

ADVICE AND COMPLICITY

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ABSTRACT

The practice of law occurs at the boundary between the criminal law and the rules of professional responsibility. In their respective definitions of lawyers' complicity in their clients' crimes, these two systems of rules conflict. The rules of professional responsibility exonerate a lawyer for advising a client in committing a crime if the lawyer acted in good faith; however, the criminal law convicts the same lawyer of aiding and abetting the client's crime even if the lawyer believed that the conduct in question was legal. As a result of this conflict, choosing which standard of complicity to apply in a given case risks undermining the purposes and interests served by the system of rules whose standard is not chosen. Perhaps worse, the lack of a consistent standard of complicity for lawyers acting as advisors forecloses all opportunities to reach a common understanding of when lawyers will be held liable for advising on legally dubious conduct. The legal profession's ethical crises over lawyers' roles in the "torture memo" controversy, the Enron scandal, and the Kaye Scholer affair demonstrate the confusion that has ensued from the absence of an adequate concept of complicity. This Note uses these crises to examine the conflict between the concepts of complicity embodied in the professional rules and the criminal law. It then seeks to resolve this conflict by exploring whether a coherent concept of lawyers' complicity can preserve the principles and purposes served by both systems while differentiating the innocent advisor from the culpable accomplice.

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INTRODUCTION

The theory of complicity describes the circumstances in which “one person . . . becomes liable for the crime of another.”¹ The basic doctrine consists of two elements: first, the alleged accomplice must take an action that facilitates the primary actor’s pursuit of a potentially criminal goal;² second, the accomplice must act with the purpose of enabling the primary actor to achieve the goal.³ If the goal pursued by the primary actor is a crime, and the primary actor accomplishes it,⁴ then the person facilitating the conduct in question becomes an accomplice.⁵ Unless a mistake of law⁶ would be a viable defense to the primary actor’s crime, the accomplice’s belief that the goal pursued by the primary actor is legal does not mitigate the accomplice’s culpability.⁷

Lawyers are professional facilitators. They engage routinely in helping people accomplish their purposes. As advisors, lawyers are called upon to render candid opinions on how clients may pursue their goals within the boundaries of the law.⁸ According to the rules of

1. Sanford H. Kadish, *Complicity, Cause, and Blame: A Study in the Interpretation of Doctrine*, 73 CALIF. L. REV. 323, 336 (1985).

2. *See id.* at 342 (“Two kinds of actions render the secondary party liable for the criminal actions of the primary party: intentionally influencing the decision of the primary party to commit a crime, and intentionally helping the primary actor commit the crime . . .”).

3. *See id.* at 346 (“[The accomplice] must act with the intention of influencing or assisting the primary actor to engage in the conduct constituting the crime.”); *see also* WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR., *CRIMINAL LAW* 576 (2d ed. 1986) (“[Accomplice liability consists of giving] assistance . . . with the intent thereby to promote or facilitate commission of the crime.”).

4. *See* Kadish, *supra* note 1, at 355 (“By its nature, the doctrine of complicity, like causation, requires a result. It is not a doctrine of inchoate liability.”).

5. *See id.* at 337 (“[The accomplice’s] liability is derivative, which is to say, it is incurred by virtue of a violation of law by the primary party to which the secondary party contributed.”).

6. “Mistake of law” refers to a defendant’s erroneous belief that the conduct for which the defendant is being prosecuted is not criminal. *See* LAFAVE & SCOTT, *supra* note 3, at 412–13 (outlining the doctrine of mistake of law). A mistake of law is not a defense to most crimes. *Id.*

7. *See* Kadish, *supra* note 1, at 349 (“[T]o be liable as an accomplice in the crime committed by the principal, the secondary party must act with the mens rea required by the definition of the principal’s crime.”); *see also* LAFAVE & SCOTT, *supra* note 3, at 579 (“Generally, it may be said that accomplice liability exists when . . . [the accomplice’s] purpose is to encourage or assist another in the commission of a crime as to which the accomplice has the requisite mental state.”).

8. *See* 1 GEOFFREY C. HAZARD, JR. & W. WILLIAM HODES, *THE LAW OF LAWYERING* § 22.2 (3d ed. 2009) (“[L]awyers contribute to the peaceful running of a lawful society by advising their clients what the law is, and by carrying out their client’s wishes within the bounds of law.”).

professional responsibility governing the legal profession, a lawyer may not advise a client in regard to activity that the lawyer knows to be criminal.⁹ But the rules do not penalize a lawyer who advises a client in an effort to determine the legality of the client's intended purposes if the lawyer acts in good faith.¹⁰

This Note argues that the criminal law and the professional rules embody conflicting concepts of lawyers' complicity in their clients' criminal activity. Under the criminal law's doctrine of complicity, a lawyer who gives advice to a client to facilitate the client's purpose, with knowledge of what the client intends to do, becomes an accomplice if the client's conduct is later determined to be criminal.¹¹ The lawyer's reasoned belief that the client's purpose was not criminal does not exonerate the lawyer unless that belief would also excuse the client.¹² In practice, this occurs rarely, because a mistake of law is not a defense to most crimes.¹³ By contrast, under the professional rules, the lawyer's belief as to the legality of the client's conduct may determine whether the lawyer committed professional misconduct.¹⁴ Under the professional rules, a good-faith belief that the client's purpose was legal is exculpatory. Under the criminal law, that belief excuses nothing.

