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Tabor Lecture

LAWYER CRIMES: BEYOND THE LAW?

Charles W. Wolfram¹

I. INTRODUCTION

Can lawyers commit crimes while engaged in the traditional practice of law? Or are lawyers, solely by virtue of their office, beyond the law? Short of such full immunity, are there situations in which lawyers while they are functioning as such are – and should be – treated differently, more leniently, by the criminal law? From a very different perspective, is there underway in some parts of the United States – as some criminal defense lawyers and organizations have periodically claimed – a prosecutor-led effort to weaken the criminal defense bar through criminal prosecution of some of its members?² From a theoretical point of view, one cannot eliminate that possibility as well as the broader, more general threat that the independence of the legal profession could be compromised by the threat of criminal prosecution of lawyers for doing what they do. Does the law allow such injustice? Would courts tolerate it?

I consider here not so much everyday “street” crimes committed by lawyers – murder, robbery, rape – although such offenses will be of secondary interest,³ but most importantly of alleged crimes committed by lawyers in the course of their professional employment and while engaged in activities that traditionally have comprised the practice of law. Take, for example, a lawyer, who, as advocate on behalf of a client,

¹ Charles Frank Reavis, Sr., Professor Emeritus, Cornell Law School. This article is a revised version of Professor Wolfram’s Tabor Lecture, presented at Valparaiso University Law School April 20, 2001.

² For a recent airing of such general charges, see, e.g., David E. Rovella, *Putting Defenders on the Defensive: The Criminal Defense Bar Says the DOJ Is Treating Some Lawyers in Drug Cases Like Criminals*, NAT’L L. J., April 2, 2001, at A1, col. 1 (reporting guilty plea of Miami criminal defense lawyer Donald Ferguson, former head of the ABA’s Criminal Justice Section and the National Association of Criminal Defense Lawyers, to felony count of money laundering for taking fees from funds known to be the proceeds of illegal drug conspiracy and reporting worries by criminal defense lawyers about prosecutorial overreaching).

³ See *infra* notes 20–28 and accompanying text.

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is taking the testimony of a favorable witness in the course of a trial through the customary process of questions and answers. As the lawyer knows, the favorable witness is providing testimony that, although apparently credible and quite advantageous for the client, is also false. Is that lawyer professionally so positioned as to be, in effect, immune from prosecution for the crime of suborning perjury or obstructing justice, if the lawyer should continue to elicit the known false testimony and then argue that the fact finder should accept it as true? Differently, suppose that the lawyer is representing a person who has been arrested, but not yet charged. The lawyer knows that another person has been called to testify before a grand jury, that the prospective witness is unrepresented by counsel, and that the person has a basis for invoking the Fifth Amendment. May the lawyer advise the third person to "take the Fifth"?⁴ Or, take an office lawyer assisting a business client who wishes to purchase a business, on credit. The client wants the lawyer to incorporate into the transaction papers certain documents reflecting that the client's financial condition is sound. However, the lawyer knows the documents to be materially false and misleading, and the lawyer also knows that the selling party will rely on those false statements to its detriment. Assuming that the transaction continues and the seller is defrauded, is that lawyer professionally so positioned as to be immune from prosecution for the crime of aiding and abetting fraud?⁵ Again, suppose that the lawyer in question, in a criminal-defense practice, accepts as her fee funds that the lawyer knows to be the proceeds of the client's business of illegally importing drugs.⁶ Is the lawyer in violation

⁴ See *infra* notes 75-79 and accompanying text; see also *State v. Carrasco*, 33 P.3d 791 (Ariz. Ct. App. 2001) (reinstating jury verdict of guilty of offense of obstruction of criminal investigation on proof that criminal defense lawyer representing client accused of sexually abusing minor stepdaughters falsely stated to worker at home for sheltered children that lawyer representing children and, in ensuing phone conversation, advised minor victim that she need not talk to police); *People v. Kenelly*, 648 P.2d 1065 (Colo. 1982) (affirming conviction of lawyer who drafted agreement for client to receive money in return for being unavailable to testify at another's criminal trial).

⁵ Cf., e.g., *United States v. Feaster*, No. 87-1340, 1988 WL 33814 (6th Cir. Apr. 15, 1988) (affirming multi-count conviction for aiding undercover federal agent in preparing false tax return).

⁶ See *People v. Zellinger*, 504 P.2d 668 (Colo. 1972) (affirming lawyer's conviction of receiving stolen property where lawyer received car in payment of fee under suspicious circumstances and failed to make further inquiry). The question of fees paid with the proceeds of crime has quieted down considerably after initial challenges to an IRS regulation requiring that lawyers report all large cash payments, identifying the payors, were uniformly rebuffed in the federal courts. See, e.g., *United States v. Sindel*, 53 F.3d 874 (8th Cir. 1995) (upholding IRS "Form 8300" requiring report of all cash payments - here to criminal-defense lawyers - in excess of \$10,000 under federal money-laundering

of the federal money-laundering statute? If the lawyer advises a client to destroy incriminating documents if a proceeding is initiated in which they might be sought, is the lawyer guilty of the offense of obstruction of justice?⁷

Lawyers functioning in good faith in these and similar situations would, of course, wish the answer to be negative. But, unfortunately, so would the lawyers functioning in bad faith. Surely, the professional and personal lives of lawyers would be far simpler and less stressful were it the case that the law shrouded all lawyers' conduct in the course of professional work with immunity from criminal prosecution. Such an immunity would still any concern that over-zealous prosecutors were using the criminal law to chill legitimate zeal on the part of their customary adversaries and other lawyers. But, just as surely, high social costs would be imposed on a society in which masses of lawyers - now likely exceeding a million throughout the country⁸ - are enabled to commit, with impunity, what for other professions or persons would be crimes, or to assist their clients to do so. As we will see, the hard questions that our subject presents involve essentially an effort to reach a suitable accommodation of those conflicting social interests.

Lawyers and judges, as well as bar disciplinary officials, presumably have a less personal objective with respect to my central questions - the wish to know the answer to them, somewhat without regard to what it might be. Thoughtful prosecutors, I suspect, have on occasion also pondered the issue of borderline lawyer criminality with some pangs of doubt. Members of the public, many of whom undoubtedly would be shocked to learn that some lawyers believe they have an occupational immunity from criminal prosecution, would doubtless also like to know the answer. Yet, after researching as diligently as one might in the law of

legislation); *United States v. Ritchie*, 15 F.3d 592 (6th Cir. 1994), *cert. denied*, 513 U.S. 868 (1994) (upholding Internal Revenue Service summons).

⁷ Cf. *United States v. Perlstein*, 126 F.2d 789 (3d Cir. 1942) (affirming conviction of obstruction of justice and conspiracy to obstruct when some overt acts occurred after empaneling of grand jury). On stronger facts, lawyers have been convicted of obstruction for personally destroying evidence. See, e.g., *United States v. Faudman*, 640 F.2d 20 (6th Cir. 1981).

⁸ See, e.g., WALT BACHMAN, *LAW V. LIFE: WHAT LAWYERS ARE AFRAID TO SAY ABOUT THE LEGAL PROFESSION* 93 (1995) ("We now have more than 800,000 American lawyers, up from 200,000 in 1970. By the turn of the century, we are expected to surpass the one million mark."); Deborah L. Rhode, *Too Much Law, Too Little Justice: Too Much Rhetoric, Too Little Reform*, 11 *Geo. J. Legal Ethics* 989, 990 (1998) (citing 1994 ABA survey for statement that number of American lawyers tripled over preceding three decades and in 1998 approached 900,000).

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virtually every American jurisdiction, including research into the body of federal decisions (which, as we will see, plays – by default – a central role in delineating the subject of lawyer crimes), one is left with, at best, only imperfect answers with rather significant areas of doubt about such fundamental questions. It is that set of questions that I wish to explore here.⁹

My thesis, ultimately, is that lawyers should enjoy no general immunity from the reach of the criminal law, including for lawyer activities in the course of law practice. But, I will just as strenuously insist that a lawyer's proper role in traditional law practice situations should be taken carefully into account in assessing criminality. How that should be done is the rub. I will emphasize the fairly uncontroversial point that a trial court presiding over the criminal trial of a lawyer accused of wrongdoing in the course of representing a client should take certain procedural steps to guard against possible prosecutorial misuse of the criminal law and against criminalizing socially desirable and professionally accepted lawyer conduct. I will also offer suggestions for reorganizing the process of making relevant charging decisions against practicing lawyers within prosecutorial offices. In that respect, it is somewhat reassuring that the federal Department of Justice has recently gone part way to put in place such an appropriate review process.¹⁰ But, it has not gone far enough. Substantively, I will also urge that a little-noticed provision of the federal witness-tampering criminal statute be generalized with respect to all lawyers crimes – in effect, placing on the prosecution the burden of proving that the conduct of the lawyer-defendant in every such case was insupportable as a proper exercise of the lawyer's function.

Even if all the recommended precautions were instituted, one must admit at the end of the day that there is an inevitable and irreducible occupational risk surrounding some areas of law practice. That risk – the nature of which will become clearer as we proceed – will continue to make lawyering in those areas more vulnerable to prosecution. To an extent, such an additional exposure must accordingly be considered a heavy but necessary cost of doing that sort of legal business. The alternative of de-criminalizing all lawyer activity within that realm is simply socially unacceptable.

⁹ My exploration is not the first. That entitlement clearly belongs to Professor Bruce Green. See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *FORDHAM L. REV.* 327 (1998).

¹⁰ See *infra* notes 121-23 and accompanying text.

Before going further, it would be well to disclose the source of my interest in the subject of lawyer criminality. At a general level, the subject is one that has intrigued me for well over two decades, inspired first by the spectacle of twenty-nine lawyer/political operatives in the Nixon administration who were convicted of felonies or suffered other remedies as the direct result of Watergate in the middle 1970s.¹¹ At least some of those lawyers were convicted of crimes for activities in the course of what could be described as otherwise traditional lawyer roles. A second, more proximate stimulus was the work involved in drafting and debating what became Section 8 of the American Law Institute's Restatement of the Law Governing Lawyers - a section that outlines the present state of the law in the United States with respect to lawyer susceptibility to criminal prosecution.¹² At least by implication, the Restatement makes the major substantive point here: that, in general, lawyers are subject to the criminal law in much the same way as are non-lawyers, although I now see that our approach is insufficiently subtle and complex.

Third, I have been involved in recent years as an expert witness in lawyer litigation. In one criminal prosecution of a lawyer for representation-related crimes, I testified for the defense side. More recently, I served as an advisor to a federal prosecutor but in the event was not designated or called as an expert. Because I feel in the circumstances that I should protect the identities of the lawyer-defendants - which federal-court juries found, respectively, guilty and innocent - I identify neither case here. Neither, as far as I have been able to discover, has resulted in a publicly reported decision. The outcome of the first case illustrates, and not for the first time, the modest contribution of legal-ethics experts¹³ in the trial of what are, at bottom, intensely fact-driven controversies.¹⁴ (Or perhaps, more personally, its outcome is a comment mainly on my own work as an expert witness.)

Fourth, my early ruminations about writing on this subject were interrupted in the deflating way that occurs, unless one is lucky or quick. In this instance, that occurred when an excellent article directly on point

¹¹ See *N.O.B.C. Reports on Results of Watergate-Related Charges Against Twenty-nine Lawyers*, 62 A.B.A. J. 1337 (1976) (reporting on release of study by the Special Committee on Coordination of Watergate Discipline of National Organization of Bar Counsel, that 27 lawyers were named as defendants or unindicted co-conspirators in criminal proceedings arising out of Watergate and 2 others were the subject of public bar discipline).

¹² RESTATEMENT OF THE LAW GOVERNING LAWYERS § 8 (2000) (hereinafter "RESTATEMENT").

¹³ See *infra* notes 126-30 and accompanying text.

¹⁴ See *infra* notes 111-19 and accompanying text.

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was published by Professor Bruce A. Green of Fordham.¹⁵ I hold Bruce Green and his work in high regard and once again learned much in studying his article, but I nonetheless found that his analysis and mine differ at certain important points, particularly on the core question of defining the criminal liability of lawyers. While I will not hereafter again refer explicitly to Professor Green's excellent article, a reader of the published version of this Tabor Lecture following along through the footnotes will recognize the debt that I, and we all, owe to his groundbreaking article.

One final word: most of the reported decisions - and there are not many - deal with lawyer crimes committed in the course of conducting a criminal-defense practice. There are, of course, similar questions that must be raised about civil litigation as well, and there are a few decisions on point. Within recent years, for example, the Seventh Circuit in *United States v. Gellene*¹⁶ captured the rapt attention of the bankruptcy bar when it affirmed the criminal conviction of a bankruptcy lawyer who was a partner in a major New York City law firm for failing to make proper disclosure of a conflict of interest in a civil bankruptcy filing. Moreover, there are perhaps even more questions that might be raised about non-litigation work by lawyers - transactional or office practice. And, indeed, some of the decisions on lawyer crime have involved such office work, such as the well-known decision of Judge Friendly in *United States v. Benjamin*,¹⁷ affirming the conviction of a lawyer, as well as an accountant, for their involvement in a securities scam, and in the process writing one of the most well-known opinions on the criminal law concept of knowledge through conscious avoidance of readily available facts. Nonetheless, despite occasionally examining decisions involving lawyer crime in contexts other than criminal defense, I will focus here mainly on that limited realm of practice. I do so in the interests both of brevity and because, as I will later stress, the context in which criminal defense lawyers work is terribly important.¹⁸ To skitter continually over disparate fields would obscure both necessary analysis and that elemental point about context.

¹⁵ Green, *supra* note 9.

¹⁶ 182 F.3d 578 (7th Cir. 1999) (affirming lawyer's conviction of offense of making false material declaration in bankruptcy proceeding).

¹⁷ 328 F.2d 854 (2d Cir. 1964).

¹⁸ See *infra* notes 111-19 and accompanying text.

II. LAWYER CRIMES: THE EASY CASES

No matter how nervous one might be about the extent to which the criminal law might apply to lawyer activities, it would, of course, go entirely too far for me to leave the impression that anyone has prominently suggested that lawyers should enjoy a general, occupational immunity from the criminal law. The arguments, which I address below,¹⁹ urging immunity from criminal liability are much more focused. I wish, then, to dispose of rather peremptorily a set of situations that I refer to as the "easy cases" - instances in which the application of criminal law to lawyers has not seriously been contested. I will then turn to the much less tractable problems.

There are at least two general areas of lawyer criminal liability that have been well-established and well-accepted for decades, even centuries, in American jurisprudence. Despite general agreement about them, however, there are useful intimations of a general nature that flow from a brief examination of both. I refer to the first area as the "totally out-of-role" lawyer crime; the second I will term the "in-role-but-clearly-wrongful" crime. I will also use the occasion of this discussion to take a brief collateral tour through the important, and also instructive, area of lawyer discipline for criminal offenses.

