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CONSPIRATORS' PRIVILEGE AND INNOCENTS' REFUGE: A NEW APPROACH TO JOINT DEFENSE AGREEMENTS

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> [The joint defense privilege] permits coconspirators to continue to conspire at a common defense, now with the privileged assistance of teams of lawyers.[1]

INTRODUCTION

You are the chief executive officer of a company under investigation by a federal grand jury for conspiracy to fix prices. Several of your own employees, as well as those of your largest competitor, have been questioned by FBI agents and some, you gather, have appeared before the grand jury. The prosecutor has offered you a deal—plead to a felony, pay a substantial fine, give full and truthful testimony (i.e., snitch), and receive no jail time—and you agonize over it. Whether the deal is a good one depends on what others are saying and, more to the point, what others plan to do—that is, do they plan to snitch first? But how can you find out? You can ask them, of course, but there are no guarantees you will receive honest answers. And if someone is already cooperating with the government, any overtures from you may later be interpreted as obstruction of justice. Prosecutors have threatened that their "generous" deal is not open indefinitely, and if the CEO of the other company takes it first, then the offer is withdrawn. What do you do?

Now imagine the same scenario playing itself in this manner: your able counsel—and for what you're paying him, he'd better be able—originally represented all of the employees at your company. When informed by prosecutors of a conflict of interest, your counsel

1 CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.4.9 (1986).

kindly arranges for representation for all of the employees. Their lawyers are all members of smaller firms, many of which spun off from the battleship firm representing you. The general counsel of your company, with the approval of the board of directors, has agreed to reimburse the legal fees for all of the company's employees. Your lawyer speaks daily with his colleagues and learns what their clients are telling prosecutors, and what prosecutors are telling them. You are relieved to learn that your chief financial officer has told a story sprinkled with just enough of the truth to be believable, and you have shaped your own story accordingly. Best of all, the CEO at your competitor is represented by your own attorney's law school roommate and close friend. The two have brokered a deal: hang tough, nobody cooperates. Dozens of subpoenas are outstanding, and the army of defense lawyers marshaled in the case is fighting each and every one. "Delay, delay, delay," your attorney tells you—which is easy for him to say, you grimly note, since the meter is running, but you know it is in your interest as well. Then, a break: the lead Department of Justice prosecutor departs for the greener pastures of private practice, leaving her underling, who never seemed to grasp the case, in charge. And finally, your lawyer gets a call from the prosecutor and hears the word you've all been waiting for: misdemeanor. Plead to a misdemeanor, pay a small fine, and the nightmare goes away. And it does.

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It is often in the interest of persons under investigation by a federal grand jury to share information. One practical difficulty with such sharing is that it may remove the cloak of privilege that otherwise shields certain information from prying eyes. When one party reveals information protected by the attorney-client privilege to another, the disclosure ordinarily effects a waiver of the privilege. Parties that perceive themselves in common interest are free to share information, but the price of such sharing may be the loss of the privilege.

The joint defense privilege emerged to address and, in part, dissolve this difficulty. It allows parties to share information with others in common legal interest, without waiver of the attorney-client privilege. Although the joint defense privilege is of relatively recent origins,[2] it has already given rise to litigation in many of the highest profile criminal investigations and prosecutions in recent memory.[3]

2 The first federal case to recognize the joint defense privilege was *Continental Oil v. United States*, 330 F.2d 347 (9th Cir. 1964).

3 The joint defense privilege and joint defense agreements have also given rise to controversy in civil cases, most recently tobacco litigation involving the Ligget

These include: the largest prosecutions of Defense Department fraud in American history ("Operation Uncover"[4] and "Operation III Wind"[5]), the investigation into the collapse of the Bank of Credit and Commerce International financial empire,[6] the investigation into illegal campaign contributions during the 1996 presidential election,[7] the prosecutions of Congressman Joseph McDade,[8] Governor Edwin Edwards,[9] and the World Trade Center bombers,[10] and perhaps most famously, the independent counsel's investigation of President Bill Clinton.[11] During the Monica Lewinsky investigation, joint defense agreements proved to be fodder for discussion in newspapers and popular journals and, more heatedly, on television shows devoted to legal and political issues.[12]

And these high-profile cases are only the tip of the iceberg. Practitioners' guides to white-collar crime now regularly include entire chapters devoted to the drafting of agreements (known as joint defense agreements) that formalize the sharing of privileged informa-

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Group. *See* Alex M. Friedman, *Another Break in Tobacco Industry's Ranks*, WALL ST. J., Jan. 9, 1997, at B1. The focus of this Article, however, is criminal investigations.

4 *See* Kiely v. Raytheon Co., 914 F. Supp. 708 (D. Mass. 1996); Aaron Zitner, *Guilt by Disassociation: Ex-Manager Says Raytheon Left Him Holding the Bag*, BOSTON GLOBE, May 28, 1995, at 65.

5 *See* ANDY PASZTOR, WHEN THE PENTAGON WAS FOR SALE 283, 287 (1995).

6 *See* Linda Himelstein, *Top Lawyers Are Subpoenaed in BCCI Probe*, LEGAL TIMES, Apr. 27, 1992, at 1.

7 *See* United States v. Hsia, 81 F. Supp. 2d 7 (D.D.C. 2000); Carrie Johnson, *Defense in Hsia Case Cries Foul*, NAT'L L.J., Dec. 7, 1999, at A3.

8 *See* United States v. McDade, No. 92-249, 1992 U.S. Dist. LEXIS 11447 (E.D. Pa. July 30, 1992).

9 *See* United States v. Edwards, 39 F. Supp. 2d 716 (M.D. La. 1999).

10 *See* Mary B.W. Tabor, *Lawyer-Client Issue Rises in Bomb Conspiracy Case*, N.Y. TIMES, June 28, 1994, at B3.

11 Litigation over the application of the joint defense privilege arose in the Whitewater investigation, *see In re* Grand Jury Subpoena Duces Tecum, 112 F.3d 910 (8th Cir. 1997), and in the Lewinsky investigation, *see In re* Lindsey, 148 F.3d 1100 (D.C. Cir. 1998). The Clinton White House also claimed the joint defense privilege in the context of congressional investigations. *See* S. REP. NO. 104-191, at 39 (1995); *see also* Susan Schmidt, *Panel Votes Whitewater Subpoena; White House Assets Attorney-Client Shield for Meeting in 1993*, WASH. POST, Dec. 9, 1995, at A1.

12 *See Burden of Proof* (CNN television broadcast, May 1, 2000), LEXIS, News Library, CNN file (quoting a lawyer noting that "prosecutors absolutely hate these joint defense agreements"); *Rivera Live* (CNBC television broadcast, Aug. 28, 1998), LEXIS, News Library, CNBC file (quoting a former prosecutor describing a joint defense agreement as a "perjury map").

tion among witnesses in a grand jury investigation.[13] As one former prosecutor noted before Congress, "The reality in the District of Columbia, as I've come to know it, is that there are joint defense agreements, and these joint defense agreements are as thick as closing binders. They're probably two, three inches thick."[14]

The academic and practitioners' literature is filled with praise of the joint defense privilege. Joint defense agreements are said to be beneficial for a number of reasons: they facilitate a flow of information among subjects of an investigation, which is assumed to be a good thing,[15] as well as promote efficiency (by permitting parties to divide up tasks)[16] and fairness (by permitting parties to coordinate strategies and overcome informational advantages ordinarily wielded by the prosecutor).[17] The occasional note of dissent is sounded,[18] but the literature is overwhelmingly devoted to arcane and often intractable questions involving the contours of the privilege.[19] Concerns about

13 *See, e.g.*, 2 OTTO G. OBERMAIER & ROBERT G. MORVILLO, WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES § 17 (2000); Jed R. Rakoff, *The Drafting of Joint Defense Agreements*, N.Y. L.J., Nov. 9, 1995, at 3.

14 *Appointing Independent Counsel To Investigate Campaign Irregularities in the '96 Presidential Campaigns, Hearing Before the House Gov't Reform and Oversight Comm.*, 105th Cong. (1998), *at* 1998 WL 442759, pt. 3 [hereinafter *Independent Counsel Hearing*] (testimony of Charles LaBella).

15 *See, e.g.*, Susan K. Rushing, Note, *Separating the Joint-Defense Doctrine from the Attorney-Client Privilege*, 68 TEX. L. REV. 1273, 1274 (1990) ("The joint-defense privilege fulfills the social goal of encouraging interparty communications by preserving their confidentiality.").

16 *See, e.g.*, 2 OBERMAIER & MORVILLO, *supra* note 13, § 17-4 ("[A] joint defense agreement may result in more efficient and more effective case management. By dividing up tasks, counsel can avoid duplication of efforts, thereby reducing costs.").

17 *See, e.g.*, ASS'N OF THE BAR OF THE CITY OF N.Y., RECOMMENDATION THAT STATE CIVIL COURTS ADOPT THE COMMON INTEREST PRIVILEGE (Jan. 28, 1998), http://www.abcny.org/interest.htm [hereinafter NEW YORK BAR RECOMMENDATION] (arguing that the joint defense privilege is "rooted in common sense, efficiency and fairness"); Deborah Stavile Bartel, *Reconceptualizing the Joint Defense Doctrine*, 65 FORDHAM L. REV. 871, 873 (1996) ("A trial becomes a lopsided contest when multiple co-defendants are discouraged from coordinating their defense and present unnecessarily inconsistent defenses. Relegating defendants to uncoordinated and inconsistent defenses bestows an unfair tactical advantage on the prosecution because inconsistent defenses impair the credibility of the defense as a whole.").

18 *See* WOLFRAM, *supra* note 1, § 6.4.9; Paul L. Seave, *Conflicts and Confidences—Does Conflict of Interest Kill the Joint Defense Privilege? The Prosecution Viewpoint*, CRIM. JUST., Spring 1992, at 7.

19 *See* Michael G. Scheininger & Ray A. Aragon, *Joint Defense Agreements*, LITIG., Spring 1994, at 11, 12 ("The boundaries of the joint defense/common interest privilege is murkier than those of the Milky Way.").

joint defense agreements[20] are trotted out only to be mocked in a throwaway footnote or dismissive paragraph.[21] Prosecutors in particular are chided for their ignorance of the mechanics of joint defense agreements, and for their failure to appreciate the societal benefits of the privilege in the context of criminal investigations.[22]

This Article questions the prevailing wisdom and argues that the joint defense privilege, especially in the context of criminal investigations, is of doubtful social utility. The Article first questions the doctrinal underpinnings of the recently minted privilege. Courts and commentators have tended to view the joint defense privilege as a logical corollary of the attorney-client privilege. Although beguiling, this approach is flawed. The purposes behind the attorney-client privilege are not consistent with the joint defense privilege. The attorney-client privilege exists to afford adequate legal representation to lay persons by allowing them to make a full disclosure of factual information to a person with expertise in the law. Although the attorney-client privilege may often shelter the guilty, this cost is considered worth paying to encourage complete divulgence both by the person whose cause is partially just and by the person who mistakenly regards some of his or her actions as legally culpable. Once disclosure is made to a client's attorney (and the attorney's agents), the policy behind the privilege is satisfied. The logic of the attorney-client privilege lends no support to the extension of the privilege to communications among lawyers and clients who happen to have interests in common.

The Article also questions the policy arguments raised on behalf of the joint defense privilege and attempts to tentatively develop a new justification for it. Many of the claimed benefits of the joint defense privilege in fostering a flow of information are, from society's perspective, largely specious; and many of the costs of the privilege, which are often unrecognized, are grave indeed. Focusing on the use of the joint defense privilege and joint defense agreements in criminal

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20 For example, the head of the Department of Justice's Criminal Division in the final years of the Clinton administration noted that joint defense agreements have the "potential for mischief" for they "allow targets to circle the wagons and make it difficult for prosecutors successfully to complete an investigation or prosecution." Irvin B. Nathan, *Interview: Asst. Attorney General James Robinson Speaks to White Collar Criminal Issues*, 6 Bus. Crimes L. Rep. (N.Y. Law Publ'g) No. 12, at 3 (Jan. 2000).

21 *See, e.g.*, Paul L. Perito et al., *Joint Defense Agreements: Protecting the Privilege, Protecting the Future*, CRIM. JUST., Winter 1990, at 40.

22 *See* Robert Morvillo, *Modernizing Joint Defense Agreements*, N.Y. L.J., June 1, 1999, at 3 ("Joint defense agreements have become a staple in multi-defendant cases, a phenomena frowned upon by prosecutors who do not appear to understand their purpose and mechanics.").

investigations and prosecutions, I argue that courts and legislatures should re-think this novel privilege and cabin its application.

The best justification for the joint defense privilege is that it helps to protect innocent persons swept up in a criminal investigation. Such persons might be pressured by a prosecutor into falsely incriminating themselves or others. They may be bolstered in their resolve to resist the prosecutor and tell the truth, if they can meaningfully communicate with other witnesses. From this justification for the privilege, however, certain consequences follow for its scope. In the criminal context, only actual defendants (parties who have already been indicted) or targets of investigation (parties with a reasonable expectation of indictment) should be able to avail themselves of the privilege. This limits the use of the privilege to those most under pressure from prosecutors and prevents peripheral witnesses in an investigation (whose interests are often far different from the targets) from being swept in with the more culpable parties.

Part I of the Article depicts the difficulties that conspirators face in coordinating a response to a criminal investigation. The game theoretic model of the prisoner's dilemma helps illuminate the difficulties that may be alleviated when criminal defense lawyers enter the scene. As repeat players in the justice system, lawyers are capable of making meaningful promises not to betray one another and are therefore better positioned than their clients, acting alone, to defeat the prisoner's dilemma. However, without the joint defense privilege, lawyers and clients would still face significant disincentives to share information. Pledges of secrecy made among lawyers and clients with common interests would not be enforceable against prosecutors.

Part II exposes the flawed doctrinal underpinnings of the joint defense privilege. The attorney-client privilege, which encourages clients to make full factual disclosures to their attorneys, does not support the creation of a privilege that shields communications among all those who claim to have interests in common. Indeed, the attorney-client privilege was traditionally circumscribed by a "confidentiality requirement"; this required lawyers and clients, on penalty of waiver of the privilege, to preserve the confidentiality of any disclosures vis-à-vis the rest of the world. A misunderstanding of the purposes of the attorney-client privilege, and the utility of the confidentiality requirement in limiting the costs of the attorney-client privilege, have propelled the development of the joint defense privilege. This Part concludes with an archaeological exploration of the joint defense privilege, from its obscure origins to its recent, explosive growth. As is apparent, doctrinal confusion has encouraged lawyers to press for indiscriminate expansion of the new privilege.

Part III then examines the current state of the joint defense privilege. The contours and scope of the privilege are, in fundamental respects, uncertain, and these uncertainties have generated a growing number of litigated cases. Courts have wrestled with both government motions to disqualify counsel on conflict of interest grounds (when one member of a joint defense agreement defects and becomes a government witness) and defense motions to dismiss indictments (when the government secures information from individuals who have defected from joint defense agreements). Inconclusive answers have resulted, especially since courts have failed to clarify the ethical duties owed an attorney in a joint defense agreement to clients other than her own.

Part IV evaluates the proposed policy rationales for the joint defense privilege, drawing from judicial opinions and scholarly commentary. The benefits of the joint defense privilege in fostering a flow of information among those with common interests are often overstated. Much information, such as legal memoranda and notes of interviews with third party witnesses, would be shared even without the joint defense privilege. Proponents of the joint defense privilege argue that society benefits when witnesses in a criminal investigation and their attorneys can directly collaborate. Such collaboration, it is said, aids in the discovery of the truth by encouraging a more vigorous and fair adversary process. It is also argued that collaboration enhances the efficiency of the criminal justice system by allowing lawyers to share the burdens of representation. These claims are scrutinized and found to be not wholly convincing. The search for truth, and the expeditious sorting of the innocent and guilty, is, in many cases, frustrated when witnesses collaborate with one another. This Part also notes that joint defense agreements may vastly multiply the quantity of work a lawyer is able to perform on his client's behalf, rendering questionable claims that the joint defense privilege reduces legal fees.

Part V offers a better rationale for the joint defense privilege, focusing on the plight of an innocent person swept into a criminal investigation. Such an individual may, in some circumstances, be pressured by a prosecutor to falsely incriminate herself. The implications of this rationale are a more narrowly focused privilege, extending only to those who are either defendants or facing the reasonable prospect of indictment. I argue that an overbroad joint defense privilege that permits all those questioned in a criminal investigation to enter into information-sharing pacts often endangers the witnesses with little or no criminal exposure. I also explore the possibility that joint defense arrangements will impel prosecutors to apply ever more invasive tactics in their quest for information.

I. THE PRISONER'S DILEMMA

The hypothetical price-fixing investigation that introduced this Article depicts the difficulties conspirators face in continuing their conspiracy and meaningfully cooperating once a criminal investigation has begun. Simply put, how can conspirators trust each other in the shadow of a grand jury investigation? This inability to trust each other and meaningfully cooperate is famously depicted in the game theoretic model known as the "prisoner's dilemma."

In Part II.A, I explore how conspiracies may unravel as prosecutors offer rewards for incriminating testimony. The prisoner's dilemma is socially beneficial in frustrating continued cooperation among the guilty and creating incentives for defection. However, the prisoner's dilemma "works" on the innocent as well as the guilty. There is the risk that an innocent or only marginally culpable party will find himself in a prisoner's dilemma, pressured to come forward with falsely incriminating evidence or suffer steeper penalties. Part II.B considers the role of defense lawyers in coordinating a response to a criminal investigation and defeating a prisoner's dilemma. Although the conspirators themselves often cannot meaningfully cooperate, their lawyers, acting as intermediaries, can. Because attorneys are involved in repeat business relationships with each other, they have an incentive to abide by their reciprocal promises. Part II.C argues that an evidentiary privilege is, in addition, an essential precondition for such cooperation. In the absence of a joint defense privilege, lawyers and clients would be reluctant to share confidences because of the risk that prosecutors could discover their communications.

A. Conspiracy and Cooperation

In the early 1500s, Niccolo Machiavelli cautioned rulers that the gravest threats to civil order come not from one man acting but from conspiracies of men joined together in a criminal venture.[23] Several centuries later, Justice Robert Jackson tersely captured the Machiavellian insight: "[T]o unite, back of a criminal purpose, the strength, opportunities and resources of many is obviously more dangerous and more difficult to police than the efforts of a lone wrongdoer."[24]

Society has developed a variety of strategies to combat criminal conspiracies. Criminal laws have traditionally assessed penalties for

23 *See* NICCOLO MACHIAVELLI, DISCOURSES ON LIVY 218–35 (Harvey C. Mansfield & Nathan Tarvoc trans., Univ. of Chi. Press 1996) (1512).

24 Krulewitch v. United States, 336 U.S. 440, 448–49 (1949) (Jackson, J., concurring).

conspiracies far in excess of what is accorded similar offenses committed by a solitary criminal.[25] A conspirator can be held responsible, and punished, for criminal acts in which he did not participate and of which he lacked actual knowledge.[26] Moreover, in conspiracy cases the criminal law relaxes the prosecutor's evidentiary burdens at trial, allowing her to introduce, for example, hearsay evidence that would otherwise be excluded in a trial of an individual defendant.[27] Through the enhanced likelihood of conviction and the prospect of steeper penalties, the criminal law effectively increases the ex ante costs of conspiracy: for those embarking on such a venture, the expected payouts—both positive and negative—exceed those of solitary endeavors.

Furthermore, and most relevant for our purposes here, the criminal law exploits the increased risks of detection that are inherent in the conspiratorial venture itself. In this manner, too, the law heightens the risks for those who would, in a conspiracy, seek most gravely to jeopardize the social order. As Machiavelli points out, the detection risks of conspiracy—prior to its implementation, during its operation, and in its aftermath—are straightforward: as the number of people in the know increases, so too does the risk that one member will, inadvertently or intentionally, betray his co-conspirators.[28]

Of course, betrayal ordinarily entails an element of self-accusation, and this in turn ordinarily entails penalties for the would-be defector. As a consequence, a "conspiracy of silence" may be preserved insofar as it benefits all involved. But the common law long recognized that authorities are permitted to reward those who defect from a conspiracy, and especially those who defect first.[29] Indeed, once the authorities have caught wind of a criminal conspiracy, the bonds that once cemented a conspiracy of silence may disintegrate, and a race to betray may begin. This possibility of reciprocal betrayal is famously captured in the so-called prisoner's dilemma, as described by William Poundstone:

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25 *See* Callanan v. United States, 364 U.S. 587, 593–94 (1961).

26 *See* Pinkerton v. United States, 328 U.S. 640, 646–47 (1946).

27 *See* FED. R. EVID. 801(d)(2)(E); Anderson v. United States, 417 U.S. 211, 218 (1974).

28 *See* MACHIAVELLI, *supra* note 23, at 218–24. The Supreme Court has noted, "Inescapably, one contemplating illegal activities must realize and risk that his companions may be reporting to the police. If he sufficiently doubts their trustworthiness, the association will very probably end or never materialize." United States v. White, 401 U.S. 745, 752 (1971); *see also* Hoffa v. United States, 385 U.S. 293, 302 (1966) (holding that defendant's "misplaced confidence" in a co-conspirator turned police informer is not entitled to constitutional protection).

29 *See* Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 85 (1995).

> Two members of a criminal gang are arrested and imprisoned. Each prisoner is in solitary confinement with no means of speaking to or exchanging messages with the other. The police admit they don't have enough evidence to convict the pair on the principal charge. They plan to sentence both to a year in prison on a lesser charge. Simultaneously, the police offer each prisoner a Faustian bargain. If he testifies against his partner, he will go free while the partner will get three years in prison on the main charge.... If *both* prisoners testify against each other, both will be sentenced to two years in jail.[30]

In this classic form of the prisoner's dilemma, each player is better off betraying the other player regardless of what his counterpart does, and, as a consequence, defection will constitute the dominant strategy of each. What this means, however, is that both prisoners are worse off than they would have been had they somehow entered into a binding agreement not to betray the other. Society, on the other hand, benefits through the application of the prisoner's dilemma.[31] Confessions in hand from both criminals, the prosecutor and police need not invest time in further investigation, nor consume judicial resources at a trial. The prisoner's dilemma is not a dilemma at all, at least from the prosecutor's perspective; it is, rather, the "optimal solution."[32]

But it is, it must immediately be added, an imperfect solution. The prisoner's dilemma creates incentives for testimony, but there are no independent guarantees that the testimony obtained by the prosecutor will be reliable. The "prisoner" is rewarded for testimony of a specific kind—that is, testimony that the prosecutor wants to hear.[33] If the prosecutor signals his suspicion that a certain person is guilty, the "prisoner" may be apt to confirm this belief, regardless of whether such testimony accurately corresponds to the prisoner's recollections.

There is, moreover, the risk that an innocent person will be pressured to falsely incriminate himself. When considering the prisoner's dilemma, it is easy to assume that the police and prosecutors have

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30 WILLIAM POUNDSTONE, PRISONER'S DILEMMA 118 (1992); *see also* ROBERT AXELROD, THE EVOLUTION OF COOPERATION 8–9 (1984).

31 *See* Gordon Tullock, *The Prisoner's Dilemma and Mutual Trust*, 77 ETHICS 229, 229 (1967) ("By deliberately putting the criminals in the dilemma, the prosecutor is acting rationally; and if they follow their individual rationality, society as a whole will be better off....").

32 *See* Pamela Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670, 693 (1992).

33 For an insightful exploration of the problem, see generally Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999).

captured the guilty parties. In a criminal investigation, however, a prosecutor might become convinced that an innocent or only marginally culpable party is guiltier than is really the case. Such a party might be enticed to provide falsely incriminating evidence, against himself and others, or face steep penalties. Prosecutorial discretion in charging[34] and immunity[35] decisions, as well as in sentencing reduction motions,[36] is vast and essentially unreviewable. Especially against the backdrop of the Federal Sentencing Guidelines, a prosecutor can ratchet up the threats on the one hand and the rewards on the other.[37] Or, in the vocabulary of the prisoner's dilemma, a prosecutor can increase the "'temptation differentials'"[38] to the point that even an innocent party may be unable to resist.[39]

Although the model of the prisoner's dilemma has been applied far and wide, from international trade disputes[40] to principles of stare decisis,[41] it might, at first blush, seem to have little application to the hypothetical grand jury investigation that introduced this Article. Recall the two targets of the grand jury investigation—CEO No. 1 of Company A and CEO No. 2 of Company B, both under investigation for price-fixing. Unlike the petty criminals of the prisoner's dilemma, the CEOs are emphatically not in "solitary confinement," as Poundstone proposes, and indeed they may have ample "means of speaking to or exchanging messages with [one] another." They may ride the same commuter train home each evening; they may golf at the same country club. Moreover, the choices confronting them are far more varied than those confronting the prisoners of the famed dilemma. For our white-collar criminals, the issue is likely not whether to coop-

34 *See* McCleskey v. Kemp, 481 U.S. 279, 312 (1987).

35 *See* 18 U.S.C. §§ 6002–6003 (1994).

36 *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (1998) (authorizing downward departure from sentencing guidelines where defendant offers "substantial assistance").

37 The literature on this point is vast. *See, e.g.*, Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1475–76 (1993).

38 *See* CHARLES J. GOETZ, LAW AND ECONOMICS 16–17 (1984).

39 *See* Julie Roin, *Competition and Evasion: Another Perspective on International Tax Competition*, 89 GEO. L.J. 543, 551 (2001) ("The prisoner's dilemma can lead to the imposition of five-year sentences on innocent individuals as well as guilty ones because the incentive to plead guilty falsely is as cogent as the incentive to truthfully plead guilty."). *But see infra* note 327 and accompanying text (arguing that innocent witnesses may be less vulnerable to the prisoner's dilemma than guilty ones).

40 *See* Kenneth W. Abbott, *The Trading Nation's Dilemma: The Functions of the Law of International Trade*, 26 HARV. INT'L L.J. 501, 503–04 (1985).

41 *See* Erin O'Hara, *Social Constraint or Implicit Collusion?: Toward a Game Theoretic Analysis of Stare Decisis*, 24 SETON HALL L. REV. 736 (1993).

erate with the prosecutor, but how much to cooperate. Indeed, the real difficulty—not nearly so bipolar as to merit the word "dilemma"—is not whether to testify, but *what* to testify to.

Nonetheless, the model of the prisoner's dilemma illuminates something central to the problem confronted by the up-scale conspirators. The nub of the problem faced by the "prisoners" is not that they cannot communicate but that they cannot trust each other, and they therefore cannot meaningfully agree to cooperate with one another. It is not a failure of communication that marks the prisoner's dilemma but an inability to meaningfully cooperate in pursuit of a common goal. Put the prisoners in the same room, rather than separate rooms, and their "dilemma" is as acute as ever. The prisoners may exchange blood oaths they will never squeal, but when they are escorted into separate rooms for questioning, neither can rely on the antecedent promises and neither can be certain that the other will resist the prosecutor's threats and entreaties.

Now consider the CEOs. Even as they ride the same commuter train each night, consider the obstacles they face to meaningful cooperation. One CEO contemplates approaching the other and plotting to stonewall the prosecutors or to craft a false alibi. But then he thinks twice: the other CEO may have already begun to cooperate with prosecutors or may plan to do so in the future. The risk that the other might defect, or has already defected, chills any effort to coordinate a defensive strategy. One CEO muses, "If I suggest that we lié, then price-fixing may be the least of my troubles. Then they'll be threatening me with obstruction of justice as well."

It is important to recognize that preventing cooperation is desirable in the above scenario where the parties are in fact guilty and where the results of any collaboration would obstruct the expeditious sorting of the guilty and innocent. But it is not immediately apparent that society benefits when *innocent* parties are frustrated from collaborating with other innocent parties under investigation. Such collaboration may bolster the resolve of the innocent witness to resist the prosecutor's threats to provide falsely incriminating testimony. And it might also reveal that many of the prosecutor's threats are little more than puffery, for other witnesses are not, as perhaps claimed by the prosecutor, on the verge of testifying against the innocent witness. The innocent witness, like the guilty one, might seek to obtain meaningful assurances from others under investigation that they do not intend to testify against him. But how are such meaningful assurances possible in the shadow of a criminal investigation?