As a result of this conflict, the professional rules acquit when the criminal law convicts. This conflict is not of merely theoretical relevance. Although the criminal law and the professional rules are separate systems, both seek to govern the behavior of lawyers acting

9. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009) ("A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . ."); see also HAZARD & HODES, *supra* note 8, § 5.3 ("Rule 1.2 seeks to assure that lawyers *not* become accomplices in criminal or fraudulent conduct."). According to the ABA, the Model Rules of Professional Conduct have been adopted in some form by all but one state. See Am. Bar Ass'n, *Model Rules of Professional Conduct Dates of Adoption*, AMERICAN BAR ASSOCIATION, http://www.abanet.org/cpr/mrpc/alpha_states.html (last visited Oct. 13, 2010).

10. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) ("[A] lawyer . . . may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law."); see also *id.* R. 8.4 cmt. 4 ("A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.").

11. See Kadish, *supra* note 1, at 346 ("[I]f it was the purpose of the one giving the advice to influence the other to commit the crime, he is an accomplice . . .").

12. See *id.* at 349 (describing the mens rea of accomplice liability).

13. See LAFAVE & SCOTT, *supra* note 3, at 412–13 (noting that mistake of law is "ordinarily not a recognized defense").

14. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (permitting lawyers to assist clients in a good-faith effort to determine the "scope, meaning or application" of the law); see also *id.* R. 8.4 cmt. 4 ("A lawyer may refuse to comply with an obligation imposed by law upon a good faith belief that no valid obligation exists.").

as advisors. Lawyers may adhere to the stricter notion of complicity embodied in the criminal law and risk unnecessarily limiting the circumstances in which they may give advice. In the alternative, they may adhere to the more permissive good-faith standard of the professional norms, at the risk of being prosecuted as accomplices without the benefit of a good-faith defense.

This inconsistency between the criminal law and the professional rules also undermines public expectations of lawyers' behavior. If the criminal-law standard of complicity prevails, the public gains the assurance of holding lawyers accountable for their complicit actions according to the same legal standards that apply to the general public. At the same time, the criminal standard risks deterring lawyers from giving socially constructive advice out of fear of being prosecuted should it turn out that, contrary to the lawyer's legal opinion, the client's conduct is actually criminal. But if the professional rules' concept of complicity governs, the public must accept that lawyers possess a special immunity to prosecution for actions taken as accomplices if those actions are taken in good faith. The legal community would bear the burden of justifying such a self-interested exception.

This Note begins by considering contexts in which the criminal law's doctrine of complicity has been applied to lawyers acting as advisors. In particular, Part I examines how the criminal law governing lawyers' advice in the context of fraud prosecutions effectively accommodates the professional rules' exemption for advice given in good faith. The fraud example provides a model for reconciling the disparity between the criminal law's and the professional rules' basic doctrines of complicity. Part II discusses the perceptions of lawyers' complicity that appeared during three major crises in the legal profession. The standard of complicity that emerged from these crises uses a distinction between the lawyer's separate roles as advisor and as advocate to draw the line between complicity and appropriate legal advice. Unlike the law of fraud, the emerging standard does not possess clear mens rea requirements that prevent conflict with the professional rules' protection for the lawyer who acts in good faith.

Part III explains why consistency between the models of complicity found in the professional rules and criminal laws is necessary to avoid undermining the values served by either system. In light of this discussion, Part IV considers how the distinction between advising and advocacy could be implemented as a general standard

for lawyers' complicity outside the context of existing specialized rules, such as fraud. It examines how the professional rules' excuse for advice given in good faith could be applied to eliminate the conflict between the professional rules' and the criminal law's differing conceptions of complicity.

I. TWO CATEGORIES OF CRIMINAL COMPLICITY

Prosecutions of lawyers who advise clients on criminal activity can be classified in two broad categories that correspond to the complexity of the client's underlying crime. In one category, the client's criminality is relatively clear: the client commits perjury, willfully disobeys a court order, or lies to immigration officials, and the client does so with the lawyer's encouragement or approval. The crimes themselves are simple, and no legal expertise is necessary to understand that the act in question is illegal. Due to the obvious illegality of the act, prosecuting the lawyer for advising the client to commit that act is uncontroversial under both the criminal law and the professional rules.¹⁵

In the second category, the client's offense is more complex, and the lawyer may be prosecuted for aiding an act whose criminality depends on a more difficult question of legal judgment. In these cases, there is a greater risk of conflict between the professional rules' and the criminal law's respective concepts of complicity. Due to the nuanced legal questions that appear in complex cases, lawyers are more able to argue that, according to their reasoned interpretation of the law, they believed that the client's conduct was legal. When the determination of guilt or innocence turns on the integrity of the lawyer's legal judgment, it is easier to cast that lawyer's decision as having been made in good faith.