A. *Totally-Out-Of-Role Lawyer Crimes*

I commence with totally-out-of-role lawyer crimes. I first want to examine the nature of such crimes and their consequences for lawyer discipline.

1. *The Nature of Totally-Out-of-Role Crimes and Their Consequences for Lawyer Discipline*

Suppose that with malice aforethought (and with whatever additional bad thoughts and actions the relevant substantive law of crimes requires), Lawyer takes the life of her husband. She is then indicted for the criminal offense of murder. The media headlines will almost certainly play on Lawyer's occupation: "Lawyer Murders Husband!!" I take it that no one would disagree that Lawyer is subject to the full reach of the criminal law. Many other lawyers will no doubt be chagrined to varying degrees because of the sharp and unwelcome, but seemingly inevitable, preoccupation of media coverage with Lawyer's

¹⁹ See *infra* note 63 and accompanying text.

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occupation in reporting about the murder and the ensuing trial. Such media sensationalism is, I suppose, intended to suggest that danger lurks everywhere, even for the well-off and occupationally privileged. Nonetheless, Lawyer's act had nothing to do with her law practice and could as well have been committed by a perpetrator pursuing any other occupation. Hence, it is not surprising that no one has ever thought to argue that lawyers who commit such totally-out-of-role offenses are in some way above the usual reach of the criminal law.²⁰ They are not now, and never have been. Lawyer will surely be tried for murder in much the same way as would any non-lawyer - at least, any other non-lawyer of the same socio-economic level - in what are otherwise the same circumstances.

Should Lawyer be convicted, and even if she were acquitted of all charges or pardoned after conviction,²¹ Lawyer can also be charged with a disciplinary offense under the non-criminal procedures set up in any jurisdiction in which she is admitted to practice. Given the seriousness of the offense, such disciplinary procedures will certainly follow, and in many jurisdictions would precede the criminal trial through a

²⁰ The argument is not as bizarre as it may at first appear. Such an argument, although today regarded as frivolous in view of the weight of authority, would have proceeded by considering the plight of a lawyer who is subjected to *both* lawyer discipline and the criminal law. Although this sequence is now quite rare, a lawyer who is required to contest disciplinary charges prior to a criminal prosecution (in the absence of the running of all relevant statutes of limitation on all possible charges of crime, or except after being granted broad immunity) faces a Hobbesian choice. She must either testify at the disciplinary proceeding and thereby face the prospect that her disciplinary testimony will be used adversely in a possible future criminal prosecution, or she must refuse to testify in professional self-defense and thereby incur a greater risk of professional discipline because of possible use of her refusal to testify as an adverse inference. If bar counsel calls the lawyer to testify in the disciplinary proceeding, a self-incrimination claim is not available in any satisfactory form. While the lawyer may refuse to testify on that ground, the lawyer's refusal may be used in the discipline case as evidence of the lawyer's guilt of the charges. See generally RESTATEMENT, *supra* note 12, at § 5 cmt. g, reporter's note, at 61; CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 3.4.3, at 104-05 (1986) (hereinafter "MODERN LEGAL ETHICS").

²¹ See generally RESTATEMENT, *supra* note 12, at § 5 cmt. g (stating that "[a] record of conviction is conclusive evidence that the lawyer committed the offense, but absence of a conviction does not preclude a disciplinary prosecution. Because of the different agencies (prosecutor and lawyer disciplinary counsel) involved in criminal and disciplinary enforcement and the higher standard of proof in criminal cases, an acquittal does not by itself preclude a charge for any disciplinary purpose"). See *id.* reporter's note at 61 (citing authority). That approach is one of long standing. See, e.g., *In re Attorney*, 86 N.Y. 563 (N.Y. 1881) (rejecting argument of lawyer that governor's pardon expunged effect of conviction for lawyer-discipline purposes in reliance on nineteenth century American and English authority).

proceeding to impose interim suspension.²² In several ways, criminal conviction has long been regarded as the proto-typically appropriate occasion for lawyer discipline. That was reflected, for example, in the many state statutes both before and after the American Revolution that listed a lawyer's commission of a serious criminal offenses as a per se ground for disbarment.²³ Lawyer crime – at least serious lawyer crime – was and remains the easy case for lawyer discipline.²⁴ The situation is nonetheless historically interesting. In a review of pre-twentieth century American lawyer-discipline cases that I conducted for a recent inquiry into the history of legal ethics,²⁵ I was struck by the very high percentage of reported lawyer-discipline decisions that resulted from convictions for just such out-of-role lawyer crimes.²⁶ It appears, in short, that for a long time a high percentage of lawyer-discipline prosecutions came only after – and, one is tempted to speculate in many of those instances, perhaps mainly *because of* – prior public conviction of a lawyer for a crime not connected to legal practice. That does not suggest that prosecutors were strongly motivated in their prosecutorial work to rid the bar of miscreants, although that might have supplied some part of their incentive. It does suggest that, without such prosecutorial efforts, the level of lawyer-disciplinary enforcement would have been even lower than the scant numbers that the then system of professional discipline produced throughout the nineteenth, and much of the twentieth, century. Beginning in approximately 1970, however, the

²² See, e.g., RESTATEMENT, *supra* note 12, at § 5 cmt. g (stating that “[i]nterim suspension of a lawyer accused of crime may be warranted and is commonly provided for following conviction of a serious crime regardless of pendency of an appeal”).

²³ See, e.g., *In re Percy*, 36 N.Y. 651, 653 (N.Y. 1867) (describing grounds stated in Section 67 of the N.Y. Code of Civil Procedure for disbarment or suspension of lawyer as including “any deceit, malpractice, crime or misdemeanor”).

²⁴ See, e.g., ABA MODEL CODE OF PROF'L RESPONSIBILITY DR 1-102(A)(3) (1969) (noting that lawyer shall not “[e]ngage in criminal conduct involving moral turpitude”); MODEL RULES OF PROF'L CONDUCT R. 8.4(b) (1983) (noting that it is unprofessional conduct for a lawyer to “commit a criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer in other respects”). See generally LAWYERS' MANUAL ON PROF'L CONDUCT 101:301 (1990) (listing decisions on lawyer crimes as a basis for discipline); MODERN LEGAL ETHICS, *supra* note 20, at § 3.3.2.

²⁵ See Charles W. Wolfram, *Toward a History of the Legalization of American Legal Ethics—I. Origins*, 8 CHI. L. SCHOOL ROUNDTABLE 469 (2001).

²⁶ Whether those reported decisions also fairly represent the unknowable number of lawyer discipline decisions that were not reported is not knowable with certainty. However, it seems fairly clear that, if anything, the unreported decisions of trial courts that were never appealed and, hence, reported would likely consist of an even greater percentage of cases of clear criminal guilt and, hence, clear grounds for discipline. That presumably was particularly the situation once it became well-established that lawyer discipline based on a criminal conviction was appropriate.

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levels of lawyer discipline have steadily risen, although surely not to everyone's satisfaction. Not even the national bar itself has expressed full satisfaction.²⁷ Discipline for practice-unrelated criminal convictions remains a significant staple of the disciplinary statistics, if at lower percentage levels relative to non-criminal professional offenses. It thus may remain the case that the concern of the bar and courts to push for lawyer discipline in cases of conviction for a serious crime is motivated as much or more by a concern with the image of the profession than with protecting clients and the legal system against lawyers who are perceived to be fundamentally flawed practitioners. To be sure, it may also, or instead, reflect the relative inadequacies of the disciplinary system in attempting to cope with what will often be strongly-contested charges of criminal conduct. In most instances, prosecutors, assisted as they are by an established investigative apparatus for detecting and gathering evidence of crimes, are probably in a superior position to carry forward a court proceeding against a lawyer for crime. Given their public funding, prosecutors are probably also better able to launch and sustain prosecutions in complex cases, as compared to the lawyer discipline process, which in most states is supported only by exactions from the legal profession from annual dues, leading to recurring crises of disciplinary funding.²⁸

2. The Process of Discipline Following a Lawyer's Criminal Conviction

While professional proceedings against lawyers for non-criminal conduct apparently constitute a larger percentage of lawyer-discipline proceedings than was true prior to 1970, it remains true that a lawyer's conviction for crime continues to be treated as a particularly egregious disciplinary offense, at least under recent articulations of such offenses.²⁹ The serious nature of a criminal conviction for lawyer discipline is reflected in two things: the inclusive definition of the kinds of criminal offenses that will subject a lawyer to professional discipline in the lawyer

²⁷ See ABA Commission on Evaluation of Disciplinary Enforcement, Report: Lawyer Regulation for a New Century 89-129 (1992) (hereinafter "McKay Commission Report") (assessing in an appendix how state and national bars had responded to specific recommendations of earlier, highly-critical ABA committee).

²⁸ Inadequate funding in view of a greatly expanded lawyer population was listed as the major problem in lawyer discipline in the most recent nationwide review of the professional disciplinary process by the ABA. See McKay Commission Report, *supra* note 27, at 69 and following.

²⁹ The necessary database of statistics on lawyer discipline before the 1970s is unavailable (unless one were to use the crude measure of reported - and thus largely appellate - decisions). Thus, it is not possible to validate statistically the frequently expressed impression that non-criminal grounds of discipline now loom larger in most jurisdictions.

codes, and the procedures for administering discipline to a convicted lawyer. Under modern lawyer codes, a lawyer is subject to professional discipline with respect to any "criminal act that reflects adversely on the lawyer's honesty, trustworthiness or fitness as a lawyer . . ." ³⁰ Note, among other things, that the lawyer codes themselves, as did the nineteenth-century statutes specifying the grounds for lawyer discipline, clearly assume that prosecutions of lawyers for crime will routinely occur. In view of that broad recognition of the potential for such applications of the criminal law to lawyer conduct, it would be entirely insupportable to argue for any sort of broad lawyer immunity.

In applying the grounds for discipline stated in the lawyer codes, many decisions have concluded that lawyer involvement in any serious criminal activity satisfies the third predictive element by indicating that the lawyer has a professionally inappropriate attitude toward illegal conduct.³¹ The seriousness of lawyer crime is also emphasized in such procedural features as the rule that a lawyer convicted of a crime is bound by the strictures of *res judicata* and cannot protest innocence in a subsequent discipline case,³² as well as the procedure for interim suspension of a lawyer pending the outcome of a criminal prosecution for a serious crime.³³ Perhaps most dramatically (certainly for the

³⁰ MODEL RULES OF PROF'L CONDUCT, *supra* note 23, at R. 8.4(b). The rule has been widely copied verbatim in the more than forty jurisdictions that have adopted some version of the Model Rules. See, e.g., INDIANA RULES OF PROF'L CONDUCT, R. 8.4(b) (2001) (same). The older, and now largely superseded MODEL CODE OF PROF'L RESPONSIBILITY (1969) contained somewhat comparable language in DR 1-102(A)(3) (lawyer shall not "[e]ngage in illegal conduct involving moral turpitude"), but seemed to stress more the moral repulsiveness of the act without attempting textually to connect the criminality of the act with its predictive elements. See MODERN LEGAL ETHICS, *supra* note 20, at 92-94.

³¹ See, e.g., *Ex parte Wall*, 107 U.S. 265, 274 (1882) (upholding disbarment from federal court of a lawyer who actively participated in the lynching of an accused being tried in same court, and on tree on court lawn, stating that for a lawyer ". . . of all men in the world, to repudiate and override the laws, to trample them under foot, and to ignore the very bands of society, argues recreancy to his position and office, and sets a pernicious example to the insubordinate and dangerous elements of the body politic. It manifests a want of fidelity to the system of lawful government which he has sworn to uphold and preserve"). See generally RESTATEMENT, *supra* note 12, at § 5 cmt. g (stating that "[a]n act constituting a violation of criminal law is also a disciplinary offense when the act either violates a specific prohibition in an applicable lawyer code or reflects adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer").

³² See McKay Commission Report, *supra* note 27, at 116-17 (reporting that forty-four of forty-nine jurisdictions surveyed had rules providing that criminal conviction is conclusive evidence that the lawyer committed the crime for which convicted, and that the only issue in the lawyer-discipline proceeding is the nature and extent of discipline to be imposed).

³³ See, e.g., *In re Brewster*, 587 A.3d 1067 (Del. 1991) (permanent disbarment of lawyer earlier placed on interim suspension after indictment in federal court for bank fraud). The

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individual lawyers involved), the ABA's own standards for imposing discipline recommend, in accord with the position of most courts, that in imposing disciplinary sanctions in such cases, disbarment rather than a lengthy term of suspension is the appropriate sanction.³⁴ The complaint, heard twenty years ago from the bar itself,³⁵ that lawyers are routinely given overly-lenient treatment by prosecutors when apprehended for criminal offenses is heard less today.³⁶ Instead, the complaint now persistently heard - at least from lawyers - is that prosecutors have become overly aggressive in their pursuit of lawyers.³⁷ I have no idea whether a statistical study (I know of none) would uphold either concern. My impression, on the whole, is that public expressions of concern by lawyers about the criminal prosecution of other lawyers may be more a product of lawyer clubbiness and special pleading than a true measure of cause for general alarm.

ABA Model Rules for Lawyer Disciplinary Enforcement apparently contemplate interim suspension for serious crime only after conviction in the criminal process. ABA MODEL RULES FOR LAWYER DISCIPLINARY ENFORCEMENT, R. 19(b)(1979). However, the ABA Model Standards for Imposing Lawyer Sanctions also contemplated interim suspension "when the lawyer poses a substantial threat of irreparable harm to the public." ABA MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS, R. § 2.4 (b) (1986). That standard, in turn, has been criticized as overly restrictive, and the ABA now takes the position that the standard should be one of "substantial threat of serious harm." See McKay Commission Report, *supra* note 27, at 55.

³⁴ See ABA MODEL STANDARDS FOR IMPOSING LAWYER SANCTIONS, *supra* note 33, at § 5.11(a) (stating that disbarment is generally appropriate when "a lawyer engages in serious criminal conduct a necessary element of which includes intentional interference with the administration of justice, false swearing, misrepresentation, fraud, extortion, misappropriation, or theft; or the sale, distribution or importation of controlled substances; or the intentional killing of another, or an attempt or conspiracy or solicitation of another to commit any of these offenses).

³⁵ ABA Special Committee on Evaluation of Disciplinary Enforcement, Problems and Recommendations in Disciplinary Enforcement 179-80 (1970) (hereinafter "Clark Committee Report") (reporting a widespread problem of lawyers accused of crime being given preferential treatment by law-enforcement authorities and courts, by way of overly-lenient plea bargains and the like).