B. The Role of Lawyers in Enforcing Promises To Cooperate

Enter the defense lawyers: how will that affect the problem faced by the CEOs? One suggestion is that the prisoner's dilemma then "may simply be played out at a different level. Each attorney will advise her client to cooperate with the prosecutor, because none can be sure that the other defendants' lawyers are not agreeing to stonewall while secretly planning to claim the prosecutor's offer for their clients."[42] But this suggestion fails to appreciate the significance of the change effected by the introduction of lawyers. Most fundamentally, lawyers, unlike their clients, are repeat players in the criminal justice system, and this allows defense lawyers to make meaningful promises—meaningful in the sense that a penalty may attach to a failure to abide by them. If one CEO promises the other that he will not cooperate in a criminal inquiry, the promise may be largely meaningless, for the two do not anticipate being in the same predicament again. To be precise, the promise is largely meaningless because no penalty, at least in the form of legal sanction, can attach to its breach. There may, of course, be reputational harms incurred to the extent one becomes widely known as a "false friend."[43] But in many circles the fact that one is a convicted felon is doubtless more damaging than whispered chatter that one ratted out a friend. Country clubs may exclude those convicted of felonies, but they risk depopulation if they exclude those who have betrayed their friends.

By contrast, a criminal defense lawyer who reneges on an agreement not to cooperate with a prosecutor may incur meaningful reputational harms in the professional circles in which he travels.[44] Criminal inquiries are, of course, the business, and the increasingly lucrative business, of criminal defense attorneys. Although the wealth and prestige of the defense bar has grown considerably over the past quarter century,[45] the problem for the aspiring white-collar defense

42 Karlan, *supra* note 32, at 694.

43 *See* Richman, *supra* note 29, at 80–86 (collecting sources from a variety of cultures stigmatizing "snitches" and "informers").

44 *See* WOLFRAM, *supra* note 1, § 2.1 ("The most widely effective form of regulation of lawyers . . . [is] the network of informal sanctions that are brought to bear against lawyers who offend accepted norms of professional behavior.").

45 Until recently, the criminal defense bar was composed mostly of solo or small-firm practitioners. It was, because of low levels of government funding for representation of indigent defendants, rather poorly compensated compared with the rest of the profession. The expansion of substantive criminal liability and aggressive prosecution of white-collar defendants beginning in the 1970s has created a market for skilled legal services. As the nature of criminal defendants, especially in the federal system, has changed, the nature of their lawyers has changed as well. More corporations and

lawyer is that there is generally little possibility of repeat clients. A partner in a large firm whose specialty is securities regulation, by contrast, has an easier time of it. If he is fortunate enough to develop a good working relationship with a general counsel at a large company, he can expect repeat business year in and year out, addressing the company's regulatory issues, overseeing its bond offerings, etc. With such a portable "book of business," he may hop from one firm to another, demanding raises and other perks, because he will have a demonstrated ability to generate business. The white-collar defense lawyer has it much harder, for as one defense lawyer succinctly put it, "I have cases, not clients."[46] If the bad news for white-collar criminal defense lawyers is that there may be little repeat business from a single client, the good news is that even one federal investigation can generate a great deal of work—more work than even one defense attorney can handle. This is not necessarily because the resources of a large firm would be overly taxed, but because conflict of interest rules usually foreclose one firm from representing all persons ensnared in the investigation.[47]

Take our hypothetical price-fixing investigation. Several dozen officers and employees of each company receive grand jury subpoenas or visits from federal agents. Although a law firm may originally represent all the employees at a company, as well as the company itself, the prosecutor will often advise that, in light of potential conflicts, separate representations should be pursued. The attorney representing the company may continue the representation of the CEO, but he will refer the rest of the employees to other attorneys—in all likelihood, to trusted attorneys with whom he has worked before and anticipates working again. As one white-collar attorney acknowledged, when referring a person who may have had information damaging to his client to another lawyer, "he wanted a friend in the case who would not turn this guy against his client."[48] Examples abound of referrals to attorneys who are dependent upon future work and who are

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business executives are investigated for, and charged with, criminal activity, and, as a consequence, the profile of criminal defendants now includes persons with sufficient wealth, as well as access to the media, to defend themselves vigorously. *See* KENNETH MANN, DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK 21–26 (1985); William J. Genego, *The New Adversary*, BROOK. L. REV. 781, 795–98 (1988).

46 MANN, *supra* note 45, at 23.

47 *See* Debra Lyn Bassett, *Three's a Crowd: A Proposal To Abolish Joint Representation*, 32 RUTGERS L.J. 387, 422–25 (2001) (discussing ethical issues involved in joint representations in criminal cases).

48 MANN, *supra* note 45, at 91.

disinclined to antagonize the referring attorney.[49] Attorneys can make themselves attractive to those in a position to refer work by cultivating a reputation for intransigent opposition to the prosecution.[50] On the other hand, an attorney who acquires a reputation as a "lone wolf" may find himself shut out of future work.[51]

In coordinating their response to a grand jury investigation, witnesses acting on their own may face insuperable obstacles. Lawyers as intermediaries resolve, at least in part, the strategic problems of coordination that characterize a true prisoner's dilemma. When two lawyers agree that it is in their client's mutual interest not to cooperate, the lawyers, unlike their clients, can make meaningful promises to reject the prosecutor's entreaties. In the iterated prisoner's dilemma, there is a penalty exacted for failure to abide by that promise.[52] With

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49 As Professor Richman notes, the career of Edward Bennett Williams alone is filled with examples. *See* Richman, *supra* note 29, at 111–25.

> A basic Williams rule is to get as many witnesses as possible under the defense tent. Usually, this is accomplished by paying their lawyers (perfectly legal), or at least arranging for their representation. In this case, Williams got his old buddy William Hundley . . . [who was] renting space in Williams's building and taking many of his cases as referrals from his landlord. Hundley was as accommodating as ever. He told [his client] to keep his mouth shut.

EVAN THOMAS, THE MAN TO SEE: EDWARD BENNETT WILLIAMS 318 (1991) (footnote omitted). When Williams represented a corporation in a criminal investigation, he often arranged for an employees to have a lawyer who was

> a friend of Williams's and dependent on Williams for referrals in the future. He felt both personal and marketplace pressures to do exactly what Williams told him to do. "The way it works is that the corporation comes to Ed, and he hands out the business," said a former federal prosecutor in Baltimore who now specializes in white-collar defense. "The unwritten rule is that if you cut and run on Ed, you're off the list."

Id. at 408. Thomas described Williams's speech to potential witnesses in the Drexel Burnham investigation: "'If you go down the road together, you look like a solid wall. . . . But if you start to crumble, you'll become like a Greek tragedy.'" *Id.* at 489–90.

50 *See generally* Ronald J. Gilson & Robert H. Mnookin, *Disputing Through Agents: Cooperation and Conflict Between Lawyers in Litigation*, 94 COLUM. L. REV. 509, 564 (1994) (discussing a "lawyer's investment in reputation").

51 *See* Kathryn W. Tate, *Lawyer Ethics and the Corporate Employee: Is the Employee Owed More Protection than the Model Rules Provide?*, 23 IND. L. REV. 1, 54 (1990) ("The temptation [for a corporate employee's separate counsel] to respond to corporate counsel with inappropriate cooperation concerning separate counsel's representation of the employee might be great because it is unlikely separate counsel will remain on the corporation's referral list if she was perceived as obstreperous.").

52 *See* AXELROD, *supra* note 30, at 125–26.

> As long as the interaction is not iterated, cooperation is very difficult. This is why an important way to promote cooperation is to arrange that two individ-

lawyers involved in the process, then, it is not simply the prisoner's dilemma played out on at a different level; it is another game altogether.

C. *Coordinating Stories: The Need for the Joint Defense Privilege*

A potential problem arises, however, when defense lawyers swap client confidences. Assume that defense lawyers promise each other that they will not breach a confidence entrusted in them by the other, and further assume that that promise is "meaningful" insofar as penalties attach to its breach. The question nonetheless arises: why should third parties, and especially prosecutors, respect such confidentiality agreements? Why don't prosecutors subpoena the attorney and client and require them to disclose what they discussed with other clients and attorneys? A prosecutor cannot, of course, ask a lawyer what he learned from his own client, nor can he ask the client what he told his own attorney, because such a client-attorney communication is ordinarily privileged. But if CEO 2 speaks with CEO 1's attorney, nothing appears to foreclose a prosecutor from questioning CEO 2 and, possibly even the attorney, about that communication—*even if a promise was made to preserve the confidentiality of the communication.* What privilege shields communications between attorneys and clients not bound together in an attorney-client relationship?

This brings us to the joint defense privilege. The process of sharing information among attorneys whose clients have interests in common will often be, at least under the modern understanding, protected by a privilege—the so-called joint defense privilege. Thus, attorneys for the CEOs in our hypothetical can strategize together, and even reveal client confidences, without fear of required disclosure to the prosecutor. Indeed, if they have entered into a "joint defense agreement," the first CEO can speak directly to the attorney for the second CEO, and the entire communication will be deemed privileged and not discoverable. Even more remarkably, under the joint defense privilege as it has evolved, the CEOs can meet in person and, provided that one of their attorneys happens to be present, the CEOs can directly collaborate on a story to tell prosecutors. Even if one of

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uals will meet each other again, be able to recognize each other from the past, and to recall how the other has behaved until now. . . . Mutual cooperation can be stable if the future is sufficiently important relative to the present. This is because the players can each use an implicit threat of retaliation against the other's defection—if the interaction will last long enough to make the threat effective.

Id.

the CEOs eventually cooperates with the prosecutor, he and his attorney will be foreclosed from revealing what they learned from the other CEO. Such an attorney-orchestrated swapping of confidences likely benefits the most culpable person under investigation, for he learns what other witnesses have told prosecutors and can shape his own story accordingly.[53] By contrast, a witness with no criminal exposure would seem to benefit little from such an arrangement; indeed, his interests might be best served by disassociating himself from the other, more guilty parties.[54]

During the Independent Counsel's investigation of President Clinton, the workings of such a joint defense arrangement were brought to public attention. It was widely reported that President Clinton's lawyers had orchestrated a joint defense arrangement.[55] Several observers speculated that President Clinton benefited from the fact that many of the witnesses in the investigation into the President's statements and actions in connection with the *Jones v. Clinton*[56] civil case had retained lawyers recommended to them by the President's own lawyers or close friends.[57] Some contended that the de-

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53 One defense attorney told Kenneth Mann:

> Take a case in the Southern District [of New York] which was a major mail fraud case . . . . Some of the witnesses in the case came from the company—worked for the company—which I represented together with its president. And some of the employees were subpoenaed and I got them lawyers whom I knew well and trusted, good men. They got them immunity, but at the same time they felt enough—and their clients did, too—enough obligation to want to speak forth and tell us what they were testifying to. And that helped me because I didn't have to worry about what they were going to say. I didn't have to shoot craps. Very helpful.

MANN, *supra* note 45, at 89.

54 *See infra* notes 193–99 and accompanying text. If the innocent witness declines to enter a joint defense agreement, there is perhaps the risk that he will be scapegoated by others. So the decision is, concededly, a difficult one.

55 *See, e.g.*, Judy Keen & Kevin Johnson, *Clinton's Lawyer Lays Groundwork Via Defense Pacts*, USA TODAY MAG., Aug. 14, 1998, at 1A.

> David Kendall, the president's personal lawyer, has woven a network of "joint defense agreements" with the lawyers for other key witnesses. Through that network, Kendall has learned some of the most sensitive information amassed by independent counsel Ken Starr . . . . Kendall is the gatekeeper for multiple joint defense agreements with witnesses' lawyers, but no one will say how many, or which lawyers are cooperating with the president's legal team.

Id.; *see also* Ronald D. Rotunda, *Independent Counsel and the Charges of Leaking: A Brief Case Study*, 68 FORDHAM L. REV. 869, 879 (1999).

56 858 F. Supp. 902, 903 (E.D. Ark. 1984).

57 For example, Monica Lewinsky originally retained a lawyer recommended to her by the President's close friend, Vernon Jordan. *See* THE STARR REPORT: THE FIND-

fense lawyers reflected a politically motivated conspiracy,[58] although others argued that business and personal relationships, rather than political ideology, explained the close-knit alliance of lawyers.[59]

Through what one defense lawyer dubbed "'the vast legal conspiracy,'"[60] the President may have learned what other key witnesses had told, or planned to tell, prosecutors, and he may thereby have been able to craft his own story accordingly. The pros and cons of a joint defense arrangement were hotly debated on the television shows that thrived during the investigation. Defense attorneys argued that information sharing was a commonplace feature in white-collar investigations and therefore acceptable.[61] Former prosecutors, however, expressed the concern that information shared through a joint defense agreement could provide a "perjury map" to witnesses inclined to alter their testimony. As one former prosecutor suggested, a witness whose lawyer had entered into a joint defense agreement might say to himself, "Well, I know what [the other witness] said, OK, now I

INGS OF INDEPENDENT COUNSEL KENNETH W. STARR ON PRESIDENT CLINTON AND THE LEWINSKY AFFAIR 121 (Public Affairs 1998).

58 *See, e.g.*, Matthew Rees, *All the President's Lawyers*, WKLY. STD., Mar. 2, 1998, at 15 ("If one doubts that the fix is in to protect Clinton, one need only consider the attorneys representing figures who have been ensnared in the Lewinsky drama. They are a group disinclined to allow any harm to come Clinton's way, even at the expense of a client's interest.").

59 Hanna Rosin, *Mining Monica*, NEW REPUBLIC, Mar. 30, 1998, at 11.

> The joint defense strategy, which allows different lawyers to share information about their clients and still preserve the attorney-client privilege, has been presented as a nefarious Democratic plot to protect Clinton (although it's quite common in white-collar criminal cases). But, if there is a plot, it's driven less by party loyalty than by ancient tribal links. Lawrence Wechsler, Currie's attorney, knows Bennett from the U.S. attorney's office for the District of Columbia, where they were part of a tight clique back in the '70s. When Bennett worked on the Pentagon fraud and abuse cases during the Reagan era, he doled out some of the business to those in the clique, including Gerard Treanor, Nancy Hernreich's attorney, who shared a firm with Cacheris for many years. Both have worked with William Hundley, Vernon Jordan's attorney.

Id.

60 Carl M. Cannon, *Attorney Network Keeps White House Right Behind Starr: Information Is Shared Routinely and Legally Through Clinton Lawyers*, BALT. SUN, Feb. 16, 1998, at 1A (quoting a defense lawyer).

61 As one defense lawyer reported, "A good lawyer will . . . send out an investigator to talk to the lawyer for the witness and say, 'You know, we understand your witness testified yesterday before the grand jury. My client's the target. Would you mind telling me what your client was asked and what your client said?'" *Rivera Live*, *supra* note 12.

know what I can say so we don't contradict each other."[62] At least in this view, the joint defense privilege diminishes the risks involved in collaborative efforts to conceal criminal activity, and it thereby undermines one of society's principal strategies to combat criminal conspiracies. In the words of Charles Wolfram, the joint defense privilege "permits coconspirators to continue to conspire at a common defense, now with the privileged assistance of teams of lawyers."[63]

II. The Rise of the Joint Defense Privilege: Mistaken Reliance on the Attorney-Client Privilege

As the previous Part described, in coordinating a response to a criminal investigation, lawyers, as repeat players in the justice system, introduce the possibility of enforceable promises. Without the joint defense privilege, however, defense attorneys would still be reluctant to share information. Regardless of any reciprocal promises to preserve the secrecy of shared client confidences, lawyers (and their clients) could still be subpoenaed by the grand jury and required to testify.

Whatever else the joint defense privilege is or does, then, most simply put, it enables a client and his attorney to share confidences with another client or attorney without loss of the attorney-client privilege. But central to all definitions of the attorney-client privilege is the requirement that a communication from a client to an attorney is privileged only if it was intended to be, and in fact remains, confidential.[64] A communication from a client to an attorney in the presence of a third person,[65] or with the intent that the communication be revealed to a third person,[66] is not privileged *ab initio*; and if an originally privileged communication is subsequently revealed to a third

62 *Id.* (statement of O.J. Simpson prosecutor Marcia Clark).

63 *See* Wolfram, *supra* note 1, § 6.4.9.

64 *See, e.g.*, United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950) ("The privilege applies only if . . . the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers . . . and the privilege has been . . . not waived by the client."); 8 John H. Wigmore, Wigmore on Evidence § 2292 (McNaughton rev. ed. 1961) (noting that the privilege applies to communications "made in confidence . . . except the protection be waived") (emphasis omitted).

65 *See, e.g.*, *In re* Grand Jury Subpoena Duces Tecum, 406 F. Supp. 381, 386 (S.D.N.Y. 1975) ("[C]ommunications between a client and his counsel in the presence of a 'third party,' i.e., one who stands in a neutral or adverse position vis-à-vis the subject of the communication, bespeaks the absence of such confidentiality and thus belies any subsequent claim to the privilege.").

66 *See, e.g.*, *In re* Ampicillin Antitrust Litig., 81 F.R.D. 377, 390 (D.D.C. 1978) ("[W]here a business proposal is sent to counsel for legal advice, with an accompany-

party, the privilege is said to be waived.[67] This "confidentiality requirement"[68] has the following consequence: when a client makes a disclosure to an attorney and that disclosure is then revealed to a third person, the privilege would seem to have been waived, *regardless* of whether that third person happens to share interests with the client or happens to be an attorney for a person with common interests.

The implications of the confidentiality requirement are captured in an exchange in the book *A Civil Action* between a curmudgeonly judge and a young lawyer. Counsel for defendant W.R. Grace Company resisted discovery of a confidence entrusted in him by counsel for co-defendant Beatrice Foods, provoking the judge's incredulity:

> The judge looked at Cheeseman. "Where's the privilege supposed to be?"
>
> Cheeseman stood to explain. "There was a communication from Beatrice Foods' client to their attorney, which was then communicated to me."
>
> "Well, then," said the judge, "the confidentiality of that is destroyed, isn't it?"
>
> "I think not," said Cheeseman.
>
> "Why not?"
>
> "Because we're engaged jointly in the defense of an action."[69]

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ing expressed intent to disclose the proposal to a third party, the communication will not be deemed to be made in confidence and thus will not be privileged.").

67 *See, e.g., In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) ("[I]f a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels."); *see also* 8 WIGMORE, *supra* note 64, § 2325.

> All involuntary disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take the measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client.

Id. (internal cross-reference omitted).

68 The phrase "confidentiality requirement" is sometimes used in a legal ethics context to refer to the professional requirement undertaken by an attorney to preserve the confidentiality of any client disclosures. *See* MODEL RULES OF PROF'L CONDUCT R. 1.6 (1983). This is *not* the sense in which I use the phrase. Throughout the Article, "confidentiality requirement" refers to the requirement imposed on both client and attorney to preserve the confidentiality of any communications vis-à-vis the rest of the world in order to preserve the attorney-client privilege.

69 JONATHAN HARR, A CIVIL ACTION 112–13 (1995), *quoted in* Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 421 n.167 (2000).

Although the judge would eventually assent to Cheeseman's argument, the joint defense privilege would nonetheless seem, at least at first glance, to be inconsistent with both the confidentiality requirement and the attorney-client privilege, at least as traditionally understood.

In justifying the joint defense privilege, many commentators nonetheless argue that it flows naturally from the attorney-client privilege. But this is incorrect. As this Part demonstrates, the purposes of the attorney-client privilege (together with its confidentiality requirement) are incompatible with the joint defense privilege.

Part II.A sketches the purposes and costs of the attorney-client privilege. The attorney-client privilege is said to promote full and frank disclosures to a lawyer, which is (supposedly) socially desirable insofar as competent legal advice encourages compliance with the law and enables laypersons to explore their legal rights. Critics of the attorney-client privilege, however, have emphasized the costs of the privilege in depriving the factfinder of relevant evidence. Part II.B then turns to the confidentiality requirement, which circumscribes the client disclosures that are protected by the attorney-client privilege and thereby limits the costs of the attorney-client privilege. Although courts have carved out exceptions to the confidentiality requirement in certain contexts, I argue in Part II.C that the logic of those contexts does not extend to "joint defense" situations—that is, situations in which parties with common interests seek to share information without waiver of the attorney-client privilege. Part II.D turns to the first American cases to abandon the confidentiality requirement in the "joint defense" context. In so doing, and in adopting the joint defense privilege, I argue that courts have neglected the social utility of the rigorous application of the confidentiality requirement.

A. The Purposes and Costs of the Attorney-Client Privilege

Before entering the thicket of the joint defense privilege, we need to get a good grasp of the purposes of the attorney-client privilege itself. Although this section may appear to be a digression, it is essential in revealing the flaw in the oft-repeated claim (or implicit assumption) that the joint defense privilege flows naturally from the attorney-client privilege itself. This section will also quickly sketch the costs of the attorney-client privilege, which are often neglected by advocates of the joint defense privilege.

The modern rationale[70] for the attorney-client privilege is that it allows persons to make a full and frank disclosure of factual information to their attorneys. This, in turn, is said to be socially desirable because it facilitates clients' ability to obtain effective legal services. A lawyer's advice, it is argued, allows individuals to determine whether their conduct would or did violate legal rules (and to what extent), as well as how to respond to the legal process.[71]

Virtually since its inception, the modern rationale has attracted criticism. Critics of the privilege emphasize the substantial costs it imposes on the judicial system. Most directly, the privilege denies an adversary and the factfinder of highly probative evidence—to wit, the testimony of the client's attorney. And indirectly the costs may be far greater, as an attorney who is entrusted with information can assist his client in filtering the evidence that reaches the factfinder.[72]

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70 The attorney-client privilege seems to have arisen in Elizabethan times as part of the code of the gentleman that prevented attorneys, as well as other gentlemen, from violating a confidence. *See, e.g.*, Dennis v. Codrington, 21 Eng. Rep. 53 (Ch. 1580). *See generally* JACK B. WEINSTEIN & MARGARET A. BERGER, WEINSTEIN'S FEDERAL EVIDENCE § 503.03[1], at 503–11 (Joseph M. McLaughlin ed., 2d ed. 2002); Geoffrey C. Hazard, Jr., *An Historical Perspective on the Attorney-Client Privilege*, 66 CAL. L. REV. 1061 (1978) (discussing the scope of the attorney-client privilege); Max Radin, *The Privilege of Confidential Communication Between Lawyer and Client*, 16 CAL. L. REV. 487 (1928) (discussing the historical policy of the attorney-client privilege). By the late eighteenth century, the "code of a gentleman" rationale had been discarded as "the need of the ascertainment of truth for the ends of justice loomed larger than the pledge of secrecy." CHARLES T. MCCORMICK, MCCORMICK ON EVIDENCE § 87 (John William Strong ed., 4th ed. 1992).

71 *See* Upjohn Co. v. United States, 449 U.S. 383, 389 (1981).

> [The] purpose [of the attorney-client privilege] is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer's being fully informed about the client.

Id. at 398; *accord* Swidler & Berlin v. United States, 524 U.S. 399, 403 (1998); United States v. Zolin, 491 U.S. 554, 562 (1989); Fisher v. United States, 425 U.S. 391, 403 (1976).

72 *See* Ronald J. Allen et al., *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*, 19 J. LEGAL STUD. 359, 363 (1991) ("Costs may increase because the lawyer may give the client guidance in how to respond honestly but craftily to an interrogatory, thus making the adversary's task of obtaining complete information more difficult."). Allen's article nonetheless concludes that the costs of the attorney-client privilege are outweighed by its benefits. *See id.* at 382–83.

Jeremy Bentham was the earliest and, in many respects, still most compelling critic of the attorney-client privilege.[73] In his *Rationale of Judicial Evidence*, he argued that it was not necessarily socially beneficial to foster candid communications between the client and attorney.[74] To be sure, society wants the "honest" client—the client with nothing to hide—to receive competent legal advice but such a client would make a full disclosure to his attorney regardless of whether the communication was privileged. Thus, the honest client does not benefit from the attorney-client privilege, and indeed would benefit from rules that made attorney-client communications freely discoverable—for his testimony at trial could then be buttressed by his own attorney's testimony. In contrast, Bentham argued, disclosure of client confidences *would* hurt clients who sought, either through silence or misleading testimony, to conceal relevant evidence from the factfinder. To guard against damaging disclosures, such clients would be forced, absent the attorney-client privilege, to filter what they told their own attorneys, with the likely result that they not receive fully effective legal counsel. And surely, Bentham argued, society benefits when "guilty" clients (his shorthand term for clients with something to hide) receive less than fully effective legal counsel.[75]

In response to Bentham's criticism, scholars have developed increasingly sophisticated utilitarian (or instrumental) justifications for the attorney-client privilege. In his 1905 treatise on evidence, Wigmore argued that Bentham's division of clients into the guilty and the innocent was insufficiently nuanced.[76] Often, Wigmore argued, a client with a valid legal claim would be deterred from seeking legal advice, absent the attorney-client privilege, because of a fear of revealing embarrassing or potentially damaging facts.[77]

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73 *See* 5 JEREMY BENTHAM, RATIONALE OF JUDICIAL EVIDENCE (London, Hunt & Clark 1827).

74 *See* 5 *id.* at 302.

75 *See* 5 *id.* at 304, 310.

> What, then, will be the consequence [of abandoning the privilege]? That a guilty person will not in general be able to derive quite so much assistance from his law advisor, in the way of concerting a false defence, as he may do at the present . . . . So much the better. To what object is the whole system of penal law directed, if it be not that no man shall have it in his power to flatter himself with the hope of safety, in event of his engaging in the commission of an act which the law, on account of its supposed mischievousness, has thought fit to prohibit?

5 *id.* at 310.

76 *See* 8 WIGMORE, *supra* note 64, § 2291.

77 8 *id.* Wigmore argued that Bentham's focus on criminal cases hindered his analysis, for it obscured the reality that, in the civil context, there is often "*no hard and*

Dissatisfaction with Wigmore's defense of the privilege[78] has led scholars to seek to place the attorney-client privilege on a surer footing. One influential article, *A Positive Theory of the Attorney-Client Privilege and the Work Product Doctrine*,[79] working within a utilitarian framework supplemented by the insights of law and economics, has argued that the attorney-client privilege is designed to foster client communications when favorable and unfavorable information is mixed, and clients may therefore have "contingent claims" of which they are unaware.[80] Other scholars have abandoned the effort to defend the privilege on a utilitarian basis altogether, arguing that the privilege is justified, regardless of its costs, because it protects the privacy of a socially valued relationship[81] or because it would be "im-

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fast line between guilt and innocence, which will justify us as stigmatizing one or the other party and banning him from our sympathy." 8 *id.* As the line between criminal and civil offenses is increasingly blurred, this criticism of Bentham gains added force.

78 Striking, given its fame and influence, are the logical gaps that pervade Wigmore's defense of the attorney-client privilege. To have seriously engaged Bentham's criticism would have required a demonstration that the attorney-client privilege benefits the "innocent" client more than the "guilty." Even accepting Wigmore's point that *all* clients have something to hide and are thereby in some respects "guilty," the relevant question would still be whether clients with less to hide fare *relatively* better in a world in which communications with attorneys are cloaked in secrecy. To be sure, all clients receive better legal advice when they have made full and complete disclosure to an attorney, but the advantage secured by the client with more to hide likely exceeds the advantage secured by the client with less to hide. If so, even in the civil context, clients with little to hide might be better off in a world without the attorney-client privilege, even if the legal advice they receive is not as capable as that they would receive in a world with the attorney-client privilege.

79 *See* Allen et al., *supra* note 72.

80 *See generally id.* at 362–83. For example, a person accused of breach of contract may be unaware that lack of consideration is a defense, and he may therefore think it necessary to perjure himself and deny that he ever made a promise to bestow a gift.

81 *See* David W. Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101, 110–11 (1956).

> *Whatever* handicapping of the adjudicatory process is caused by recognition of the privilege[s] is not too great a price to pay for secrecy in certain communicative relations—husband-wife, client-attorney, and penitent-clergyman . . . . Therefore, to conceive of the privileges merely as exclusionary rules, is to start out on the wrong road . . . . Primarily they are a right to be let alone, a right to unfettered freedom, in certain narrowly prescribed relationships . . . .

Id. (emphasis added). The patent difficulty with Louisell's argument is that privacy is *not*, in fact, regarded as intrinsically valuable in our judicial system. *See* Allen et al., *supra* note 72, at 373 ("The legal system has routinely sacrificed the privacy of litigants to the interests of justice. A litigant can be required to reveal the most sordid and intimate details of his marriage or even to pull his pants down in front of a jury."). In any event, the relationship between a parent and child is more socially valued than

moral for society to constrain anyone from discovering what the limits of [the law's] power over him are."[82]

But many scholars have continued to sound notes of skepticism as to the social benefits of the attorney-client privilege, belittling arguments that the attorney-client privilege is necessary to foster client disclosures to an attorney[83] and that the privilege promotes compliance with the law.[84] As one distinguished commentator has concluded, af-

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that between an attorney and client, and yet our judicial system does not recognize the privacy of the former: there is no parent-child privilege in the federal system. *See In re* Grand Jury, 103 F.3d 1140, 1146 (3d Cir. 1997).

