unlike ordinary street crimes, such as theft or drug-dealing, which are obviously criminal, economic crimes often involve business transactions that are not inherently wrongful.[146] While everyone assumes that Enron was rife with criminality, the actual causes of its demise were not theft or embezzlement, but rather, involved the use of sophisticated financial vehicles and transactions that are recognized as perfectly legitimate in most circumstances.[147]

If the assumption is that every investigation of organizational misconduct will result in a criminal conviction, then the DOJ's disdain for lawyers would be defensible. But it is not always the case that the corporation and its officers are engaged in wrongdoing. In a recent prosecution of two mid-level executives from the K-Mart Corporation who were accused of securities fraud, the government dismissed the charges after its second witness contradicted her earlier grand jury testimony about the receipt of documents that showed the defendants had not tried to

145. Thompson Memorandum, *supra* note 14, at Introduction.

146. *See* Green, *supra* note 13, at 510 (

> Not only does white collar crime present difficulties in assessing the means by which it is committed, the harms it causes, and the victims it affects, but there are also problems in determining exactly who (or what, in the case of an entity) should be held responsible. Many of the offenses referred to above are most likely to occur within the context of complex institutions, such as large corporations, partnerships, and government agencies. In such organizations, responsibility for decision making and implementation is shared among boards of directors, shareholders, top and mid-level managers, and ground-level employees. As a result, the blame we attribute to an individual actor within the organization in which he works may be less than the blame we attribute to an individual actor committing an equally serious street crime on his own.

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147. *See* Frank Partnoy, *A Revisionist View of Enron and the Sudden Death of "May"*, 48 VILL. L. REV. 1245, 1245-46 (2003) ("Enron is largely a story about derivatives—financial instruments such as options, futures, and other contracts whose value is linked to some underlying financial instrument or index. A close analysis of the facts shows that the most prominent SPE [Special Purpose Entity] transactions were largely irrelevant to Enron's collapse, and that most of Enron's deals with SPEs were arguably legal, even though disclosure of those deals did not comport with economic reality. To the extent SPEs are relevant to understanding Enron, it is the derivatives transactions between Enron and the SPEs—not the SPEs themselves—that matter. Even more important were Enron's derivatives trades and transactions other than those involving the SPEs.").

deceive the company about the accounting for a transaction.[148] Similarly, the charges against the individuals arising from the Salt Lake City Olympic bid scandal were dismissed at the close of the government's case, and the district court judge stated that the government's case had offended his sense of justice.[149] Unlike the view of *NYPD Blue*, that "lawyering up" is only done by guilty suspects to thwart an investigation, corporate officers and employees do not necessarily act illegally in every instance, and their reliance on lawyers is not designed simply to frustrate the government's investigation of clear wrongdoing.

CONCLUSION

The world might be a better place without lawyers, although I doubt it. We hear quite frequently the quotation from Shakespeare's *Henry VI (Part II)*[150]—"The first thing we do, let's kill all the lawyers."[151] However, we are not quite sure how to react. Leave it to lawyers—and legal academics—to argue whether that line was meant as a true wish for a better world without lawyers or a compliment to lawyers because of their ability to guard against despotism.[152] However, lawyers are recognized as important in the civil arena and constitutionally required in many criminal cases. As Justice Stevens noted in a dissenting opinion:

> If the Government, in the guise of a paternalistic interest in protecting the citizen from his own improvidence, can deny him access to independent counsel of his choice, it can change the character of our free society. Even though a dispute with the sovereign may only involve property rights, . . . the citizen's right of access to the independent, private bar is itself an aspect of liberty that is of critical importance in our democracy.[153]

In the name of investigating corporate crime, the DOJ has given expression to a mistrust of lawyers as little more than hindrances to the protection of society from wrongdoing. We are told, in effect, that lawyers cannot be trusted because their ethical rules permit them to obstruct justice,

148. *See* David Ashenfelter & Greta Guest, *Charges Tossed in Kmart Crime Case*, DETROIT FREE PRESS, Nov. 8, 2003, at A1.

149. *See* Mike Gorrell & Linda Fantin, *Acquitted*, SALT LAKE TRIB., Dec. 6, 2003, at A1 (quoting the judge as stating: "In all my 40 years experience with the criminal justice system . . . I have never seen a criminal case brought to trial that was so devoid of criminal intent or evil purpose. . . . This, in light of the evidence presented, offends my sense of justice.").

150. WILLIAM SHAKESPEARE, THE SECOND PART OF KING HENRY THE SIXTH, act 4, sc. 2.

151. *Id.*

152. For various commentators' interpretations of the Shakespeare quotation, see Benjamin Barton, *The Emperor of Ocean Park: The Quintessence of Legal Academia*, 92 CAL. L. REV. 585, 600 n.46 (2004) (book review).

153. Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305, 370-71 (1985) (Stevens, J., dissenting).

and their advice to clients to assert their constitutional rights makes it appreciably more difficult to investigate and to prosecute economic crimes committed by corporations and their officers and employees.

However, the DOJ's suspicion of lawyers and the targeting of legal advice as something to be limited or eliminated if possible from corporate crime investigations are steps toward viewing all such allegations of misconduct as proven unless—and until—determined otherwise. I submit that this approach takes the issue of overcriminalization to a new level by making the provision of proper legal advice an indicia of criminality and an instrumentality to be removed from the hands of those subject to a criminal investigation in much the same way an officer would take a weapon or contraband from a suspect.