The crime of aiding and abetting fraud offers an example of this dynamic.¹⁶ The criminal laws proscribing fraud contain specific mens rea requirements that augment the basic doctrine of complicity and avoid the conflict that would otherwise emerge with the professional

15. See ANNOTATED MODEL RULES OF PROF'L CONDUCT R. 1.2(d) annot. (6th ed. 2007) (citing lawyer discipline cases involving violations of court orders and other clearly illegal offenses).

16. See Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 688 (2005) (discussing legal advisors' susceptibility to allegations of fraud). See generally Geoffrey C. Hazard, Jr., *How Far May a Lawyer Go in Assisting a Client in Legally Wrongful Conduct?*, 35 U. MIAMI L. REV. 669 (1981) (discussing the scope of attorneys' liability for client fraud).

rules' standard of good faith. For example, the criminal provisions of the Securities Act of 1933¹⁷ and the Securities Exchange Act of 1934¹⁸ make it a criminal offense to willfully or knowingly violate their substantive provisions.¹⁹ A lawyer who knowingly violates any of the securities laws can hardly be imagined to have acted in good faith. Although stopping short of offering a broad good-faith defense against a fraud prosecution,²⁰ these mens rea elements require that the defendant possessed a mental state that is incompatible with good faith.

*United States v. Benjamin*²¹ illustrates how securities fraud statutes eliminate the conflict between the models of complicity in the

17. Securities Act of 1933, 15 U.S.C. §§ 77a–77aa (2006); *see also id.* § 77x (providing criminal penalties for “[a]ny person who willfully violates any of the provisions of this subchapter”).

18. Securities Exchange Act of 1934, 15 U.S.C. §§ 78a–78oo (2006 & Supp. III 2009); *see also id.* § 78ff(a) (providing criminal penalties for “any person who willfully and knowingly” misrepresents a material fact in an Exchange Act statement).

19. LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 1347 (4th ed. 2001) (“All of the SEC statutes make it a criminal offense ‘willfully’ to violate any of their provisions, any related *rule*, or (with respect to the last four acts in the series) any related *order*.”). In *SEC v. National Student Marketing Corp.*, 457 F. Supp. 682 (D.D.C. 1978), the court upheld aiding-and-abetting liability for lawyers advising on securities transactions, holding counsel liable for ignoring the materiality of information that was omitted from a shareholder proxy statement and for subsequently failing to interfere with a related merger. *See id.* at 713 (“The record amply demonstrates the ‘knowledge of the fraud, and not merely the undisclosed material facts’ that is required to meet this element of secondary liability.” (quoting *Hirsch v. du Pont*, 553 F.2d 750, 759 (2d Cir. 1977))). The Private Securities Litigation Reform Act of 1995 (PSLRA), Pub. L. No. 104-67, 109 Stat. 737 (codified as amended in scattered sections of 15 and 18 U.S.C.), instructed the Securities and Exchange Commission (SEC) to prosecute violations of the Exchange Act, codifying a broad range of criminal prohibitions that apply to counsel advising on a securities transaction. *See* 15 U.S.C. § 78t(e) (providing for prosecution of persons who “knowingly provide substantial assistance” to violators of the securities laws); *Stoneridge Inv. Partners v. Scientific-Atlanta, Inc.*, 128 S. Ct. 761, 769 (2008) (recognizing that “Congress . . . directed prosecution of aiders and abettors by the SEC” in § 78t(e)). The precedent established in *Stoneridge* continues to haunt lawyers advising on disclosure-related matters involving securities. *See SEC v. Bank of Am. Corp.*, 653 F. Supp. 2d 507, 509 (S.D.N.Y. 2009) (questioning why the SEC did not seek penalties from lawyers who prepared disclosure statements omitting allegedly material information in a merger transaction). Courts have interpreted the relevant section of the PSLRA as requiring that an aider and abettor have actual knowledge of a violation of the Exchange Act rather than allowing liability for recklessness by secondary actors. *See, e.g., SEC v. Pasternak*, 561 F. Supp. 2d 459, 501 (D.N.J. 2008) (requiring actual knowledge of a securities-law violation, as opposed to reckless action, and citing cases that imposed the same requirement).

20. *See United States v. Wolfson*, 405 F.2d 779, 781–82 (2d Cir. 1968) (rejecting appellants’ argument that they could not be convicted of violating the Securities Exchange Act because they were not aware of its registration requirements).