82 Charles Fried, *Correspondence*, 86 YALE L.J. 584, 586 (1977).

83 Several empirical studies have concluded that a substantial majority of laypersons would continue to confide in lawyers even if secrecy was limited. *See, e.g.*, Vincent C. Alexander, *The Corporate Attorney-Client Privilege: A Study of Participants*, 63 ST. JOHN'S L. REV. 191, 414 (1989).

> The circumstances in which the privilege plays a major role in influencing candor seem to be relatively rare. In day-to-day corporate counseling, the findings suggest that a manager's need to cope with a heavily regulated business environment and his sense of trust in counsel are probably sufficient to produce open communications.

Id.; Fred Zacharias, *Rethinking Confidentiality*, 74 IOWA L. REV. 351 (1989) (presenting an analytical framework for considering exceptions to confidentiality rules); Note, *Functional Overlap Between the Lawyer and Other Professionals: Its Implications for the Privileged Communications Doctrine*, 71 YALE L.J. 1226, 1232 (1962); *see also* Swidler & Berlin v. United States, 524 U.S. 399, 409 n.4 (1998) (summarizing literature on this point).

84 Judge Frank Easterbrook likened the attorney-client privilege, and the corollary work product doctrine, to a property rights regime for lawyers, which protects attorney-generated information and thereby encourages its creation. *See* Frank H. Easterbrook, *Insider Trading, Secret Agents, Evidentiary Privileges, and the Production of Information*, 1981 SUP. CT. REV. 309, 353–64. But Easterbrook remained *dubitante* on the *social* benefits of the information thereby created. *Id.* at 361 ("To say, as the Court did [in *Upjohn Co. v. United States*], that a restriction of the scope of the attorney-client and work product privileges would reduce the investment in information may be to praise that result, not to condemn it."). As Easterbrook notes with respect to the IRS's investigation of illegal payments by Upjohn Co., which culminated in the landmark decision, *Upjohn Co. v. United States*, 449 U.S. 383 (1981), "the firm used its privilege to defeat a claim of access by the IRS, which presumably would have used the information to enforce the laws more accurately." *Id.* at 358. Daniel Fischel has recently intensified this criticism of the *Upjohn* decision. *See* Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1, 28–32 (1998). The Supreme Court in *Upjohn* based its decision on the claim that the attorney-client privilege allows persons to know what the law is and therefore encourages persons (*e.g.*, those confronted with a blizzard of regulations) to take greater steps to comply with the law. Upjohn Co. v. United States, 449 U.S. 383, 389 (1981). Fischel argues that the Court got it exactly backwards: by upholding the claim of privilege, "the Court allowed the company to reduce the expected penalty for its violations. Reducing expected sanctions, however, will increase the number of violations by lowering the cost of noncompliance." Fischel, *supra*, at 31. A slightly more optimistic view of the privilege is reflected in a 1989

ter a sweeping survey of the costs and benefits of the privilege, determining its relative effects on the truth-seeking process is a "stupefying, complex task."[85]

B. The Confidentiality Requirement: Limiting the Costs of the Attorney-Client Privilege

We turn now to the confidentiality requirement of the attorney-client privilege. Because the joint defense privilege would seem to substantially abridge the confidentiality requirement, we need to identify the purposes of the confidentiality requirement and whether those purposes are consistent with the joint defense privilege.

Client-attorney communications are not indiscriminately privileged. As the attorney-client privilege came over time to be justified on a utilitarian basis, the common law circumscribed the privilege's scope to a discrete set of client-attorney communications that society deems, on balance, worthy of protection. That set was limited to factual disclosures made by a client to an attorney for the purpose of obtaining legal advice.[86] And it is limited still further by the confidentiality requirement: the attorney-client privilege does not extend to communications made in the presence of third persons, Wigmore argued, because "[t]he presence of a third person . . . is obviously unnecessary for communications to the attorney as such . . . ."[87] The confidentiality requirement ensures that client disclosures made either in the presence of a third party or with the expectation that the

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article by Louis Kaplow and Stephen Shavell. *See* Louis Kaplow & Stephen Shavell, *Legal Advice About Information To Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565 (1989) (studying not the favorability of the privilege but, rather, the social value of the lawyers' role in selecting information for their clients' presentation to the tribunal). Although, like Fischel, they emphasize the "diluting effect of legal advice" on expected sanctions for criminal offenses, *id.* at 614, they are more receptive to the argument that privileged advice rendered ex ante (that is, prior to litigation and prior to parties having engaged in a course of action) can enhance compliance with law. *Id.* at 597 ("The socially desirable character of legal advice offered ex ante stands in sharp contrast to the questionable social value of advice offered during litigation.").

85 Easterbrook, *supra* note 84, at 361. In this Article, I do not take a stand one way or the other on the desirability of the attorney-client privilege. My narrower purpose is, after a reminder of the costs of the privilege, to question its extension to shared communications among clients and lawyers with common interests.

86 *See* United States v. Davis, 636 F.2d 1028, 1044 (5th Cir. 1981) ("An attorney who acts as his client's business advisor . . . is not acting in a legal capacity, and records of such transactions are not privileged.").

87 *See* 8 WIGMORE, *supra* note 64, § 2311.

disclosures will be relayed to a third party are not protected by the attorney-client privilege.

The confidentiality requirement has recently sparked a lively academic debate. Professor Paul R. Rice, a leading commentator,[88] has advocated the wholesale abandonment of the confidentiality requirement.[89] Surveying the origins of the attorney-client privilege, Rice contends that it is "not clear" how the requirement arose in the first place,[90] but whatever its origins, it serves no purpose today other than to spawn costly litigation.[91] In tacit acknowledgment of the irrationality of the confidentiality requirement, Rice argues, courts have abandoned its stringent application,[92] and one result of this abandonment is the doctrine of the joint defense privilege.[93]

In rising to the defense of the confidentiality requirement, Professor Melanie Leslie refutes many of Rice's arguments.[94] As Leslie shows, Rice's error is in assuming that the purpose of the attorney-client privilege is the same as the purpose of the confidentiality requirement; in fact, the confidentiality requirement "acts in opposition to the privilege by serving an important limiting function."[95] The privilege may exist to induce frank communications from client to attorney, but the limitation imposed by the confidentiality requirement

88 Professor Paul R. Rice is the author of an influential treatise on the attorney-client privilege. PAUL R. RICE, ATTORNEY-CLIENT PRIVILEGE IN THE UNITED STATES (1993).

89 *See* Paul R. Rice, *Attorney-Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished*, 47 DUKE L.J. 853 (1998) [hereinafter Rice, *Attorney-Client Privilege*]. Rice argues that "confidentiality is not a logical imperative of the attorney-client privilege." *Id.* at 860. He reasons that the attorney-client privilege exists to induce clients to be forthcoming with their attorneys; the confidentiality requirement, however, does not advance those purposes one whit. Imagine a client who is "only willing to speak [to an attorney] in a context of secrecy." For such a client, Rice maintains, the confidentiality requirement is unnecessary: the client would preserve the confidentiality of the communication regardless of whether the law attached a penalty to a disclosure to a third party. Now imagine a client who is unconcerned about the secrecy of his communication with an attorney: such a client would make a full disclosure to an attorney with or without a confidentiality requirement. Either way, Rice concludes, the confidentiality requirement is pointless. *Id.* at 853–61; *see also* Paul R. Rice, *A Bad Idea Dying Hard: A Reply to Professor Leslie's Defense of the Indefensible*, 2001 WIS. L. REV. 187, 187 ("[T]he element of confidentiality is a costly and unnecessary diversion from the policies furthered by the attorney-client privilege.").

90 Rice, *Attorney-Client Privilege*, *supra* note 89, at 870.

91 *Id.* at 888–98.

92 *Id.* at 872–80.

93 *Id.* at 878.

94 *See generally* Melanie Leslie, *The Costs of Confidentiality and the Purpose of Privilege*, 2000 WIS. L. REV. 31.

95 *Id.* at 36.

is a recognition of the costs of the privilege in depriving the factfinder of highly relevant evidence. The confidentiality requirement is intended to restrict the scope of communications shielded by the attorney-client privilege to those that would not have occurred but for the existence of the privilege. If a client is willing to communicate in the presence of a third party who may be questioned in a legal proceeding, then he cannot be said to have relied upon the privilege in communicating with an attorney; and if the client, after the fact, discloses the substance of the communication to a third party, this "constitutes good evidence that the privilege was unnecessary to induce the communications to the attorney."[96]

Professor Leslie is, however, less convincing when she defends the joint defense privilege as consistent with the cost-limiting rationale of the confidentiality requirement.[97] The following section shows that the joint defense privilege, unlike other exceptions to the confidentiality requirement, is not consistent with the rationale of limiting costs or of candid disclosure to one's lawyer.

C. Exceptions to the Confidentiality Requirement

The confidentiality requirement is not absolute; under certain circumstances, courts have long recognized that client-attorney communications can be shared with third persons without waiver of the attorney-client privilege. The traditional exceptions are consistent with the purposes of the attorney-client privilege and do not measurably increase the costs of the privilege to society.

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96 *Id.* at 54. A related justification for the confidentiality requirement, not explored by Professor Leslie, is that it works as a protection against the use of the attorney-client privilege as both a sword and shield. As courts have often noted, the "[s]elective disclosure [of privileged information] for tactical purposes waives the privilege." United States v. Jones, 696 F.2d 1069, 1072 (4th Cir. 1982). Selective disclosure can occur in two ways: first, a disclosure *to* selected persons; and second, a disclosure *of* selected materials. The confidentiality requirement to the attorney-client privilege is designed to prevent both. Thus, a party cannot disclose privileged documents to certain individuals and then turn around and claim the privilege against other individuals. *See In re* John Doe Corp., 675 F.2d 482, 489 (2d Cir. 1982). Nor can a party reveal certain privileged documents with respect to a subject matter but then refuse to produce other documents pertaining to the same subject matter. *See* EDNA SELAN EPSTEIN, THE ATTORNEY-CLIENT PRIVILEGE AND THE WORK PRODUCT DOCTRINE 163 (3d ed. 1997).

97 Leslie, *supra* note 94, at 65–66 ("The extension of the joint defense doctrine to co-defendants, or to parties who anticipate becoming co-defendants, in a civil suit does not undermine the confidentiality requirement because clients would not disclose privileged information absent the doctrine.").

The first context in which sharing is permitted is when more than one person retains the same lawyer. Business partners A and B are under investigation for tax fraud; they jointly consult a lawyer after receiving grand jury subpoenas. A makes admissions that are damaging to herself, but which may tend to exculpate B. A and B are later indicted. Can B testify as to the disclosures A made to their joint attorney in B's presence? The modern answer is no.[98] The logic is that A and B are jointly regarded as the client: B is not a "third person" for purposes of determining whether the communication was confidential to begin with, and therefore the privilege cloaks the initial consultation. Although the proposition is debatable, and indeed was once debated,[99] it is at least broadly consonant with the rationale of the attorney-client privilege: the privilege exists to allow a client to communicate frankly with an attorney, and when there is more than one client, the "client unit" should be able to communicate with an attorney without a member of the client unit fearing that any disclosures will later be used against her.

A second situation: what if the client speaks a foreign language? Wigmore allowed that in such a circumstance the attorney and the client could have a translator present when they met, or the client could be interviewed by a translator employed by the attorney, who could translate the client's story for the attorney.[100] For purposes of determining whether the attorney-client privilege existed to begin with or was waived, the translator is not regarded as a "third person." Again, the rule accords with the asserted purposes of the attorney-client privilege—to facilitate communications from client to attorney. Without the assistance of the translator, no meaningful communication, or attorney-client relationship, is possible.

The rule for translators was famously extended to accountants by Judge Henry Friendly in *United States v. Kovel*.[101] In *Kovel*, a tax attorney had directed a client to meet with an accountant under his supervision. The question was whether communications made to the accountant were protected by the attorney-client privilege; Judge Friendly concluded that they were. He noted that, "in contrast to the Tudor times when the privilege was first recognized, the complexities

98 This may not always have been the prevailing view. *See* 5 CHARLES FREDERIC CHAMBERLAYNE, A TREATISE ON THE MODERN LAW OF EVIDENCE § 3693 (1911) (joint client communications not privileged because confidentiality lacking).

99 *See* 5 *id.* § 3693.

100 *See* 8 WIGMORE, *supra* note 64, § 2301 (stating that when an agent's or clerk's help is "indispensable to the attorney" and it is necessary to share client communications with them, such communication does not lose its privileged status).

101 296 F.2d 918 (2d Cir. 1961).

of modern existence prevent attorneys from effectively handling clients' affairs without the help of others . . . ."[102] Since the assistance of agents was "indispensable" to the attorney's work and the communications of the client were "often necessarily committed to them by the attorney or by the client himself," the privilege must include all the persons who act as the attorney's agents.[103] Judge Friendly's conclusion is also in harmony with the rationales of the attorney-client privilege. The privilege exists to encourage clients to confide in, and forge relationships with, their attorneys; the privilege would be a meaningless one if the client's communication is in a form unintelligible to the attorney, either because it is in a foreign language or in the form of arcane "accounting concepts." After all, "[a]ccounting concepts are a foreign language to some lawyers in almost all cases, and to almost all lawyers in some cases."[104]

And we come now to the "joint defense" scenario: client C1 makes disclosures in confidence to attorney A1; A1 seeks to share those confidences with lawyer A2, whose client, C2, shares interests with C1. Can A1 reveal client confidences to A2 in return for a reciprocal disclosure of client confidences? The short answer and simple logic of the attorney-client privilege suggests not. The ability to trade confidences with another lawyer, or another client, does not encourage or enable the client to confide in her attorney, nor does it measurably promote the relationship between the client and the attorney, and *those* are the asserted purposes of the attorney-client privilege.[105]

To be sure, the reciprocal disclosures enable both lawyers to provide their clients with more effective legal representation than would be possible without the disclosures. In this broad sense, the disclosures may be said to resemble the lawyer's disclosure of complicated business data to an accountant. But if the touchstone is simply whether a disclosure of client confidences facilitates legal representation, one could not plausibly limit such disclosures to lawyers. It is easy to imagine circumstances in which a client will feel more comfortable, and be more forthcoming, if he consults with an attorney in the presence of a parent or a close friend, but courts have regularly held

102 *Id.* at 921 (citation omitted).

103 *Id.* (quoting 8 WIGMORE, *supra* note 64, § 2301).

104 *Id.* at 922.

105 *See* WOLFRAM, *supra* note 1, § 6.4.9 ("Rarely in coparty situations will the presence of the third party be at all necessary to facilitate communication between lawyer and client.").

that such communications are not privileged.[106] An attorney is free, of course, to interview a parent of a client, but if the lawyer discloses client confidences in the course of the interview—even to gauge the parent's assessment of the testimony—the privilege is waived.

It is thus important to keep in mind a salient point about the attorney-client privilege: not everything that improves legal representation is covered by the attorney-client privilege. Facilitating legal representation in every possible way is not the touchstone of the privilege; the touchstone is insuring the secrecy of a client's disclosures *to the client's lawyer.* Society allows the client and attorney to preserve the secrecy of their communications because without it, it is assumed, a client would not be able to make a full and frank disclosure to his attorney. The sharing of client confidences with a translator or an accountant (or a paralegal or a secretary) is consistent with the attorney-client privilege and the confidentiality requirement because sharing with such persons furthers the client's ability to communicate meaningfully with his attorney; sharing of client confidences with another attorney does not accord with the attorney-client privilege because it in no sense furthers a client's ability to confide in his attorney. How, then, could the joint defense privilege have arisen?

D. The Growth of the Joint Defense Privilege

We turn to the origins and evolution of the joint defense privilege.[107] Where new evidentiary privileges are urged, the Supreme Court has traditionally cautioned that they be carved out narrowly and developed slowly.[108] The history of the joint defense privilege shows that, in this area, courts have not been mindful of this note of caution. After just a handful of cases in the late nineteenth and early twentieth centuries permitting, in narrowly defined circumstances, the sharing of privileged information, courts in the second half of the twentieth

106 *See* United States v. Evans, 113 F.3d 1457 (7th Cir. 1997) (holding that the presence of a third party at the defendant's meeting with defense attorney precluded the defendant from asserting the attorney-client privilege to prevent the attorney from testifying). Similarly, if an attorney, to better understand what a client had said, had consulted the client's friend and disclosed the substance of the communication, the privilege would be thereby waived.

107 I call it an "evolution," but not in the classical sense of a slow, gradual change over time; it has, rather, constituted an evolution in the modern understanding of a "punctuated equilibri[um]," in which a period of virtual standstill (or equilibrium) is punctuated by an episode of rapid development. *See* Steven Jay Gould & Niles Eldredge, *Punctuated Equilibria: The Tempo and Mode of Evolution Reconsidered,* 3 PALEOBIOLOGY 115, 115 (1977).

108 *See* Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990).

century expanded the joint defense privilege with little thought about its rationale or costs.

As shown below, a flawed understanding of the attorney-client privilege has propelled the expansion of the joint defense privilege. Courts eventually came to assume that any communication to or from a lawyer that enhanced the lawyer's ability to represent his client was protected by the attorney-client privilege; they disregarded the narrow, more accurate rationale for the attorney-client privilege, which is to foster factual disclosures from a client to a lawyer. The flawed understanding of the attorney-client privilege has resulted in the joint defense privilege ballooning out beyond its initial, rather modest origins—helping parties who faced a common litigation opponent work together on a common defense at trial.

1. Origins

Although the first American case seen as adopting the joint defense privilege was decided shortly after the Civil War,[109] other courts were reluctant to embrace it for many decades thereafter. That first case purported to be based on the attorney-client privilege, and in fact did not claim that a new privilege had been created. However, its understanding of the attorney-client privilege was too radical a departure from traditional principles for other courts to quickly follow suit. It disregarded the purpose of the attorney-client privilege and the very real potential for conflicts of interest among criminal defendants. But pressure from the legal profession won in the end, and courts began to ratify the new understanding of the privilege by the 1960s. One limitation that the early cases shared was the apparent requirement that clients had to be parties to actual litigation to enter into joint defense arrangements. Eventually, even this limitation was swept

109 Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822 (1871); *see* Bartel, *supra* note 17, at 886 ("In *Chahoon v. Commonwealth* an American court first recognized the joint defense privilege . . . ."); Patricia Welles, *A Survey of Attorney-Client Privilege in Joint Defense*, 35 U. MIAMI L. REV. 321, 324 (1981) ("Since *Chahoon v. Commonwealth* in 1871, United States courts have recognized the attorney-client privilege in a joint defense."); Rushing, *supra* note 15, at 1277 (identifying *Chahoon* as the "genesis" of the joint defense privilege); Note, *Waiver of Attorney-Client Privilege on Inter-Attorney Exchange of Information*, 63 YALE L.J. 1030, 1032–33 (1954) (concluding that, as of 1954, only two American cases had relied upon a joint defense privilege, *Chahoon*, 62 Va. at 822, and *Schmitt v. Emery*, 2 N.W.2d 413 (Minn. 1942)); Michael Davidson, *The Joint Defense Doctrine: Getting Your Story Straight in the Mother of All Minefields*, ARMY LAW., June 1997, at 18 ("[The joint defense privilege] first appeared in published case law in 1871." (citing *Chahoon*, 62 Va. at 822)); Robert G. Morvillo, *Joint Defense Agreements*, N.Y. L.J., Dec. 3, 1991, at 3 ("The first case to explicitly recognize the privilege was *Chahoon v. Commonwealth* . . . .").

away, as notions of the attorney-client privilege became ever more distended.

The case often cited as demonstrating the privilege's hoary origins, the 1871 Virginia decision *Chahoon v. Commonwealth*, shows how an imprecise understanding of the attorney-client privilege creates a doctrinal muddle that can actually harm defendants. As the final shots of the Civil War were being fired, a wealthy foreigner named Solomon Haunstein, who had settled in Virginia, passed away. His real estate holdings spread throughout the Richmond area, and in the chaotic aftermath of the Civil War a carpetbagger named George Chahoon and a local attorney named Jonathan Sands conspired to defraud the Haunstein estate. They forged a promissory note against the estate and instituted a civil suit to recover on it.[110] At some point, Chahoon and Sands persuaded the executor of Haunstein's estate, Richard S. Saxnay, to join the conspiracy. Although Saxnay originally recognized the note to be a forgery and vowed to fight it, once having joined the conspiracy he acquiesced in a default judgment against the Haunstein estate.[111]

The three were jointly indicted. Apparently recognizing a potential conflict of interest, the three conspirators retained separate counsel. And apparently also recognizing a commonality of interest, the three collaborated at a pre-trial joint strategy meeting. The meeting was attended by the three co-defendants, together with Sands's counsel, Gregory, and Saxnay's counsel, Lyon[112]. (Chahoon's own counsel did not attend the meeting.) The court apparently severed the trials.

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110 *Chahoon*, 62 Va. at 835.

111 The conspiracy was undone by an employee of Saxnay, named Cole, who testified that his employer had originally told him that the note was a forgery but later (presumably after he had entered the conspiracy) claimed that it was genuine. The description by the Virginia Supreme Court of these events in a related case, involving Chahoon's coconspirator Sands, is wonderfully vivid:

> It tends strongly to show, that in the short interval of time between the two conversations with the witness, Cole, an extraordinary change had been wrought in the mind of . . . Saxnay; that he had deserted his impregnable camp and gone over to that of the enemy, and joined him in the assault they were about to make upon that estate which it was his sworn duty to defend. In what way this mysterious change was brought about, by whose agency, and what were the terms of capitulation, we do not know and probably never will. We only how the curator acted afterwards, and in concert with whom, and with what result of action, all of which tends strongly to show that between the two conversations with Cole, Saxnay became one of the conspirators to defraud the estate of Haunstein and convert it all to their own use.

Sands v. Commonwealth, 62 Va. (21 Gratt.) 871, 897–98 (1872).

112 *Chahoon*, 62 Va. at 835.

At Chahoon's trial, the prosecutor called Saxnay. Saxnay testified that, at the strategy meeting, Chahoon stated that he would deny at trial that he had received the money from the fraudulent note. Chahoon sought to rebut this testimony at trial by calling Saxnay's counsel, Lyon. The Virginia Supreme Court, by a vote of two to one, affirmed the trial court's decision to deny Chahoon the testimony of this witness.[113]

The court reasoned as follows. Given that they were under joint indictment for conspiracy, "it was natural and reasonable, if not necessary, that these parties . . . should meet together in consultation with their counsel, communicate to the latter all that might be deemed proper for them to know, and make all necessary arrangements for the defence [sic]."[114] The court observed that the three co-defendants "might have employed the same counsel, or they might have employed different counsel as they did. But whether they did the one thing or the other, the effect is the same, as to their right of communication to each and all of the counsel . . . ."[115] The court concluded: "the counsel of each was in effect the counsel of all, though, for purposes of convenience, he was employed and paid by his respective client."[116] It followed that

> [t]hey had a right, all the accused and their counsel, to consult together about the case and the defence, [sic] and it follows as a necessary consequence, that all the information, derived by any of the counsel from such consultation, is privileged, and the privilege belongs to each and all of the clients, and cannot be released without the consent of all of them.[117]

The *Chahoon* court's conversion of each defendant's counsel into counsel for everyone ("the counsel of each was in effect the counsel for all") is a distortion of the attorney-client relationship and thus the attorney-client privilege. The defendants involved in the defrauding of the Haunstein estate had retained separate counsel for a reason: they were aware that there were potential conflicts among them. Because they chose to retain separate counsel, each had the ability to consult with his own lawyer in confidence. As shown in the discussion of the attorney-client privilege above, ensuring that a client has an opportunity to confide in his own lawyer is the point of the privilege. Despite the court's argument that it was "natural and reasonable" for

113 *Id.* at 845.
114 *Id.* at 839.
115 *Id.* at 841.
116 *Id.* at 842.
117 *Id.*

them all to consult with each other, this joint consultation did not further the purposes of the attorney-client privilege as traditionally understood.

Under the classic rules of the "confidentiality requirement," speaking with a third party—even co-defendants or their lawyers—would waive the attorney-client privilege. Nor should the expectations of the co-defendants matter: it is, or should be, irrelevant that the conspirators thought they could communicate with each other cloaked in the attorney-client privilege. (Such expectations are, after all, shaped in part by judicial decisions, and through the nineteenth century no American case had thrown into question the "confidentiality requirement.") All defendants were represented by counsel, who should have been aware of the risk of waiving the privilege in any conversation in which the confidentiality was not strictly preserved. As the *Chahoon* court notes, it may have been possible for all the co-defendants to retain the same counsel, but the fact is that they did not. The court glossed over the likely reason for separate counsel—the potential conflicts of interest among the defendants—far too quickly in allowing this expansion of the attorney-client privilege.

In the decades that followed *Chahoon*, the issue of privilege in joint defense cases arose on several occasions, and courts repeatedly declined to find a joint defense privilege applicable to the facts of a given case. The Seventh Circuit's 1924 decision *Smale v. United States*[118] is illustrative, particularly that case's probing inquiry into whether a joint defense truly existed.[119] As in *Smale*, courts in the first half of the twentieth century typically proved willing to look closely to see how closely aligned the "common interests" were among the litigants before accepting the parties' representations that they shared interests when inter-client and inter-attorneys communications were made.[120]

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118 3 F.2d 101 (7th Cir. 1924).

119 The facts of *Smale* were similar to those of *Chahoon*. Smale and Carroll were indicted for obstruction of justice. *Id.* at 101. While in jail, immediately after their arrest, the two sent for their attorneys. *Id.* After Caroll's attorney, Igoe, arrived, but before Smale's lawyer arrived, the three met. At trial, Igoe testified as to Smale's statements at that meeting. *Id.* The court allowed this testimony because "Igoe never was employed by Smale, and there is nothing to indicate that Smale ever intended to employ Igoe, or that Igoe led Smale to believe he would serve any defendant other than Carroll." *Id.* at 102.

120 For example, in *State v. Hodgdon*, 94 A. 301 (Vt. 1915), three co-defendants were indicted for burglary. Noting that there was no evidence of a "common defense," the trial court permitted one of the co-defendant's counsel to cross-examine Hodgdon as to a conversation between the cross-examining counsel on the one hand an Hodgdon and his counsel on the other. *Id.* at 302; *see also* Radio Corp. of Am. v.

Indeed, in the first half of the twentieth century, invocation of the privilege was affirmed only once,[121] in the 1942 Minnesota case *Schmitt v. Emery*.[122] Although that case extended the concept to include civil litigation, the *Schmitt* court limited the sharing to a small amount of information that was directly relevant to joint interests.[123] And, as in *Chahoon*, the *Schmitt* court only allowed the privilege after both defendants were confronting pending to the many cases that have followed in their train, for the courts there recognized the sharing of privileged materials only among parties who faced a trial together as co-defendants. This restriction would seem, not only at least at first glance but even after more searching scrutiny, to have a certain plausibility to it. At the trial stage, it can be more clearly determined whether there is a robust common interest among defendants; positions on issues will likely have crystallized to a significant degree by this point, and adverse positions will have been uncovered.

The judicial reluctance to extend the attorney-client privilege naturally had an effect on defense practice, and lawyers were not shy about voicing their concerns, particularly as a lucrative practice in defending antitrust actions was developing. Canvassing the views of lawyers primarily in large New York firms, a 1954 *Yale Law Journal* student note observed that "fear of waiving" the attorney-client privilege often resulted in lawyers deciding to withhold information from others in common legal interest.[124] These lawyers believed the privilege would be especially useful to them in defending antitrust actions. The dearth of precedent afforded courts "great latitude in interpreting the 'joint defense' priniciple,"[125] the student note observed. The note

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Rauland Corp., 18 F.R.D. 440 (E.D. Ill. 1955) (rejecting claim of joint defense privilege); Rediker v. Warfield 11 F.R.D. 125 (S.D.N.Y. 1951) (same).

121 *See* Note, *supra* note 109, at 1032–33.

122 2 N.W.2d 413 (Minn. 1942).

123 *See id.* at 417. That case involved co-defendants sharing notes of a lawyer's interview of a defendant so that they could join together in writing a brief attempting to exclude the interviewing lawyer's testimony. *Id.* at 415. After finding that lawyer's interview was covered by the attorney-client privilege, the court added that the furnishing of the copy of the notes to allow briefing did not waive the privilege. *Id.* at 416.

> The purpose of furnishing counsel a copy was not to disclose its contents. It was furnished solely to accommodate them and thereby to enable them to make their effort and aid more effective in the common cause of excluding the statement. The copy was furnished solely for that limited purpose.