³⁶ *Cf., e.g.,* McKay Commission Report, *supra* note 27, at 127-28 (finding no problem similar to that reported by Clark Committee Report, as discussed *supra* note 35, and, to the contrary, concluding that "[t]he advent of statewide disciplinary agencies with professional disciplinary counsel and the great increase in disciplinary actions against lawyers have effectively eliminated the ability of respondents to play prosecutors and disciplinary counsel against one another" and further finding it "very unlikely today that a prosecutor would be susceptible to a plea for leniency on the basis that an accused lawyer might lose his or her license").

³⁷ See *supra* note 2.

B. In-Role-But-Clearly-Wrongful Crimes

Beyond criminal conviction of a lawyer for offenses having nothing essentially to do with law practice, there is a second category of relatively non-controversial criminal prosecutions of lawyers. That consists of crimes that the lawyer committed in the course of representing a client, but in which the lawyer's activity was clearly wrongful. Teasing out the features of this necessarily inexact category assists in developing an insight about lawyer criminality generally. Again, this is an area in which lawyer activists and lawyer organizations - the bodies most likely to make arguments about limiting the application of criminal law to lawyers - have not contested the proposition that the same law that applies to non-lawyers should apply to lawyers as well. At bottom, the instinct that lawyers must surely accept the criminal-law consequences of clearly wrongful criminal conduct is based on concern about the injury to persons and society that immunity would create, and the perception that extending immunity to such offenses is simply unwarranted by any legitimate need for latitude arising out of the lawyer's occupational role. In other words, it is apparently widely accepted that lawyers can function with full effectiveness without engaging in this category of acts that clearly violate the criminal law. In addition, as we will see, many of the included offenses involve crimes directed against the lawyer's own client, a situation in which it would be difficult to propound a reason for giving special protection to lawyers. To the contrary, given our typical assumption about the vulnerability of clients to lawyer over-reaching, the situation would seem to call for special vigilance in enforcing the criminal law.

The case reporters contain many such in-role cases.³⁸ Those decisions are regularly ignored by proponents of the view that lawyers should be subject to the criminal law in the course of their work only to a limited degree. One prowling the reporters can unearth a trove of such decisions. A lawyer in Ohio was recently disciplined after being convicted for a crime while serving as prosecutor - an unusual instance of a watchdog being bitten.³⁹ The charges involved filing a false affidavit

³⁸ GEOFFREY C. HAZARD, JR., ET AL., *THE LAW AND ETHICS OF LAWYERING* 69-79 (3d ed. 1999) (offering a useful selection of decisions and a run-through of the most prominent offenses in the lawyer-crime decisions).

³⁹ See Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721, 722 nn.3-4 (2000) (examining the infrequency of professional discipline of prosecutors and repeated charges by defense lawyers and others that many instances of clear prosecutorial

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with the court regarding the value of a vehicle in the course of a prosecution, apparently to enhance the charge or the sentence imposed.⁴⁰ A lawyer in Michigan was subjected to discipline following his conviction of the crime of assault and battery after he, as the court put it, "lost it" during a highly contentious deposition, came around the deposition table, and assaulted the deponent.⁴¹ A lawyer in Rhode Island was recently exonerated of the charged criminal offense of harboring a criminal, but only because the police had misrepresented to him that warrants were not outstanding for the arrest of his client.⁴² The Second Circuit recently upheld the RICO-conspiracy convictions of two named partners in a New York City law firm who, as the evidence showed, had entered into a long-standing arrangement with corrupt officers of a police pension fund. Under the scheme, the lawyers received millions of dollars in fees in return for their undertaking to kick back hundreds of thousands of dollars to the officials.⁴³ In that decision, and others like it, courts have accepted prosecutor arguments, on particular facts, that the "enterprise" required for criminal RICO liability was the law firm itself.⁴⁴

Most properly grouped in this category of in-role-but-clearly-wrongful cases are situations in which lawyers are convicted and disbarred after having been found guilty of stealing their clients' funds,⁴⁵ or committing similar serious wrongs against their clients.⁴⁶ Criminal courts, prosecutors, and bar-disciplinary agencies all seem, quite rightly, to treat such offenses with special strictness. For example, the United States Supreme Court recently upheld, unanimously, the mail fraud conviction of a partner in a large Minneapolis law firm who had traded

misconduct are not made the subject of professional discipline and collecting commentators making such charges).

⁴⁰ Toledo Bar Ass'n v. Slack, 725 N.E.2d 631 (Ohio 2000). Lawyer Slack had also been convicted of multiple felony counts in an unrelated matter. *Id.* at 632.

⁴¹ Grievance Adm'r v. Fink, 612 N.W.2d 397, 399 (Mich. 2000).

⁴² State v. Acciaro, 748 A.2d 811 (R.I. 2000).

⁴³ United States v. Zichettello, 208 F.3d 72 (2d Cir. 2000).

⁴⁴ See, e.g., United States v. Teitler, 802 F.2d 606 (2d Cir. 1986) (affirming personal-injury lawyers' conviction of RICO conspiracy to defraud insurers through scheme to press groundless personal injury claims through suborned perjury, false documents, etc.).

⁴⁵ See, e.g., *In re Neufeld*, 704 N.Y.S.2d 579, 581 (N.Y. App. Div. 2000) ("There is a wealth of controlling authority in this [court] supporting disbarment under these circumstances [citing cases].").

⁴⁶ See, e.g., United States v. Bronston, 658 F.2d 920 (2d Cir. 1981) (affirming conviction of lawyer for mail fraud arising out of representation of clients with conflicting interests). Cf., e.g., United States v. D'Amato, 39 F.3d 1249 (2d Cir. 1994) (reversing, for insufficient evidence of scienter, conviction of lawyer - brother of then junior Senator from New York - for mail fraud in over-billing government agency).

profitably in the stock market on information that the lawyer had gained from confidential law firm information about its clients.⁴⁷ The aptness of such an application of the criminal law to lawyers can hardly be doubted. As mentioned, the offense is particularly objectionable because it is committed by a fiduciary against a person, the client, who is both the singular object of the lawyer's fiduciary duty and is highly vulnerable to being victimized.⁴⁸ Second, and flowing from that reason, there can be no objection to the use here of the criminal law on the ground that it would chill a lawyer in functioning in that role. Instead, such "chilling" (call it deterrence if you will) comports fully with the objectives of both the criminal law, the law of fiduciary breach,⁴⁹ and the lawyer codes⁵⁰ - each of which (mutually reinforcing each other) treat such anti-client conduct as a clear violation of the lawyer's duties.⁵¹

C. *Easy Cases of Law Crime in the Final Analysis*

Where do we stand in the final analysis with the "easy cases" of lawyer criminal responsibility? While many bar leaders and lawyer critics agree that the level of disciplinary enforcement of lawyers is in several respects still deficient,⁵² discipline of lawyers who have already been convicted of a criminal offense remains a bedrock basis for professional discipline. While I know of no supporting statistics, my firm impression is that, in most jurisdictions, almost any serious crime by a lawyer will lead ineluctably to substantial discipline. That provides an apt occasion for raising a fundamental question of theory: given the greater availability of professional discipline today, why is it any longer necessary to bring to bear on many lawyers the additional sanctions of the criminal law? Would it not suffice to handle all lawyer crimes as disciplinary offenses under the established lawyer-discipline system?

⁴⁷ *United States v. O'Hagan*, 521 U.S. 642 (1997) (divided Court affirms conviction on "misappropriation-based" count, and unanimous Court affirms on mail fraud count).

⁴⁸ See *supra* p. 85.

⁴⁹ See generally RESTATEMENT, *supra* note 12, at ch. 3.

⁵⁰ See, e.g., ABA MODEL CODE OF PROF'L RESPONSIBILITY, *supra* note 24, at DR 9-102 (same); MODEL RULES OF PROF'L CONDUCT, *supra* note 24, at R. 1.15 (disciplinary rule imposing several *per se* rules with respect to client property).

⁵¹ That is seen, among other things, in the law of fiduciary breach and its multiplication of special remedies for the injured client, such as the imposition of a constructive trust on profits made by the faithless lawyer. See, e.g., RESTATEMENT, *supra* note 12, at § 60 cmt. j (discussing disgorgement as a remedy for lawyer's wrongful act of profiting from confidential client information, even if activity actually causes client no harm).

⁵² See generally McKay Commission Report, *supra* note 27 (illustrating the bar's own assessment, which reflects less than complete satisfaction with the state of lawyer discipline).

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The fundamental objection to such a radical change, of course, is that the system of lawyer discipline is insufficiently public and insufficiently accountable to warrant the degree of public confidence that would be required before it could be argued to be a fit replacement for the criminal law. Further, the objective of professional discipline is mainly to limit a lawyer's practice – fully by suspension or partly through probation or supervised practice – or to preclude it altogether through disbarment. The criminal law, on the other hand, seeks to deter both the perpetrator and others similarly disposed so that they will not commit future crimes.⁵³ That objective assumes a punishment sufficient for that broadly deterrent purpose. Few, including few lawyers, would accept the proposition that professional discipline would, or could, provide deterrence as effective as that provided by the criminal law.

Apart from theory and viewed solely as a matter of process, the procedures of lawyer discipline are ill-designed for processing charges that lawyers have committed criminal offenses. Even in those states, now the vast majority, that prosecute lawyer discipline cases with professional staff,⁵⁴ the staff is not trained in the much different requirements of criminal procedure. In almost all states, lawyer discipline proceedings take place in secret (or at least not in accordance with the public-trial requirement of the Constitution),⁵⁵ and many other

⁵³ See generally MODEL PENAL CODE § 1.02 (1962) (listing several purposes of criminal law, including forms of deterrence); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 1.5 (2d ed. 1986) (discussing deterrence purposes of criminal law); PAUL H. ROBINSON, CRIMINAL LAW § 1.2 (1997) (same).

⁵⁴ See McKay Commission Report, *supra* note 27, at 95-97 (noting significant increase in professional discipline, but lingering problems, including, even in some states with large lawyer populations, over-reliance on volunteers to screen or prosecute complaints); see also *id.* at 98 (finding that “[i]n individual jurisdictions, lack of funding and staff often results in insufficient training of both disciplinary agency staff and adjudicators [T]raining of disciplinary officials and staff remains a problem . . .”).

⁵⁵ Despite the recommendation of the McKay Commission that all disciplinary proceedings against lawyers be accessible to the public, most states maintain secrecy until announcement of a public disciplinary sanction. McKay Commission Report, *supra* note 27, at 34-39. State courts have rejected attempts, on a variety of theories, to open up closed disciplinary proceedings. See, e.g., *In Re Burling*, 651 A.2d 940 (N.H. 1994) (rejecting petition to make public a disciplinary file on a specific lawyer); *Office of Disciplinary Counsel v. Anonymous Attorney A*, 714 A.2d 402, 403 n.2 (Pa. 1998) (noting that, pursuant to disciplinary enforcement rule providing for secrecy, identity of lawyer undergoing disciplinary investigation would remain confidential in appeal raising question of proper burden of proof); *Bailey v. Utah State Bar*, 846 P.2d 1278 (Utah 1993) (rejecting on grounds of quasi-judicial immunity, a suit by clients for negligence of bar association in failing to disclose pattern of misconduct by lawyers). *But see, e.g., Daily Gazette Co. v. Comm. On Legal Ethics*, 326 S.E.2d 705 (W. Va. 1984) (holding that press had constitutional right to access lawyer discipline proceedings). Some of the applications of the secrecy rules seem

procedures constitutionally required for criminal prosecutions, such as trial by jury,⁵⁶ appointed counsel,⁵⁷ and respect for the privilege against self-incrimination,⁵⁸ are not observed.

More importantly, the politics are wrong. Even if all necessary procedures were adopted to bring lawyer discipline even modestly into accord with the minimal requirements of criminal procedure, the imagined process clearly would not gain public confidence that it could regularly achieve the objectives of the criminal law. The wrong body would make the rules. Even after reforms effected in most states during the last part of the twentieth century transferred much power to shape lawyer code rules from lawyers and their bar associations to public bodies, the practical power to define lawyer disciplinary offenses still lies largely in the hands of lawyers.⁵⁹ In many states, lawyers' bar associations still play an important role, in some states amounting to de facto control of the process. Even if courts took a much more active role in lawyer "criminal discipline" than is true now of lawyer discipline

highly problematic. See, e.g. *Attorney T. v. Office of Disciplinary Counsel*, 547 A.2d 350 (Pa. 1988) (holding that, prior to adjudication, disciplinary counsel could not disclose information about lawyer to requesting disciplinary authorities in another state in which lawyer was also admitted).

⁵⁶ Compare Clark Committee Report, *supra* note 35, at 136 (commenting on a 1970 ABA report that Georgia, North Carolina, and Texas permitted trial by jury in lawyer-discipline cases), with McKay Commission Report, *supra* note 27, at 117 (jury trial still permitted in Georgia and Texas).

⁵⁷ See, e.g., *In re Wade*, 814 P.2d 753, 762-63 (Ariz. 1991) (holding no right to appointed counsel in disciplinary proceeding); *Walker v. State Bar*, 783 P.2d 184, 188-89 (Cal. 1990) (holding that in proceeding for disbarment lawyer not entitled to appointed counsel under due process clause); *Florida Bar v. Winn*, 593 So. 2d 1047, 1048 (Fla. 1992) (holding that lawyer has no right to state-funded appointed counsel, but does have right to self-representation or retained counsel). Cf. *In re Campbell*, 544 N.Y.S.2d 832 (N.Y. App. Div. 1989) (holding that, in absence of extraordinary circumstances, no right to appointment of counsel in disciplinary proceeding based on criminal conviction in another state).

⁵⁸ The key decision is *Baxter v. Palmigiano*, holding (in a prison disciplinary context, but applied quite broadly) that it generally would not offend the privilege against self-incrimination for the subject of discipline to be given the choice of either complying with a request to testify or facing an adverse inference from a claim of a right to remain silent. 425 U.S. 308, 317-18 (1976). In the lawyer-discipline context, the view is very widely followed. See, e.g., *In Re Henley*, 518 S.E.2d 418 (Ga. 1999) (holding that an adverse inference is justified in context of production of documents); *In Re Kadish*, 669 N.Y.S.2d 532 (N.Y. App. Div. 1998) (holding it permissible to draw a negative inference from a lawyer's failure to explain missing client funds). Cf., e.g., *State ex rel. Oklahoma Bar Ass'n v. Gasaway*, 863 P.2d 1189, 1201 (Okla. 1993) (holding that, under state bar rule permitting such, lawyer invoking right against self-incrimination could refuse to answer formal complaint without admitting allegations).

⁵⁹ See generally Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389 (1992) (tracing the increasing ascendancy of judge-made law in regulating lawyers).