21. *United States v. Benjamin*, 328 F.2d 854 (2d Cir. 1964).

criminal law and the professional rules.²² Martin Benjamin, a lawyer, was convicted of willfully conspiring to sell unregistered securities in concert with Milton Mende, Benjamin's client and the principal promoter of the scheme.²³ Benjamin and his co-conspirators obtained corporate assets that were sold in 1919, prior to the enactment of the Securities Act of 1933.²⁴ Section 3(a)(1) of the Securities Act contained an exemption from its registration requirements for shares of companies that were sold prior to or within sixty days of May 27, 1933, provided that those shares were not sold again by a new issuer.²⁵ Mende sought to take advantage of the exemption for shares issued prior to 1933 by purchasing all of the corporation's outstanding shares and selling them under the name of a new corporation.²⁶ Benjamin supported Mende's efforts by drafting letters to potential purchasers asserting that the shares fell within the exemption and therefore were not subject to the registration requirement.²⁷

Arguably, Benjamin may not have understood that Mende's acquisition of the pre-1933 shares made the subsequent sale of those shares a new issuance that was not subject to the exemption in Section 3(a)(1). Provided that Benjamin was laboring under a mistaken belief about the applicability of the exemption, he may be said to have been acting in good faith. But the "willfulness" criterion of the Securities Act fraud provision foreclosed this argument by requiring evidence that Benjamin actually knew of the registration requirements and also knew that Mende's actions rendered Section 3(a)(1) inapplicable to the new share offering.²⁸ Evidence was found to support both requirements, leaving Benjamin little room to argue that he acted in good faith.

22. Cf. Manning Gilbert Warren III, *The Primary Liability of Securities Lawyers*, 50 SMU L. REV. 383, 398 (1996) (invoking *Benjamin* as a "behavior-shaping judicial statement[']"). See generally LOSS & SELIGMAN, *supra* note 19, at 176 (noting that the SEC frequently quotes from *Benjamin* in enforcement actions); Marc I. Steinberg, *Attorney Liability for Client Fraud*, 1991 COLUM. BUS. L. REV. 1, 1 (quoting Judge Friendly's opinion in *Benjamin*).

23. *Benjamin*, 328 F.2d at 856.

24. *Id.* at 857.

25. 15 U.S.C. § 77c(a)(1) (1964).

26. *Benjamin*, 328 F.2d at 857.

27. See *id.* at 857–60 (describing Benjamin's activities).

28. See *id.* at 863 ("[Benjamin] must have known that control of the corporation . . . was being acquired by Mende and that the statute explicitly denied exemption to any new offerings by persons in control, a limitation of which his testimony before the SEC showed he was well aware.").

A second case, *United States v. Cavin*,²⁹ demonstrates how criminal fraud statutes avoid the potential for disagreement between the criminal law's and the professional rules' basic doctrines of complicity. In *Cavin*, the trial court held an associate at a New Orleans law firm liable as a co-conspirator in a scheme to defraud the state insurance regulator.³⁰ The associate, Gerald Daigle, Jr., advised David Ridgeway in Ridgeway's efforts to start an insurance business.³¹ Daigle reviewed documentation submitted to the Louisiana insurance regulators and advised Ridgeway on compliance with the regulators' requirement that the insurance company maintain a sufficient capital balance to pay out claims by policyholders. He also actively assisted Ridgeway in obtaining funds for the insurance venture.³²

Contrary to the statements that Daigle submitted to the insurance regulators, the assets were not owned by Ridgeway but were borrowed.³³ Although Daigle had been involved in orchestrating several of the loan transactions,³⁴ he insisted at trial that he could not have acted with fraudulent intent because he did not understand that the assets were disqualified from fulfilling the regulator's capital-balance requirement.³⁵ But the court found sufficient evidence that Daigle knew the assets were disqualified and that he acted with the purpose to defraud the insurance regulator.³⁶ This proof of Daigle's knowledge established his guilt because it excluded the possibility that he had acted in good faith.

Cavin and *Benjamin* illustrate that fraud statutes reconcile the criminal law's and the professional rules' versions of complicity by adding mens rea elements that require some degree of knowledge that the act in question is illegal. By imposing this requirement, the fraud statutes guide judicial analysis to a result that excludes the possibility that a guilty defendant acted in good faith. The anti-fraud

29. *United States v. Cavin*, 39 F.3d 1299 (5th Cir. 1994).

30. *Id.* at 1304.

31. *Id.* at 1302 ("Ridgeway's efforts were assisted professionally by Daigle, an associate soon to become a partner at a prestigious New Orleans law firm.").

32. *See id.* at 1302-04 (describing Daigle's activities).

33. *Id.* at 1303 ("To replace the \$1 million . . . Ridgeway entered into a stock rental transaction. . . [Ridgeway] reported [the stock] to the Commissioner as an unencumbered asset.").

34. *Id.* at 1303-04 (describing Daigle's involvement in a sham stock-rental transaction and securities purchase).