Id. at 417. The *Schmitt* court thus narrowly restricted the scope of the joint defense privilege.

124 *See* Note, *supra* note 109, at 1030 n.2.

125 *Id.* at 1033.

questioned the underlying rationale of the privilege. The author also, not sufficiently attentive to professional pressure, doubted the privilege's prospects for expansion. Because of the "weakness of its policy rationale," the note predicted that the joint defense privilege would not grow significantly.[126] "Enthusiasm for the 'fox hunt' philosophy of litigation is waning, and the tactical advantage in an exchange of information among independently hired attorneys might be deemed of insufficient social importance to justify an extension of the privilege."[127]

The Yale note has not proven prescient. The student writer underestimated the continuing efforts of the bar, especially the elite bar, in persuading courts to expand the privilege. Lawyers continued to press for a "tactical advantage" and proved difficult to resist. Despite the perceived "weakness of its policy rationale," American courts, at counsel's urging, have not only embraced the joint defense privilege but have done so enthusiastically. They have interpreted its coverage far beyond anything originally conceived in *Chahoon* and *Schmitt.*

2. Evolution

The impetus for this expansion was an extremely broad view of the attorney-client privilege. As courts began to look favorably on the joint defense privilege in the 1960s and '70s, they abandoned the idea that the goal of the attorney-client privilege was to promote full and frank disclosures from a client to an attorney. Instead, they adopted the view that the purpose of the attorney-client privilege was the sweeping one of generally making representation of clients "more effective" or of "facilitating representation." As a result of this broad view of the attorney-client privilege, courts cast aside earlier limitations, such as requiring people entering into joint defense agreements to be actual parties to litigation.

The Ninth Circuit in 1964 was the first federal court to embrace the joint defense privilege, and in so doing it dramatically expanded its scope, based on a broad view of the attorney-client privilege. In *Continental Oil Co. v. United States,*[128] the court abandoned what had appeared to be a requirement that litigation have formally commenced before the sharing of privileged information would be permitted. Not surprisingly, given the interest of the elite bar described in the 1954 note, the case involved an antitrust investigation.[129] In

126 *Id.* at 1033–34.
127 *Id.* at 1034.
128 330 F.2d 347 (9th Cir. 1964).
129 *Id.* at 348.

Continental Oil, employees at two companies were called to testify before a grand jury. Both before and after their grand jury appearances, lawyers at the two companies questioned the client/witnesses and prepared interview memoranda, which they then shared with one another.[130] Subpoenas were issued for these memoranda, and the companies moved to quash.[131] The government raised the argument that the *Chahoon* and *Schmitt* cases were distinguishable because the exchange of information in *Continental Oil* occurred before litigation, criminal or civil, had commenced (that is, before an indictment or complaint had been filed).[132] The Ninth Circuit rejected the argument, relying on the attorney-client privilege: "We think that this attempt to distinguish those cases is not valid here. All of the reasons for the creation of the attorney-client privilege are as operative here as if the privilege had been claimed after an indictment had been returned."[133] Crediting the defendants' argument that the lawyers' exchange of memoranda was intended "to make their representation of their clients . . . more effective," the Ninth Circuit declined to infer a waiver of the privilege despite the absence of any pending litigation.[134]

The *Continental Oil* court, following *Chahoon*, rejected *sub silentio* the narrow, traditional purpose of the attorney-client privilege, which is to promote full and frank disclosures from a client to an attorney. Viewed in this manner, the attorney-client privilege would not extend to communications between lawyers, even though such communications might facilitate a lawyer's ability to render advice to a client. The understanding of the attorney-client privilege reflected in *Continental Oil* lacks a meaningfully limiting principle. If any communications that promote "effective . . . representation" are protected by the privilege, there is no plausible argument why sharing should be limited to inter-lawyer communications; surely a lawyer might render more effective advice if he were also able to share client confidences with the client's friends, parent, employers, etc.

Furthermore, the removal of a temporal limitation—that the privilege apply only when litigation is actually pending and not simply anticipated—had the potential to vastly expand the scope of the privilege and to include parties whose interests share little in common. Indeed, the Ninth Circuit swiftly extended *Continental Oil* in *Hunydee*

130 *Id.*
131 *Id.* at 349.
132 *Id.* at 349–50.
133 *Id.* at 350.
134 *Id.* at 348–49.

v. United States[135] to cover parties before indictment whose interests were far from perfectly aligned. Again, in doing so the court relied on the attorney-client privilege.

In *Hunydee*, a husband and wife, under investigation for tax fraud, retained separate counsel. At a pre-indictment meeting with their respective attorneys, Mrs. Hunydee's lawyer stated that he had advised his client to cooperate with the government.[136] Mr. Hunydee and his attorney then conferred for fifteen or twenty minutes, after which he stated to the assembled foursome that he would "plead guilty and take the blame."[137] The plea did not go as planned, and Mr. Hunydee was tried. At Mr. Hunydee's trial, the prosecution called Mrs. Hunydee and her attorney to testify to this statement at the meeting.[138] Although the trial court permitted the testimony, the Ninth Circuit reversed.[139] The *Hunydee* court found that the attorney-client privilege had not been waived, despite the fact that the purpose of the pre-indictment meeting was emphatically not to mount a *joint* defense but to encourage Mr. Hunydee to plead out and thereby relieve Mrs. Hunydee of any criminal exposure.[140] The *Hunydee* court cited *Continental Oil* for the proposition that the attorney-client privilege extends to exchange of information between counsel when the communications "concern common issues and are intended to facilitate representation in possible subsequent proceedings."[141] Neither a joint defense nor pending litigation was necessary any longer.[142] And, as in *Continental Oil*, the *Hunydee* court based its decision on a strikingly broad rationale for the attorney-client privilege, to cover any communications intended to "facilitate representation."[143]

Whether the joint defense privilege extended, in the criminal context, to pre-indictment meetings among attorneys and clients was litigated for at least another decade. In the case of *In re Grand Jury Subpoena Duces Tecum Dated November 16, 1974*,[144] a New York district court acknowledged that "the guidance of precedent in this precise area is rather unexpectedly spare," but relying on *Hunydee*, *Continental Oil*, and *Chahoon*, the court applied the joint defense privilege in the

135 355 F.2d 183 (9th Cir. 1965).
136 *Id.* at 184.
137 *Id.*
138 *Id.*
139 *Id.* at 185.
140 *Id.*
141 *Id.*
142 *Id.*
143 *Id.*
144 406 F. Supp. 381 (S.D.N.Y. 1975).

pre-indictment setting. The court confronted the fact that clients in common interest today may find themselves in an adversarial position tomorrow, but it nonetheless embraced the joint defense privilege as a correlative of the attorney-client privilege itself.[145]

The joint defense privilege has quickly moved farther and farther into uncharted terrain, based on an expansive view of the attorney-client privilege. Courts have continued to chisel at the requirement that parties invoking the joint defense privilege have closely aligned interests, allowing the privilege to cover more and more situations, even where participants had only nebulous interests in common. In *United States v. Zolin*,[146] again in the Ninth Circuit, a party under investigation by a federal grand jury shared documents with third parties who were not directly under investigation. The court nonetheless concluded that the disclosure did not result in a waiver of the privilege: "Even where the non-party who is privy to the attorney-client communications has never been sued on the matter of common interest and faces no *immediate* liability, it can still be found to have a common interest with the party seeking to protect the communications."[147] The target of the investigation (Ron Hubbard, the founder of the Church of Scientology) faced criminal liability as a result of possible violations of the tax laws; the third parties faced no legal exposure at the time, but were members of the church and therefore had, in the court's view, "'a common interest' in sorting out the respective affairs of the church and Mr. Hubbard."[148] Thus, a common housekeeping interest, together with the possibility of future litigation together, was deemed sufficient to invoke the joint defense privilege.

The often tenuous nature of the common interest linking parties in a joint defense agreement is thrown into bolder relief in *Chan v. City of Chicago*.[149] There, the court recognized a joint defense agreement that had been entered into by defendants and a third party, even though the civil suit was over two years old and the plaintiff had

145 *Id.* at 389. The court wrote

> The [attorney-client] privilege is . . . born of the law's own complexity. The layman's course through litigation must at least be evened by the assurance that he may, without penalty, invest his confidence and confidences in a professional counselor. That assurance is no less important or appropriate where a cooperative program of joint defense is helpful or, *a fortiori*, necessary to form and inform the representation of clients whose attorneys are separately retained.

Id. at 388 (citing United States v. Kovel, 296 F.2d 918 (2d Cir. 1961)).

146 809 F.2d 1411 (9th Cir. 1987).

147 *Id.* at 1417 (emphasis added).

148 *Id.*

149 162 F.R.D. 344 (N.D. Ill. 1995).

given no indication that he intended to name the third party as a defendant.[150] The court did suggest that "there must be some realistic basis for believing that someone will become a joint defendant before a joint defense privilege can arise,"[151] although some commentators have rejected such a restriction: "Only if there is no common interest and the interests of the parties are totally antagonistic will the privilege be denied."[152]

The rapid development of the joint defense privilege over the course of a few decades contrasts with the slow and careful development of the attorney-client privilege over centuries. Previously, courts addressing the attorney-client privilege took at least some account of the truth-defeating functions of the privilege and weighed those costs against any possible benefits. But in the area of the joint defense privilege, some courts treat the phrase "attorney-client privilege" as a mind-numbing mantra, and dazed by its power, they have authorized all manner of exchanges, irrespective of how aligned or incongruent the clients' interests may be or to what extent the privilege may hamper discovery of the truth.

III. CURRENT STATUS OF THE JOINT DEFENSE PRIVILEGE

The joint defense privilege is characterized today by a core certainty as to the existence of a privilege of some sort and a confounding uncertainty as to the precise details. As I show in this Part, threading through all of the doctrines that now cluster around the newly minted privilege is a misguided and imprecise analogy to the

150 *Id.* at 346.

151 *Id.*

152 2 WEINSTEIN & BERGER, *supra* note 70, § 503(b)[06], at 503-100 to 503-101. Although this view has been overwhelmingly rejected, *see, e.g.*, United States v. Aramony, 88 F.3d 1369, 1392 (4th Cir. 1996); Loustalet v. Refco, Inc., 154 F.R.D. 243, 248 (C.D. Cal. 1993), one court has adopted the Weinstein and Berger approach and in so doing set the high water mark to date of the joint defense privilege. *Visual Scene, Inc. v. Pilkington Bros.*, 508 So. 2d 437 (Fla. Dist. Ct. App. 1987), in which a Florida state court recognized a joint defense privilege between parties on *opposite* sides of a civil suit, dramatically illustrates the sweep of the privilege in some jurisdictions today. *Id.* at 442. The plaintiff VSI, a distributor of sunglasses to drugstores, sued Pilkington, a glass supplier, and Metro, a glass processor. *Id.* at 439. VSI and Metro argued that the glass supplied by Pilkington was defective, although VSI also contended that Metro had acted negligently in processing the glass. *Id.* VSI and Metro exchanged privileged materials to further their joint argument that Pilkington had acted negligently. *Id.* at 439–40. The court concluded, "To extend the common interest privilege to parties aligned on opposite sides of the litigation for another purpose is not inconsistent with any policy underlying the attorney-client privilege and merely facilitates representation of the sharing parties by their respective counsel." *Id.* at 441–42.

attorney-client privilege. This imprecision at the origins of the joint defense privilege has resulted not simply in academic uncertainty about the privilege's nature and limits, but also in a growing number of litigated cases.

Part III.A quickly catalogs the basic uncertainties that surround the joint defense privilege, from the questions over the proper name to the legal tests that have emerged in the courts and legislatures. Parts III.B through III.E sketch the uncertain contours of the privilege, parsing the explicit language and implicit concepts in the three-pronged test that has evolved in the federal courts. The joint defense privilege is revealed to be a doctrinal hodgepodge. Courts have failed to clarify what communications are protected by the joint defense privilege,[153] and they have divided as to how closely aligned the interests of parties must be in order to invoke the privilege.[154] There are, in addition, persisting questions as to the enforceability of joint defense agreements[155] and as to the ethical duties owed by attorneys in joint defense arrangements to clients other than their own.[156] As I discuss in Part III.F, these, and myriad other, uncertainties have prompted demands for greater "certainty" in the application of the joint defense privilege and even for the development of a wholly independent privilege.

A. The Uncertainties of the Basic Tests

The question marks that characterize the joint defense privilege begin with its name. Although the phrase "joint defense privilege" is the historical front-runner since its birth in 1975,[157] it has recently met with competitors. In particular, "'common interest' doctrine"[158] seems to be gaining ground, followed by a legion of minor candidates, struggling against the odds to attain respectability. The candidates include: "'common interest' privilege,"[159] "common interest rule,"[160] "common defense doctrine,"[161] "joint interest privilege,"[162] "joint

153 *See infra* Part III.B.

154 *See infra* Part III.C.

155 *See infra* Part III.D.

156 *See infra* Part III.E.

157 *In re* Grand Jury Subpoenas Duces Tecum Dated Nov. 16, 1975, 406 F. Supp. 381, 395 (S.D.N.Y. 1975).

158 *In re* Lindsey, 158 F.3d 1263, 1279 (D.C. Cir. 1998).

159 *In re* Grand Jury Subpoena, 119 F.3d 750, 753 (9th Cir. 1997).

160 United States v. Schwimmer, 892 F.2d 237, 243 (2d Cir. 1989).

161 Andritz Sprout-Bauer, Inc. v. Beazer East, Inc., 174 F.R.D. 609, 634 (M.D. Pa. 1997).

162 *In re* Sealed Case, 29 F.3d 715, 716 (D.C. Cir. 1994).

prosecution privilege,"[163] "joint interest doctrine,"[164] "common purpose theory,"[165] and "pooled information exception."[166] Sniffing in disgust at the judicial morass of "mangled concepts," Wright and Miller argue that the proper name is "allied lawyer doctrine,"[167] and at least one court thought that had a nice ring to it.[168]

Indeed, if "[t]he first step to wisdom is calling a thing by its right name,"[169] whoever coined the phrase "joint defense privilege" may have never reached step two. Is it a "privilege" in its own right[170] or simply an exception to the confidentiality requirement of the attorney-client privilege?[171] And "defense": does it apply only to defendants? What about parties anticipating litigation but not currently confronting it? And finally, "joint": can *any* parties with common legal (or simply commercial) interests avail themselves of the privilege? Is "joint" akin to "common," in the sense that parties joined together in a class action, for example, must evince a commonality of interest?[172] The questions multiply, as does the suspicion that "joint defense privilege" may fail to capture the complexity of the concept it purports to label.

All fifty states have embraced the joint defense privilege in some form. In roughly half the states, the privilege has been legislatively codified. Some legislatures[173] have adopted privilege rules drawn from the evidentiary rules proposed by the Supreme Court in 1971,

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163 *In re* Imperial Corp. of Am., 174 F.R.D. 475, 478 (S.D. Cal. 1997).

164 A-Mark Auction, Inc. v. Am. Numismatic Ass'n, No. 3-99-MC-0014P, 1999 U.S. Dist. LEXIS 15192, at *4 (N.D. Tex. Sept. 27, 1999).

165 Virgin Islands v. Joseph, 685 F.2d 857, 862 (3d Cir. 1982).

166 Visual Scene, Inc. v. Pilkington Bros., 508 So. 2d 437, 440 (Fla. Dist. Ct. App. 1987).

167 8 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, JR., FEDERAL PRACTICE AND PROCEDURE § 5493 (Supp. 2001) ("Federal courts continue to confuse the allied lawyer doctrine, which applies when parties with separate lawyers consult together, and the joint client doctrine, which applies when two clients share the same lawyer, by using the phrase 'joint defense privilege' to mangle the . . . concepts."); *id.* § 5493 n.91 (citing cases that "mangle the . . . concepts").

168 Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 435 n.1 (Bankr. S.D.N.Y. 1997).

169 Roulette v. City of Seattle, 97 F.3d 300, 302 (9th Cir. 1996).

170 This conclusion is reached, for example, in Bartel, *supra* note 17.

171 *See* Davidson, *supra* note 109, at 21 ("The joint defense doctrine acts as an exception to the general rule that disclosure of confidential attorney-client communications to a third party waives the privilege . . . .").

172 *See* FED. R. CIV. P. 23(b)(3); Ortiz v. Fibreboard Corp., 527 U.S. 815, 827–28 (1999).

173 These states are Alaska, Delaware, Idaho, Nebraska, Nevada, New Mexico, Oregon, and Wisconsin.

but ultimately not adopted by the U.S. Congress,[174] which included a provision permitting parties to share information without waiver of the attorney-client privilege.[175] For example, the Alaska statute provides that

> [a] client has a privilege to refuse to disclose and to prevent any other person from disclosing the confidential communications made for the purpose of facilitating the rendition of the professional legal services to the client . . . by the client or the client's lawyer to a lawyer representing another in a matter of common interest.[176]

Other legislatures have adopted an evidentiary privilege modeled on the more stringent Uniform Rule of Evidence 502(b), which requires that litigation be actually pending for the privilege to apply.[177] In the remaining states, courts have exercised their power to make common law and have, over the years, developed a joint defense privilege.[178] Whether the privilege has been created legislatively or by the courts, it remains vague and difficult to define in nearly every jurisdiction.

Federal courts have stumbled forward in the creation of a privilege without any legislative guidance. The test now regularly applied in federal court, albeit with varying results from jurisdiction to jurisdiction, provides as follows: to invoke the joint defense privilege, a

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174 By not adopting the evidentiary rules, Congress intended "to leave privilege questions to the courts rather than attempt to codify them." United States v. Weber Aircraft Corp., 465 U.S. 792, 804 n.25 (1984).

175 *Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States, Proposed Rules of Evidence for the United States Courts and Magistrates* (1971), *in* 51 F.R.D. 315, 361–62 (1971) (regarding Rule 503(b)(3)).

176 ALASKA R. EVID. 503(b).

177 These states are Arkansas, Hawaii, Maine, Mississippi, New Hampshire, North Dakota, Oklahoma, South Dakota, Texas, and Vermont. Texas's code is illustrative; it provides that the joint defense privilege protects

> [c]onfidential communications made for the purpose of facilitating the rendition of professional legal services . . . by the client or a representative of the client, or the client's lawyer or a representative of the lawyer, to a lawyer or a representative of a lawyer representing another party in a pending action and concerning a matter of common interest therein.

TEX. R. EVID. 503(b)(1)(C); *see also* Ryals v. Canales, 767 S.W.2d 226, 229–30 (Tex. Crim. App. 1989) (rejecting joint defense privilege because there was no pending action at time of sharing). States that have adopted the Uniform Rules of Evidence require pending litigation. *See* Boston Auction Co. v. W. Farm Credit Bank, 925 F. Supp. 1478, 1482–83 (D. Haw. 1996) (applying Hawaii evidence law and rejecting joint defense privilege where there was no "pending action").

178 The New York bar has recently recommended that the legislature amend the code of evidence to recognize the joint defense privilege. *See* NEW YORK BAR RECOMMENDATION, *supra* note 17.

party must show that "(1) the communications were made in the course of a joint defense effort, (2) the statements were designed to further the effort, and (3) the privilege has not been waived."[179] Placed side by side with Judge Wyzanski's famous ten-part test for evaluating the existence of an attorney-client privilege,[180] or Wigmore's almost equally detailed definition,[181] the current federal standard for the joint defense privilege is lacking in rigor and instantly generates more questions than it settles. Nor should this be surprising, given that the attorney-client privilege evolved over centuries, calibrated to address the competing demands of society—for every person's evidence—and the individual—for effective legal representation, but the joint defense privilege emerged suddenly and developed with little attention to first principles or the costs of the privilege.

B. Communications

Communications made in the course of a joint defense effort.[182] The ambiguities embedded in the current definition of the joint defense privilege begins with *communications.* The classic definitions of the attorney-client privilege[183] concretely specify what communications are

179 Haines v. Ligget Group, Inc., 975 F.2d 81, 94 (3d Cir. 1992); *see, e.g., In re* Sealed Case, 29 F.3d 715, 718–19 (D.C. Cir. 1994); United States v. Bay State Ambulance & Hosp. Rental Serv., 874 F.2d 20, 27–28 (1st Cir. 1989). I focus below on the federal standard because most sophisticated criminal investigations are ordinarily undertaken at the federal level.

180 *See* United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358–59 (D. Mass. 1950).

> (1) [T]he asserted holder of the privilege is or sought to become a client; (2) the person to whom the communication was made (a) is a member of the bar of a court, or his subordinate and (b) in connection with this communication is acting as a lawyer; (3) the communication relates to a fact of which the attorney was informed (a) by his client (b) without the presence of strangers (c) for the purpose of securing primarily either (i) an opinion on law or (ii) legal services or (iii) assistance in some legal proceeding, and not (d) for the purpose of committing a crime or tort; and (4) the privilege has been (a) claimed and (b) not waived by the client.

Id.

181 8 WIGMORE, *supra* note 64, § 2292.

> (1) [W]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) except the protection be waived.

Id.

182 *See supra* note 179 and accompanying text.

183 *See supra* notes 180–81 and accompanying text.

protected by the privilege: factual disclosures from a client to an attorney made to solicit legal advice.[184] By contrast, precisely what "communications" fall within the ambit of the joint defense privilege has been open to interpretation and evolution. The earliest federal case to adopt the privilege (*Continental Oil*) involved communications among lawyers whose clients shared a legal interest;[185] the next case (*Hunydee*) expanded the privilege to communications among lawyers *and clients* when the latter shared common interests.[186]

This, however, does not capture the breadth of the doctrine as it has evolved, for communications between two clients directly are now cloaked in the joint defense privilege, providing that one of their lawyers (or even, in some jurisdictions, one of the agents of one of the lawyers)[187] is present when the conversation occurs. Courts have generally balked at regarding communications between clients directly, which are conducted outside the presence of an attorney or his agent, as cloaked in the privilege.[188] At least one court has, however, recently abandoned even this requirement, drawing upon developments in the law of the attorney-client privilege.[189] The full range of communications potentially sheltered by the joint defense privilege is thus, at this time, indeterminate.

C. Joint Defense Effort

Yet more problematic is the phrase "joint defense effort." How joined, or identical, must the interests of persons be if they endeavor

184 *See United Shoe Mach. Corp.*, 89 F. Supp. at 358 (limiting the attorney-client privilege to "communication[s] relat[ing] to a fact of which the attorney was informed").

185 330 F.2d 347 (9th Cir. 1964); *see also supra* text accompanying notes 128–35.

186 355 F.2d 183 (9th Cir. 1965); *see also supra* text accompanying notes 135–43.

187 *See* United States v. McPartlin, 595 F.2d 1321 (7th Cir. 1979) (ruling that statements made by a co-defendant to an investigator acting for defendant's counsel were protected from disclosure by the co-defendant's attorney-client privilege). In *McPartlin*, two co-defendants (McPartlin and Ingraham) jointly planned to discredit a government witness. *Id.* at 1335. In the course of these preparations, McPartlin made incriminating statements to an investigator employed by Ingraham's attorney. *Id.* At trial, Ingraham sought to introduce into evidence statements made by McPartlin to the investigator. *Id.* The court sustained McPartlin's objection that the statements were protected by the attorney-client privilege. *Id.*

188 *See* United States v. Gotti, 771 F. Supp. 535, 545 (E.D.N.Y. 1991); Schachar v. Am. Acad. of Opthalmology [sic], Inc., 106 F.R.D. 187, 191–92 (N.D. Ill. 1985); *see also* John Labatt LTD v. Molson Breweries, 898 F. Supp. 471, 476–77 (E.D. Mich. 1995) (holding that communications are privileged only if the party receiving the information is a "conduit" to the other party's attorney).

189 IBJ Whitehall Bank & Trust v. Cory & Assocs., Inc., No. 97 C5827, 1999 U.S. Dist. LEXIS 12440, at *20 (E.D. Ill. Aug. 12, 1999).

to embark on a joint defense? Can *any* two or more persons claim a common interest and, in this way, avail themselves of the joint defense privilege? The history of the joint defense privilege reflects the dilution of a requirement that parties invoking the joint defense privilege have the sort of discrete and vigorous common interest that emerges when parties face a common litigation adversary. As we shall see, this dilution leads to the problem of the innocent witness being drawn into cooperation arrangements with the guilty.

Whereas in *Chahoon*, the joint defense was mounted by co-defendants—that is, persons jointly facing a prosecutor—subsequent cases have permitted a claim of a joint defense privilege before an indictment has been filed. Courts have failed to explain why, however, a criminal investigation necessarily generates a *common* interest, let alone a common *legal* interest. Illustrative is the *Hunydee* case, where the Ninth Circuit leapt to the conclusion that a husband and wife under investigation for tax fraud thereby—that is, as a consequence of the investigation—had a common interest. Another view, bolstered by the fact that the two had retained separate counsel, is that the investigation did not align the spouses' interests but divided them, rendering the application of the *joint* defense privilege inappropriate.

If two business partners are being investigated for tax fraud, one may raise as a defense that he was unaware of the records submitted by the other. Because the denial of the willfulness required for tax fraud may depend on one partner's shifting the blame to the other,[190] the "innocent" partner has an interest in aligning himself with the prosecutor. The "innocent" partner may nonetheless prefer to identify himself with his guilty partner, possibly out of friendship or a concern that a tax fraud indictment would injure his commercial enterprise. But courts have overwhelmingly rejected, at least in the civil context, the extension of the joint defense privilege to those who share emotional or commercial, as opposed to legal, interests: unless parties face pending, or reasonably anticipated, *litigation* together, they cannot avail themselves of the joint defense privilege.[191] But in

190 *See* United States v. Pomponio, 429 U.S. 10, 11 (1976); United States v. Bishop, 412 U.S. 346, 361 (1973) (holding that "willfully" requires no more than an intentioned violation of a known legal duty).

191 Concededly, the distinction between a commercial interest and a legal interest may not be wholly clear. *See In re* Subpoena Duces Tecum Served on N.Y. Marine & Gen. Ins. Co., M 8-85 MHD, 1997 WL 599399, at *4 (S.D.N.Y. Sept. 26, 1997) ("Although the distinction between a common legal, as opposed to a commercial, interest is somewhat murky, a common legal interest has been defined as one in which the parties have been, or may potentially become, co-parties to a litigation, . . . or have a

the context of a criminal investigation, courts have abandoned any inquiry into the nature of the *common* interest.[192]

In the typical white-collar investigation, the number of persons called to testify before a grand jury may run into the dozens, and, unlike the two business partners discussed above, they typically hold, or have held, unequal roles in their organization. Most of these persons face little or no criminal exposure. These are the bookkeepers, the secretaries, the paralegals, who are questioned as to what they saw, or were told, or were ordered by their superiors to do. The prosecutor has no grounds for suspicion that they have committed any crimes, but he needs their testimony to determine if others have. The joint defense privilege purportedly enhances a lawyer's ability to render legal advice, but in the case of such a peripheral witness, it is unclear how the witness benefits (in the form of enhanced legal advice), for to begin with he faces no legal exposure.

Complicating the situation further is the fact that the witness's lawyer may have been provided by the subject's or target's lawyer. The witness's lawyer may be grateful for the referral (and hoping for more work) and may seek to repay the favor by encouraging his client to craft a story that does not incriminate the target of the investigation (who is often the witness's employer).[193] Often, low-level employees in a criminal enterprise face some criminal exposure, but the prosecu-

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'coordinated legal strategy.'") (citations omitted). But courts have looked to whether the parties claiming the joint defense privilege are together confronting pending or anticipated litigation. *See In re* Grand Jury Subpoenas 89-3 & 89-4, 734 F. Supp. 1207, 1212 (E.D. Va. 1990) ("Movant invites the Court to extend the joint defense privilege to include entities who are not parties to the litigation, but who merely have a pecuniary interest in it. The Court declines this invitation."), *aff'd in part and vacated in part*, 902 F.2d 244, 249 (4th Cir. 1990).

> Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims. The district court's ruling, apparently based on the notion that the joint defense privilege is limited to codefendants, was in error.

Id.

192 *See, e.g.*, United States v. Zolin, 809 F.2d 1411, 1417 (9th Cir. 1987) (affirming district court's finding that parties "'had a common interest' in sorting out the respective affairs of the Church and Mr. Hubbard" and noting that all those present at the meeting were church employees).