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generally, the involvement of courts itself would be highly problematical. In most states, the entire lawyer-discipline process is subject to the regulatory control of the jurisdiction's highest court, and to that body alone.⁶⁰ Specifically, this discipline process excludes the legislature from regulating lawyers in the practice of law and, according to some courts, lawyers in other roles.⁶¹ Unless that concept were discarded, courts would be in the highly compromised position of formulating the criminal law of lawyer crimes through a rulemaking or common-law process that, under state constitutions, would be purportedly immune from overhaul or tinkering by democratically-elected state legislatures, while at the same time applying that law against lawyers.

No one, of course, has attempted to present a thorough-going argument that the lawyer discipline system should take over the adjudication of lawyer crimes.⁶² Shortcomings similar to those just

⁶⁰ This concept, which I have termed the 'negative aspect of the inherent-powers doctrine,' is given widespread recognition. See RESTATEMENT, *supra* note 12, at § 1 cmt. c; MODERN LEGAL ETHICS, *supra* note 20, at § 2.2.3; Charles W. Wolfram, *Lawyer Turf and Lawyer Regulation—The Role of the Inherent-Powers Doctrine*, 12 U. ARK. LITTLE ROCK L. REV. 1, 6 (1989-90). The "affirmative" form of the doctrine is well-established in Indiana, and its highest court has intimated a strong form of the "negative" aspect. See *In re State Bar Ass'n Petition*, 550 N.E.2d 311, 312 (Ind. 1990) (upholding bar association program for interest on lawyers' trust accounts, stating that, under state constitution, "the Indiana Supreme Court is vested with the exclusive responsibility and duty to supervise the admission of applicants to the practice of law, supervise the discipline and disbarment of lawyers, and prohibit the unauthorized practice of law"). The claim is somewhat tenuously based on the following language from Article 7, Section 4 of the Indiana Constitution dealing with the original jurisdiction of the state supreme court: "The Supreme Court shall have no original jurisdiction except in admission to the practice of law; discipline or disbarment of those admitted; the unauthorized practice of law; discipline, removal, and retirement of justices and judges; supervision of the exercise of jurisdiction by the other courts of the State; and issuance of writs necessary or appropriate in aid of its jurisdiction." IN CONST. art. VII, § 4.

⁶¹ On extravagantly broad holdings of an exclusive power in the state's courts to displace contrary attempts by the state legislature to regulate lawyers in their law practice, see RESTATEMENT, *supra* note 12, at § 1 cmt. c., at 13; see also, e.g., *Kury v. Commonwealth*, 435 A.2d 940 (Pa. Commw. Ct., 1981) (holding invalid as applied to lawyers an act of legislature prohibiting conflicts of interest of former members of the state legislature in appearances before state administrative agencies).

⁶² Different, but problematical for its own reasons, is the situation created by the court's decision in *Commonwealth v. Stenhach*, 514 A.2d 114 (Pa. Super. Ct. 1986), *appeal denied*, 534 A.2d 769 (Pa. 1987). See *infra* notes 50-51 and accompanying text. The court first announced a requirement that a lawyer turn over evidence of a client crime removed from a crime scene in described circumstances and held that the lawyers in question had violated that requirement. See *Stenhach*, 514 A.2d at 123. But the court went on to hold that the criminal statutes under which the lawyers were prosecuted were unconstitutionally overbroad because the statutes would cover situations involving proper lawyer conduct, and on that

considered would preclude resort to any other familiar system as an alternative to criminal prosecution, such as the legal malpractice adjudicatory system, whose procedures in some respects may be more in line with criminal procedure than is true of the lawyer-discipline system. That said, however, and on the assumption that it would be insupportable to cloak lawyers with a general immunity from the normal operation of the criminal law, one has also accepted a large - if still undefined - role for the criminal law in regulating lawyers.

III. CRIMINALIZING TRADITIONAL LAW PRACTICE: THE TOUGHEST CASES

We move then from solid ground into more uncertain terrain to those situations that undoubtedly pose the most difficult questions and the most pressing concerns - those in which a lawyer is charged with an offense during the course of representing a client, and in which it could be argued seriously that the traditional role of a lawyer encompassed the lawyer's actions. Those most difficult cases have gratefully been few and far between, but they have, naturally enough, given rise to the sharpest disagreement between prosecutors and lawyers. To take us through this particular minefield, I have chosen as illustrative two decisions that are probably entitled to be called the leading decisions on point.⁶³ Both are federal appellate decisions, written by well-known jurists, against interesting factual records, that nicely pose the hard questions for us. Unfortunately, the courts' analyses have been hardly correct or even particularly illuminating.

In the first case, *United States v. Cintolo*,⁶⁴ the First Circuit affirmed the conviction of a lawyer for obstruction of justice, principally on evidence that the lawyer, William J. Cintolo,⁶⁵ had advised his client to

basis the court vacated the lawyers' convictions. *See id.* at 125-27. The court also intimated that its result was not impelled by the otherwise quite strong Pennsylvania version of the "inherent powers" doctrine under which only the courts can regulate lawyers. *Id.* "[T]he courts have the power, *outside the context of criminal sanctions*, to regulate the conduct of attorneys practicing before them." *Id.* (emphasis added). The apparent upshot is that, pending possible legislative repair to fix the overbroad features of the statute, lawyer discipline would be the only permissible basis for sanctioning violations of the court's rule on evidence tampering.

⁶³ Importantly, the decisions examined below are the only two reported decisions directly on point. Other opinions have contributed to the body of law, but mainly through dicta. Other prosecutions raising the most difficult questions might, of course, have occurred - and some undoubtedly have, but they have not generated reported decisions.

⁶⁴ 818 F.2d 980 (1st Cir. 1987).

⁶⁵ One perusing a contemporary Boston phone book will find a William J. Cintolo listed there as a practicing lawyer. *See, e.g.,* <http://yp.yahoo.com> (last visited on October 31, 2001). Cintolo was indefinitely suspended after his conviction, served his criminal sentence

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plead the Fifth Amendment when called to testify before a grand jury. Eleven years later, in *United States v. Cueto*,⁶⁶ the Seventh Circuit affirmed the conviction of lawyer, Amiel Cueto, for obstruction of justice and conspiracy to defraud the United States because the lawyer had, on behalf of a client, filed lawsuits in state and federal courts. Such lawyering activities as advising a client confronting a grand jury summons about the Fifth Amendment and filing suits on behalf of a client appear, at one level, to be entirely traditional lawyer work involving lawful activity on the part of the client, and hence, derivatively lawful activity on the part of the lawyer. We should thus be concerned immediately that prosecution of the lawyers involved in those and similar cases, wrongly would chill all lawyers in the performance of those lawful tasks. That, to be sure, was the principal argument on appeal – appeals, in each instance, that were supported by organizations of state and national criminal defense lawyers that presented their positions as amicus curiae. On the other hand, as we will see, the specific facts before the court in each instance made the finding of criminality ultimately sustainable, if not compelling.

Cintolo and *Cueto* are strikingly similar in several ways quite useful for our present analysis.⁶⁷ Fortunately for us, they also both involve charges primarily of the same federal offense – obstruction of justice.⁶⁸

in thirteen months, and has been reinstated to practice law in Massachusetts with the enthusiastic support of the Boston-area criminal defense bar. See Ralph Ranalli, *Disbarred Mob Lawyer to be Reinstated in July*, BOSTON HERALD, June 21, 1995, at 12, available at 1994 WL 5673770. Mr. Cintolo currently works as a lawyer in the Boston area for the law firm Cosgrove, Eisenberg & Kiley, P.C. My research assistant, Mauricio A. Gonzalez, called and spoke to Mr. Cintolo at the firm's office. Mr. Cintolo confirmed that the firm does advertise in the Boston Yellow Pages but without his name.

⁶⁶ 151 F.3d 620 (7th Cir. 1998).

⁶⁷ I do not list all the striking similarities in the text. Among other things, the decisions also suggest (but neither discusses) the substantive question whether it is permissible for a lawyer to agree to provide legal counsel on an ongoing basis to members of an enterprise that, to the lawyer's knowledge, engage in a continuing course of criminal conduct where the lawyer's services will directly involve that conduct. A negative answer is strongly implied in the discussion in *Cueto* of the seemingly more modest charge of a RICO violation. In such a case, a federal prosecutor would presumably also charge a RICO conspiracy, with the requisite predicate acts being the lawyer's otherwise-typical legal services and the requisite predicate crimes being the substantive violations involved in the ongoing criminal enterprise.

⁶⁸ Criminal-defense lawyers who know the facts of the *Cintolo* decision well might cringe. To set the record straight, *Cintolo* involved an indictment consisting of two counts charging obstruction and one count charging conspiracy to commit obstruction under 18 U.S.C. §§ 371 & 1503. See *Cintolo*, 818 F.2d at 983. Lawyer Cintolo was, in fact, found guilty by the jury only on the conspiracy count, and there are surely important differences between the conspiracy and substantive counts for purposes of substantive criminal law and, perhaps

We may thus concentrate our substantive attention on that one federal criminal offense. The offense, as stated in 18 U.S.C. § 1503,⁶⁹ applies to the actions of a person who "corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice."⁷⁰ As will be seen, there are also striking similarities in the way that each court approached the question of the relationship between the criminal law and the practice of law. Following ample precedent, both courts emphasized that the line between legitimate lawyering and criminal conduct is profoundly factual rather than legal. First, that line "must inevitably be drawn case by case."⁷¹ For both courts, that meant that there is no room for per se rules, irrebuttable presumptions of correct lawyer behavior, or similar sorts of bright lines or safe harbors for determining questions of lawyer criminality.⁷² Second, placement of that

more importantly, evidence and similar rules. Nonetheless, in the critical portion of *Cintolo* dealing with the sufficiency-of-the-evidence issue as to *Cintolo's* role as a lawyer. See *id.* at 989-96. The court deals mainly with the concept of obstruction of justice as the "gravamen of the accusation." *Id.* at 984. No important aspect of the court's substantive discussion appears to turn on differences between the obstruction and conspiracy-to-obstruct counts.

⁶⁹ 18 U.S.C. § 1503 (a) (1994 & Supp. 2000).

⁷⁰ 18 U.S.C. § 1503 (a). While it might be missed on a first reading, it should be carefully noted that § 1503, in effect, describes two sets of conduct as obstruction. Both sets involve conduct that "influences, obstructs or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice." *Id.* But that can be accomplished either (1) "corruptly" or (2) "by threats or force, or by any threatening letter or communication." *Id.* In both cases that we will examine, the lawyer-defendant was not charged with the second type of obstruction, but merely of acting "corruptly."

The court in *Cintolo* overruled lawyer *Cintolo's* objection that the obstruction statute was void for vagueness-as-applied. See *Cintolo*, 818 F.2d at 996-97. Those not concerned with upholding the statute (as would any court confronted with an argument that it was unconstitutional) would have to agree that, even if minimally constitutional, the wording of Section 1503 hardly provides a clear roadmap of the offense, for lawyers or anyone else. The effort of the *Cintolo* court to define the key term "corruptly" is singularly unhelpful, other than affirming that the term is applied "broadly." *Id.* at 991; see also *Cueto*, 151 F.3d at 630 (quoting approvingly from *United States v. Griffin*, 589 F.2d 200, 206-07 (5th Cir. 1979), to the effect that Congress purposefully drafted the obstruction statute in broad terms in order to deal with the great variety of ways that the "imagination of the criminally inclined" might devise to impede or thwart the administration of justice) (citation omitted).

⁷¹ Both decisions employ the same formulation. The court in *Cintolo* noted that "[w]hatever the contours of the line between traditional lawyering and corrupt intent may be, they must inevitably be drawn case-by-case." *Cintolo*, 818 F.2d at 995. The court in *Cueto* noted that "[w]hatever the contours of the line between traditional lawyering and criminal conduct, they must inevitably be drawn case-by-case." *Cueto*, 151 F.3d at 634 (noting that the potential danger of permitting prosecutors to "inquire into the motives of criminal defense lawyers ad hoc" was not raised here because the court's "conclusion [was] limited to the specific facts of this case").

⁷² See, e.g., *Cueto*, 151 F.3d at 631 ("an individual's status as an attorney engaged in litigation-related conduct does not provide protection from prosecution for criminal

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line ultimately depends on a factual determination (thus to be made almost without effective possibility of reversal on subsequent appellate review) in the first instance by the jury, and, subject to substantial restrictions, by the trial judge in reviewing a guilty verdict.⁷³ Third, those fundamental factual elements turn mainly on that most intangible and elusive of inquiries into the "corrupt" state of mind or "intent" of an accused lawyer, again based on contested facts.⁷⁴

Most dramatically, each case raises deeply troubling concerns because both defendants were criminal-defense lawyers being prosecuted for acts that they took in the course of providing what the Sixth Amendment to the United States Constitution treats as a bedrock right of all citizens defending themselves against the state in criminal cases: the right to counsel. Both decisions involve a complex set of facts and contested evidence. Both are lengthy, dealing with a host of objections, and I here touch on only a portion of relevant discussion. I take these decisions up in the order in which they were decided: *Cintolo* in 1987, and *Cueto* in 1998.

conduct"); *Cintolo*, 818 F.2d at 990, 992 (rejecting the argument of a lawyer and amici that "[s]o long as lawyer tenders facially legitimate explanation for conduct performed in the course of his defense of a client," the factfinder must evaluate conduct in question on that basis alone, and refusing to accept argument of lawyer and amici that a lawyer's "corrupt motive may not be found in conduct which is, itself, not independently illegal"); see also supra note 56 and accompanying text.

⁷³ See *Cintolo*, 818 F.2d at 983; *Cueto*, 151 F.3d at 629-30.

⁷⁴ See *Cueto*, 151 F.3d at 631 ("[I]t is not the means employed by the defendant that are specifically prohibited by the statute; instead, it is the defendant's corrupt endeavor which motivated the action It is undisputed that an attorney may use any lawful means to defend his client, and there is no risk of criminal liability if those means employed by the attorney in his endeavors to represent his client remain within the scope of lawful conduct. However, it is the corrupt endeavor . . . which motivated Cueto's otherwise legal conduct, that separates his conduct from that which is legal."); *Cintolo*, 818 F.2d at 995 ("We recognize the dangers that are present if prosecutors can be allowed to inquire into motive in such confined circumstances, and we respect the importance of allowing defense counsel to perform legitimate activities without let or hindrance. We do not see this case, however, edging into that forbidden terrain.").