35. *Id.* at 1306 ("Daigle maintains that the status of these so-called 'rental assets' was unclear at the time and therefore he lacked fraudulent intent . . .").

36. *See id.* at 1306-07 (outlining evidence suggesting Daigle's knowledge and purpose).

rules offer an example of how the criminal law can accommodate the professional rules' protection for advice given in good faith.

II. THE ADVISING-ADVOCACY DISTINCTION AS A MEASUREMENT OF COMPLICITY

The requirement of fraudulent intent that preserves fraud prosecutions' consistency with the professional rules' good-faith standard does not exist in all conceptions of lawyers' complicity. The critical responses to three crises in the legal profession invoked a different norm for lawyers' complicity that casts the advising lawyer as an accomplice when the lawyer has confused the responsibilities of an advisor with the role of an advocate before the court. While these criticisms present a viable concept of lawyers' complicity, unlike the criminal prohibitions on fraud, this concept of complicity lacks specific mens rea requirements that reconcile the criminal law's doctrine of complicity with the professional rules' exemption for lawyers acting in good faith.

Neutrality figures prominently in the duties of the advisor, whereas the adversarial process found in litigation relies upon zealous partisanship.³⁷ But the systemic protections afforded by the adversarial process disappear in the context of the lawyer's advising role, since no opposing counsel or neutral arbiter acts as a check on partisan representation.³⁸ In the advising context, the lawyer is expected to present the client with the potential risks involved in adopting a given course of action.³⁹ Bias in favor of the client's

37. See MODEL RULES OF PROF'L CONDUCT R. 2.1 (2009) ("In advising a client, a lawyer shall exercise independent professional judgment and render candid advice."); HAZARD & HODES, *supra* note 8, § 23.2 (noting that Rule 2.1 prohibits the lawyer from "play[ing] sycophant" to a client seeking to "have her own preconceptions confirmed rather than seek genuine advice"); see also DEBORAH L. RHODE, IN THE INTERESTS OF JUSTICE: REFORMING THE LEGAL PROFESSION 53–58 (2000) (presenting and critiquing the traditional justifications for the adversary system); CHARLES W. WOLFRAM, MODERN LEGAL ETHICS 564 (1986) (summarizing the features of the adversary system).

38. See Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. J. 1159, 1161 (1958) ("Partisan advocacy plays its essential part in [litigation], and the lawyer pleading his client's case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counselor.").

39. See MODEL RULES OF PROF'L CONDUCT R. 1.4(b) ("A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation."); HAZARD & HODES, *supra* note 8, § 7.4 ("[Under Rule 1.4(b),] a lawyer must arm clients with the information necessary for making important decisions about the representation . . .").

preferred course of action would undermine the integrity of the lawyer's advice.⁴⁰

The controversies surrounding the "torture memos" issued by the Office of Legal Counsel; Vinson & Elkins' role in the Enron scandal; and Kaye, Scholer, Fierman, Hays & Handler's (Kaye Scholer) representation of Lincoln Savings & Loan (Lincoln) in an examination by a federal bank regulator involve lawyers who were subsequently criticized for having been complicit in illegal conduct. This Part isolates the common elements of each of these criticisms to delineate the concept of complicity that emerged in each case. This Part concludes that, according to these critics' concepts of complicity, the distinction between advising and advocacy constitutes an important element in determining when a lawyer ceases to act as an advisor and becomes an accomplice.

A. *The Torture Memo Controversy*

In a series of memoranda written in 2002 and 2003, attorneys in the Department of Justice's Office of Legal Counsel (OLC) created the framework for the Department of Defense and Central Intelligence Agency (CIA) interrogations of prisoners held in Iraq, Afghanistan, and Guantanamo Bay, Cuba.⁴¹ Although then-Assistant Attorney General Jay Bybee signed all but one of the memos, they were drafted primarily by John Yoo,⁴² an influential member of the OLC who espoused expansive views of presidential power in wartime.⁴³ Together, the opinions authored by Yoo eliminated the legal restraints upon the treatment of individuals held by the CIA and the Department of Defense imposed by the Geneva Conventions,⁴⁴

40. See HAZARD & HODES, *supra* note 8, § 23.2 ("A lawyer's duty to exercise independent professional judgment may be threatened not only by 'others' but by clients as well; a client may consult a lawyer to have her own preconceptions confirmed rather than to seek genuine advice.").

41. See generally THE TORTURE PAPERS 3-360 (Karen J. Greenberg & Joshua L. Dreitel eds., 2005) (containing memoranda composed by OLC attorneys).

42. See S. COMM. ON ARMED SERVS., 110TH CONG., INQUIRY INTO THE TREATMENT OF DETAINEES IN U.S. CUSTODY, at xv-xvi (Comm. Print 2008) (describing the drafting of the memos).

43. See JACK GOLDSMITH, THE TERROR PRESIDENCY: LAW AND JUDGMENT INSIDE THE BUSH ADMINISTRATION 22-23 (2007) (introducing Yoo as an "OLC deputy with authority to issue legal opinions that were binding throughout the executive branch").