193 Some observers have drawn attention, rightly or wrongly, to the ordeal endured by White House steward Bayani Nelvis during the Independent Counsel's investigation of President Clinton. Rosin, *supra* note 59, at 11.

tor is more interested in pursuing their higher-ups. The prosecutor may be prepared to grant the employee a favorable deal in return for testimony against his employer or superiors.[194] The witness's lawyer may nonetheless emphasize the benefits of "hanging together" with all the others ensnared in the investigation (including, of course, the superior, who may have the most to lose) or in crafting a "unified story" to tell prosecutors. Whether this really works to the employee's advantage in organized crime and white-collar investigations is an insufficiently studied question.[195]

There is, however, reason for doubt. For example, in response to "Operation Uncover" in the late 1980s, a federal probe into the mis-

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> Take the case of Joseph Small, the relatively obscure attorney representing Bayani Nelvis, the White House steward. Small seems just a little too tethered to the White House. After an erroneous report appeared saying Nelvis had told both the Secret Service and the grand jury that he had seen the president and Monica alone together, Small issued a statement calling it "absolutely false." But the statement came from the White House, not from Small's law firm. This aroused Starr's suspicions, prompting him to recall Nelvis before the grand jury for more grilling.

Id.; Judy Keen & Kevin Johnson, *Clinton's Lawyer Lays Groundwork Via Defense Pacts*, USA TODAY MAG., Aug. 14, 1998, at 1A.

> [President Clinton's lawyer David] Kendall also has a cooperation agreement with Joseph Small, the lawyer for White House steward Bayani Nelvis, who is not in any apparent legal peril. [Law professor Jonathon] Turley says this might constitute an inappropriate use of joint defense agreements and may put pressure on Nelvis to give testimony favorable to Clinton. "A joint defense agreement places enormous pressure on these White House employees to conform to the president's account and the collective defense," he says. "It can create an extremely coercive environment for low-level employees."

Id. Also worthy of consideration is the saga of Lisa Ann Jones, a low-level employee at Drexel Burnham, whose lawyer represented Drexel as well in the larger probe. Jones was ultimately charged with, and convicted of, perjury. *See* Richard H. Underwood, *Perjury! The Charges and the Defenses*, 36 DUQ. L. REV. 715, 761–64 (1998).

194 Prosecutors, for example, enjoy essentially unreviewable discretion in charging decisions, *see* McCleskey v. Kemp, 481 U.S. 279, 312 (1987), and in decisions to recommend downward departures from the Sentencing Guidelines. *See* U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2001).

195 *Cf.* ALAN DERSHOWITZ, THE BEST DEFENSE 398–99 (1982).

> The bosses have an interest in assuring that their own lawyers—lawyers they are paying—are representing the mules. The last thing the boss wants is for an independent lawyer—or worse, a lawyer friendly to the prosecutors—to encourage the mules to buy their freedom in exchange for turning in the boss . . . . [A] smart boss will generally try to retain the best possible lawyers for his mules. But he will try to get lawyers who will urge the mules to "fight rather than switch" allegiances.

Id.

use of classified documents by major defense contractors, Raytheon Co. secured counsel for one of its employees, John Kiely.[196] It then entered into a joint defense agreement with Kiely, pursuant to which documents were exchanged and a collaborative defense mounted to the investigation.[197] Apparently lulled by Raytheon's soothing promises, Kiely and his attorney declined to cooperate with the prosecutors.[198] After Raytheon struck a deal with prosecutors, they predictably directed their fire at the $60,000 per year middle manager, who was convicted by a jury of conspiring to defraud the government by illegally using classified documents.[199] As Kiely learned, the fact that two parties both face criminal exposure does not mean that their interests are necessarily aligned. Courts and other commentators, however, persist in glossing over this reality. The assumption that any two or more persons who are being questioned, or who are under investigation, somehow share a common legal interest is simply not necessarily the case.

D. Agreement

Statements were designed to further the joint defense effort.[200] Even parties that actually share a common legal interest may not have embarked on a joint defense. If two persons are being questioned by a grand jury, there may then be, under the current view, the requisite common interest to justify the creation of the joint defense privilege, but unless the two have actually *agreed* to "further" a joint defense, any materials shared will not be covered by the joint defense privilege. For the joint defense privilege to exist, then, courts have insisted that there be an explicit "agreement" manifesting that a "joint defense effort" has been undertaken.[201] This requirement has led to further confusion, however, because it marks a significant divergence from the attorney-client privilege.

The attorney-client privilege can exist even if an attorney and prospective client never agree that the attorney will undertake the representation. The privilege is inferred by law when a person con-

196 *See* Kiely v. Raytheon Co., 914 F. Supp. 708, 710 (D. Mass. 1996).

197 *See id.*

198 *See id.*

199 *Id.* at 711; Zitner, *supra* note 4, at 65.

200 *See supra* note 179 and accompanying text.

201 *See* United States v. Sawyer, 878 F. Supp. 295, 295 (D. Mass. 1995) (finding no joint defense agreement because defendant did not prove that the communications at issue were made "during the course of a joint defense agreement"); SIG Swiss Indus. v. Fres-Co Sys., USA, Inc., No. 91-0699, 1993 U.S. Dist. LEXIS 3576, at *7 (E.D. Pa. Mar. 17, 1993).

sults with an attorney, or one reasonably believed to be an attorney, with a view towards obtaining legal services.[202] Courts have extended the protection of the attorney-client privilege to disclosures made by a person in the mistaken, although subjectively reasonable, belief that an attorney-client relationship could develop.[203] By contrast, courts have rejected such arguments in the context of the joint defense privilege, concluding that "one party's mistaken belief about the existence of a joint defense does not, and cannot, give rise to a joint defense privilege."[204]

Illustrative is *United States v. Weissman*,[205] where the Second Circuit declined to infer a joint defense agreement even where there was considerable evidence to support the defendant's claim that he believed such an agreement existed.[206] In *Weissman*, a company chief financial officer (CFO) and the company itself were under investigation by a congressional committee. Perceiving themselves to have common interests, they and their lawyers shared information for several weeks.[207] Eventually, documents were uncovered indicating that the CFO (Weissman) faced personal criminal liability.[208] At a meeting on June 16, 1993, attended by Weissman, his lawyers, and the company's lawyers, the CFO made disclosures that were damaging to himself.[209] At a meeting the following day, Weissman made similar disclosures.[210] After the company decided to cooperate with prosecutors, its lawyers turned over notes taken at both meetings.[211] The notes from the June 17 meeting included a reference to a joint defense agreement, and prosecutors sealed off the notes and made no use of them.[212] However, seeing no references to a joint defense

202 MCCORMICK, *supra* note 70, at § 88 ("Communications in the course of preliminary discussions with a view to employing the lawyer are privileged though the employment is in the upshot not accepted."). In *Westinghouse Electric Corp. v. Kerr-McGee Corp.*, 580 F.2d 1311 (7th Cir. 1978), for example, the court rejected the view that the attorney-client relationship "'arises *only* when the parties have given their consent, either express or implied.'" *Id.* at 1316 (citation omitted).

203 Thus, for example, a disclosure to someone mistaken for a lawyer may be protected by the attorney-client privilege. *See* United States v. Boffa, 513 F. Supp. 517, 522–23 (D. Del. 1981).

204 *Sawyer*, 878 F. Supp. at 297 n.1 (citing *In Re* Bevill, Bressler & Schulman Asset Mgmt. Corp., 805 F.2d 120 (3d Cir. 1986)).

205 195 F.3d 96, 98–99 (2d Cir. 1999).

206 *Id.*

207 *See id.* at 98.

208 *Id.*

209 *Id.*

210 *See id.* at 98–99.

211 *Id.* at 99.

212 *Id.*

agreement in the June 16 notes, the prosecutors relied upon them in developing information against the CFO.[213]

Weissman moved to dismiss the indictment, alleging that the use of the June 16 notes was improper, and the Second Circuit affirmed the district court's denial of the motion.[214] The court of appeals reasoned that "prior to Weissman's June 16th revelations, Empire had no reason to know of his wrongdoing . . . . Some form of joint strategy is necessary to establish a [joint defense agreement], rather than merely the impression of one side as in this case."[215] The court implicitly accepted the conclusion that once Empire was alerted to Weissman's personal liability, the company was free to enter into a joint defense agreement with him. What prevented the formation of a joint defense effort on or prior to June 16 was not the absence of a joint interest in concealing Weissman's wrongdoing but the absence of a knowing agreement between Empire and Weissman that extended to the concealment of Weissman's personal wrongdoing.

The unanswered (and, indeed, unasked) question is why such an agreement—in effect, a "meeting of the minds" between two persons to conceal the wrongdoing of one of them—should be given judicial effect in the first place. In most circumstances, an agreement to conceal evidence is disfavored.[216] Two persons can, of course, contract not to volunteer information to a third, but such an agreement is generally not enforceable in a judicial proceeding.[217] As Wigmore notes,

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213 *See id.*

214 *Id.* at 98. The district court canvassed the case law and concluded that the Ninth Circuit was on "one end of the spectrum" in holding that "the joint defense privilege arises out of and protects any general-purpose meeting in which codefendants discuss matters of common interest." United States v. Weissman, No. 5194 CR 760 CSH, 1996 WL 737042, at *7–*8 (S.D.N.Y. Dec. 26, 1996). Other circuits, the district court found, "required evidence of common defense strategy or activity between the parties before extending to them the protections of joint defense privilege." *Id.* at *8. The district court correctly predicted that "the Second Circuit, unlike the Ninth Circuit, is unwilling to infer a joint defense agreement from the simple circumstance of a general purpose meeting." *Id.* at *9.

215 *Weissman*, 195 F.3d at 99–100 (citations omitted).

216 *See, e.g.*, Raytheon Co. v. Superior Court, 256 Cal. Rptr. 425, 427 (Ct. App. 1989) (stating that "a bargain to suppress evidence is disfavored for obvious reason").

217 For example, in *Williamson v. Superior Court*, 135 Cal. Rptr. 744 (Ct. App. 1977), *vacated on other grounds*, 21 Cal. 3d 829 (1978), the plaintiff brought a personal injury suit against Firestone, a tire manufacturer, and Big Four, a manufacturer of tire-changing equipment. *Id.* at 745. An expert retained by Big Four prepared a report that concluded that Firestone was at fault. Williamson v. Superior Court, 21 Cal. 3d. 829, 832 (1978). Big Four and Firestone came to an agreement that Big Four would agree to withdraw the expert's report and thereby conceal it from the plaintiff, and in return Firestone would agree to indemnify Big Four. *Id.* The California appellate

"The judicial search for truth could not endure to be obstructed by a voluntary pledge of secrecy . . . ."[218] And the Supreme Court has specifically recognized that *criminal* matters pose an especially compelling need for relevant evidence: the "longstanding principle that 'the public . . . has a right to every [person's] evidence' . . . is particularly applicable to grand jury proceedings."[219] Thus, the law of the joint defense privilege, which requires an agreement to conceal evidence for the privilege to exist, conflicts with the ordinarily predominant principle that agreements to conceal evidence from a litigation adversary, let alone a grand jury, are void.

Courts have, in fact, occasionally balked at enforcing joint defense agreements. In *Kiely v. Raytheon*, discussed earlier,[220] Kiely sued Raytheon for breaching an agreement, which allegedly included a provision requiring each party to notify the other if it intended to cooperate with prosecutors. The district court rejected Kiely's claim, finding that

> [a]n agreement by Kiely and Raytheon not to talk to the government without the other's consent would have given either a potential veto over the other's furnishing relevant, truthful information to investigators of criminal activity. Such a veto would obviously interfere with the investigation and might even in some circumstances amount to a criminal obstruction of justice.[221]

As drafted today, joint defense agreements typically require parties to notify other participants of any intent to withdraw, and, more importantly, agreements often impose significant penalties on any withdraw-

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court concluded that the Big Four-Firestone agreement was unenforceable. *Williamson*, 135 Cal. Rptr. at 746. According to one judge in the majority, permitting parties to enter into agreements to deny information to others would "encourag[e] attorneys for separate defendants to enter into calculated, collusive and conspiratorial understandings to impede, impair and defeat the legitimate efforts of a plaintiff to obtain discovery of relevant and needed material." *Id.* at 751 (Jefferson, J., concurring).

218 8 WIGMORE, *supra* note 64, § 2290; *see also* Branzburg v. Hayes, 408 U.S. 665, 682 n.21 (1972) (finding that "the mere fact that a communication was made in express confidence, or in the implied confidence of a confidential relation, does not create a privilege").

219 *Branzburg*, 408 U.S. at 688 (quoting United States v. Bryan, 339 U.S. 323, 339 (1950) (citations omitted)). The Court has also indicated that several privileges do not apply in criminal proceedings, although they may apply in civil proceedings. *Id.* at 685–701; *see also* United States v. Nixon, 418 U.S. 683, 712 n.19 (1974); *cf.* 26 U.S.C. § 7525 (Supp. V 1999) (providing for limited accountant privilege in "noncriminal proceedings" in federal courts); MCCORMICK, *supra* note 70, § 104 (noting that some states deny physician-patient privilege "in criminal cases generally, or in felony cases, or in cases of homicide").

220 *See supra* notes 196–99 and accompanying text.

221 Kiely v. Raytheon Co., 914 F. Supp. 708, 714 (D. Mass. 1996).

ing parties.[222] Because such penalties may constitute, in the words of the *Kiely* court, "a substantial impediment" to the grand jury investigation,[223] for they deter cooperation with prosecutors, courts in the future may prove unwilling to enforce joint defense agreements.

E. Waiver and Ethical Issues

The privilege has not been waived.[224] The third prong of the test developed by the federal courts for the joint defense privilege tracks the final requirement of the attorney-client privilege.[225] The application of the non-waiver requirement has, however, produced inconclusive litigation and doctrinal uncertainty in the context of the joint defense privilege. As will be explored below, the waiver question is connected with ethical issues for defense attorneys who are parties to joint defense agreements.

With respect to the attorney-client privilege, the client is deemed the holder of the privilege, and he can, intentionally or inadvertently, waive the privilege himself if he discloses materials to a third party.[226]

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222 For example, joint defense agreements often provide that any party that withdraws from the agreement waives the right to preserve the confidentiality of any shared communications. *See* Model Joint Defense Agreement of Law Firm X, at para. 8 (on file with author). The Model states that,

> [i]n the event that an Attorney or Client withdraws from this Agreement . . . such Attorney or Client thereby waives: (a) any attorney-client privilege or work product with respect to communications made to the remaining Attorneys or Clients to this Agreement, (b) any claims of confidentiality concerning information provided to the Attorneys and Clients pursuant to this Agreement . . . .

Id. And, in addition, withdrawal from a joint defense agreement often results in a target of an investigation discontinuing the payment of a witness's legal fees.

223 *See Kiely*, 914 F. Supp. at 714.

224 *See supra* note 179 and accompanying text.

225 *See* 8 WIGMORE, *supra* note 64, § 2292 (stating that the attorney-client privilege exists except when the client waives the protection).

226 *See In re* Sealed Case, 877 F.2d 976, 980 (D.C. Cir. 1989) (finding the privilege was not preserved when the document was produced regardless of whether the production was inadvertent, reasoning "if a client wishes to preserve the privilege, it must treat the confidentiality of attorney-client communications like jewels—if not crown jewels"); 8 WIGMORE, *supra* note 64, § 2325.

> All involuntary disclosures, in particular, through the loss or theft of documents from the attorney's possession, are not protected by the privilege, on the principle that, since the law has granted secrecy so far as its own process goes, it leaves to the client and attorney to take measures of caution sufficient to prevent being overheard by third persons. The risk of insufficient precautions is upon the client.

Id.

The client can also waive the privilege indirectly if he authorizes his attorney to disclose privileged information. Unless the client consents, however, the attorney has a duty to protect the confidence of any client communications in order to preserve the privilege.[227] The issue is complicated in the context of the joint defense privilege principally because it is unclear who the holder of the privilege is and who, therefore, can either "waive" the privilege or authorize its waiver. When one client withdraws from the joint defense agreement and agrees to cooperate with the prosecutor in return for a favorable deal, courts have regularly held that the withdrawing client, acting on his own, cannot waive the privilege. "[U]nder the common interest privilege," courts routinely state, "waiver of the privilege requires consent of all parties who share the privilege."[228] Under the current view of the joint defense privilege, then, only if *all* the clients who entered into a joint defense agreement consent to the waiver of the privilege can either they or their lawyers disclose joint defense materials to a third party.

Explaining this result has sent courts twisting into doctrinal contortions. One doctrinal route was suggested by the *Chahoon* court, which held that in a joint defense arrangement, "the counsel of each was in effect the counsel of all,"[229] language parroted by subsequent courts.[230] A joint defense arrangement, under this view, transforms and expands the attorney-client relationship. When a client enters into a joint defense agreement, he may "in effect" count all lawyers representing the parties to the agreement as his own lawyers, and he can seal their lips as to any disclosures just as he can seal the lips of his own lawyer. A client can thus prevent an attorney retained by any party to a joint defense agreement from waiving the privilege with respect to joint defense communications, and unless all of the clients agree to a waiver, the joint defense privilege continues in effect.

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227 *See In re* Claus Von Bulow, 828 F.2d 94, 100 (2d Cir. 1987) ("[T]he [attorney-client] privilege belongs solely to the client and may only be waived by him. An attorney may not waive the privilege without his client's consent."). *Compare* United States v. Bump, 605 F.2d 548 (10th Cir. 1979) (finding that lawyer's disclosure to a prosecutor constituted waiver because he was acting with client's consent), *with* Schnell v. Schnall, 550 F. Supp. 650, 653 (S.D.N.Y. 1982) (holding that the lawyer's testimony before the SEC did not constitute waiver because there was no indication that the client had authorized disclosures).

228 *See, e.g., In re* Imperial Corp. of Am., 179 F.R.D. 286, 289 (S.D. Cal. 1998); *see also, e.g.*, John Morrell & Co. v. Local Union 304A, 913 F.2d 544, 556 (8th Cir. 1990).

229 Chahoon v. Commonwealth, 62 Va. (21 Gratt.) 822, 842 (1871).

230 *See, e.g., In re* Grand Jury Subpoena Duces Tecum Dated Nov. 16, 1974, 406 F. Supp. 381, 388–89 (S.D.N.Y. 1975).

The solution suggested by the *Chahoon* court generates difficulties. Consider the ramifications for legal ethics rules, when a party to a joint defense agreement defects and agrees to take the stand against his former co-conspirator. In cross-examination, can the defendant's attorney confront the defector with admissions he made in the course of joint defense consultations? If, as suggested by the *Chahoon* court, the defendant's attorney was "in effect" the defector's attorney as well at that time,[231] the answer suggested by the *Model Rules of Professional Conduct* would seem to be that he may not. Rule 1.6 prohibits an attorney from "reveal[ing] information" imparted by a client; this would seem to be implicated if the defendant's attorney was "in effect" the defector's attorney when the admissions were made.[232] And this, in turn, would trigger the application of Rules 1.7[233] and 1.9.[234] The former prohibits an attorney from representing a client where such representation would be "materially limited by the lawyer's responsibilities to another client,"[235] and the latter prohibits a lawyer from representing a client with "materially adverse interests" to that of a former client, who the attorney represented "in a substantially related matter."[236] Taken together, the Model Rules suggest that the attorney's ability to represent the defendant would be compromised and limited by his duties to the defector (viewed "in effect" as his erstwhile client) and that withdrawal and even disqualification would be appropriate. This was, in fact, the conclusion reached by an ABA opinion letter exploring the issue in the civil context.[237] And in the criminal

231 *Chahoon*, 62 Va. at 842.

232 *See* MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (1983) ("A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation . . . .").

233 *See id.* R. 1.7(b) ("A lawyer shall not represent a client if the representation of that client may be materially limited by the lawyer's responsibilities to another client or to a third person, or by the lawyer's own interests . . . .").

234 *See id.* R. 1.9(a) (1980) ("A lawyer who has formerly represented a client in a matter shall not thereafter represent another person in the same or a substantially related matter in which that person's interests are materially adverse to the interests of the former client unless the former client consents after consultation . . . ."); *see also* Seave, *supra* note 18, at 15 ("The word 'client' in Rule 1.9(a) has been broadly construed to include an individual who is not a client but to whom an attorney has a 'fiduciary obligation.'") (citing Westinghouse Elec. Corp. v. Kerr-McGee Corp., 580 F.2d 1311, 1319–20 (7th Cir. 1978)).

235 *See supra* note 233.

236 *See supra* note 234.

237 ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-395 (1995) (discussing the obligations of a lawyer who formerly represented a client in connection with a joint defense consortium). The author of the opinion letter took the view

context, the United States Supreme Court has further held that the Sixth Amendment guarantee of effective counsel authorizes trial courts to disqualify defense counsel unable, due to ethical constraints, to provide their client with conflict-free representation.[238]

Courts struggled with the ethical issues raised by joint defense arrangements in the final years of the previous Bush administration, when federal prosecutors fired off disqualification motions in a trio of high-profile criminal cases.[239] The impetus may have been comments by the head of the Department of Justice's criminal fraud division that disqualification motions were appropriate when a participant in a joint defense agreement defected and became a cooperating witness.[240] Although the courts in all three cases permitted the defense attorneys to continue their representations, despite the fact that they had been privy to information shared by individuals who were now cooperating, and possibly testifying, witnesses, the reasoning employed was troubling to the defense bar.[241] In one case, the court, in

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that an attorney who received information shared pursuant to a joint defense agreement is under an obligation (imposed by Rule 1.6) not to disclose the materials, and an obligation (imposed by Rule 1.9) not to represent a person whose interests are adverse to a member of a joint defense group. *Id.* The author further concludes that Rule 1.7 would foreclose the representation of a client which would likely be limited by the requirements imposed by Rules 1.6 and 1.9. *Id.*

238 *See* Wheat v. United States, 486 U.S. 153, 160 (1988) (finding that courts can disqualify defense counsel to ensure "that criminal trials are conducted within the ethical standards of the profession"); *see also* FED. R. CRIM. P. 44(c) (authorizing courts to disqualify counsel where there is "good cause" to believe conflict of interest exists).

239 *See* United States v. Bicoastal Corp., No. 92-CR-261, 1992 U.S. Dist. LEXIS 21445, at *9 (N.D.N.Y. Sept. 28, 1992) (allowing the defendants to keep their counsel under a government motion for an inquiry into potential conflicts of interest); United States v. McDade, No. 92-249, 1992 U.S. Dist. LEXIS 11447, at *1 (E.D. Pa. July 30, 1992); United States v. Anderson, 790 F. Supp. 231, 232 (W.D. Wash. 1992).

240 *White-Collar Prosecutors Probe Joint Defense Agreements*, THE DOJ ALERT, July 1991, at 3 ("[Urgenson] noted . . . that there may be grounds to disqualify defense attorneys if the defendants' interest diverge and their attorneys use information obtained through joint defense agreement to cross-examine various witnesses.").

241 *See* Matthew D. Forsgren, Note, *The Outer Edge of the Envelope: Disqualification of White Collar Criminal Defense Attorneys Under the Joint Defense Doctrine*, 78 MINN. L. REV. 1219, 1241 n.121 (1994).

> The government might have lost the battle (i.e., disqualification of a particular group of attorneys) in these cases, but under no circumstances did the government lose the war (i.e., the proposition that a court may disqualify criminal defense attorneys under the joint defense doctrine). On the contrary, in each case the court applied traditional disqualification analysis, although joint defense disqualification presents more complex considerations than disqualification for successive or multiple representation.

concluding that disqualification was unwarranted, relied heavily on the fact that little information had been shared during joint defense discussions.[242] In the two other cases, the courts emphasized the fact that the former members of the joint defense agreement had not joined the prosecutor's motion to disqualify, strongly hinting that had the former members done so, the courts would have decided the cases differently.[243] But all three cases took for granted that an attorney-client relationship was formed between each of the clients of a joint defense agreement and each of the attorneys and that therefore the ethical rules involving nondisclosure of confidential information and avoidance of conflicted representations were applicable. In the event that substantial information had been shared or the defector had moved to disqualify an attorney in a joint defense agreement, the courts signaled that they would have been receptive to disqualification motions.

The decisions "caused great concern and uncertainty in the white-collar defense community"[244] and sent the defense bar scrambling to refashion joint defense agreements to address the ethical issues raised in these three cases.[245] One solution—intended to

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Id. (internal cross-references omitted).

242 *See Bicoastal*, 1992 U.S. Dist. LEXIS 21445, at *7.

243 For example, *McDade* involved the investigation and prosecution of Congressman Joseph McDade. *McDade*, 1992 U.S. Dist. LEXIS 11447, at *2. McDade and a former aide, Raymond Wittig, retained separate counsel in the course of an investigation into whether the Congressman received illegal gratuities. *Id.* at *2–*3. McDade, Wittig, and their lawyers, however, shared information under in a joint defense agreement for over two years until Wittig decided to plead out. *Id.* at *3. Prosecutors then moved to disqualify McDade's lawyers. Although the district court judge "confess[ed] to being not altogether comfortable with the situation," *id.* at *6, in light of the "disturbing ethical tensions," *id.* at *1, he denied the motion to disqualify. *Id.* at *2. The court found it significant that Wittig, although requesting that McDade's lawyer preserve the confidentiality of his prior communications, did not join the prosecutor's motion to disqualify. *Id.* at *11; *see also Anderson*, 790 F. Supp. at 232 (assuming that joint defense agreement raised potential conflict of issues, and noting that the defendant had made an informed and knowing waiver of his right to conflict-free counsel).

244 Ronald J. Nessim, *Conflicts and Confidences—Does Conflict of Interest Kill the Joint Defense Privilege? The Defense Viewpoint*, CRIM. JUST., Spring 1992, at 8; *see also* Robert S. Bennett, *Foreword to* Eighth Survey of White Collar Crime, 30 AM. CRIM. L. REV. 441, 450–51 (1993) (arguing that prosecutorial motions to disqualify joint defense attorneys make up "an increasingly aggressive effort . . . to tip the balance in the adversarial system in their own favor").

245 The New York bar was particularly candid in expressing its concerns. Its Committee on Professional Responsibility wrote that:

> The problem with viewing the joint defense doctrine as an extension of the attorney-client privilege is that this analysis might suggest that the joint defense doctrine hinges on the existence of an attorney-client relationship

circumvent the ethical problems that seem to be part and parcel of a broadly conceived attorney-client relationship extending to all clients in a joint defense arrangement—was simply to rewrite joint defense agreements. Attorneys added recital provisions to the effect that no attorney-client relationship was formed among the various signatories to a joint defense agreement and their attorneys.[246] And specifically to deal with the ethical conflict of interest rules, attorneys amended joint defense agreements to provide that any defector waived (1) the right to preclude the use of admissions he made during joint defense discussions and (2) the right to seek the disqualification of the attorneys who were privy to those admissions.[247]

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between each attorney in the joint defense and each participant. This view . . . would import the notion that an attorney owed the identical fiduciary duty to every participant . . . .

Recognizing this concern, many courts and commentators consider the joint defense doctrine to be separate and apart from the attorney-client privilege.

Comm. on Prof'l Responsibility, Ass'n of the Bar of the City of N.Y., *Ethical Implications of Joint Defense Common Interest Agreements*, *in* 51 REC. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 115, 118 (1996).

246 Sample joint defense agreements are included in Steven Alan Reiss & Laraine Pacheco, *The Essential Elements of a Joint Defense Agreement*, 8 White-Collar Crime Rep. (Andrews Publ'g) No. 2, at 1 (Feb. 1994).

247 The New York bar recommends inserting the following provision:

Nothing contained [in this agreement] shall be deemed to create an attorney-client relationship between any attorney and anyone other than the client of that attorney . . . and no attorney who has entered into this Agreement shall be disqualified from examining or cross-examining any joint defense participant who testifies at any proceeding, whether under a grant of immunity or otherwise, because of such an attorney's participation in this agreement, and it is herein represented that each party to this agreement has specifically advised his or her client of this clause.

Comm. on Prof'l Responsibility, *supra* note 245, *in* 51 REC. OF THE ASS'N OF THE BAR OF THE CITY OF NEW YORK 115, 121 (1996). Two model joint defense agreements recently obtained from Washington, D.C. firms indeed contain language to that effect. See Model Joint Defense Agreement from Law Firm Y, para. 11 (on file with author), which states,

Each counsel and client further agree that if any Client who is or has at any time been a party to this Common Interest Agreement testifies in any investigation, litigation, or proceeding, Counsel for any other parties to this Agreement shall not be precluded from utilizing in the examination of such testifying person any or all information independently obtained or derived from confidential communications made, or information provided, pursuant to this Agreement, including communications made or information provided by the testifying person or his or her Counsel.