A. United States v. Cintolo⁷⁵

Cintolo involved as the lawyer's client Gennaro Angiulo, who used his apartment as headquarters for his illegal gambling and loan-sharking businesses.⁷⁶ What was unknown to Angiulo, his associates, or lawyer William Cintolo was that their extensive conversations in the apartment were all being secretly recorded by the FBI.⁷⁷ Walter LaFreniere was a customer of both businesses.⁷⁸ He had run up large debts on the gambling side of the business and was thus haplessly under the heel of the loan-sharking side.⁷⁹ Various of Angiulo's minions had already subjected LaFreniere to unpleasantness in unsuccessful attempts to enforce his indebtedness to Angiulo.⁸⁰ Federal agents, knowing LaFreniere's plight and evidently hoping to persuade him to serve as a sympathetic witness, attempted to interview him and summon him to testify before a grand jury that, as Angiulo and his henchmen accurately speculated, was investigating Angiulo's illegal businesses.⁸¹

When LaFreniere first appeared before the grand jury, he refused to testify on Fifth Amendment self-incrimination grounds.⁸² Concerned that LaFreniere might be granted immunity, and thereafter, coerced into testifying under threat of criminal contempt, Angiulo wished to have LaFreniere "stand up" - that is, even if granted immunity, commit criminal contempt by refusing to testify and suffer the months of ensuing imprisonment rather than give damaging testimony (or risk committing perjury, with its longer sentence).⁸³ Angiulo thus directed an associate to escort LaFreniere to lawyer Cintolo's office for what was apparently their first meeting.⁸⁴ Shortly thereafter, Cintolo met with Angiulo and associates in the absence of LaFreniere.⁸⁵ From this and later

⁷⁵ 818 F.2d 980 (1st Cir. 1987). As a reading of the full opinion in *Cintolo* will show, I give here only a truncated account of the court's necessarily condensed recounting of the facts. Judge Selya's opinion, written with characteristic wit, is a fair smattering of sarcasm and displays of recondite terminology that will require many close readers of the opinion to navigate it with a good dictionary at hand (an exercise that would also have better served the author of the opinion at several points).

⁷⁶ *Id.* at 984.

⁷⁷ *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.*

⁸¹ *United States v. Cintolo*, 818 F.2d 980, 984 (1st Cir. 1987).

⁸² *Id.*

⁸³ *Id.* at 985.

⁸⁴ *Id.*

⁸⁵ *Id.* LaFreniere was apparently not called as a witness by either side in Cintolo's trial. The First Circuit does not mention whether Cintolo's frequent discussions with Angiulo and

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conversations between Cintolo and Angiulo, all recorded verbatim, it is clear and was conceded by Cintolo that he was aware that Angiulo was uncertain whether he could trust LaFreniere not to testify, even if that meant his imprisonment, and that Angiulo was actively considering other alternatives, such as having LaFreniere murdered by his associates.⁸⁶ Cintolo's conversation indicated that he was entirely willing, even eager, to share with Angiulo all information that LaFreniere provided to him as his lawyer, and that he understood and supported Angiulo's objective of persuading LaFreniere, by threats if necessary, not to testify even if immunized but instead, to accept lengthy imprisonment for criminal contempt.⁸⁷ Indeed, Cintolo was at some pains to reassure Angiulo that he had repeatedly instructed his client as Angiulo wished.⁸⁸

When LaFreniere was called back before the grand jury and, as expected, provided with broad immunity from prosecution, he read from a script prepared and given to him by Cintolo, still refusing to testify.⁸⁹ As rehearsed by Cintolo, LaFreniere invoked Fifth Amendment grounds that the court would later hold to be "clearly frivolous."⁹⁰ LaFreniere, accompanied by Cintolo as his champion, was subsequently held in contempt and sentenced to an eighteen-month term of

others out of LaFreniere's presence violated his duties of loyalty and confidentiality to LaFreniere, on the assumption that the latter was his only client in the matter. *See id.*

⁸⁶ *Id.* at 985-86.

⁸⁷ *United States v. Cintolo*, 818 F.2d 980, 985-86 (1st Cir. 1987).

⁸⁸ *Id.* During one apartment conversation just after federal and state tax filing dates had passed, Cintolo changed the subject from the question of LaFreniere's trustworthiness and revealed to Angiulo a scheme he claimed to have concocted. *Id.* at 988 n.4. Under it, Angiulo and several of his associates would pool funds for Cintolo to make an otherwise anonymous tax payment, which he would later claim to be on behalf of whichever one of them was later singled out for tax violations. *Id.* Cintolo had evidently become aware of the Ninth Circuit decision, *Baird v. Koerner*, in which the court, purportedly applying California law, held that a lawyer could not be forced to testify as to the identity of clients on whose behalf he had made an anonymous tax payment on the ground that such coercion would violate the attorney-client privilege. *See Baird*, 279 F.2d 623 (9th Cir. 1960). Courts generally have limited *Baird* to its facts. *See generally In re Grand Jury Proceeding*, 680 F.2d 1026, 1027 (5th Cir. 1982) (en banc) (stating that *Baird*-type application of attorney-client privilege is "limited and narrow exception"); RESTATEMENT, *supra* note 12, at § 69 cmt. g, reporter's note at 533-34; MODERN LEGAL ETHICS, *supra* note 20, at 260-61. The Ninth Circuit has itself greatly limited *Baird*. *See In re Grand Jury Subpoena Duces Tecum*, 695 F.2d 363, 365 (9th Cir. 1982) (stating that *Baird* is to be "narrowly applied").

⁸⁹ *Cintolo*, 818 F.2d at 988.

⁹⁰ *Id.* On the state of Fifth Amendment jurisprudence supporting this characterization, *see id.* at 988 n.5.

imprisonment, which he served in full.⁹¹ As Angiulo would put it, he "stood up" well indeed.

At his trial, Cintolo testified that "he had not acted with the intent corruptly to obstruct or impede" the work of the grand jury.⁹² Instead, he claimed that, fearing for his client LaFreniere's welfare, he had played the role of double agent, masquerading before Angiulo to appear as if cooperating with him, but solely for the purpose of being able to counsel better his own client.⁹³ Thus, the central issue with respect to the sufficiency of evidence was whether, in view of Cintolo's sworn statement of an alternative, non-corrupt motive for his activities in advising LaFreniere about the Fifth Amendment, the jury should have been permitted to find, as evidently it did, that his explanation was false.⁹⁴ It was here that amicus briefs of lawyer organizations took the position that the jury should have been instructed that they had to accept Cintolo's self-justification, so long as the lawyer had tendered a "facially legitimate explanation for conduct performed in the course of his defense of a client."⁹⁵ The facial legitimacy, of course, refers not to the frivolous Fifth Amendment objection, but to Cintolo's sworn claim that his motive, in his role of double agent, was to protect his client and not to further the mob's obstruction of the grand jury inquiry.

That, however, the First Circuit refused to do, holding that the jury was entitled to reject Cintolo's defense as incredible and accept instead the competing and entirely plausible interpretation urged by the prosecution.⁹⁶ The court also found ample record evidence on which a jury could rest its finding that Cintolo's purpose in participating in the scheme to persuade LaFreniere not to testify was, as Section 1503 specified, "corrupt."⁹⁷ As the court put it, "[t]he fact that this participation was clothed, at least in part, in the mantle of superficially 'professional' conduct does not exonerate the lawyer from culpability," for, according to the court, "acceptance of a retainer by a lawyer in a

⁹¹ *Id.* at 988-89.

⁹² *Id.* at 989.

⁹³ *Id.* There is no indication in the appellate decision whether expert testimony had been offered at Cintolo's trial on such matters as whether such a role was plausible or whether a reasonable lawyer would have simply notified authorities of the threats against his client. *See id.* While portions of the court's opinion are rather heavily sarcastic, there is no mention whether the court would approve or disapprove of a lawyer playing such a double role in preference to deploying more obviously client-protective strategies. *See id.*

⁹⁴ *Id.* at 989-90.

⁹⁵ *United States v. Cintolo*, 818 F.2d 980, 990 (1st Cir. 1987).

⁹⁶ *Id.* at 989.

⁹⁷ *Id.* at 990.

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criminal case cannot become functionally equivalent to the lawyer's acceptance of a roving commission to flout the criminal law with impunity."⁹⁸

The *Cintolo* court's attention in reciting evidence is primarily focused on the outrageously criminal schemes of Angiulo, and the court also stresses at several points that LaFreniere was committing a criminal act in refusing to testify, despite the government's grant of immunity.⁹⁹ Hence, it might be argued that the critical element for the court was that *Cintolo* was assisting his client in a criminal act, and at that on behalf of an ongoing criminal enterprise. But such a reading would be directly at odds with the court's extended analysis of precedent from other circuits, in which the court invokes other Section 1503 decisions affirming convictions for acts by a non-lawyer that amounted to nothing more than urging a prospective grand jury witness to invoke the Fifth Amendment in the first instance in order to protect a third person, which it would be the lawful right of the witness to do.¹⁰⁰ In an ensuing discussion of a series of hypothetical situations of plausibly innocent acts (such as purchasing a chisel or driving someone to the airport), the court again emphasizes that by a "sort of alchemy" an innocent act may be converted into an unlawful obstruction on proof of corrupt intent.¹⁰¹ In this regard, the court concludes, a lawyer cannot "be plucked gently from the madding crowd and sheltered from the rigors" of the obstruction statute.¹⁰² As the court repeatedly stresses, a lawyer must stand in the same position as non-lawyer with respect to the application of the obstruction statute.¹⁰³ Beyond that, however, the opinion does not offer a

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ *Id.* at 992. The court approvingly discusses *Cole v. United States*, 329 F.2d 437 (9th Cir. 1964), *cert. denied*, 377 U.S. 954 (1964), as such a decision. *Id.* Even more directly in point, as the court notes in *Cintolo*, is *United States v. Cioffi*, 493 F.2d 1111 (2d Cir. 1974), *cert. denied*, 419 U.S. 917 (1974), where the court explicitly rejected an argument that urging another person to do what they were legally entitled to do could not be corrupt within the meaning of the obstruction statute. *Id.* at 992-93. See generally *Cioffi*, 493 F.2d at 1119.

¹⁰¹ *United States v. Cintolo*, 818 F.2d 980, 993 (1st Cir. 1987).

¹⁰² *Id.*

¹⁰³ See also, e.g., *id.* at 996 (stating "[b]y our reckoning, attorneys cannot be relieved of obligations of lawfulness imposed on the citizenry at large. Acceptable notions of evenhanded justice require that statutes like § 1503 apply to all persons, without preferment or favor. As sworn officers of the court, lawyers should not seek to avail themselves of relaxed rules of conduct. To the exact contrary, they should be held to the very highest standards in promoting the cause of justice" and stating "[w]e see nothing to recommend the proposition that attorneys can be of easier virtue than the rest of society in terms of the criminal code. As citizens of the Republic equal under law, all must comply with the same statute in the same manner").

significantly instructive analysis because, despite its apparent erudition, it offers only hints at its rationale. Apparently, at the end of a lengthy opinion, we find only that equating lawyers with non-lawyers under the obstruction statute rests on an assumed tenet of democracy under which all citizens are to be treated equally. *Cueto*, unfortunately, offers even less by way of rationale, in part because the evidence of criminality is, if anything, more compelling.

B. *United States v. Cueto*¹⁰⁴

Cueto, like *Cintolo*, involved a criminal enterprise of an equally institutionalized and extensive scope. Thomas Venezia owned B & H Vending. Through it, he operated a video gambling business that prospered through illegal gambling payouts to the employees of bars in the East St. Louis area, where Venezia had installed video poker game machines.¹⁰⁵ Use of the machines in connection with such payouts violates state and federal gambling and racketeering laws.¹⁰⁶ Venezia retained lawyer Amiel Cueto for personal legal representation and to defend bar owners who might be prosecuted for their participation in the business.¹⁰⁷ Following an extensive federal-state investigation that had several twists and turns, Venezia and B & H were indicted and convicted on federal racketeering and related charges.¹⁰⁸ In a pattern that one sees in several similar cases,¹⁰⁹ Venezia then agreed, in return for a recommended reduction in his sentence, to cooperate with federal prosecutors in their investigation and ultimate prosecution of his own

¹⁰⁴ 151 F.3d 620 (7th Cir. 1998).

¹⁰⁵ *Id.* at 624.

¹⁰⁶ *Id.* The court noted that games of chance that consume coins and reward "winnings" with game replays are legal; payoffs in the form of cash or liquor by bar owners cross the line into illegal gambling. *Id.* at 625 n.2.

¹⁰⁷ *Id.* at 625.

¹⁰⁸ *Id.*

¹⁰⁹ At a point in its analysis of Cueto's guilt, the court notes that the government's theory of prosecution was predicated on Cueto's holding of a personal financial interest in protecting Venezia's illegal gambling operation through a series of investments. *See supra* note 100. This, it was argued, provided the basis for a finding of his corrupt intent under 18 U.S.C. § 1503. *See Cueto*, 151 F.3d at 631. At this point, the court appends a footnote stating that the court was "puzzled why the government did not indict and prosecute Cueto in the underlying racketeering case" and expresses "concern[] about the relationship between the instant appeal and the underlying prosecution of the gambling operation and the racketeering enterprise." *Id.* at 631 n.10. The puzzlement and concern are not further identified, but rather obviously have to do with the transparent motives of the government. *See id.* Nonetheless, the court pushes the point no further. *Id.* The point of the footnote, if intending to signify something more than providing evidence of judicial naivete, is obscure.

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lawyer Cueto who had advised Venezia up until he was indicted.¹¹⁰ Note here how client testimony (waiving, of course, the attorney-client privilege) takes the place of the verbatim recording of conversations in *Cintolo*. Note also that a successful criminal lawyer, as with any other criminal in a multi-person crime, needs complete and long-lasting client loyalty to escape conviction. Venezia, as with many other clients, did not "stand up."¹¹¹

In rejecting Cueto's void-for-vagueness challenge to the federal obstruction statute, the Seventh Circuit insisted that the concept of "corrupt" endeavor was sufficiently definite - at least for a lawyer.¹¹² According to the court:¹¹³

[a]s a lawyer, [Cueto] 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.' . . .¹¹⁴ More so than an ordinary individual, an attorney, in particular a criminal defense attorney, has a sophisticated understanding of the type of conduct that constitutes criminal violations of the law. There is a discernable difference between an honest lawyer who

¹¹⁰ *Id.* at 628 n.8. Also indicted along with Cueto were Venezia himself and a third codefendant, a local public official who served as an "investigator" for Cueto and Venezia during the federal-state investigation of B & H. At least two other public officials play major supporting roles. See *id.* at 625-28. One was a state court judge who agreed to Cueto's extraordinary request for an immediate hearing of a motion for preliminary injunction against a hitherto undercover FBI agent, when notice of the suit and the motion was served only moments before on the agent, who appeared without counsel and whom the court refused to permit to put on a defense. See *id.* at 626. The other was a federal Congressman who, perhaps unwittingly, supported portions of Cueto's scheme and appeared to have had a partnership with Cueto in some gambling-related real estate. See *id.* at 627-28.

¹¹¹ See *supra* note 76 and accompanying text.