44. Memorandum from Jay S. Bybee, Assistant Att'y Gen., OLC, U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes, II, Gen. Counsel, U.S.

the Torture Convention,⁴⁵ customary international law,⁴⁶ the Fifth and Eighth Amendments to the U.S. Constitution,⁴⁷ U.S. federal law of general applicability,⁴⁸ U.S. federal law applicable only in special federal jurisdictions,⁴⁹ and the U.S. Torture Statute⁵⁰ and War Crimes Statute.⁵¹ In place of these restraints, the memos left a construction of the Torture Statute that prohibited only the most extreme forms of treatment,⁵² which could be avoided by interrogators who asserted that they acted out of “self-defense” or “necessity”⁵³ and that, in any event, would be unconstitutional as applied to interrogations ordered by the president.⁵⁴ According to the report of the Senate Armed Services Committee on the treatment of prisoners held by the CIA and the Department of Defense, the memos “distorted the meaning and intent of the anti-torture laws” and “rationalized the abuse of detainees in U.S. custody.”⁵⁵ This deconstruction of the law turned concrete legal limitations into manipulable policies⁵⁶ that left field commanders with little guidance as to the boundaries of permissible treatment of detainees.⁵⁷

The most notorious of these memos, written in August 2002, construed the provisions of the federal code that criminalize torture⁵⁸ to apply only to the infliction of “serious physical damage” that is

Dep’t of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees 9–10 (Jan. 22, 2002) (on file with the *Duke Law Journal*).

45. Memorandum from Jay S. Bybee, Assistant Att’y Gen., OLC, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, at 14–22 (Aug. 1, 2002) (on file with the *Duke Law Journal*).

46. Memorandum from Bybee to Gonzales and Haynes, *supra* note 44, at 32–37.

47. Memorandum from John C. Yoo, Deputy Assistant Att’y Gen., OLC, U.S. Dep’t of Justice, to William J. Haynes, II, Gen. Counsel, U.S. Dep’t of Def., Military Interrogation of Alien Unlawful Combatants Held Outside the United States 2–10 (Mar. 14, 2003) (on file with the *Duke Law Journal*).

48. *Id.* at 11–47.

49. *Id.*

50. Memorandum from Bybee to Gonzales, *supra* note 45, at 4–5.

51. Memorandum from Bybee to Gonzales and Haynes, *supra* note 44, at 2–10.

52. Memorandum from Bybee to Gonzales, *supra* note 45, at 14–22.

53. *Id.* at 39–46.

54. *Id.* at 31–39.

55. S. COMM. ON ARMED SERVS., *supra* note 42, at xxvii.

56. *See id.* at xiii (“[T]he decision to replace well established military doctrine, i.e., legal compliance with the Geneva Conventions, with a policy subject to interpretation, impacted the treatment of detainees in U.S. custody.”).

57. *See id.* at xxiv (describing Lt. Gen. Ricardo Sanchez’s issuance and withdrawal of several official policies governing the treatment of detainees in Iraq).

58. 18 U.S.C. §§ 2340–2340B (2006).

equivalent to “permanent impairment of a significant body function,” “organ failure,” or “death.”⁵⁹ Shortly after being released by the *Washington Post* in June 2004,⁶⁰ the memos provoked a crisis in the interpretation of the legitimate boundaries of legal advice.⁶¹ Although a range of commentators—including legal academics specializing in the law of war,⁶² lawyers at the State Department,⁶³ congressional investigators,⁶⁴ and Yoo’s successor at the OLC⁶⁵—framed their criticisms differently, much of the criticism of the memos centered on the tension between the lawyer’s role as advocate and the lawyer’s duties as advisor.

Critics took several different approaches to describing the wrong Yoo committed in drafting the memos. One line of criticism held that the memos failed to present a balanced view of the definition of torture by taking extreme positions and failing to cite countervailing

59. Memorandum from Jay S. Bybee, Assistant Att’y Gen., OLC, U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340–2340A, in *THE TORTURE PAPERS*, *supra* note 41, at 176.

60. See Kathleen Clark, *Ethical Issues Raised by the OLC Torture Memorandum*, 1 J. NAT’L SECURITY L. & POL’Y 455, 462–63 (2005) (“The legal analysis in the [August 2002] [m]emorandum was so indefensible that it could not—and did not—withstand public scrutiny.”); see also Mike Allen & Susan Schmidt, *Memo on Interrogation Tactics Is Disavowed*, WASH. POST, June 23, 2004, at A1 (reporting the withdrawal of the August 2002 memorandum); David Ignatius, Op-Ed., *Small Comfort*, WASH. POST, June 15, 2004, at A23 (reporting the release of the torture memo on the *Washington Post*’s website).