Model Joint Defense Agreement from Law Firm X, *supra* note 222, at para. 8, says,

Such provisions have not, however, eliminated the problem. In many cases parties cooperate and embark upon a joint defense without entering into any formal, written agreement. (Although courts have required parties invoking the joint defense privilege to demonstrate an agreement, they have not required that the agreement be in writing.[248]) In at least two recent cases involving oral joint defense agreements, *United States v. Henke*[249] and *Gilson v. State*,[250] courts have held that an attorney-client relationship existed between one client and another client's attorney, when information had been shared pursuant to a joint defense agreement. In *Henke*, the trial court refused to permit an attorney to withdraw on the eve of trial, despite the attorney's claim that his ability to represent his client was limited by his prior "representation" of others who had been involved in a joint defense but who had subsequently cooperated with the prosecution.[251] The Ninth Circuit reversed, concluding that the attorney owed ethical duties to all clients in a joint defense.[252] In *Gilson*, which culminated in the imposition of the death penalty, the trial court refused to permit a defendant to call as a witness his original attorney, who had been privy to communications by a joint defendant.[253] The state appellate court affirmed, concluding that the defendant's lawyer owed ethical duties to the other defendant.[254] In a recent civil case, how-

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> In the event that an Attorney or Client withdraws from this Agreement . . . , [n]othing herein shall be deemed to prevent the remaining Attorneys from continuing their representation of the remaining Clients upon the withdrawal of any other Attorney or Client, including the right of the remaining Attorneys to examine any withdrawing Attorney or Client at any hearing, trial or proceeding.

248 *See* Scheininger & Aragon, *supra* note 19, at 11.

249 222 F.3d 633 (9th Cir. 2000).

250 8 P.3d 883 (Okla. Crim. App. 2000).

251 *Henke*, 222 F.3d at 637–38.

252 *See id.* at 638, 643. The Ninth Circuit reasoned

> [a] joint defense agreement establishes an implied attorney-client relationship with the co-defendant . . . . This privilege can also create a disqualifying conflict where information gained in confidence by an attorney becomes an issue, as it did in this case.

Id. at 637 (citation omitted).

253 *Gilson*, 8 P.3d at 908.

254 *Id.* The facts of *Gilson* were as follows: two defendants, Gilson and Coffman, having been charged with murder, retained separate counsel and entered into a joint defense agreement. *Id.* After communications were shared among the two and their lawyers pursuant to a joint defense agreement, Coffman pled out and agreed to testify at Gilson's trial. *Id.* Gilson's trial counsel, Deborah Maddox, filed a motion to withdraw "based upon a conflict of interest she would face if placed in the position of attacking Coffman's credibility as a witness if she testified in Appellant's [i.e., Gil-

ever, a district court concluded, at odds with the *Gilson* and *Henke* courts, that a joint defense agreement did *not* give rise to an implied attorney-client relationship.[255] So the law in the area remains uncertain.

Even where joint defense agreements contain provisions disclaiming the formation of an attorney-client relationship with another client's attorney and relinquishing any right to seek disqualification of those attorneys, fundamental questions remain. First and foremost are the recital provisions disclaiming the formation of an attorney-client relationship. Simply put, if no attorney-client relationship is formed among the various witnesses/clients and the attorneys, what is the basis for the claimed confidentiality of the shared communications? Some commentators have suggested that an attorney would owe fiduciary duties to a witness who shared information pursuant to a joint defense agreement.[256] Even if true, the significance of such a relationship is opaque: whatever duties a fiduciary owes another, he ordinarily cannot, simply on the basis of that fiduciary relationship, refuse to provide evidence in a judicial proceeding. The recital provisions may rescue the joint defense privilege from the ethical issues

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son's] trial." *Id.* The state filed a similar motion to disqualify Maddox, and the trial court concurred, granting the motion to withdraw. *Id.* At Gilson's trial, after Coffman had testified, Gilson called Maddox to the stand, but the court prohibited the offered testimony. *Id.* In affirming the trial court's decision, the court of criminal appeals wrote, "Appellant [Gilson] assumes, without conceding, that Coffman properly invoked her attorney-client privilege with Ms. Maddox. However, he argues that any privilege was waived when Coffman took the stand to testify . . . ." *Id.* at 909. The court's superficial treatment of the argument is a case study in the mangling of the attorney-client privilege and joint defense privilege. Instead of coming to terms with the fact that Maddox was not Coffman's lawyer to begin with and that it is therefore mysterious how Coffman could "invoke[ ] her attorney-client privilege with Ms. Maddox," the court simply recited the mantra that the attorney-client privilege is the oldest of the common law privileges, as if that point was either disputed or relevant. *See id.* And, with respect to the waiver issue, the court concluded that Coffman took no affirmative act justifying a waiver because she was compelled to testify and did not do so "voluntarily." *Id.* Hence, in *Gilson* as in *Chahoon v. Commonwealth*, 62 Va. (21 Gratt.) 722 (1871), a co-defendant testified as to a joint communication and the defendant was foreclosed from calling an attorney privy to the communication to challenge the testimony. Summing up, then, the court in *Gilson* concluded that Coffman's right to invoke her attorney-client privilege as to communications to Maddox (grounded in a non-existent attorney-client relationship) trumped Gilson's right to compulsory process (grounded, of course, in the Sixth Amendment of the United States Constitution). *Gilson*, 8 P.3d at 909–10 (rejecting due process argument because Gilson had cross examined Coffman).

255 Essex Chem. Corp. v. Hartford Accident & Indem. Co., 993 F. Supp. 241, 253 (D.N.J. 1998) (reversing a magistrate's disqualification order).

256 *See* Bartel, *supra* note 17, at 918–24; Rushing, *supra* note 15, at 1278–81.

that arise from an attorney-client relationship, but the cost seems to be rendering the privilege itself groundless.

Provisions waiving objections by a defector to the use of information he shared during joint defense discussions are equally problematic. The attorney-client privilege exists only where disclosures are made both in confidence and with the intent that they remain confidential.[257] Most joint defense agreements nowadays, however, provide that communications remain confidential subject to a condition subsequent: in the event that one member defects, he waives any objection to the public use of information that he shared (although he himself is supposedly still bound to preserve the confidentiality of information shared with him). The contingent confidentiality that characterizes joint defense agreements is inconsistent with the attorney-client privilege and renders problematic any claims that a joint defense privilege somehow arises from the attorney-client privilege.[258]

Similarly, provisions waiving a right to disqualify other counsel in a joint defense arrangement are problematic and likely unenforceable.[259] If, on the one hand, no attorney-client relationship is formed among the various witnesses/clients and the attorneys in a joint defense agreement (as claimed by the recital provision), then it is difficult to understand the basis of the asserted confidentiality. If, on the other hand, an attorney-client relationship *is* formed, then it is unclear how an attorney can opt out of the ethical conflict of interest rules that govern any such relationship.[260] In the criminal context, courts have rigorously enforced conflict-of-interest rules. The Supreme Court held in *Wheat v. United States*[261] that the judicial system has an independent interest in ensuring that criminal defendants have conflict-free counsel.[262] It is, therefore, unlikely that a court would regard as binding a party's decision to waive his or her right to

257 *See supra* Part II.B.

258 Even a proponent of the joint defense privilege acknowledges this difficulty. *See* Bartel, *supra* note 17, at 911 n.203.

259 No court has yet ruled on the issue, although other provisions of joint defense agreements have already been ruled unenforceable. *See* Kiely v. Raytheon Co., 914 F. Supp. 708 (D. Mass. 1996).

260 *See* Seave, *supra* note 18, at 17.

261 486 U.S. 153 (1988).

262 *Id.* at 153.

> When a trial court finds an actual conflict of interest which impairs the ability of a criminal defendant's chosen counsel to conform with the ABA Code of Professional Responsibility, the court should not be required to tolerate an inadequate representation of a defendant.

Id.; *see also* Glasser v. United States, 315 U.S. 60 (1942) (discussing a court's power to ensure that proceedings are fair and not tainted by conflict of interest).

seek disqualification, for the court could pursue disqualification sua sponte.[263]

F. An Independent Privilege?

After a few decades of experience, the joint defense privilege is still, at its core, uncertain, for there is no consensus as to the nature of the relationship that exists between attorneys and clients who are engaged in a joint defense. And this uncertainty has generated, among other controversies, insoluble ethical dilemmas. A solution bubbling up in the academic literature is to craft an altogether new privilege, one that borrows haphazardly from the attorney-client privilege, the work product doctrine, and fiduciary law principles.[264] Although the proposal to craft an independent privilege has yet to be embraced in the courts,[265] it has been promoted as a solution to the doctrinal and ethical problems that arise from "conceptualizing" the joint defense privilege as simply an extension of the attorney-client privilege.

The multiplicity of viewpoints on the ethical and various other issues that surround the joint defense privilege has prompted a chorus of protests from the bar, with complaints that uncertainty about the contours of the privilege have "chilled" the formation of joint defense groups.[266] Nonetheless, many attorneys report that the privilege, albeit in its current confused and almost incoherent form, is nonetheless effective in defending targets of a criminal investigation. Consider the following observation by Lanny Breuer, a prominent Washington, D.C., defense lawyer, and a veteran of President Clinton's White House Counsel's Office: "Prosecutors these days have it tough. With the ever-increasing sophistication of the white collar defense bar, prosecutors in multidefendant investigations often face a unified wall of resistance from the witnesses and targets of their in-

263 *See* FED. R. CRIM. P. 44(c) (authorizing court to disqualify counsel where "good cause" to believe conflict of interest exists).

264 *See* Bartel, *supra* note 17, at 918–24.

265 *See* United States v. Agnello, 135 F. Supp. 2d 380, 382 (E.D.N.Y. 2001) ("The joint defense privilege 'is not an independent basis for privilege but an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party.'") (quoting Sec. Investor Prot. Corp. v. Stratton Oakmont, Inc., 213 B.R. 433, 435 (Bankr. S.D.N.Y. 1997)).

266 Bartel, *supra* note 17, at 872; *see also* Amy Foote, Note, *Joint Defense Agreements in Criminal Prosecutions: Tactical and Ethical Implications*, 12 GEO. J. LEGAL ETHICS 377, 387 (1999) (noting the "chilling effect" of the *McDade*, *Bicoastal*, and *Anderson* decisions); Gregory J. Kopta, Comment, *Applying the Attorney-Client Privilege and Work Product Privileges to Allied Party Exchange of Information in California*, 36 UCLA L. REV. 151, 153 (1988) ("Continuing uncertainty exacts a high price. Fear of waiver in general is very expensive to both the participants and the legal system itself.").

quiries."[267] This is so, Breuer and his coauthor Michael Imbroscio explain, because "[w]orking under a shield of privilege in multidefendant cases—sometimes called the 'joint defense' or 'common interest' privilege—skilled defense lawyers are able to share information and coordinate defense strategy among those facing a prosecutor's scrutiny."[268] Prosecutors "are often frustrated by the effectiveness of the arrangement," but "there is nothing prosecutors can do to object."[269] The claim recently received some confirmation in congressional testimony by a leading federal prosecutor. Charles LaBella, the former U.S. attorney from San Diego tapped to head up an investigation into campaign finance violations during the 1996 presidential campaign, testified as to the difficulties he confronted during the investigation, focusing on joint defense agreements:

> The reality in the District of Columbia, as I've come to know it, is that there are joint defense agreements, and these joint defense agreements are as thick as closing binders. They're probably two, three inches thick. Everyone has a lawyer. Everyone does a shuffle in a white collar case. Everyone forgets their name when you start to question them. Everyone, when you put a memorandum in front of them says, I see my signature, I see the memorandum, but I don't remember writing it; I don't remember what it says; and I can't tell you why I wrote it. I've been doing white collar cases virtually all my career. This is the shuffle that you get. It's not the president or the vice president I'm talking about, but every witness that you come up against in a white collar case. These are very difficult cases to make.[270]

The simple response to LaBella might be that white-collar cases, like all criminal cases, should be difficult cases to make. Our system is designed to place substantial obstacles in the way of the police and prosecution, so highly do we as a society value our constitutional rights and so vigilantly do we guard against overreaching by the state. But such a response, however much it may resonate rhetorically, is surely question-begging. We do not put up obstacles to the police and prosecution simply for the sake of putting up obstacles. The serious question is whether joint defense agreements promote or undermine socially desirable goals.

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267 Lanny A. Breuer & Michael X. Imbroscio, *An Unreasonable Condition: Targets Seeking Leniency Are Increasingly Asked To Withdraw from Joint Defense Agreements*, LEGAL TIMES, Sept. 20, 1999, at S27.

268 *Id.*

269 *Id.*

270 *Independent Counsel Hearing*, *supra* note 14 (questions omitted).

Whether the joint defense privilege is advanced as an extension of the attorney-client privilege or as an independent privilege altogether, it is plainly a departure from the traditional privilege rules. Before embracing the novel privilege, courts need to gain a fuller picture of both the costs and benefits it poses to society.[271] Contrary to what some assume,[272] it is hardly self-evident that society, on balance, benefits from the judicial recognition of the joint defense privilege. Especially in the context of a criminal investigation, there may be serious doubts as to why *from society's perspective* the sharing of information among clients (and attorneys) with common interests is beneficial.

IV. Costs and Benefits of the Joint Defense Privilege

Many of the justifications supplied to support the joint defense privilege are linked to the rationales for the attorney-client privilege itself. The results are, I argue in this Part, an unimpressive edifice upon which to support a novel evidentiary privilege. The joint defense privilege is said to be essential to foster disclosures among attorneys and clients with common interests (in much the same way that the attorney-client privilege is said to be essential to foster communications between a client and an attorney). As I argue in Part IV.A, however, a great deal of sharing would occur even in the absence of the joint defense privilege. To assess the merits of the joint defense privilege, one would need to attain greater clarity in defining precisely what sort of inter-party communications are likely facilitated by the joint defense privilege, and whether society benefits when such communications are encouraged. I then question claims that the joint defense privilege in fact promotes socially valued ends, such as the search for truth (Part IV.B), a fair adversary system (Part IV.C), and the "efficiency" of the litigation process (Part IV.D).

A. Sharing Without the Joint Defense Privilege

Let us begin by accepting the assumption that an unrestricted flow of information among clients and lawyers, where the clients share common interests, benefits society. We would still need to inquire what portion of that information flow, and concomitant alleged social benefits, are properly attributed to the joint defense privilege. Al-

271 *See* 8 Wigmore, *supra* note 64, § 2285 (arguing that new evidentiary privileges should be created only where the injury to a socially valued relationship is "greater than the benefit thereby gained for the correct disposal of litigation").

272 *See, e.g.*, Rushing, *supra* note 15, at 1274 ("The joint-defense privilege fulfills the social goal of encouraging interparty communications by preserving their confidentiality.").

though the joint defense privilege is often indiscriminately credited for the entirety of such an information flow,[273] this premise is faulty. Would parties that share a common interest—for example, in frustrating a criminal investigation or prosecution—pool information even if there were no joint defense agreement? The answer is plainly yes. In this respect, one must, as a threshold matter, distinguish between information protected by the attorney-client privilege or work product doctrine on the one hand and altogether unprivileged information on the other. With respect to the latter, information may well be shared irrespective of whether a joint defense agreement exists.

For example, a prosecutor tells the attorney for witness X that she doubts the truthfulness of witness Y on a certain point. Will X's attorney relay that information to Y's attorney? He may, if either X's interests are aligned with Y's interests or if he hopes to earn the professional gratitude of Y's attorney. Whether X and Y have entered into a joint defense agreement is not directly implicated: the communication from the prosecutor to X's attorney is not privileged, so the communication from X's attorney to Y's attorney would not be privileged either, regardless of whether a joint defense agreement existed. It is perhaps the case that clients and attorneys who have entered into a joint defense agreement forge closer interests than otherwise identically situated clients and attorneys who have not entered into a joint defense agreement. Thus, the likelihood of the sharing of such information may increase on the margin once a joint defense agreement is in place; this, however, is a far more modest claim on behalf of the joint defense agreement than those regularly made.

Now consider the information sharing that may occur if X receives a subpoena for certain documents. X's attorney considers sharing a draft motion to quash with Y's attorney to solicit his advice. Although the draft motion is not protected by the attorney-client privilege,[274] it is covered by the work product doctrine, which creates a

273 *See* Bartel, *supra* note 17, at 871 ("Communications in pursuit of a joint defense will not occur . . . [without] the joint defense privilege . . . .").

274 Recall that the attorney-client privilege exists only to shield factual disclosures from the client to the attorney; it does not protect legal memoranda, for example, except to the extent that they embody or reflect such factual disclosures. Moreover, even if the draft motion to quash includes factual disclosures from the client to the attorney, it still might not be protected by the attorney-client privilege if the disclosures were made with the intent that they become part of a public document, such as a legal filing. *See In re* Grand Jury Proceedings, 727 F.2d 1352, 1356–58 (4th Cir. 1984) (finding that information supplied to a lawyer with intent that it become part of a prospectus is not protected by attorney-client privilege).

zone of privacy within which lawyers can prepare for litigation.[275] Unlike the attorney-client privilege, the work product protection is not waived by disclosure to a nonadversarial third party.[276] Accordingly, X's attorney could preserve the work product protection despite sharing the draft motion with Y's attorney. Again, then, the sharing may occur irrespective of the existence or nonexistence of a joint defense agreement. To be sure, the work product doctrine provides only a qualified protection, which can be overcome by a showing of substantial need, unlike the "absolute" protection of a true evidentiary privilege.[277] And without the joint defense privilege, X's attorney runs the

275 *See* Hickman v. Taylor, 329 U.S. 495, 510–11 (1947). *Hickman* was partially codified in the 1970 amendments to the *Federal Rules of Civil Procedure*. *See* FED. R. CIV. P. 26(b)(3).

276 *See* Duplan Corp. v. Deering Milliken, Inc., 540 F.2d 1215, 1222 (4th Cir. 1976) ("We . . . are of the opinion that broad concepts of subject matter waiver analogous to those applicable to claims of attorney-client privilege are inappropriate when applied to Rule 26(b)(3)."); *In re* F.A. Potts & Co., 30 B.R. 708, 711–12 (Bankr. E.D. Pa. 1983) (finding that disclosure of a letter to an "unrelated third party" did not constitute a waiver of the work product protection).

277 In fact, the attorney-client privilege is not nearly as absolute as is often assumed. "[P]redictability in the application of the privilege . . . is largely lacking in many areas," *see* MCCORMICK, *supra* note 70, § 87, and "the privilege does not have the reach many lawyers believe it has." EPSTEIN, *supra* note 96, at 453. It does not apply to client communications seeking business or political or personal advice, *see* MCCORMICK, *supra* note 70, § 88, is overridden when client and attorney become embroiled in a dispute, *see* EPSTEIN, *supra* note 96, at 278–82, and, of course, does not cover communications made in furtherance of a client's crime or fraud. *See* United States v. Zolin, 491 U.S. 554, 562–63 (1989). Furthermore, the attorney-client privilege, like all common-law privileges recognized by Federal Rule of Evidence 501, is an ex post rule of admissibility in federal court proceedings, not an ex ante guarantee of confidentiality. The scope of the evidentiary privileges can vary among the fifty states (each governed by its own statutory and common law) and the federal courts (governed by Rule 501). A communication is not privileged in all fora merely because it is privileged in one forum. Accordingly, a federal common-law privilege cannot guarantee confidentiality in all proceedings at all times. *But cf.* Upjohn Co. v. United States, 449 U.S. 383, 393 (1981) ("An uncertain privilege, or one which purports to be certain but results in widely varying applications by the courts, is little better than no privilege at all."). Is the attorney-client privilege worthless because it is neither absolute nor wholly predictable? Surely not. A sophisticated client may judge the risks associated with a disclosure to an attorney as less than the expected benefits (enhanced legal services). In much the same way, an attorney may judge the risks associated with a disclosure to another attorney as less than the expected benefits. The existence of a joint defense privilege or a joint defense agreement simply shifts the risk-benefit analysis. The risk of disclosure to a prosecutor may decrease if there is a joint defense agreement, but that risk will never be zero. The basic Machiavellian insight that the risks associated with a conspiracy increase as the number of persons "in the know" grows cannot be defeated by the creation of a parchment privilege.

risk that, should Y later decide to cooperate with prosecutors, he will give this information to prosecutors. But how much of a danger is that? X's attorney may well conclude that, even without the joint defense privilege, the harm that would come from disclosure of a draft motion (relatively small) discounted by the likelihood that it will ever be shared with prosecutors (relatively slight) is less than the immediate and concrete benefits that can come from input from another lawyer on a draft motion.[278]

The sharing of client confidences ordinarily poses far greater risks. X discloses inculpatory facts to his attorney; the attorney considers sharing the information with Y and Y's attorney in the hope that they can collectively craft a story that places those facts in a less damaging light. Without a joint defense agreement in place, X's attorney is unlikely to share the damaging information. Sharing of confidential communications would waive the attorney-client privilege, and the sharing permitted under the work product protection does not extend to client confidences.[279] Thus, if X's attorney disclosed his client's confidential communication to Y and Y's attorney, it could be argued that the attorney-client privilege had been waived. At a minimum, without a joint defense agreement, he would be unable to seal the lips of Y and Y's attorney should they cooperate with the prosecutor. Because the client's disclosure may be highly compromising, his attorney will thus be reluctant to share the information with anyone else in the absence of a joint defense agreement.

One should add, however, that even if the parties have entered into a joint defense agreement, there would necessarily be significant risks in any disclosure of highly damaging information to another person. X's attorney may disclose such evidence to Y and Y's attorney if they can assist him in crafting an exculpatory story, but even if the sharing is conducted under the cover of a joint defense agreement, there would be attendant risks. Should Y decide to cooperate with the prosecutor, he will in theory be foreclosed from disclosing the information supplied by X, but enforcement of the joint defense agreement is hardly certain. If the risks associated with a disclosure are great (because the information is extremely damaging), even a relatively high degree of confidence in the preservation of its confidentiality might still discourage the attorney from sharing the information.

278 The analysis would be similar for an attorney's notes of an interview with a third-party witness. The notes are covered by the work product doctrine, which protection would be preserved in the event the notes were shared with a non-adversarial third party.

279 *See* Bartel, *supra* note 17, at 916 (noting that "[s]haring of client-lawyer communications is not permitted by the strict application of the work product doctrine").

The existence of a joint defense agreement may increase the attorney's confidence, but that confidence can never be complete, and the associated risks can never be zero.[280]

Thus, one should not overstate the significance of the joint defense privilege. A vast amount of information (unprivileged information, legal memos, notes from interviews of third parties) may be shared with or without the privilege. Joint defense agreements may promote the sharing of such information as parties, having bound themselves together by a joint defense agreement, see their fortunes as more intimately intertwined. But the principal effect of the joint defense privilege is to promote the sharing of a specific type of information: client confidences. The joint defense privilege bridges the gap left by the work product doctrine and attorney-client privilege and reduces, although by no means eliminates, the potentially grave risks associated with the sharing of client confidences.

B. The Search for Truth: Coordinating Stories

Although the costs of the attorney-client privilege, in denying access to all of the evidence, have long been recognized, recent scholarship has drawn attention to the truth-promoting aspects of the privilege. When clients are encouraged to make full factual disclosures to their attorneys, it is argued, attorneys are better able to transmit complete and accurate information (especially information pertaining to "contingent claims") to the factfinder.[281] Proponents of the joint defense privilege have similarly argued that the sharing of factual and legal information among clients (and attorneys) with common interests at a minimum does not frustrate the search for truth and may in fact foster it. Information is not withheld from the prosecutor as a consequence of the joint defense privilege, it is said; the joint defense privilege simply permits the sharing of information among parties in common interest.[282] And by allowing defense attor-

280 I am indebted for this point to a candid defense lawyer, who remarked to me that if he finds a document that is extremely damaging to his client but which had not been subpoenaed, "I wouldn't show it to my dog, let alone another lawyer. I don't care if I had a joint defense agreement."

281 *See* Allen et al., *supra* note 72, at 364–69 (arguing that the attorney-client privilege allows attorneys to explore "contingent claims" and thereby enhances their ability to convey truthful information to the factfinder).

282 *See* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, EVIDENCE § 5.15 (2d ed. 1999) ("The litigation process is generally not deprived of evidence [by the joint defense privilege] that would otherwise be available because the collaborative communications are unlikely to be made in absence of the privilege."); Daniel J. Capra, *The Attorney-Client Privilege in Common Representations*, TRIAL LAW Q., Summer 1989, at 20,

neys more effectively to represent their clients through the development of unified theories not riddled with inconsistencies, the truth is likelier to emerge from a more robust adversarial system.[283] Furthermore, it is argued, absent the joint defense privilege, a defense attorney may be unaware of what other witnesses have already testified and will thus be unable to confront a client with information at odds with a false story that a client is planning to tell.[284] One supporter of the novel privilege concludes that "[d]eterring the formation of joint defense groups . . . undermines the search for truth."[285]

In the context of a criminal investigation, this claim may be overstated. The goal of any criminal investigation is to accurately determine whether a crime has been committed and, if so, to sort the guilty from the innocent. To accomplish these goals, a prosecutor frequently depends on securing the truthful testimony of an "insider."[286] If little or no information flows among the various insiders and a prisoner's dilemma is created, the insiders may be pressured to cut a deal

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21 ("A uniform rule extending the privilege to all communications made in the interest of common representation would be consistent with the policies of the privilege, without imposing an unnecessary cost upon the search for truth."); Perito et al., *supra* note 21, at 40 ("Defendants are only barred from disclosing information learned during the course of the joint defense, and absent a joint defense agreement, they would be unlikely even to have gained such knowledge.").

283 Scheininger & Aragon, *supra* note 19, at 13 ("A joint defense agreement facilitates coordinated defense strategy."); Forsgren, *supra* note 241, at 1232 ("When defendants share factual information, they can better present a "'coherent and plausible defense, rather than one riddled with immaterial inconsistencies.'" (quoting Perito et al., *supra* note 21, at 40)).

284 *Cf.* Bartel, *supra* note 17, at 880 ("The joint defense agreement does not significantly enhance the opportunities to engage in concerted secret criminal activity. To the contrary, having lawyers injected into the group through joint defense arrangements should stifle further criminal activity . . . .").

285 *Id.* at 873.

286 *See* Genego, *supra* note 45, at 791–92 (1988) ("Since many white collar and drug offenses are committed in private, among groups of willing participants, the government often relies on confidential informants to gather information." (footnote omitted)); Peter J. Henning, *Testing the Limits of Investigating and Prosecuting White Collar Crime: How Far Will the Courts Allow Prosecutors To Go?*, 54 U. PITT. L. REV. 405, 449 (1993) ("Often the best witness is the defendant herself, if she made incriminating statements to investigators or co-conspirators . . . ."); John C. Jeffries Jr. & John Gleeson, *The Federalization of Organized Crime: Advantages of Federal Prosecution*, 46 HASTINGS L.J. 1095, 1104 (1995) ("Generally speaking, successful prosecution of organized crime leaders requires the use of accomplice testimony."); Earl J. Silbert, *Defense Counsel in the Grand Jury—The Answer to the White Collar Criminal's Prayers*, 15 AM. CRIM. L. REV. 293, 293 (1978) (noting that criminal investigations are "wholly dependent on the ability to compel the production of documents and the testimony of witnesses, particularly those with inside knowledge").

with the prosecutor and provide testimony.[287] If information flows freely, however, deals may be struck among the insiders to deny mutually incriminating information to the prosecutor. More precisely, deals will be struck among the insiders' lawyers, who will usually have had preexisting business relationships and who may be dependent upon each other for future business referrals. Absent the joint defense privilege, the market for information as to conspiratorial acts is best characterized as a monopsony, with the only potential buyer being the prosecutor.[288] Once the joint defense privilege is born, insiders may prefer to barter information with one another, and they may then be in a position to "join together like musk oxen to show common horns to the government."[289]

Even where the joint defense privilege does not facilitate outright "stonewalling," it enhances an attorney's ability to "prepare" a witness, which may in turn decrease the likelihood that the truth will emerge in a criminal investigation. An attorney fully apprized of that to which other witnesses of an investigation have testified, or plan to testify, is in a far better position to advise a client before he appears before the grand jury. Any attorney who has prepared a client for a deposition or a grand jury appearance is aware of the ease with which testimony and even recollections can be shaped and even created.[290] Clients, as well as friendly witnesses, for the most part *want* to be helpful when

287 Professor Akhil Amar, for example, has written in favor of excluding defense lawyers from the grand jury: "It is in fact quite useful for society to have at least one nonviolent but secret interrogation place, so that individual members of organized conspiracies can be brought in one by one, and their partners in crime will never know for sure whether they ratted or stood mute." AKHIL REED AMAR, THE CONSTITUTION AND CRIMINAL PROCEDURE 218 n.171 (1997). He explains that "[t]he secrecy of the grand jury room is in effect the wall between prisoners that creates a classic 'prisoner's dilemma' to confess the truth." *Id.*

288 *See* MAXWELL L. STEARNS, PUBLIC CHOICE AND PUBLIC LAW 118 (1997).