¹¹² A similar theme of you-should-have-known-better has met similar lawyer arguments of ignorance or reliance. See, e.g., *United States v. Friedland*, 83 F.3d 1531, 1539 (3d Cir. 1996) (rejecting lawyer's argument that he relied on representation of Southern District of New York federal prosecutors that they would recommend reduction of penalties in his District of New Jersey prosecution, on ground that, as lawyer, defendant should have known that only United States attorney in district of prosecution had such power). See generally MODERN LEGAL ETHICS, *supra* note 20, at 18.

¹¹³ *Cueto*, 151 F.3d at 631-32.

¹¹⁴ [Author's footnote.] *Id.* at 631 (quoting from *United States v. Griffin*, 589 F.3d 200, 206-07 (5th Cir. 1979)) (stating that void-for-vagueness doctrine not a shield for those already bent on wrongdoing).

unintentionally submits a false statement to the court and an attorney with specific corrupt intentions who files papers in bad faith knowing that they contain false representations and/or inaccurate facts in an attempt to hinder judicial proceedings. It is true that to a certain extent, a lawyer's conduct influences judicial proceedings, or at least attempts to affect the outcome of the proceedings. However, that influence stems from a lawyer's attempt to advocate his client's interests, *within the scope of the law*. It is the 'corrupt endeavor' to influence the due administration of justice that is the heart of the offense, and Cueto's personal financial interest¹¹⁵ is the heart of his corrupt motive.

We can also be assured that the court's surmise about lawyers' abilities of penetrating insight is surmise, not based on any record evidence of Cueto's individual skills. So much, then, for arguments that applying the criminal law to lawyers will "chill" their work for their clients.¹¹⁶ According to the Seventh Circuit, lawyers, much less than enjoying immunity from the criminal law, labor under special disabilities that make them, if anything, even more vulnerable to conviction for obstruction - including presumed knowledge of the meaning of highly obscure criminal statutes.¹¹⁷

How well do Cueto's activities match the contours of traditional law practice? The charges against Cueto mainly concerned his work for his clients Venezia and B & H, in connection with the federal-state anti-gambling investigation.¹¹⁸ The one representational matter that we will examine here concerned Cueto's legal work in pressing a state court lawsuit against one Bonds Robinson, an FBI undercover officer,¹¹⁹ whose

¹¹⁵ [Author's footnote.] The "business interests" to which the court refers involved financial transactions and business deals that lawyer Cueto and client Venezia entered into after the client-lawyer relationship commenced. Included was a topless nightclub, an asbestos-removal company, and Venezia's purchase of Cueto's office building, moving B & H's corporate headquarters into it. *Id.*

¹¹⁶ The foregoing observations immediately precede the court's rejection of the argument in an amicus brief filed by the National Association of Criminal Defense Lawyers that affirmance of Cueto's "sweeping prosecution will sufficiently chill vigorous advocacy and eventually destroy the delicate balance between prosecution and defense which is necessary to maintain the effective operation of the criminal justice system." *Id.* at 632.

¹¹⁷ *Id.* at 631.

¹¹⁸ *Id.* at 628-30.

¹¹⁹ Robinson was employed by the Illinois Liquor Control Commission. *United States v. Cueto*, 151 F.3d 620, 625 (7th Cir. 1998). At some point, Robinson assumed a role as

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work had led to several successful raids on B & H-supplied bars and caused the arrest of several bar employees, obviously threatening B & H's illegal gambling business.¹²⁰ Cueto apparently knew of Robinson's role (the court does not allude to this aspect of the evidence) and apparently decided to "out" him. He first filed the state-court lawsuit, *Venezia v. Robinson*, but did not immediately serve the papers. Cueto instead obtained a court order directing Robinson to appear as a witness in one of the pending state criminal proceedings arising out of a raid.¹²¹ When Robinson appeared to testify, Cueto served him with a subpoena that gave him fifteen minutes to appear for an injunction hearing, in which Venezia sought preliminary and permanent injunctions against Robinson's interference with Venezia's business.¹²² Robinson, who had not seen a copy of the complaint, had not been served with process, and was not represented by counsel, was, of course, not prepared to respond.¹²³ The state court judge nonetheless denied Robinson's request for counsel, permitted Cueto to cross-examine him extensively about the FBI investigation of Venezia (which to that point had been covert, if not terribly successfully so), and then entered a preliminary injunction indefinitely enjoining Robinson.¹²⁴ While the injunction was subsequently thrown out once the case was removed to federal court,¹²⁵ Venezia had been provided an opportunity to cross-examine the FBI's chief undercover operative investigating his client.

The ensuing federal prosecution of Cueto was simplified greatly by the fact that Cueto, by entering into extensive business partnerships with Venezia,¹²⁶ provided ample evidentiary basis for a finding of motive for

undercover agent for the FBI, posing as a corrupt liquor agent, in order to gather evidence against Venezia and B & H. In this pose, he had sent word to Venezia that he could limit the investigations if Venezia would pay him a bribe. *Id.*

¹²⁰ *Id.* at 633.

¹²¹ *Id.* at 626.

¹²² *Id.* at 626.

¹²³ *Id.*

¹²⁴ For later developments in the long-running saga of *Venezia v. Robinson* and its progeny, in state and federal court, see *id.* at 626-27. Venezia lost in the federal courts on the obvious ground that Robinson had been denied due process in the state-court action.

¹²⁵ See *United States v. Cueto*, 151 F.3d 620, 626-27 (7th Cir. 1998). While the Seventh Circuit opinion traces the unsuccessful course of *Venezia v. Robinson*, it nowhere characterizes the lawsuit as frivolous, as had the court in *Cintolo* with respect to lawyer Cintolo's legal position. Despite silence on that point, it would be preposterous to assume that Cueto's lawsuit, although it was commenced in a manner that was held to violate the due process rights of Robinson - and clearly so - nonetheless minimally merited being heard.

¹²⁶ See *id.* at 631 ("[t]he government's theory of prosecution is predicated on the fact that Cueto held a personal financial interest in protecting the illegal gambling enterprise, which

his "corrupt" lawyering on behalf of client Venezia.¹²⁷ Most obviously, as part-owner of B & H, Cueto stood to lose financially if Robinson's successful undercover work continued.¹²⁸ The court's analysis is taken from the *Cintolo* decision, which it extensively cites.¹²⁹ As had the *Cintolo* court, the *Cueto* court also rejected Cueto's void-for-vagueness attack on the federal obstruction statute as applied to his activities.¹³⁰ The court also found, on Cueto's argument of insufficiency of evidence, that the trial record overwhelmingly supported the jury's finding.¹³¹ In the course of discussing the evidence, the court held that it was not necessary that the lawyer's activities be successful in order to constitute obstruction,¹³² and that the evidence did not portray Cueto's legitimate involvement in Venezia's defense or his interferences with the administration of justice as merely inadvertent.¹³³ The court also held that Cueto's various advocacy efforts to benefit Venezia (and himself) were not protected by the First Amendment because criminal activity does not fall within the scope of protected speech.¹³⁴ As to the argument, which the court addressed throughout its opinion, that Cueto was involved only in traditional litigation-related activities, the court responded that "[w]e refuse to accept the notion that lawyers may do anything, including violating the law, to zealously advocate their clients' interests, and then avoid criminal prosecution by claiming that they were 'just doing their job.'"¹³⁵

Perhaps so, but aside from the colorful - and, I believe, narratively instructive-facts of both *Cintolo* and *Cueto* - neither opinion is particularly illuminating about how either a lawyer functioning carefully and in good faith, or a later reviewing court or jury carefully analyzing a factual record, is to determine whether particular lawyer conduct is criminal or non-criminal. According to both decisions, acts that are otherwise entirely lawful - advising a client about his Fifth Amendment rights or filing and pressing a lawsuit for a client - can nonetheless be found to be criminal.

formed the requisite corrupt intent for his conduct, to qualify as violations of the [obstruction statute]").

¹²⁷ See, e.g., *id.* at 624.

¹²⁸ See *id.* at 625.

¹²⁹ *Id.* at 631.

¹³⁰ *Id.* at 630-32.

¹³¹ *United States v. Cueto*, 151 F.3d 620, 632-34 (7th Cir. 1998).

¹³² *Id.* at 633.

¹³³ *Id.* at 633-34.

¹³⁴ *Id.* at 634 n.11.

¹³⁵ *Id.* at 634.

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Such a loose-jointed state of affairs is troubling. Is there a better way of marking off where legitimate lawyering ends and lawyers crimes begin? In light of the facts of these cases and such partial illumination as they shed, I turn next to such an effort.

IV. CONTEXT: LAWYERING CONSTRAINTS ON THE LAW OF LAWYER CRIMES

The over-arching principle that one might be tempted to take away from decisions such as *Cintolo* and *Cueto* is that lawyers, even when functioning as such, are constrained by the criminal law to the same degree as would a non-lawyer performing the same or a similar personal service. But only a few moment's reflection will indicate convincingly that this is not so - or at least it is not so in some important areas of law practice.

It is simply insupportable to say, as *Cintolo* seems to say,¹³⁶ that lawyers functioning in their professional capacity are subject to all of the strictures of the criminal law without regard to the professional nature of their activity. To the contrary, in a significant number of areas, lawyers operate with special legal license and special legal privileges that make what otherwise would be wrongful conduct on the part of a non-lawyer legally permissible for a lawyer to do.

Take the traditional area of law practice that we have been focusing on thus far - the activities of a criminal defense lawyer. Consider first what such a lawyer may legitimately do in attempting to obtain the acquittal of a person the lawyer knows to be guilty of the charged offense.¹³⁷ While largely theoretical discussions have focused on the lawyer's activities in such a situation, it is not currently doubted in the legal profession that it is legal - that is, certainly, not in violation of the criminal law - for a lawyer to do so.¹³⁸ Indeed, for a lawyer to fail to

¹³⁶ See *supra* notes 85-86 and accompanying text.

¹³⁷ In some discussions of this and similar problems, the extreme epistemological position is taken that lawyers can never "know" such a thing as the guilt or innocence of their clients or whether a fact is true or false. While I disagree with Professor Monroe Freedman on much else, I emphatically agree with his position that such a radical epistemological position ignores both legal and practical reality and, indeed, it may be very much against the interests of an accused. See MONROE H. FREEDMAN, *LAWYERS ETHICS IN AN ADVERSARY SYSTEM* 52-53 (1975); see also, e.g., Harry I. Subin, *The Criminal Lawyer's "Different Mission": Reflections on the "Right" to Present a False Case*, 1 *GEO. J. LEG. ETHICS* 125, 141-43 (1987) (hereinafter "Subin, Different Mission") (discussing generally and rejecting the radical epistemological position).

¹³⁸ See, e.g., GAVIN MACKENZIE, *LAWYERS AND ETHICS* 4-41 (2000 supp.) (reporting on compatible Canadian professional view and stating that "there is general agreement among

assert a legally available defense for such a client, solely on the ground that the accused client is factually innocent, would itself raise serious questions of the propriety of the lawyer's activities.¹³⁹ Beyond that basic point, it is also the dominant professional view that it is legal and even, according to some lawyers, required that the criminal defense lawyer so conduct herself that a non-lawyer bystander would believe that the lawyer is attempting to obtain an acquittal by creating in the jury's mind a false understanding of the facts.¹⁴⁰ This might be attempted, for

commentators that because of the purposes of the criminal justice system, it is proper for criminal defence lawyers to cross-examine witnesses whom they know to be telling the truth in such a way as to persuade the court not to believe the witnesses"). Compare ABA STANDARDS OF CONDUCT FOR PROSECUTION AND DEFENSE PERSONNEL, Standard 7.6 (1971) (now superseded) (declaring that a lawyer "should not misuse the power of cross-examination or impeachment by employing it to discredit or undermine a witness if [the lawyer] knows the witness is testifying truthfully"), DAVID LUBAN, *LAWYERS AND JUSTICE: AN ETHICAL STUDY* 150-53 (1988) (concluding that cross-examination of known truthful witness cannot be defended by arguments about lawyer's special role), and Subin, *Different Mission*, *supra* note 137, at 135 (finding no discernible redeeming social value in making the truth appear as a lie in criminal defense), with *United States v. Wade*, 388 U.S. 218, 257-58 (1967) (White, J., concurring) (describing such activity as professionally accepted), Stephen Ellman, *Lawyering for Justice in a Flawed Democracy*, 90 COLUM. L. REV. 116, 155-56 (1990) (book review of Luban, *supra*, arguing that such cross-examination is warranted), Monroe H. Freedman, *Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions*, 64 MICH. L. REV. 1469, 1474 (1966) (arguing that the attack of truth is necessary to protect client confidentiality and for effective defense), John B. Mitchell, *Reasonable Doubts Are Where You Find Them: A Response to Professor Subin's Position on the Criminal Lawyer's "Different Mission,"* 1 GEO. J. LEG. ETHICS 339 (1987) (arguing that, for professional and legal reasons, the practice is justifiable), and Harry I. Subin, *Is This Lie Necessary? Further Reflections on the Right to Present a False Defense*, 1 GEO. J. LEG. ETHICS 689 (1988) (conceding that Mitchell's argument that precluding defense lawyer from attacking truthful case against defendant may be incompatible with duty of defense lawyer to assure that prosecution meets its high burden of proof at trial).

¹³⁹ Even under the high hurdle created by *Strickland v. Washington*, 466 U.S. 668 (1984), which requires that the convicted client must show both fundamental error on the part of counsel and "prejudice" that probably affected the outcome of the case to prevail on claim of ineffective assistance of counsel, a lawyer who put on no defense based on her belief in the client's guilt would provide ineffective assistance. See, e.g., *State v. Holland*, 876 P.2d 357 (Utah 1994) (finding ineffective assistance where lawyer's loyalty to criminal defense client compromised belief he should be convicted); *State v. Harbison*, 337 S.E.2d 504 (N.C. 1985) (finding per se ineffective assistance where, without consent of accused, defense lawyer admitted guilt to jury in closing argument).

¹⁴⁰ Views have differed on whether such conduct is required. See RESTATEMENT, *supra* note 12, at § 106 cmt. c, at 141 (taking position that "a lawyer is never required to conduct such examination"); MONROE H. FREEDMAN, *UNDERSTANDING LEGAL ETHICS* ch. 8 (1990) (cross-examination of known truthful witness required when doing so would further litigation position of client-accused); Subin, *Different Mission*, *supra* note 137 (considering various positions that have been advanced, almost all of them in academic or other theoretical works, and concluding with argument for prohibiting defense lawyer from presenting false defense).

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example, by cross-examining with forensic demonstrations of deep skepticism a prosecution witness whom the lawyer knows to be telling the truth. That could be attempted through such stratagems as peppering the witness with probing, sarcastic, and challenging questions, all calculated to convey to the finder of fact the lawyer's disbelief in the testimony as part of the advocate's effort to induce the jury to share that belief.¹⁴¹ The lawyer, in short, may attempt to obtain an acquittal by creating the false impression that a known true statement is false, or at least not credible.