61. See, e.g., José E. Alvarez, *Torturing the Law*, 37 CASE W. RES. J. INT’L L. 175, 176–77 (2006) (“When our high-level torturers act they do not do so by ignoring the law or acting extralegally but by systematic and reasoned misinterpretations of the law.”); Michael Hatfield, *Fear, Legal Indeterminacy, and the American Lawyering Culture*, 10 LEWIS & CLARK L. REV. 511, 515 (2006) (“[T]he legal profession’s response to [the August 2002 memo] has been an exceptionally deep and widespread expression of dismay.”); Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1687 (2005) (“Reading the memoranda of Judge Bybee and Professor Yoo . . . shook my faith in the integrity of the community of American jurists.”).

62. See, e.g., Alvarez, *supra* note 61, at 186–98 (criticizing the memo’s conclusions under the laws of war); Waldron, *supra* note 61, at 1693–95 (same).

63. See MICHAEL P. SCHARF & PAUL R. WILLIAMS, *SHAPING FOREIGN POLICY IN TIMES OF CRISIS* 192–93 (2010) (relating former State Department Legal Adviser William Taft’s reflection that the OLC memos arrived at “conclusions that were not consistent with our treaty obligations under the Convention against Torture and our obligations under customary international law”).

64. See S. COMM. ON ARMED SERVS., *supra* note 42, at xxvii (“[The August 2002 memorandum interpreting the torture statute] distorted the meaning and intent of anti-torture laws, rationalized the abuse of detainees in U.S. custody[,] and influenced Department of Defense determinations as to what interrogation techniques were legal for use during interrogations conducted by U.S. military personnel.”).

65. See GOLDSMITH, *supra* note 43, at 144–51 (analyzing the flaws of the August 2002 memorandum construing the torture statute).

precedents.⁶⁶ As several critics noted, this failure to consider contrary authority was compounded by the duties incumbent upon Yoo as an advisor to the government. These critics maintained that the obligation to provide a balanced assessment increases for a lawyer advising the government when that lawyer's views will not likely be subject to review by a court, either because those injured by the policy will lack standing to seek a remedy in court or because the judiciary will defer to the executive's claims of secrecy on grounds of national security.⁶⁷

A second line of criticism, building on the first, drew upon the concept that the government attorney has a heightened responsibility to consider the full scope of potential harm that the government's contemplated course of action could cause to third parties. This heightened duty is most acute when that course of action could result in consequences that offend widely shared contemporary definitions of morality.⁶⁸

66. See, e.g., Alvarez, *supra* note 61, at 185–86 (“[T]hese memoranda are advocacy briefs by ‘can do’ lawyers but certainly not objective examinations of the current treaty obligations of the United States.”); Clark, *supra* note 60, at 462 (“[T]he [August 2002] Memorandum presents highly questionable claims as settled law. It does not present either the counter arguments to these claims or an assessment of the risk that other legal actors—including courts—would reject them.”); Neil M. Peretz, *The Limits of Outsourcing: Ethical Responsibilities of Federal Government Attorneys Advising Executive Branch Officials*, 6 CONN. PUB. INT. L.J. 23, 49–50 (2006) (“The government attorneys preparing the memos may have failed to meet their ethical responsibility . . . to explore alternative perspectives and to ensure such perspectives were represented during the policymaking process.”); see also Adam Liptak, *Legal Scholars Criticize Memos on Torture*, N.Y. TIMES, June 25, 2004, at A14 (surveying criticisms by prominent legal scholars).

67. See Peretz, *supra* note 66, at 37–39 (“Legal advisors to policymakers should not zealously advocate because it is unlikely that an equally zealous adversary will arise to oppose them. . . . [T]here is often no adversary to counterbalance the government attorney’s advocacy. . . .”). See generally WALTER E. DELLINGER, DAWN JOHNSEN, RANDOLPH MOSS, CHRISTOPHER SCHROEDER, JOSEPH R. GUERRA, BETH NOLAN, TODD PETERSON, CORNELIA T.L. PILLARD, H. JEFFERSON POWELL, TERESA WYNN ROSEBOROUGH, RICHARD SHIFFRIN, WILLIAM MICHAEL TREANOR, DAVID BARRON, STUART BENJAMIN, LISA BROWN, PAMELA HARRIS, NEIL KINKOPF, MARTIN LEDERMAN & MICHAEL SMALL, PRINCIPLES TO GUIDE THE OFFICE OF LEGAL COUNSEL 2 (2004), available at http://www.acslaw.org/files/2004_programs_OLC_principles_white_paper.pdf (“OLC’s analysis should disclose, and candidly and fairly address, the relevant range of legal sources and substantial arguments on all sides of the question.”).

68. See Jesselyn Radack, *Tortured Legal Ethics: The Role of the Government Advisor in the War on Terrorism*, 77 U. COLO. L. REV. 1, 19–30 (2006) (propounding a “morally perilous question” doctrine guided by the Eighth Amendment that triggers heightened duties for lawyers advising the government); see also Hatfield, *supra* note 61, at 518–24 (discussing the role of the author’s moral views in determining the content of the reasoning in the August 2002 memo); cf.