289 *See The Effect of State Ethics Rules on Federal Law Enforcement Hearing Before the Subcomm. on Criminal Justice Oversight of the Senate Comm. on the Judiciary*, 106th Cong. 50 (1999) (statement of John Smietanka, former Principal Associate Deputy General). For example, although federal prosecutors in Washington, D.C. originally sought prison sentences ranging from thirty-five years to life imprisonment for the so-called "P Street" crew, they ended up settling for pleas bargains for as little as three and a half years. One defense lawyer explained that an iron-clad joint defense agreement allowed the defendants to secure such a favorable deal from prosecutors: "[The joint defense agreement] made it more difficult for the government to divide and conquer. We had a unified team they couldn't penetrate." Eva M. Rodriguez, *Prosecution Trades Shaky Drug Case for Pleas*, LEGAL TIMES, Jan. 18, 1993, at 2 (statement of Henry Asbill).

290 On the malleability of memory, see John S. Applegate, *Witness Preparation*, 68 TEX. L. REV. 277, 328 n.277 (1989), and Richard C. Wydick, *The Ethics of Witness Coaching*, 17 CARDOZO L. REV. 1, 10 n.34 (1995).

meeting with an attorney, and one needs to do very little to nudge them in a preferred direction. A statement of the relevant law, a description of the theory of the case, a confident, approving reference to some favorable facts learned from other witnesses or documents, and a client who previously had dim or ambiguous recollections will come to have an absolutely "honest" memory. An attorney can subtly, or not so subtly, coach a client to bend testimony to conform to a story widely agreed upon by those under investigation.[291]

An attorney's ability to coach a client is, however, in large part a function of how much information the attorney has prior to meeting with the client. If a grand jury is investigating several individuals for price-fixing and the prosecutor has focused attention on a certain business meeting, there are limits, not only ethically, but also tactically, to any witness preparation session, as long as each witness is ignorant of the other's testimony. To illustrate this point, I have adapted a hypothetical witness preparation session described by Professor Wydick.[292] Assume that prosecutors are probing a certain business meeting; they want to know if Ms. E and Mr. F. discussed three topics—X, Y, and Z. Professor Wydick suggests that an attorney for Mr. F. can coach her client in the following manner:

Q) At the meeting, did Ms. E say X?
A) No, I am quite certain she didn't.
Q) Did she say Y at the meeting?
A) Again, I am quite certain that she did not.
Q) At the meeting, did Ms. E say Z?
A) Well, you know, as to Z, yes, I think she may very well have said Z.
Q) O.K. now, I need to make sure that I understand correctly what you are telling me. You are absolutely certain that E did not say X, is that right?

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291 In *United States v. Ebens*, 800 F.2d 1422 (6th Cir. 1986), for example, an attorney sought to fashion a unified story by delivering the following speech to three witnesses:

> The purpose of this meeting tonight is so we can help each other remember exactly what happened, how it happened, when it happened and all the minor details. . . . I was talking with [a fourth witness, not present at the meeting] . . . but according to his version of the facts, it's quite different from what I have so far understood them to be. So, I would center on my facts on what you, three of you, say they are and somehow try to either fit all the other facts around these, or if they don't fit, then I have to watch out, you know, there's something else, somebody saying something else.

Id. at 1431 n.2. This speech only came to light because one of the witnesses surreptitiously tape recorded the meeting.

292 Wydick, *supra* note 290, at 32–34.

A) Yes, that's right.
Q) And you are absolutely certain that E did not say Y, is that right?
A) Yes, that's right.
Q) And as to Z, you say "I think," but you aren't certain? Am I correct in believing that you simply do not know one way or the other as to Z?
A) Yea, I guess that's right.
Q) So you remember for certain that she did not say X, and you remember for certain that she did not say Y, but you do not remember one way or the other about Z, is that right?
A) Right.[293]

The attorney's questioning induces Mr. F to deny what he had originally come close to admitting—that topic Z was discussed at the meeting. Professor Wydick suggests that in the above scenario the attorney may have violated the rules of professional ethics that prohibit the elicitation of false testimony,[294] but he acknowledges the difficulties in enforcing such rules. He therefore counsels attorneys to be more attentive to the distorting effects of leading questions, as discussed in the work of linguists and moral philosophers, and he appeals to attorneys' "informed conscience."[295]

A better check on overaggressive witness preparation is likely the attorney's own self-interest or at least her interest in advancing the interests of her client. For example, although witness preparation sessions typically conclude with a bout of "role-playing," lawyers are often advised that elaborate mock-questioning can backfire and result in testimony that appears "canned."[296] Likewise, an attorney's interest in advancing her client's interest may discourage her from implanting testimony where she is ignorant of the testimony provided by others'

293 *Id.* at 33.

294 *Id.* at 34 ("It is unethical."). *See* MODEL RULES OF PROF'L CONDUCT R. 3.4(b) (1983) (asserting that a lawyer shall not "counsel or assist a witness to testify falsely"); MODEL CODE OF PROF'L RESPONSIBILITY DR 7-102(A)(6) (1980) (stating that a lawyer shall not "[p]articipate in the creation or preservation of evidence when he knows or it is obvious that it is false").

295 Wydick, *supra* note 290, at 52.

296 *See* James W. McElhaney, *Horse-Shedding the Witness*, TRIAL, Oct. 1987, at 80, 83 ("It is better for there to be a little awkward spontaneity than the impression that everything is canned."); *see also* JOHN O. SONTENG ET AL., THE TRIALBOOK 214 (student ed. 1984) (advising that witnesses should "avoid the rehearsed look"); Carol T. Rieger, *M. Dombroff: Dombroff on Unfair Tactics*, 69 MINN. L. REV. 1430, 1439 (1985) (book review) (arguing that legal "gamesmanship" can result in bad advice). A famous example of apparently scripted testimony that backfired occurred in the Triangle Shirtwaist fire case in New York. *See* Daniel J. Kornstein, *A Tragic Fire—A Great Cross-Examination*, N.Y. L.J., Mar. 28, 1986, at 2.

witnesses. In the scenario described above, it would be not simply unethical but tactically unwise to exhort a client to deny that topic Z was discussed when others who attended the meeting may testify to the contrary. Where the lawyer remains unsure of the testimony of others, she has an incentive to ascertain what really happened so as to provide better counsel to her client.

The notion that the truth is more likely to emerge when attorney and client are kept, at least in part, uninformed, conflicts with the prevailing wisdom of the legal profession.[297] When, for example, Oliver North was questioned by the Senate, his attorney, Brendan Sullivan, Jr., complained that he and his client had not been provided with some of the documents upon which North was to be questioned until only a few days before his appearance before Congress. Sullivan told Senator Inoye that North "cannot be expected to accurately recall all of the facts" or to provide "complete and accurate testimony" without prior consultations with counsel.[298] As Professor Applegate notes, the comment probably came as a surprise to most viewers, who held the "common belief that an honest witness simply takes an oath and testifies."[299] But Professor Applegate seconds Sullivan's remarks, arguing that "[w]ithout an understanding of the underlying facts, witnesses may be flustered at trial by statements of other persons or by documents of which they were unaware."[300]

The argument that the jury will accord undue importance to a witness's confusion on the stand, whatever its merits at trial, has little force in the context of a criminal *investigation.* An experienced prosecutor would far prefer to have the opportunity to question each witness without that witness first having been "prepared" and coached by an attorney as to what others had testified. Such a prosecutor understands that a witness will not perfectly recall events; indeed, a witness's first recollection of events is apt to change when confronted with documentary evidence and the testimony of others. A witness may originally testify that topic Z was not discussed, but confronted with the

297 *See* Applegate, *supra* note 290, at 304 ("Lawyers frequently inform witnesses of facts of which they were previously unaware by telling the witness directly or by comparing the testimony of witnesses possessing similar knowledge. There are compelling reasons for informing a witness of other views, and most commentators do not question the practice.").

298 *Iran-Contra Investigation: Joint Hearing Before the Senate Select Comm. on Secret Military Assistance to Iran and the Nicaraguan Opposition and the House Select Comm. To Investigate Covert Arms Transactions with Iran,* 100th Cong. 3–5 (1987) [hereinafter *Iran-Contra Investigation*]. The episode is discussed in Applegate, *supra* note 290, at 283–84.

299 *See* Applegate, *supra* note 290, at 283.

300 *Id.* at 304.

secretary's minutes or with the testimony of others, the witness may honestly change his opinion. The prosecutor will, or should, understand that the original testimony was honest and even accurate, in the sense that it reflected the witness's recollection at that time. Recollections change as a witness is presented with more evidence; the question is whether the truth is more likely to emerge when a witness originally does not know what others have testified.

It is important to recall, moreover, that the joint defense privilege, as it has evolved, does not even require that attorneys act as intermediaries in the swapping of information. Parties working together in a joint defense agreement can gather in a room and, as long as one attorney, or even one agent of an attorney, is present, any exchange will be privileged. Thus, it would be a simple matter for one witness to address another witness and say, "My recollection is that we never discussed X, Y, or Z. In fact, all I recall discussing is your son's wedding," and the entire exchange would be privileged.[301] Such a conversation would clearly frustrate the search for the truth. As the Supreme Court has noted, "if . . . all witnesses remain in the courtroom while the grand jury investigation was going on to ensure that all testified in a consistent manner, it cannot seriously be doubted that this practice would hinder the grand jury in its task of uncovering the truth."[302]

Bentham, as well as the modern critics of the attorney-client privilege,[303] reminds us that there is at least a question whether society benefits when all clients, guilty and innocent, receive zealous legal advice. The limitations reflected in the traditional understanding of the attorney-client privilege, such as the confidentiality requirement and the restriction of the privilege to factual communications from a client to an attorney, implicitly reflected an awareness that, beyond a

301 Thus, when two witnesses coach each other in the presence of an attorney, the exchange is privileged, but if the same conversation occurs outside the presence of an attorney, the exchange is not privileged. And sophisticated clients *do* give "legal" advice to one another. For example, FBI surveillance recorded mobster Sammy Gravano lecturing a young member of the Gambino family:

> You're called to the grand jury. You gotta take the fifth. Alright so far? Now they give you immunity. What do you do? . . . [T]here is [sic] three things: common sense, common sense is one part, seventy-five percent of the answers. Another ten or fifteen percent . . . you gotta dance and bob and weave. One, I didn't remember, I don't think so, or to the best of my knowledge. Okay? Let's say fifteen percent, so that's seventy-five percent, so we're up to ninety percent. Ten percent, you out and out lie.

United States v. Gambino, 59 F.3d 353, 364 (2d Cir. 1995).

302 United States v. Mechanik, 475 U.S. 66, 74 (1986) (O'Connor, J., concurring).

303 *See supra* notes 74–75, 84 and accompanying text.

certain point, legal advice can become, from society's perspective, *too* zealous. There may be a socially optimal level of legal representation—advice that allows parties to be apprized of their rights, to explore contingent claims, etc.—but beyond that point, legal advice may frustrate other goals of the judicial system, including preeminently the discovery of the truth.

C. *Fairness: Symmetry Between Defense and Prosecution and the Role of Secrecy*

Another argument made on behalf of the attorney-client privilege is that the privilege ensures the even-handed application of the law.[304] Likewise, proponents of the joint defense privilege argue that it promotes fairness between the prosecution and the defense.[305] The prosecutor, it is said, has his own information-gathering device—the grand jury—which operates in secret,[306] and simple fairness dictates that witnesses also be permitted to operate their own secretive "shadow grand jury."[307]

This argument, which wraps the joint defense privilege in a patina of reasonableness, is fundamentally flawed. The prosecutor seeks to gather evidence in secret, to be sure, but the preservation of secrecy is not the prosecutor's *raison d'etre.* The prosecutor seeks to gather as

304 Professor Charles Fried, for example, has argued that it would be "immoral" to constrain citizens from either learning of their rights or from learning from others of their rights. *See* Fried, *supra* note 82, at 586. "Fairness" means that society should allow individuals to determine what the limits of the law are in relation to oneself, and this means societal recognition of a privilege that shields communications between a client and an attorney.

305 *See* NEW YORK BAR RECOMMENDATION, *supra* note 17 (arguing that the joint defense privilege "is rooted in common sense, efficiency and fairness"); Bartel, *supra* note 17, at 873 ("A trial becomes a lopsided contest when multiple co-defendants are discouraged from coordinating their defense and present unnecessarily inconsistent defenses. Relegating defendants to uncoordinated and inconsistent defenses bestows an unfair tactical advantage on the prosecution because inconsistent defenses impair the credibility of the defense as a whole."); Capra, *supra* note 282, at 20 (asserting that "pooling of information is often necessary to an effective defense or cause of action"); Foote, *supra* note 266, at 377 (explaining that "courts have welcomed the emergence of the joint defense doctrine because sharing information among multiple defendants is critical to effective representation"); Forsgren, *supra* note 241, at 1232 (stating that "courts recognize that the joint defense doctrine 'can be necessary for a fair opportunity to defend' in white collar cases" (quoting United States v. McPartlin, 595 F.2d 1321, 1336 (7th Cir. 1979))).

306 Morvillo, *supra* note 109, at 3 ("Grand jury secrecy is heavily relied upon [by prosecutors] to prevent subjects or targets of an investigation from learning about the relevant facts and allegations." (citation omitted)).

307 Jed S. Rakoff, *The Drafting of Joint Defense Agreements,* N.Y. L.J., Nov. 9, 1995, at 3.

much evidence as possible to determine whether a crime has been committed and, if it has, to present that evidence to a factfinder. Secrecy is an instrumental good, for it protects the reputations of those involved in an investigation, as well as enhances the likelihood of a successful investigation.[308] If the prosecutor determines that no crime was committed, then the evidence will never be revealed; if, however, a crime *has* been committed, the evidence will be publicized in a trial. Even prior to trial, if the prosecutor discovers evidence of wrongdoing, he will typically present that evidence to a target and his attorney in an effort to persuade him to plead guilty or simply to give him an opportunity to present an innocent explanation. And after an indictment, a prosecutor has a constitutional duty to disclose information to the defense.[309] The prosecutor, in short, engages in information-control practices only to further his true objectives—sorting the guilty from the innocent and marshalling the evidence against the former.

By contrast, for the defense lawyer, secrecy and information-control *are* the paramount goals. During the investigation phase, "the central theme of the white-collar crime defense function . . . [is] to keep potential evidence out of government reach by controlling access to information."[310] The defense attorney works to stem the flow of information to the government from his client and from any third party witnesses under his client's control;[311] information control is even sought in communications between the client and attorney.[312] If the defense attorney succeeds in preventing the prosecutor from

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308 The Supreme Court has summarized the reasons for grand jury secrecy, as required by Rule 6(e) of the Federal Rules of Criminal Procedure, as follows:

> (1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witness who may testify before [the] grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammeled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt.

Douglas Oil Co. v. Petrol Stops N.W., 441 U.S. 211, 219 n.10 (1979) (quoting United States v. Rose, 215 F.2d 617, 628–29 (3d Cir. 1954)).

309 *See* 28 U.S.C. § 2244(b)(2)(B) (Supp. V 1999); Brady v. Maryland, 373 U.S. 83, 87 (1963).

310 MANN, *supra* note 45, at 5.

311 *See id.* at 124–80.

312 Lawyers often do not seek the full factual picture from their clients so as not to trigger their ethical responsibilities. *See* STEPHEN GILLERS, REGULATION OF LAWYERS 445–51 (6th ed. 2002); MANN, *supra* note 45, at 103–23.

learning about incriminating evidence and keeping it secret, then he will have achieved his goal.[313]

In criminal procedure, then, "symmetrical," seemingly even-handed rules can have asymmetrical consequences. Rules that equally enhance the ability of the defense and the prosecution to deny information to the other can benefit the defense, but gravely impair a criminal investigation.[314]

D. Efficiency

Finally, its proponents claim that the joint defense privilege promotes "efficiency." The joint defense privilege is said to allow lawyers, working in concert, to avoid duplicative efforts, thereby reducing legal costs.[315]

A response to this argument might begin by sounding a note of surprise: why are lawyers so eager to *decrease* legal fees? The attorney-client privilege plainly benefits lawyers by *increasing* the amount of legal work relative to the work available to other professions. Accountants, investment bankers, and business consultants, who increasingly compete with lawyers for clients, cannot promise their clients secrecy in the wide range of circumstances that an attorney can. Thus, a cli-

313 By contrast, with respect to exculpatory evidence, the defense attorney will have every incentive to disclose such evidence.

314 *See* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1922 (1993).

315 *See* Bartel, *supra* note 17, at 873 ("The presentation of inconsistent defenses also lengthens a trial's duration, consuming more of a court's time than otherwise would occur. Deterring joint defense groups causes inefficiency that our criminal justice system cannot afford . . . ."); Joseph J. Ortego & David J.Vendler, *Avoiding Pitfalls of Joint Defense Groups*, FED. LAW., June 1998, at 30, 37 ("[The joint defense privilege] is a necessity, given today's concerns for limiting litigation expenses, avoiding duplication of legal services, and expediting resolution of disputes."); Reiss & Pacheco, *supra* note 246, at 2 ("[A] joint defense agreement may result in more efficient and more effective case management. By dividing tasks, counsel can avoid duplication of efforts, thereby reducing costs."); Scheininger & Aragon, *supra* note 19, at 13 ("[A] joint defense agreement lets defendants share resources, thereby reducing the staggering costs of defending a large case."); Kopta, *supra* note 266, at 154 ("Greater freedom to exchange privileged information could reduce . . . legal costs. . . ."); Rushing, *supra* note 15, at 1280 ("The policy underlying the joint-defense privilege, then, is to promote the general efficiency of legal representation by giving parties the tactical advantage of access to information in the possession of others."); Note, *The Corporate Attorney-Client Privilege: Culpable Employees, Attorney Ethics, and the Joint Defense Doctrine*, 58 TEX. L. REV. 809, 839 n.147 (1980) ("Society has an interest in promoting cooperation among joint defendants to enhance the efficiency of litigation, a benefit that offsets the cost of any obstruction of truthfinding that the doctrine might engender.").

ent seeking secrecy will have no choice but to retain a lawyer, even though other professionals might be able to offer similar services.[316] Lawyers have, predictably, defended the attorney-client privilege with vigor, and one would also expect attorneys to lobby against the privileging of communications between clients and other professionals, an expectation borne out by recent ABA opposition to a Congressional proposal to extend a limited evidentiary privilege to accountants.[317] Why, however, are lawyers so eager for courts and legislatures to develop, expand, and render more certain a privilege the purported consequence of which is to reduce legal work? Suffice it to say, we need to probe further.

What such a probe first reveals is that, although the joint defense privilege is touted for increasing efficiency, litigation arising out of joint defense agreements has proven to be a growth industry. Joint defense arrangements have prompted, as already indicated, government motions to disqualify defense counsel on conflict of interests grounds (when one member of a joint defense agreement defects and becomes a government witness),[318] defense motions to dismiss indictments (when the government secures information from a defector that was protected by the joint defense privilege),[319] and suits for damages on the basis of breached joint defense agreements.[320]

Moreover, implicit in the claim that the joint defense privilege increases efficiency is the idea that there is a finite amount of legal work to do, and joint defense agreements simply permit attorneys to divide up the work, to their clients' benefit. But in actual practice joint defense agreements *multiply* the amount of work that attorneys can do, even if there is no separate litigation as a result of the agreement.

Consider a grand jury investigation involving ten witnesses. First consider how the investigation might play out in the absence of a joint defense agreement. A witness with little knowledge of relevant events is subpoenaed by the grand jury. The attorney interviews the client

316 *See* Fischel, *supra* note 84, at 3–8.

317 *See* Mark Thompson, *A Taxing Matter: Lawyers Are Bracing for Competition from Accounting Firms*, CAL. LAW., Oct. 1998, at 17 (discussing ABA opposition to extension of accountant's privilege).

318 *See* United States v. Anderson, 790 F. Supp. 231 (W.D. Wash. 1992); United States v. Bicoastal Corp., No. 92-CR-261, 1992 U.S. Dist. LEXIS 21445 (N.D.N.Y. Sept. 28, 1992); United States v. McDade, No. 92-249, 1992 U.S. Dist. LEXIS 11447 (E.D. Pa. July 30, 1992).

319 *See* United States v. Henke, 222 F.3d 633 (9th Cir. 2000); United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989).

320 *See* Kiely v. Raytheon Co., 914 F. Supp. 708 (D. Mass. 1996).

before the grand jury appearance, accompanies him to the grand jury, and does a relatively quick debriefing afterwards. There may be some exchanges with other attorneys involved in the investigation, but in the absence of a joint defense privilege, attorneys will be reluctant to swap client confidences. There are limits, therefore, on attorney-orchestrated strategizing.

Now consider how the investigation plays out with a joint defense agreement in place. Before any witness testifies, attorneys discuss each of their client's stories; meetings and conference calls are conducted, with many of the witnesses and attorneys present, to coordinate a response to the investigation. After each witness testifies before the grand jury, he is elaborately debriefed by his attorney. The attorney then prepares a memorandum to be shared with other attorneys, which explores not only the testimony given, but also the prosecutor's questions, as a reflection of the prosecutor's knowledge and the direction of his case. Attorneys again conduct meetings and conference calls, larding their bills with endless hours of "strategy sessions" or the like. Absent a joint defense agreement, cooperation among attorneys may occur anyhow, but it will not be nearly as involved as when a joint defense agreement exists.

When proponents of the joint defense privilege argue that the privilege reduces legal fees by permitting the consolidation and division of work, they are looking, as it were, at only one side of the ledger. The joint defense privilege may, on the one hand, reduce legal fees by promoting a division of labor.[321] But, on the other hand, the privilege increases fees by enhancing a lawyer's opportunities to perform work on his client's behalf. Without the joint defense privilege, an attorney can *himself* use any information he develops in the course of a representation to develop legal theories and formulate defenses. As Judge Easterbook notes, the attorney-client privilege serves as a "species of property right in information," permitting the attorney to realize a return on his investment in information.[322] But that return is limited by the non-disclosure requirement, for the only potential buyer of the attorney-generated information is the prosecutor. Once a joint defense agreement is in place, however, the information can be peddled to other persons under investigation and their lawyers, as well as to the prosecutor. Because there are more potential buyers for the attorney-generated information, the value of the infor-

321 One should, however, not overstate the efficiencies that should be credited to the joint defense privilege. It is important to recall that much division of labor could occur even without the joint defense privilege. *See supra* Part IV.A.

322 *See* Easterbrook, *supra* note 84, at 356–57.

mation, formerly suppressed when the prosecutor enjoyed monopsony power, increases.[323] And as the value of attorney-generated information increases, so too will the expected investment in legal services. In short, the effectiveness of a lawyer's advice to his client has likely increased as a result of the joint defense agreement, but so too, in all likelihood, has his billable hours.

Even assuming, contrary to the above conclusion, that the joint defense privilege works, on balance, to reduce the overall fees charged by lawyers, the privilege may nonetheless generate externalities that would need to be taken into account. Any fair assessment of the joint defense privilege and the agreements it fosters must acknowledge that they *increase* the obstacles faced by prosecutors in a criminal investigation. By fostering cooperation among persons under investigation, joint defense agreements decrease the likelihood that any one insider will cooperate with a prosecutor at the outset of an investigation. When evidence is not forthcoming from the parties themselves, prosecutors and law enforcement officers will need to labor to find other evidence. Such an expenditure of law enforcement resources is a social cost absent from the calculus of those who tout the efficiency of joint defense agreements. An alternative prosecutorial strategy in response to a joint defense agreement may be to offer generous deals (principally involving a reduction of punishment) to entice one of the insiders to testify. Here, again, joint defense agreements create externalities (shortened incapacitation of offenders, diminished deterrence, reduced fines recovered) that undercut claims as to the "efficiency" of joint defense agreements.

It might be said in response that, especially with respect to certain business and regulatory offenses, the criminal statutes themselves are so indeterminate and the maximum statutory penalties so steep that they "over-deter," for they deter more socially beneficial activities than socially harmful activities.[324] To the extent that joint defense agreements force prosecutors to accept deals involving penalties less than the statutory maximum, society, as well as the individuals under investigation, benefit, for the penalties then actually assessed are more appropriately gauged to the offense.[325]

Whatever the merits of this argument, it is important to recognize how far afield it is from the arguments on behalf of the joint defense

323 *See* STEARNS, *supra* note 288, at 118.

324 For example, payments to foreign officials, though criminalized in some circumstances, may entail zero social costs. *See* Daniel R. Fischel, *The Corporate Governance Movement*, 35 VAND. L. REV. 1259, 1270–71 (1982).

325 *See* Fischel, *supra* note 84, at 32; Kaplow & Shavell, *supra* note 84, at 600.

privilege ordinarily peddled today. To state this view plainly: the privilege is socially beneficial because it increases the cost of investigating and prosecuting crime; the increased investigation and prosecution costs mean less effective enforcement, which in turn lowers expected sanctions; and lower expected sanctions in turn means less compliance with the criminal law, which is said to be desirable precisely because the criminal law itself is misguided. It is, perhaps, a sufficient response to note that this argument is patently overbroad: we may concede that some and even many criminal laws are misguided, but few would argue that *all* of them are. If so, then the better answer is to reform those flawed laws, not change evidentiary rules and criminal procedure in a way that hinders the enforcement of *all* criminal laws.

In sum, from society's standpoint, a "prisoner's dilemma"—which depends on the impossibility of coordination and therewith the nonexistence of a joint defense privilege—may be more efficient than a system in which joint defense agreements foster cooperation among persons under investigation. The prisoner's dilemma increases the likelihood that plea bargains can be quickly obtained from one insider after another. An efficient criminal investigation is one that expeditiously sorts the guilty from the innocent. Joint defense agreements, which frustrate such sorting, are unlikely to promote efficiency.

V. The Joint Defense Privilege Reconsidered

Courts and academics have failed to explain the doctrine of the joint defense privilege or supply compelling policy justifications for it, because they have been wedded to the ideas that surround the attorney-client privilege. Having stripped away these misconceptions, this Part tentatively proposes another justification for the joint defense privilege in the context of a criminal investigation and in light of that justification, a more precisely defined privilege.

Part V.A argues that the joint defense privilege is better understood, and justified, as an attempt to alleviate the risk that an innocent witness in a criminal investigation will be pressured by prosecutors to falsely inculpate himself. This suggestion is then scrutinized in Part V.B, especially in light of the possibility that joint defense agreements might have the effect of entangling an innocent witness in a criminal conspiracy. Ultimately, this Article is skeptical of the benefits of the joint defense privilege even for the innocent witness, at least when the privilege is broadly construed. Focusing on the plight of the innocent witness, confronting the prisoner's dilemma of falsely incriminating himself or facing steeper penalties, suggests a more narrowly tailored

privilege. In Part V.C, I argue that the joint defense privilege should be restricted to those currently under indictment or reasonably expecting to be indicted.

A. The Innocent Witness

We have already explored the power of the prisoner's dilemma in eliciting testimony in a criminal investigation.[326] The prisoner's dilemma, however unfortunate for those confronting it, is a socially useful tool in pressuring those naturally reluctant to incriminate themselves and others to provide such testimony. One concern, however, is the possibility that the prisoner's dilemma may result in untruthful testimony, offered in the hope of appeasing the prosecutor. An especial concern is that an innocent witness, confronted with the threat of a significant penalty and unable to reach out to others under investigation, may be pressured to falsely inculpate himself and others.[327] The joint defense privilege may prove a boon to the guilty in crafting false alibis, but that cannot be the end of our analysis, for society benefits when the innocent succeed in defeating the prisoner's dilemma. Thus, the joint defense privilege, although imposing substantial costs on society, may still be defensible if it promotes this goal, even if it creates widespread procedural obstacles in all criminal investigations.

One immediate way in which in which the joint defense privilege may benefit the innocent witness is in facilitating her ability to obtain legal advice.[328] For example, in a large-scale corporate investigation, the corporation may provide attorneys for its employees, often on the condition that they enter into a joint defense agreement with the cor-

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326 *See supra* Part I.A.

327 One should not overstate this possibility. An innocent person, especially one advised by competent counsel, is usually in a better position than a guilty one to resist the prosecutor's threats, and thereby to defeat the prisoner's dilemma. The efficacy of the prisoner's dilemma depends upon a realistic basis for the prosecutor's claims to possess evidence or information. If the prosecutor tells an innocent witness that he possesses evidence against her, the claim is likely to be met with some skepticism, for the innocent witness knows no such (reliable) evidence exists. Such a claim may, however, be consistent with the facts as known by the guilty witness, who is likely to be more vulnerable to the prisoner's dilemma as a consequence. *See* William J. Stuntz, *Waiving Rights in Criminal Procedure*, 75 VA. L. REV. 761, 798 n.114 (1989) (arguing that the prisoner's dilemma is likely to exert greater pressure on innocent witnesses than guilty ones).