While the legal immunity of a criminal defense lawyer to function as such is, to my mind, a bedrock-solid proposition within the American criminal-justice system, it is rarely asked how that conclusion squares with the obstruction of justice or similar criminal statutes.¹⁴² Does not such lawyering just as surely interfere with the due administration of justice as did the activities of Cintolo and Cueto? Indeed, is not such interference (in at least some senses of that term) precisely what a candid criminal-defense advocate would admit was uppermost on her mind?

The inescapable answer is that those concepts do not square at all, or at least not without some fast verbal footwork involving a good bit of winking and nodding, with at least the lay conception of obstruction of justice. Any person other than a lawyer who knowingly attempted to create a false impression about the guilt or innocence of an accused in the course of the trial – such as by testifying or submitting into evidence a document known to be false – would surely violate the criminal law.¹⁴³ Why then do lawyers, in one way (and not the best way) of putting the question, get a pass on this body of criminal law when conducting a criminal defense?

The answer has to do with the nature of the criminal process and at least professional perception of the outer limits – but nonetheless

¹⁴¹ On the permissibility of such cross-examination, see, e.g., RESTATEMENT, *supra* note 12, at § 106 cmt. c (describing issue as “particularly difficult” but suggesting that practice is “legally permissible.”). But see, e.g., Carl M. Selinger, *The “Law” on Lawyer Efforts to Discredit Truthful Testimony*, 46 OKLA. L. REV. 99 (1993) (disagreeing with position taken in Restatement); Subin, *Different Mission*, *supra* note 137.

¹⁴² See *supra* notes 69-74 and accompanying text (discussing the elements of offense).

¹⁴³ The point is graphically illustrated by the curious case of *In re Schachne*, 5 F. Supp. 680, 682 (E.D.N.Y. 1934). In that case, the court held that a lawyer who had been acting as criminal defense attorney but then withdrew and took the stand as a sworn character witness for the accused in the same proceeding was guilty of professional misconduct where the evidence showed that the lawyer knew the accused client was in fact guilty of the charged offense. *Schachne*, 5 F. Supp. at 682.

accepted limits - of a lawyer's proper role within that process. At bottom, the privilege extended to a criminal defense lawyer to treat white as black, and black as white is based on two concepts. The first is the importance - *always* as a matter of democratic theory and at least sometimes as a matter of vindicating the factual innocence of the accused - of permitting a vigorous defense of every accused. As the lawyer saying has it, we permit every criminal-defense lawyer in every criminal defense to put the prosecution - the state - to its proof on every proposition necessary to obtain a conviction.¹⁴⁴ The second reason has to do with the great practical difficulties of ascertaining the core fact of what the lawyer "knew" about guilt and innocence, truth and falsity.¹⁴⁵ Those difficulties are chiefly two. The first is the ubiquitous problem in the law of proving a state of mind - intent or purpose. Often, that difficulty will be compounded by the potential for the seriously distorting effect of "hindsight bias,"¹⁴⁶ because defense-lawyer prosecutions often come only after conviction of the accused client.¹⁴⁷ The second problem is the necessity of invading what the law otherwise treats as the confidential area of client-lawyer communications.¹⁴⁸ To be sure, the crime-fraud exception¹⁴⁹ will probably strip away confidentiality, and often the client will waive the privilege explicitly as part of a plea bargain, as did attorney Cueto's client. In addition, since no such trial could occur, with fairness to the accused lawyer, without opening up part or all of the course of communication between defense lawyer and accused, even if the client does not cooperate with the prosecution or otherwise waive the privilege, the lawyer is entitled to use client information to the extent reasonably necessary in her

¹⁴⁴ An excellent article by John B. Mitchell refers to this as the process of making the screens of the criminal law work. See John B. Mitchell, *The Ethics of the Criminal Defense Attorney—New Answers to Old Questions*, 32 STAN. L. REV. 293 (1980).

¹⁴⁵ This is not to say that it is meaningless to refer to a lawyer's knowledge, *cf. supra* note 106, but that a determination of that knowledge is, for practical reasons, often difficult to make with confidence.

¹⁴⁶ See generally Jeffrey J. Rachlinski, *A Positive Psychological Theory of Judging in Hindsight*, 65 U. CHI. L. REV. 571, 571-93 (1998) (describing psychological phenomena of hindsight bias, where observers' belief in such elements as causes of remembered events can be heavily distorted by knowledge of subsequent outcomes).

¹⁴⁷ In cases such as *Cueto*, where the former client has struck a deal with the prosecutor to testify against the client's former lawyer, hindsight bias is further exacerbated by the jury's awareness of the client's admission that his intent was itself unlawful.

¹⁴⁸ See generally RESTATEMENT, *supra* note 12, at § 60(1)(a) (stating general duty of a lawyer regarding client confidentiality and not revealing client communications).

¹⁴⁹ See generally *id.* at § 82.

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defense.¹⁵⁰ While the law, on balance, thus allows deep client secrets to be spilled rather wholesale in the courtroom, we should hardly count that as a unalloyed victory – certainly not for confidentiality values in general.

Similar objections, of course, could be and have been made to the deployment against lawyers of obstruction and similar criminal statutes, with their heavy dependence on state-of-mind determinations. Yet, the case is readily made that if lawyers were free to commit acts that would otherwise constitute obstruction and similar offenses, the ensuing state of affairs would wreak havoc with a fragile criminal-justice system. And it is hardly trivial to urge that any alternative verbal formulation to define criminally-prohibited acts in this area should reach broadly to encompass all likely objectionable schemes of the criminally disposed. Criticizing such statutes as the federal obstruction statute as obscurely worded is easily done; it is much more difficult to formulate something more precise with approximately the same reach.

Hence, we are left wishing for greater precision, but having little hope of finding any in more skillfully crafted criminal statutes that are broad enough to capture most socially destructive activity. We wish to maintain the full vigor of traditional law practice, yet we are constrained to admit that traditional lawyering can also sometimes tread over the line into the criminal. And we must concede that much of the difference turns on the disposition, the intent, the purpose of the lawyer – surely a difficult concept to prove and a dangerous concept to permit to run loose because of its potential for erroneous jury findings. To help – but surely not to cure – the inherent ambiguity of such a situation, I offer three modest suggestions – one structural, another procedural, and the third substantive.

¹⁵⁰ See *id.* at §§ 64, 83 (discussing the exception to the agency-law-based rule of confidentiality, permitting a lawyer to reveal confidential client information in his or her own self-defense, including in a situation in which a non-client brings an official proceeding against the lawyer, and the corresponding “self-defense” exception to the attorney-client privilege); see also *Regina v. Murray*, 48 O.R.3d 437 (Ontario 2000) (discussing a similar rule in Canada, whereby lawyer-accused, charged with criminal offense of obstructing justice by removal of videotapes from client’s home and subsequent retention, entitled to offer in evidence client communications otherwise protected under solicitor-client privilege, even if client opposes such use).

A. Structural Protections: Avoiding Retaliatory Prosecutions

The first, structural, suggestion is to reduce the risk of retaliatory prosecutions. A particular danger involved in criminal prosecutions of lawyers inheres in the strong legal tradition, and accompanying legal doctrine, that discretion in prosecution - selecting offenses and defendants to charge, and selecting the actual charges brought - resides only in prosecutors. Hence, courts have steadfastly refused to take on the task of assessing whether prosecutorial discretion was properly exercised in all but extreme and obvious cases of corruption or bias.¹⁵¹ But, in a case involving prosecution of a criminal defense lawyer, that could mean that the same lawyer-prosecutor who has prosecuted a criminal charge against an accused who was vigorously defended by a criminal-defense lawyer will then be the same person (or at least colleagues within the same prosecutor's office) deciding whether to prosecute the criminal-defense lawyer for crimes allegedly committed during the course of the criminal defense. Such an exercise of discretion could, without hope of effective judicial review, turn on entirely inappropriate considerations, such as a desire to neutralize a particularly successful criminal-defense lawyer who litigates vigorously, but lawfully. Acting on an abiding personal animosity toward a particular criminal-defense lawyer or such lawyers in general, even if clumsily disguised, will pass judicial notice. Even most decisions by a prosecutor to charge a lawyer for acts committed in the course of a successful criminal defense involving the same prosecutor, while suspicious - and

¹⁵¹ Under existing law, courts will provide no scrutiny of the exercise of prosecutorial discretion. In almost every instance in which an accused has attempted to argue that the prosecutor has over-charged or selected a particular defendant for prosecution on impermissible grounds, courts have resisted under broad holdings, leaving such decisions to the discretion of the prosecutor. See generally Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393, 408-415 (2001) (reviewing decisions upholding questionable uses of prosecutorial discretion). Situations exist in which courts will intervene, but they are exotic instances requiring proof of a particularly objectionable criterion for choice, such as race-based or gender-based criteria, in making the charging decision. See, e.g., *United States v. Armstrong*, 517 U.S. 456 (1996) (holding that defendant seeking discovery on defense of racially-discriminatory prosecution must first produce credible evidence that government could have prosecuted similarly situated defendants of other races, but failed to do so); *McCleskey v. Kemp*, 481 U.S. 279 (1987) (rejecting attack on constitutionality of Georgia's death-penalty administration, despite evidence of racial discrimination in administration); *Wayte v. United States*, 470 U.S. 598 (1985) (holding that defendant alleging selective prosecution in failure to register for draft has burden of proving both discriminatory impact and discriminatory intent); *Oyler v. Boles*, 368 U.S. 448 (1962) (holding that selective prosecution violates federal Constitution only if race, religion or other arbitrary classification motivates prosecution).

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possibly rankly so (as where the lawyer has frequently obtained acquittals in prosecutions brought by that prosecutor) - will not rise to the level of judicially reviewable exercises of prosecutorial discretion.

Plainly, there is need for structural protection. Within the federal criminal justice system, such protection has recently been put in place, but more should be installed. At the outset, it is important to note that it is the case, and probably will remain so, that difficult or complex cases of lawyer prosecution will predominantly involve federal prosecutors.¹⁵² It is thus somewhat welcome news that the Department of Justice recently put in place the beginnings of a policy that has much to recommend it. The regulation, which is part of the U.S. ATTORNEYS MANUAL,¹⁵³ requires that written notice of a federal prosecution against a lawyer must be sent to the assistant attorney general for criminal matters in Washington. However, this reporting requirement only applies: first, when the lawyer is prosecuted for an offense committed in the course of representing a client; second, when the client of the lawyer is likely to testify against the lawyer; and third, when the client's testimony will be given pursuant to a non-prosecution, cooperation or similar agreement with the government. It is, I think, not a serious criticism that the requirement is solely one of reporting - rather than, for example, that the assistant attorney general personally signs off on the indictment. A conscientious assistant attorney general, alert to the importance of oversight, will need nothing more than notice, while an inattentive official would likely sign anything to keep the paper flowing. The first restriction - implicitly omitting the reporting requirement for lawyer prosecutions for non-practice offenses - is sensible. Indeed, it dovetails exactly with the area in which concern about lawyer prosecution is most acute.

¹⁵² That follows for many reasons, including the typically greater investigative and organizational resources of federal prosecutors, the greater immunity of federal prosecutors from local bar influences (which can severely dampen the enthusiasm of an elected district attorney to conduct a prosecution that significant elements of the local bar will find threatening), and the more-encompassing reach and judicially-tested nature of relevant federal criminal statutes. Part, perhaps most, of the reason is the ongoing federalization of much of criminal law in general. See, e.g., LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 261-76 (1993).

¹⁵³ The manual is taken seriously by federal prosecutors but by its own terms does not have the force of a binding regulation. Hence, it is not enforceable in court against the United States. See, e.g., *Nichols v. Reno*, 931 F. Supp. 748, 751-52 (D. Colo. 1996) (citing several authorities, the court holds in prosecution of Oklahoma City bombing suspect, that protocol to be followed in death penalty cases set out in manual did not create judicially enforceable substantive or procedural rights).

The remaining limitations, however, seem inapt and should be recast. They seem to confuse our current problem with another, more vocal, dispute - that over the extent to which prosecutors can make contact with a person represented by counsel.¹⁵⁴ In situations of the kind discussed in this Lecture, the risk of prosecution based on inappropriate assessment could be equally great regardless of the kind of arrangements, or even the absence of arrangements, between prosecutor and client. A wiser policy would extend the requirement of reporting to all instances in which a United States attorney proposes to indict any lawyer for a crime committed in the course of representing a client. The factors relating to whether the client will testify and, if so, under what kind of plea agreement, are irrelevant and should be dropped as limiting conditions.

Can this sort of supervisory limitation on overly-aggressive prosecution of lawyers be duplicated in the states? The problems here are more complex. They arise out of the strong tradition, if not state constitutional arrangement, under which prosecutorial discretion is in no sense centralized. In New York, for example, local district attorneys of the state's eighty-seven counties function as little lords in their impregnable fiefdoms. There is no state-wide authority that has either visitorial or, certainly, supervisory authority over them.¹⁵⁵ How, if at all, that could be overcome for our modest purposes must lie beyond the

¹⁵⁴ The literature on the subject is extensive. See, e.g., Sapna K. Khattwala, Note, *Toward Uniform Application of the "No-Contact" Rule: McDade is the Solution*, 13 GEO. J. LEGAL ETHICS 111 (1999) (favorably analyzing effects of federal legislation requiring federal prosecutors to abide by state rules limiting contact with suspects represented by counsel); John H. Lim, Note, *The Side Effects of a Legal Ethics Panacea: Revealing a United States' Standing Committee's Proposal to "Standardize" Ethics Rules in the Federal Courts as an Attempt to Undermine the No-Contact Rule*, 13 GEO. J. LEG. ETHICS 547 (2000) (urging rejection of proposal of a committee of the United States Judicial Conference to standardize ethics rules in all federal courts as subterfuge to allow federal prosecutors to ignore state anti-contact rules); see also Roger C. Cramton & Lisa K. Udell, *State Ethics Rules and Federal Prosecutors: The Controversies Over the Anti-Contact and Subpoena Rules*, 53 U. PITT. L. REV. 291 (1992); William J. Stunz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903 (1993). The issues were also surveyed in a quite recent Tabor Lecture. See Susan R. Martyn, *Are We Moving in the Right Direction? Sadducees, Two Kingdoms, Lawyers, and the Revised Model Rule of Professional Conduct*, 34 VAL. U. L. REV. 121, 164-68 (1999) (discussing efforts of ABA Ethics 2000 commission to reach consensus on proposed revisions to ABA Model Rule 4.2 and noting that the anti-contact rule "has devoured a greater number of hours in [deliberations of ABA's commission] Ethics 2000 than any other").

¹⁵⁵ The New York Court of Appeals has recently held that the state's governor is empowered to appoint the attorney general to conduct a prosecution in individual cases. *In re Johnson*, 691 N.E.2d 1002 (N.Y. 1997). But it would be extremely unlikely that the governor would do so in each case of a prosecution of a lawyer for a practice-related offense.