328 *See* Bartel, *supra* note 17, at 883 (arguing that joint defense agreements "help procure legal representation for people who otherwise might lack the financial means to hire a lawyer").

poration and freely share information. The joint defense privilege allows such a transaction to occur.[329]

Moreover, an innocent witness, or a marginally culpable one, pressured to provide falsely incriminating evidence, would benefit from the ability to communicate with other witnesses. Such a witness may lack the resolve, if isolated from other witnesses, to rebut the charges. In other words, to defeat the prisoner's dilemma, communication and coordination with other witnesses will often be important. An innocent witness may be tempted to succumb to the prosecutor's threats unless he can obtain meaningful assurances from other witnesses that they have not testified and do not intend to testify against him. Indeed, a joint defense agreement may be *more* useful to an innocent witness unexpectedly thrust into a criminal investigation than a guilty one. Those who have embarked on a criminal conspiracy may have forged meaningful bonds prior to the initiation of an investigation. Secrecy oaths, commonplace among criminal conspirators across cultures, may diminish the power of a prosecutor's threats and enhance the ability of those trapped in the prisoner's dilemma to defeat it.[330] Thus, although a joint defense agreement may do little to enhance the ability of organized crime individuals, for example, to coordinate their response to an investigation, such an agreement may prove invaluable to the truly innocent.

Finally, the innocent witness may benefit from the joint defense privilege insofar as it is a bulwark against prosecutorial overreaching and abuse. Although the topic of prosecutorial abuse has attracted considerable scholarly attention of late,[331] the utility of joint defense agreements as checks upon prosecutorial overreaching has not been considered. Where the prosecutor is convinced, rightly or wrongly, that the target of the investigation is guilty, he may threaten her, when all else fails, with perjury and obstruction of justice charges. A prosecutor with a weak case based on a violation of the substantive criminal

329 Nor should one assume that innocence necessarily obviates the need for legal counsel in a criminal investigation. A prosecutor, unlike an omniscient observer, cannot "know" that a witness is innocent, especially in the early stages of an investigation. Other persons involved in the investigation may tell prosecutors, in honest error or to deflect attention from themselves, that the truly innocent witness was not innocent at all. A lawyer can assist the wrongly accused both in communicating informally with the prosecutor to signal his innocence and in preparing the client to respond to the false accusations.

330 *See* Richman, *supra* note 29, at 78 & n.35 (discussing Mafia secrecy oaths).

331 *See, e.g.*, Angela J. Davis, *The American Prosecutor: Independence, Power, and the Threat of Tyranny*, 86 IOWA L. REV. 393 (2001); Peter J. Henning, *Prosecutorial Misconduct in Grand Jury Investigations*, 51 S.C. L. REV. 1 (1999); Fred C. Zacharias, *The Professional Discipline of Prosecutors*, 79 N.C. L. REV. 721 (2001).

law may nonetheless have a stronger case that a false statement was made, perhaps inadvertently, in the course of the investigation. The joint defense privilege may mitigate this danger. Absent the joint defense privilege, a party may testify before a grand jury with the genuine desire to provide full and complete evidence, but he may unintentionally omit a vital fact. The prosecutor could then claim that this omission was willful and develop a criminal case based on it. For example, a party may testify that he did not attend a certain meeting or that a certain subject was not discussed at the time. This may well be an honest, unrefreshed recollection. With a joint defense agreement in place, however, the party may learn that others have testified that such a meeting occurred before he is called to testify. Their description of the meeting may jar his memory, allowing him to give a more accurate account to a grand jury or to a law enforcement officer. The joint defense privilege may thus protect the innocent by preventing prosecutors from making baseless accusations and threatening prosecutions on manufactured charges of perjury or obstruction of justice.

Although the joint defense privilege, viewed as a refuge for the innocent witness thrust into a criminal investigation, is the best justification for the joint defense privilege, it is not wholly convincing. As an initial matter, it is true that joint defense agreements may enable persons to obtain legal representation at no cost to themselves—because their fees are paid by others—but the disinterestedness of the legal representation they receive may suffer as a result. An innocent witness may be best advised to disassociate himself from the other persons being questioned and to cooperate with prosecutors. The decision to cooperate is a "leap into the unknown," and the client, even a sophisticated client, is likely to rely heavily on the advice of counsel.[332] If the attorney's personal interest is aligned with that of another lawyer, there is at least ground for the suspicion that the minor player may not receive wholly independent and prudent legal advice.

B. The Joint Defense Privilege as a Trigger for Prosecutorial Overreaching

To the extent that a joint defense agreement hinders the prosecutor's access to information, it deprives him of the information with which he can quickly sort the innocent from the guilty. Confronted with such obstacles, the prosecutor can either fold up the investigation and decline prosecution or more aggressively seek out the information that will advance the investigation (and thereby, perhaps, his

332 *See* Richman, *supra* note 29, at 73 (arguing that one should "appreciate the critical role of defense lawyers in the decision to cooperate").

career). The fallacy of those who laud the joint defense privilege and the arrangements it fosters is the assumption that the prosecutor will always choose the first option. In fact, the prosecutor may aggressively pursue the case in a manner that makes the innocent witness worse off than he was before entering into a joint defense agreement.

To be sure, a prosecutor confronts a world in which there are more crimes to be pursued than there are hours to pursue them, and declination of a difficult case would allow a prosecutor to develop other, easier ones. But even if such considerations might incline the prosecutor to discontinue an investigation, other factors may rouse him to pursue it even more relentlessly in the face of seemingly insuperable obstacles. Federal prosecutors are, in part through self-selection, among the more aggressive members of the legal profession, and such character traits are likely only exacerbated by the culture of prosecutorial offices, where a reputation for *declining* cases is often worse than a reputation for *losing* cases.[333]

Consider, again, a previously quoted passage in which a prominent defense attorney extolled the virtues of joint defense agreements. Lanny Breuer, former White House Special Counsel for President Clinton, wrote, "In a world of only black and white, prosecutors frequently view [a joint defense] arrangement as obstructionist and fundamentally undermining their search for truth. *While these feelings are not surprising, there is nothing prosecutors can do to object.*"[334]

But there *are* prosecutorial strategies in response to joint defense agreements. A prosecutor, unable to gather evidence that either sorts the guilty from the innocent or is sufficient to charge any person with a substantive offense, may threaten to charge all involved with criminal conspiracy or its modern incarnation, a RICO violation.[335] Such a charge may have the effect of sweeping in the innocent, or only barely guilty, with the most culpable parties. Then, the minor player will confront the possibility of sanctions vastly greater than any injury to society caused by his conduct.[336] Moreover, one of the many aspects of RICO that makes it so famously congenial to prosecutors is the lib-

333 On prosecutorial culture generally, see Bennett L. Gershman, *The Prosecutor's Duty to Truth*, 14 GEO. J. LEGAL ETHICS 309, 318–25 (2001).

334 Breuer & Imbroscio, *supra* note 267, at S27 (emphasis added).

335 18 U.S.C. §§ 1961–1968 (1994).

336 *See* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., CRIMINAL LAW § 6.8(a), at 588–89 (2d ed. 1986). As Professor Stunz has noted, moreover, "the extra punishment is not necessarily justified as a penological matter, nor is the prosecutor likely to want actually to impose it on low-level figures in the criminal organization. The prosecutor's interest is not in overpunishment but disclosure." Stuntz, *supra* note 314, at 1951.

eral availability of pretrial forfeiture.[337] During the Chicago U.S. attorney's investigation of the commodities market in the late 1980s, traders were pressured to testify against their higher-ups during midnight visits by law enforcement agents. According to newspaper accounts, traders reported that they were threatened with RICO charges: "You like your house, you like your car? Your wife likes her jewels? Well, they're ours now."[338]

When information is not forthcoming, another prosecutorial tactic is to subpoena the family members of witnesses who have failed to provide evidence. Many criticized the Office of the Independent Counsel's decision to subpoena Monica Lewinsky's mother to the grand jury,[339] but the occasional observer noted that the practice, unseemly or not, is utterly commonplace.[340] Family members are, after all, often privy to relevant evidence, and, other than spouses, none can claim a privilege in the federal or state system.[341] Prosecutors are unlikely to deny themselves a potentially valuable source of information when other sources prove unfruitful.

Another prosecutorial tactic is to ratchet up the pressure, and potential exposure, of a witness who has not, in the prosecutor's opinion, been altogether candid. I discussed above the utility of a joint defense agreement in heading off a possible case for perjury. But sim-

337 *See* 18 U.S.C. § 1963(d)(1) (providing for the issuance of pretrial restraining orders to preserve the availability of tainted assets for postconviction forfeiture, as described in § 1963(a)).

338 Editorial, *The Kinder, Gentler Hog Butcher*, WALL ST. J., Jan. 26, 1989, at A14. RICO charges were also used to coerce testimony during Rudolph Giuliani's investigation of Wall Street figures. *See* L. Gordon Crovitz, *How the RICO Monster Mauled Wall Street*, 65 NOTRE DAME L. REV. 1050, 1059 (1990). Giuliani brought a RICO prosecution rather than a tax fraud case against the relatively small securities house Princeton/Newport Partners because "RICO could be the rubber hose to bludgeon Princeton/Newport officials into testifying against bigger fish." *Id.* Lawyers for Princeton/Newport alleged, "'The primary purpose [of the RICO prosecution] in this case is to coerce the testimony of the defendants against principals at Drexel Burnham Lambert and Goldman Sachs.'" *Id.* They further claimed that prosecutors told them—a claim denied by prosecutors—"that 'we have no real interest' in Princeton/Newport, but that the firm 'can help us with Drexel Burnham and others. . . . If you cooperate, fine. If you don't, we are going to roll right over you to get where we want to go.'" *Id.*

339 *See* Vikram David Amar & Akhil Reed Amar, *Justice: 10 Things We Learned From Starr*, L.A. TIMES, Oct. 24, 1999, at M3; Juliet Eilperin, *Gingrich Awaits Starr Report: Speaker Reassures GOP Colleagues of Political Boon*, WASH. POST, Apr. 4, 1998, at A1; Stuart Taylor Jr., *Must a Parent Testify?*, NEWSWEEK, Feb. 23, 1998, at 33.

340 *See* Davis, *supra* note 331, at 427.

341 *See In re* E.F., 740 A.2d 547, 549 (D.C. 1999) ("To our knowledge, no federal court of appeals or state highest court has recognized a parent-child privilege, even limited to confidential communications.").

ilar dangers are not altogether eliminated. In this respect, the catch-all "false statement" statute, 18 U.S.C. § 1001, is a notoriously useful prosecutorial tool, for its encompassing language covers any "false, fictitious, or fraudulent statement or representation . . . in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States."[342] There is no requirement that the statement actually mislead investigators; the prosecution can "create" a § 1001 case by asking a witness questions when she already knows the answers. In the candid words of the Solicitor General in a recent oral argument before the Supreme Court, the prosecution can then "escalate completely innocent conduct into a felony."[343]

Prosecutors have also taken aim at the attorney-client privilege itself, exciting the especial ire of defense counsel. Prosecutors have increasingly alleged that attorney-client communications were in furtherance of an ongoing crime, and a number of courts have been receptive, embracing an expansive approach to the crime-fraud exception to the attorney-client privilege.[344] A prosecutor can also

342 Section 1001 provides in full:

> [W]hoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully (1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; (2) makes any materially false, fictitious, or fraudulent statement or representation; or (3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title or imprisoned not more than 5 years, or both.

18 U.S.C. § 1001 (1994).

343 Transcript of Oral Argument, Brogan v. United States, 522 U.S. 398 (1998) (Docket No. 96-1579), Dec. 2. 1997, 1997 U.S. Trans. LEXIS 76, at *32–*33 (statement of Solicitor General Seth Waxman); *see also Brogan*, 522 U.S. at 416 (Ginsburg, J., concurring) (warning about "overzealous" prosecutors using § 1001); Giles A. Birch, Comment, *False Statements to Federal Agents: Induced Lies and the Exculpatory No*, 57 U. CHI. L. REV. 1273, 1278 (1990)

> [I]f an investigator finds it difficult to prove some elements of a crime, she can ask questions about other elements to which she already knows the answers. If the suspect lies, she can then use the crime she has prompted as leverage or can seek prosecution for the lie as a substitute for the crime she cannot prove.

Id. (citation omitted).

344 As one defense attorney noted, "The Department of Justice seems to be pushing the envelope in trying to get courts to say that you don't need to have communications as the law has traditionally recognized in furtherance of crime or fraud, but simply something that is related to a potential crime or fraud." *Interview with Jan Handzlik, Kirkland & Ellis and Vincent J. Marella, Bird, Marella, Boxer & Walpert, Los Angeles, California*, CORP. CRIME REP., Feb. 8, 1999, at 12, 14–15 (statement of Ian Handzlik).

pressure corporate managers to waive the corporate attorney-client privilege or face indictment and stiffer penalties.[345] Prosecutors have lately been more vigorous in demanding information about the source of legal fees, rejecting claims that such information is privileged.[346] And prosecutors have required participants in joint defense agreements to sever their ties with the other joint defense members as a condition of government cooperation.[347] In short, the suggestion that prosecutors are powerless in response to joint defense agreements is woefully off the mark. Indeed, if Breuer's and Imbroscio's claim was accurate, how could one explain the title of a recent ABA Criminal Justice Section meeting: "Assault on the Privilege: Protecting and Defending the Attorney-Client Privilege, Work Product, and Joint Defense Agreements in Criminal Investigations"?[348]

There has been an outpouring of recent academic articles complaining about such prosecutorial "assaults" and gesturing rather broadly to an alleged rise in prosecutorial abuse.[349] I would suggest that one explanation for prosecutorial "overreaching" in the conduct of investigations is that "the ever increasing sophistication of the white collar defense bar,"[350] and the proliferation of information-control practices, such as the joint defense privilege, have spurred prosecutors to more intrusive means of extracting information. This, in turn, may drive defense counsel to be ever more active in their own efforts to frustrate the prosecutor.

My suggestion has a counterpart in the academic literature. Professor Stuntz has written recently about legislative responses to judi-

345 Robert Morvillo, a defense lawyer in New York City, has written,

> The office of the United States Attorney for the Southern District of New York routinely coerces corporate waivers of the privilege by informing corporate managers that their failure to waive the privilege will be evaluated in determining whether the corporation has been sufficiently cooperative to avoid indictment and/or a severe guidelines sentence.

Robert G. Morvillo, *The Decline of the Attorney-Client Privilege*, N.Y. L.J., Dec. 2, 1997, at 3 (citation omitted).

346 *See, e.g.*, *In re* Grand Jury Subpoena, 204 F.3d 516, 520 (4th Cir. 2000) ("'[T]he identity of the client, the amount of the fee, the identification of payment by case file name, and the general purpose of the work performed are usually not protected from disclosure by the attorney-client privilege.'" (quoting Chaudhry v. Gallerizzo, 174 F.3d 394, 402 (4th Cir. 1999))).

347 *See* Breuer & Imbroscio, *supra* note 267, at S27.

348 Meeting of the Criminal Justice Section of the American Bar Association (Feb. 7, 1999).

349 *See supra* note 331.

350 *See* Breuer & Imbroscio, *supra* note 267, at S27.

cially created procedural protections for criminal defendants.[351] Stuntz argues that legislatures have emasculated many judicial protections by underfunding criminal defense counsel, increasing sentences for numerous offenses, and vastly expanding substantive criminal liability.[352] Stuntz argues, in other words, that judicially created criminal procedure rules are (partly) driving an ill-advised expansion of the substantive law, which in turn makes courts more protective of the rights of suspects, and continuing on in a vicious cycle.

My claim is that another cycle may be occurring. As courts prove more receptive to expansions of the attorney-client privilege, defense counsel have exploited those advantages and proven more effective in stymieing the prosecutors' access to information. But this, in turn, has driven prosecutors to become more aggressive in their efforts to obtain information. Not only legislatures, but prosecutors as well, can respond to enhancements in criminal procedural protections. Thus, although joint defense agreements are promoted as a check upon prosecutorial abuse, they may have precisely the opposite effect. Joint defense agreements, which prevent the expeditious acquisition of information, may galvanize a prosecutor to pursue ever more intrusive techniques.

C. Rethinking the Contours of the Joint Defense Privilege: A New Model for Its Justification and Scope

The most compelling argument for recognizing the formation of joint defense agreements in criminal investigations is to protect innocent witnesses being pressured by prosecutors to come forward with evidence that falsely incriminates themselves or others. Society benefits when the innocent succeed in defeating the prisoner's dilemma, and to the extent that the joint defense privilege assists the innocent witness in so doing, it may be justified on this basis. With that argument in mind, but against the backdrop of the significant costs of the joint defense privilege when guilty parties avail themselves of the privilege and when prosecutors ratchet up penalties in response to joint defense agreements, we can sketch the appropriate contours of the privilege. As with any evidentiary privilege, the joint defense privilege should "'be strictly construed'"[353] to achieve its objective—that is, to protect the innocent person pressured to falsely incriminate himself.

351 *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1 (1997).

352 *Id.* at 55–59.

353 Univ. of Pa. v. EEOC, 493 U.S. 182, 189 (1990) (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)). The Supreme Court has stated that a privilege applies

An appropriate entry to the question of the privilege's proper scope is to consider when an innocent person is likely to face such pressure. Someone who has been indicted and charged with a criminal offense is plainly in such a predicament. A prosecutor is likely to condition a favorable plea bargain or sentencing reduction motion on the defendant's willingness to falsely concede his own guilt and often to provide testimony, of possibly doubtful veracity, against others. Especially after a prosecutor has indicted several people together, a joint defense agreement (and its concomitant information sharing) may strengthen the determination of innocent defendants to resist the pressure of the pending charges. Thus, where criminal litigation has actually commenced, the joint defense privilege would, under this argument, be defensible.

More difficult questions arise prior to indictment in the context of an ongoing criminal investigation. Most persons called to testify before a grand jury, especially ones represented by counsel, have some idea of where they fit in an investigation and what their exposure is, if any, before entering the grand jury. A defense lawyer ordinarily requests that a prosecutor, before a grand jury appearance, identify his client's "status," which can range from a target, to a subject, to a mere witness.[354] The United States Attorneys' Manual[355] (U.S.A.M.) defines a "target" as "a person as to whom the prosecutor or the grand jury has substantial evidence linking him or her to the commission of a crime and who, in the judgment of the prosecutor, is a putative defendant,"[356] and the U.S.A.M. defines a "subject" as "a person whose conduct is within the scope of the grand jury's investigation."[357] "Witness" is the catch-all category for all other persons called to testify.[358] The definitions are somewhat imprecise,[359] and some-

only where it is "necessary to achieve its purpose," Fisher v. United States, 425 U.S. 391, 403 (1976), and "promotes sufficiently important interests to outweigh the need for probative evidence." *Trammel*, 445 U.S. at 51.

354 *See* U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL §§ 9-11.150 to 9-11.154 (Supp. 1992) [hereinafter UNITED STATES ATTORNEYS' MANUAL].

355 Although the U.S.A.M. does not confer any rights, *see* United States v. Lorenzo, 995 F.2d 1448, 1452 (9th Cir. 1993), it is regularly consulted by prosecutors in grand jury practice.

356 UNITED STATES ATTORNEYS' MANUAL, *supra* note 354, § 9-11.151.

357 *Id.*

358 *Id.* "Witness" can be used in the generic sense of anyone called to testify before a grand jury, or it can be used in the more specific sense of someone with no criminal exposure, that is, in contradistinction to a subject or target.

359 Indeed, interpretations vary from jurisdiction to jurisdiction, and even from prosecutor to prosecutor. For some prosecutors a target is someone virtually certain to be indicted; others, adopting a more expansive interpretation of the U.S.A.M., ap-

one's status can change over time.[360]

Nonetheless, the decisive point for our purposes is that a person called to testify before the grand jury who is told that he is merely a witness (in contradistinction to a target or subject) is under virtually no pressure, at least from the prosecutor, to provide falsely incriminating testimony. Such a status carries no implied threat, and, as a consequence, the party in no way confronts a prisoner's dilemma (i.e., provide false testimony against oneself or face steeper penalties). By contrast, a party informed by the prosecutor that he is the "target" of the investigation is impliedly being threatened and would be reasonably fearful of indictment. Such a party *is* confronting a prisoner's dilemma and, even if he is innocent, may succumb to the pressure of falsely incriminating himself to ward off indictment. The designation of "subject" is the most indeterminate of the three, for the prosecutor is signaling his concerns that the person might have committed a crime but that there is insufficient evidence to know one way or other. Ordinarily, the designation of "subject" is interpreted not as a threat but as an acknowledgement of the prosecutor's ignorance.[361]

The implications of this analysis are as follows. Only persons currently under indictment or reasonably anticipating the possibility of indictment—that is, those identified by prosecutors as targets—should be permitted to avail themselves of the joint defense privilege. "Witnesses" in an investigation, facing no criminal exposure and under no implied threat of possible indictment, have little need for such a privilege because they are under virtually no pressure to falsely incriminate themselves or others. Although those designated "subjects" may not have the same degree of confidence, they are also not in a prisoner's dilemma because the status of subject carries no implied threat of impending indictment.

Where persons with relevant evidence, but facing no criminal exposure, enter into joint defense agreements with the targets of the investigation, the result is likely truth-defeating. The targets can then shape their stories, or gauge their strategy, more fully informed about the progress of the investigation. The truth is more likely to emerge in a criminal investigation in which targets are isolated, as much as

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ply the term to those linked to substantial evidence of guilt, but as to whom there is still a question whether indictment will be pursued.

360 As more evidence emerges, one initially deemed a "witness" may later be judged a subject or even a target: the bookkeeper once thought to be in the wrong place at the wrong time may in fact be a knowing accomplice.

361 Reflecting this fact, the U.S.A.M. counsels prosecutors to notify targets of their status but makes no similar suggestion for those who are subjects. *See* UNITED STATES ATTORNEYS' MANUAL, *supra* note 354, § 9-11.151.

possible, from others called to testify and thereby prevented from coordinating strategy or fabricating alibis with non-targets.[362]

Limiting the scope of the joint defense privilege may also protect the witness with no criminal exposure. Although joint defense agreements are celebrated for increasing the flow of information, it is often unclear how such an information flow benefits an innocent person testifying before the grand jury. He, after all, usually gains little from learning what others have testified. And, in fact, a joint defense arrangement poses significant risks to such a person, who may be drawn into a criminal conspiracy in which he played little or no part. His lawyer, perhaps paid by the target's lawyer, may encourage the witness to shade his story in a way that benefits the target but which may arouse the prosecutor's suspicions. Indeed, joint defense arrangements often prove to be extremely coercive environments for minor witnesses, for they are pressured to protect the targets of the investigation.[363]

Following this new model, courts should resist the conclusion that all persons questioned in a criminal investigation share a common interest and can, as a consequence, be permitted to enter into a joint defense agreement. Where a witness has no criminal exposure and has no reasonable expectation of being indicted together with the targets of an investigation, he (and his lawyer) have no proper basis for entering into a joint defense agreement with others under investigation. Only actual defendants and targets of an investigation, under this approach, would typically be permitted to avail themselves of the joint defense privilege.[364]

Limiting the joint defense privilege to those who are either under indictment or who face the reasonable possibility of indictment, it may be objected, gives rise to line-drawing problems. How can one know, it may be asked, in the midst of a criminal investigation, whether one reasonably faces a risk of indictment? The objection, although worthy of serious consideration, is not decisive. As an initial matter, there are already thorny line-drawing problems surrounding the joint defense

362 *See supra* Part IV.B.

363 *See supra* notes 193–95 and accompanying text.

364 It is already the case that targets of an investigation have protections that non-targets do not. U.S. attorneys are encouraged to afford targets "an opportunity to testify . . . before the grand jury" before indictment, *see* UNITED STATES ATTORNEYS' MANUAL, *supra* note 354, § 9-11.153, and are discouraged from subpoenaing a target, absent special reasons. *See id.* § 9-11.151; *see also id.* § 7-1.200 ("The Antitrust Division, of course, follows the Department's general practice of informing individuals, under certain circumstances, that they are targets of an investigation and advising them of the opportunity to appear voluntarily before the grand jury.").

privilege in the criminal context; as Part III argued, courts have inconclusively struggled to define the contours and scope of the joint defense privilege.

More importantly, the rule proposed here dovetails with the rule that already exists in civil litigation: only those with a "realistic basis" for believing that they may be joint defendants (or plaintiffs) are permitted to avail themselves of the privilege.[365] Courts have erroneously adopted the view that *all* persons questioned in a criminal investigation have a "realistic basis" for believing that they may end up as joint defendants. There is no empirical or logical support for this view; it simply reflects an abdication of the courts' proper role in limiting an evidentiary privilege, particularly one as novel as the joint defense privilege, to the category of cases in which it is most justified.

The rationale for the joint defense privilege proposed here—protecting the innocent person pressured to inculpate himself or others—suggests a narrowing of the scope of the privilege in the context of a criminal investigation. To accomplish this result, however, no change is required in the basic tests already adopted by courts and legislatures in recognizing the joint defense privilege. Rather, courts need to adopt the same rule—a "realistic basis" of status as co-litigants—in the same criminal context that already prevails in the civil context. In the absence of a common *legal* interest, as occurs when two or more parties face pending or reasonably anticipated litigation together, the joint defense privilege should not be recognized.

CONCLUSION

Most commentators have treated resistance to the emergence and expansion of the joint defense privilege as antiquarian and misguided. This Article's goal is to force practitioners and academics to confront a panoply of questions that surround the novel privilege, questions that render its continual expansion of doubtful social utility. As the title of the Article suggests, the joint defense privilege may be a refuge for the innocent, but it is also often a privilege to conspire: courts need to make an effort to cabin the application of the privilege to limit its costs.

The Article has aimed to strip away a number of misconceptions. First is the assumption that the joint defense privilege is a necessary corollary of the attorney-client privilege. The attorney-client privilege is premised on the (still controversial) claim that society is better off when clients are afforded a zone of privacy in consultations with their

365 Chan v. City of Chicago, 162 F.R.D. 344, 346 (N.D. Ill. 1995).

attorneys; such attorney-client privacy benefits society as a whole, it is argued, because clients can make a full disclosure of factual information to a person trained in the law. Such a rationale does not support the sharing of confidential information with persons outside the immediate attorney-client circle.

A second misconception is that any enhancement of the services lawyers are able to render their clients is socially advantageous. Although the attorney-client privilege is not costless, for it may result in the withholding of relevant evidence from an adversary or factfinder, it is said to be, on balance, socially desirable for a number of reasons: fully informed, lawyers can apprize clients of their rights, assist clients in efforts to conform their conduct to the law, and allow clients to explore claims or defenses of which they were hitherto unaware. The privilege is, however, circumscribed in scope and riddled with exceptions. These limitations, such as the confidentiality requirement, restrict the services an attorney can render a client to those deemed to be, on balance, in society's interest.

A third misconception is that the "flow of information" that results from the joint defense privilege—principally, the sharing of client confidences—necessarily benefits society at large. It is often in society's interest to frustrate efforts among citizens to pursue cooperative strategies. Especially in the context of criminal investigations, joint defense agreements entail significant, although often unrecognized, externalities. Like other procedural obstacles to criminal investigations, the joint defense privilege has a diluting effect on expected criminal sanctions.

The strongest argument for recognizing the formation of joint defense agreements in criminal investigations is to protect innocent witnesses. To be more precise, it is to protect innocent persons who are being pressured by a prosecutor to come forward with false evidence that incriminates themselves or others. Society benefits when the innocent succeed in defeating such a prisoner's dilemma. With that argument in mind, but against the backdrop of the significant costs of the joint defense privilege, this Article proposes to limit the privilege to those currently facing indictment or who reasonably expect to be indicted.

More broadly, the Article highlights a neglected component of the dynamic unleashed when courts extend certain kinds of procedural protections to criminal defendants. That legislatures may, regrettably, respond to judicially created rights by changing the substantive law has recently been recognized. I suggest that prosecutors can, and almost certainly will, respond as well. Confronted with obstacles such as joint defense agreements, prosecutors can be expected to resort to

a variety of tactics to extract information, tactics which, although permitted by the courts, have been tarred as prosecutorial overreaching. As defense attorneys play a more active role in packaging the information that reaches prosecutors or staunching the flow of information altogether, one should not be surprised to find prosecutors taking a more active role in seeking to gather information.