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scope of this study. The problem would obviously require separate address in each state. One possibility would be statewide legislation requiring notice to a state office – say, the state attorney general and the state bar – of any prosecution of a lawyer for practice-related crimes. Such notice would enable those other agencies to review the prosecution and make their own determinations concerning whether the prosecution is warranted and, if not, to intervene in a procedurally appropriate way.

B. Procedural Protections: Expert Testimony and Court Instructions

Once a prosecution is commenced, there are at least two areas in which judges, under existing law, can contribute to the desirable effort of seeing that no innocent lawyer is found guilty of alleged practice-related crimes. One of the chief difficulties in enforcing a criminal statute against lawyers, such as the federal obstruction statute, is that everything turns on intent and context. The jury's task will be difficult because of the inescapably elusive nature of the elements of intent.¹⁵⁶ Moreover, the jury's ability to understand and assess will either be extremely limited or perhaps distorted by individual jurors' prior life experiences.¹⁵⁷ It seems particularly apt then, that courts allow testimony – properly limited¹⁵⁸ – that will allow the jury to hear discussion (and perhaps expert disagreement) about the proper role and activities of lawyers.¹⁵⁹ For

¹⁵⁶ That is true in all such prosecutions other than those where the lawyer-defendant attempts to put forward a counter-productive story consisting of suspiciously self-serving denials or where there is clear documentary or other physical evidence. As *Cintolo* illustrates, even prosecutions of lawyers based on strong evidence (there contemporaneous, secret tape recordings) did not prevent what the jury evidently concluded was an elaborate and false lawyer tale of an innocent state of mind. See *supra* notes 79-83 and accompanying text.

¹⁵⁷ Exposure to the portrayal of lawyers in the media very likely will have left at least some jurors with erroneous ideas about traditional law practice. See, e.g., Michael Asimow, *Bad Lawyers in the Movies*, 24 NOVA L. REV. 533 (2000) (survey of 284 films indicates that in 1930-70 films, two-thirds of lawyer portrayals were affirmative, but films since then are highly negative); Michael Asimow, *When Lawyers Were Heroes*, 30 U.S.F. L. REV. 1131, 1133 (1996) ("Just as the old movies unrealistically painted lawyers in glowing terms, the current ones are too negative. Yet they accurately reflect and no doubt reinforce the popular culture in which attorneys have about the same public approval rating as the criminals they represent."). Lawyers also commonly regard their own portrayals by the media and in popular culture as unfairly negative. See, e.g., Nancy B. Rapoport, *Dressed for Excess: How Hollywood Affects the Professional Behavior of Lawyers*, 14 NOTRE DAME J. L. ETHICS & PUB. POL'Y 49 (2000).

¹⁵⁸ One clearly sensible limitation would be to rule inadmissible any attempt by an expert witness to testify to an "opinion" about the ultimate guilt or innocence of the accused lawyer.

¹⁵⁹ As mentioned, I have a financial conflict in making observations about admitting such expert testimony, because of my own role as occasional expert witness in criminal

example, in *United States v. Kellington*,¹⁶⁰ the Ninth Circuit held that a trial court had properly granted a new trial on behalf of a lawyer-defendant because of the trial court's error in excluding expert testimony relating to the alleged dilemma facing the lawyer. Other decisions are generally in accord.¹⁶¹ Thus, the law needs no development here, at least in the federal courts, but it would be well to underscore its potential importance.

Another well-established device is jury instructions. As several judges have done in prosecutions of lawyers for practice-related crimes, it is certainly fitting for the presiding judge to lend his or her weight of authority, through instructions to the jury, to such established and professionally accepted factors as the lawyer's primary duty to the client, duties of confidentiality and loyalty, and similar general considerations. In short, here too the weight of judicial approval should be placed on concepts of traditional lawyering in good faith.¹⁶² Such instructions would go far to remove concerns that lay jurors in criminal cases, unacquainted with the occasionally counter-intuitive but accepted roles of lawyers, might mistake good faith traditional lawyering for criminal conduct.

prosecutions of lawyers. See *supra* note 14 and accompanying text. Nonetheless, the law on the admissibility of expert testimony in lawyer prosecutions is fairly well-settled.

¹⁶⁰ 217 F.3d 1084 (9th Cir. 2000).

¹⁶¹ See, e.g., *United States v. Kloess*, 251 F.3d 941, 949 (11th Cir. 2001), *rev'g* 97 F. Supp. 2d 1084 (N.D. Ala. 2000) (holding that defendant-lawyer is entitled to rebut the government's case through expert testimony); *United States v. Cavin*, 39 F.3d 1299, 1308-09 (5th Cir. 1994) (holding that trial court erred in excluding testimony of lawyer-expert witness about ethical constraints under which lawyers practice, as well as about "the substance of rental asset transaction" as to which lawyer provided legal services); *State v. Larsen*, 865 P.2d 1355, 1360-63 (Utah 1993) (stating testimony by lawyer-expert admissible on question of factual elements of question of materiality of information not disclosed to investors). See generally Tim A. Thomas, Annotation, *Admissibility, in Prosecution of Attorney for Collaborating with Client in Criminal Activities, of Evidence as to Attorneys' Duties Under Code of Professional Responsibility*, 111 A.L.R. FED. 403 (1993). On the broader question of the admissibility of expert testimony by lawyers on their work, see generally Charles W. Ehrhardt, *The Conflict Concerning Expert Witnesses and Legal Conclusions*, 92 W. VA. L. REV. 645 (1990); Carl M. Selinger, *The Problematic Role of the Legal Ethics Expert Witness*, 13 GEO. J. LEGAL ETHICS 405 (2000).

¹⁶² Not all lawyer-defendants would, of course, be entitled to such an instruction. If, for example, there was no evidence of good faith in the record, an instruction assuming the lawyer's good faith would not be appropriate. See, e.g., *Durie v. Florida*, 751 So. 2d 685, 690 (Fla. Dist. Ct. App. 2000) (finding no error for trial court to refuse to instruct that lawyer acting in good faith in honest belief that advice is well-founded is not criminally answerable for mere error in judgment, where no evidence that lawyer had good faith belief in client's entitlement to funds involved in grand theft prosecution of lawyer).

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C. *Substantive Protection: Extension of the Federal Witness-Tampering Proviso*

Finally, Congress has already partially provided what should be another generalized substantive protection for all lawyers prosecuted for practice-related crimes. A subsection of the federal witness-tampering statute provides that the tampering crime "does not prohibit or punish the providing of lawful, bona fide, legal representation services in connection with or anticipation of an official proceeding."¹⁶³ The latter element, describing the types of proceedings within the section, simply repeats the substantive element of tampering, and is not generalizable to other offenses.

The first portion of the proviso (excepting from the definition of the offense "the providing of lawful, bona fide, legal representation") was added in 1986. At least one recent, major decision¹⁶⁴ has held that the statute requires that, once the accused lawyer has pleaded the subsection as an affirmative defense and satisfied the minimal burden of showing that the accused was a licensed lawyer who was retained by a client to perform the legal representation that constituted the charged conduct, the government bears both the burden of proof and the burden of persuasion beyond a reasonable doubt to rebut the affirmative showing in demonstrating the improper purpose of the accused.¹⁶⁵ Thus, what might have been conceived of as (only) a defendant-lawyer's explanation becomes a principal part of the government's case. That will occur so long as (and only after) the lawyer-accused pleads and minimally proves

¹⁶³ 18 U.S.C. § 1515(c) (1994 and Supp. 2000) (added by Criminal Law and Procedure Technical Amendments Act (1986)).

¹⁶⁴ *Kloess*, 251 F.3d at 941 (dismissing indictment for failure to allege non-application of § 1515(c) in case of prosecution of lawyer for obstructing communication to judge of information regarding commission of criminal offense). Another factor, not mentioned by the court in *Kloess*, strongly supports its analysis and result. Accepting the argument of the government that the burden of pleading and proof of the Section 1515(c) defense was on the accused would have forced many lawyer-defendants onto the witness stand, creating the need for extensive and probably intricate judicial management to limit cross-examination to protect the Fifth Amendment privilege of the accused.

¹⁶⁵ *Id.* ("A defendant-lawyer seeking the safe harbor of Section 1515(c) must affirmatively show that he is entitled to its protection . . . This is a minimal burden. Evidence tending to show that the defendant is a licensed attorney who was validly retained to perform the legal representation which constitutes the charged conduct is sufficient to raise an inference of innocent purpose. Any requirement to do more would unconstitutionally shift the burden to the defendant to prove his innocence by negating an element of the statute - the required *mens rea*. This the Constitution forbids.") (citations and footnote omitted).

the defense (or the government concedes the minimal showing).¹⁶⁶ That will have any number of felicitous effects, including confronting the prosecutor at the outset with the implicit congressional judgment that "lawful, bona fide, legal representation" is above and beyond the condemnation of the criminal law. The argument is considerably circular - being based in large part on the requirement that the legal representation be "lawful," but the point is nonetheless worthwhile. I should also point out that the law is still very much in a state of development under the witness-tampering statute, and we have yet to hear from other federal courts of appeals and, possibly, the Supreme Court on the interpretation of the subsection. For what it is worth, the interpretation discussed here seems eminently sound to me.

Indeed, why should not Congress generalize that concept into a free-standing Section of Title 18 of the United States Code that would apply to *all* offenses charged against a lawyer? The idea would be to write the new, generalized statute in a way that clearly requires in every prosecution of a lawyer that the government prove beyond a reasonable doubt the same proposition now required only in witness-tampering prosecutions. Once the accused-lawyer raised and minimally proved the foundation for the defense, the government would always bear the burden of proving that the lawyer's conduct did not constitute the provision of "lawful, bona fide, legal representation services" to a client. Both the theory and the facts of the cases we have examined in which convictions of lawyers have been upheld would support such a limitation. Moreover, the decided cases suggest that the government would face no difficult burden in doing so. The defense would not be overbroad, because a lawyer charged with a non-representation offense (e.g., tax evasion by non-payment of the lawyer's own taxes) would be unable to make the minimal showing, and thus, no additional burden would be shifted to the prosecution.

V. CONCLUSION

Truth be told, we lawyers are filled with deeply contradictory thoughts about the criminal law. Civilized social life without it is not imaginable. Lawyers can often be found at the forefront of public campaigns to improve and enhance criminal law enforcement. Indeed,

¹⁶⁶ In *Kloess*, the Eleventh Circuit concluded that the defendant-lawyer's burdens of pleading and proof were anticipated and thus met by the indictment itself, which alleged, first, that the accused was a licensed lawyer, and second, that he had been retained to provide the representation which consisted of the charged offense. *Id.* at 948 n.8.

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no utopian scheme that I am aware of dares to dispense with it. Libertarians of almost all stripes concede, if with reluctance, that some such system is vital even in a minimal state. On the other hand, we have darker thoughts. Those of us who do not practice in the field (and, I suspect, some of us who do) are troubled by the operation of the criminal-justice system, as is the vast majority of non-lawyers.¹⁶⁷ There are several reasons for this. Most obviously, there are important reasons to be concerned that our criminal justice system does not work well.¹⁶⁸ Thus, we may fear that lawyer-defendants will fall into convictions, not because they are guilty, but because they are the victims of a deeply-defective system. But, lawyers have no claim for immunity from a system that, with all its defects, is imposed on all others - including the great masses of those who have no realistic share of blame for its imperfections.

Then again, our unease about the criminal law might be less articulately self-protective. Despite our ability to recount intellectually the importance of criminal law prosecution and criminal law defense, the world of crime and criminals is for many lawyers strongly repulsive. Criminal courts, at least specialized criminal courts in large cities, are typically from somewhat to decidedly seedy, ruthless, hostile, and worse. Lawyers who spend their professional lives dealing with crime are able to tell exotic stories, but we view both prosecutors and, perhaps more, defense lawyers with at least mild suspicion. With notable exceptions, the lawyers who find their practice confined to criminal work are often among the least respected of lawyers amongst their professional peers,¹⁶⁹ occasionally - but hardly always - with reason. We fear that this little-known world may be personally threatening and sordid, such as portrayed for us in Tom Wolfe's criminal judicial hell in modern urban life.¹⁷⁰

¹⁶⁷ See, e.g., MODERN LEGAL ETHICS, *supra* note 20, at 4 (stating that "[i]t is probably accurate, if controversial, to say that defense of persons accused of crime has led to more public antipathy toward the legal profession than any other cause. Yet, of course, it is both indispensable and honorable that lawyers continue in that and other difficult roles").

¹⁶⁸ See, e.g., H. RICHARD UVILLER, VIRTUAL JUSTICE: THE FLAWED PROSECUTION OF CRIME IN AMERICA (1996).

¹⁶⁹ See JOHN P. HEINZ & EDWARD O. LAUMANN, CHICAGO LAWYERS: THE SOCIAL STRUCTURE OF THE BAR (1982) (hypothesizing the existence of two "hemispheres" of lawyers based on empirical data - one dealing with wealthy and corporate clients, primarily in wealth-maximizing lawyering; the other dealing with low- and middle-income individuals with problems, e.g., criminal defense, which are functions of a legal system they cannot strongly influence).

¹⁷⁰ See TOM WOLFE, THE BONFIRE OF THE VANITIES (1987).

The idea that a brother or sister lawyer might become entangled in that ambiguous realm of harsh and threatening justice gives us pause. Some of us will even admit to feelings that the criminal law is not for the likes of *us* lawyers! It is for . . . who? . . . well, people different from us – bad people. But of course it is not, at least it is not exclusively for the strangers among us, either (certainly) under widely-accepted political theories of justice or (to a less-confident degree) in actual practice.

Lawyers must and will be prosecuted for crimes, including crimes committed on behalf of clients in the course of law practice. At least some of those criminal charges will involve the very difficult and troubling situations that we have considered here – those in which the lawyer's guilt is highly fact-specific. Perhaps worse, for some offenses critical evidence will rest entirely on proof that the lawyer performed an otherwise entirely lawful legal service for a client but for a criminally wrongful purpose. With the procedural protections now in place and with enhanced administrative arrangements of the sort that I have urged, I believe that criminal justice for lawyers is at least as attainable as it is for other citizens.

More than that, lawyers – in justice – cannot ask. Beyond this, we lawyers must proceed as clients often must: with both good faith and a wise attention to the sometimes clumsy demands of law. The law, as it often is for clients in their very important activities, will sometimes be unknowable with certainty. To that extent, as with clients, a lawyer will suffer the qualms of doubt inflicted by the human institution of law. There is no plausible alternative, painful as the doubts may be. And undoubtedly, a wise lawyer will stop short of discernible limits and refuse to enter, on behalf of a client, areas of doubtful legality, even if the lawyer is convinced that the law “should” not disallow the contemplated activity. Justice and prudence are not at war.