Other criticisms were voiced in the language of mens rea requirements found in criminal law statutes. The term “reckless” appears in discussions of the memos to describe the state of mind of the drafter in regard to the probability that the interrogation policies addressed by the memos were illegal.⁶⁹ Noted international law scholar José Alvarez, for example, described the treatment of international legal authority in the memo construing the torture statute as “cavalier, even reckless.”⁷⁰

Each of these critiques corroborates a fourth line of criticism, which maintains that Yoo mistook his role as an advisor to the government for the role of an attorney representing a client in litigation.⁷¹ In the former role, the attorney assists the client in determining how the client may realize his or her intended purposes in conformity with the law, whereas, in the latter, the attorney crafts an argument that the client’s conduct falls within the law.⁷² Such a mistake results when the lawyer transposes the duty of zealous

HAZARD & HODES, *supra* note 8, § 23.4 (describing Rule 2.1 of the Model Rules of Professional Conduct as contemplating “a moral dialog between autonomous individuals”).

69. See, e.g., Liptak, *supra* note 66 (reporting criticism by Cass Sunstein that the reasoning in the August 2002 memo was “just short of reckless”).

70. Alvarez, *supra* note 61, at 186.

71. See, e.g., GOLDSMITH, *supra* note 43, at 149 (relating criticism of the August 2002 memorandum that “[i]t reads like a bad defense counsel’s brief, not an OLC opinion”); Clark, *supra* note 60, at 458 (“[The memo’s] assertions about the state of the law are so inaccurate that they seem to be arguments about what the authors (or the intended recipients) wanted the law to be rather than assessments of what the law actually is.”); Radack, *supra* note 68, at 27 (reporting criticism of a former Third Circuit Court of Appeals judge that “[t]he position taken by the government lawyers in these legal memoranda amount[s] to counseling a client as to how to get away with violating the law” (second alteration in original)); Vanessa Blum, *Culture of Yes: Signing Off on a Strategy*, LEGAL TIMES, June 14, 2004, at 12 (quoting former OLC attorney Bruce Fein identifying the “problem with” the OLC’s legal advice as being “that you start out with a conclusion and then go put together the jigsaw puzzle that makes it legal instead of looking for the most persuasive answer under the law”); Stephen Gillers, *Tortured Reasoning*, AM. LAW., July 2004, at 65 (“As an advisor, a lawyer is not an advocate.”); Andrew Rosenthal, Editorial Observer, *Legal Breach: The Government’s Attorneys and Abu Ghraib*, N.Y. TIMES, Dec. 30, 2004, at A22 (“[A] more cynical approach [to the law] says that lawyers are simply an instrument of policy—get me a legal opinion that permits me to do X. Sometimes a lawyer has to say, ‘You just can’t do this.’” (quoting attorney Jeh Johnson)). See generally DELLINGER ET AL., *supra* note 67, at 2 (“OLC should not simply provide an advocate’s best defense of contemplated action that OLC actually believes is best viewed as unlawful.”).

72. See Fuller & Randall, *supra* note 38, at 1161 (“Partisan advocacy plays its essential part in [litigation], and the lawyer pleading his client’s case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counselor.”); see also WOLFRAM, *supra* note 37, at 691 (“[A] lawyer’s counseling can serve as a mechanism of social control by performing the socially desirable function of encouraging law compliance on the part of clients.”).

representation from the litigation context to the advisory context. The danger is that, in an excess of misplaced zeal, the lawyer will guide the client into acting illegally.⁷³

B. *The Enron Scandal*

As in the torture memo controversy, lawyers in the Enron scandal were perceived by their critics as having facilitated crimes by giving legal advice. According to these critics, Enron's financial collapse in 2001 was precipitated by a corresponding collapse of professional competence and integrity among the lawyers advising the company.⁷⁴ In spite of the involvement of Enron's attorneys at Vinson & Elkins in approving transactions and the inadequate disclosures that the Department of Justice later prosecuted as crimes,⁷⁵ the attorneys avoided public sanction. Due to the inability of the existing professional standards governing the role of corporate counsel⁷⁶ and of the reporting obligations imposed by the securities laws⁷⁷ to limit the advisor's participation in corporate misdeeds, commentators were left without a clear standard for assessing whether the conduct of

73. See Clark, *supra* note 60, at 465–67 (contrasting the responsibility of advisors to provide balanced legal analysis, or to caution their clients as to unbalanced aspects of their analysis, with the liberty of advocates to assert non-frivolous claims).

74. See, e.g., WILLIAM C. POWERS, JR., RAYMOND S. TROUBH & HERBERT S. WINOKUR, JR., REPORT OF INVESTIGATION BY THE SPECIAL INVESTIGATIVE COMMITTEE OF THE BOARD OF DIRECTORS OF ENRON CORP. 17 (2002) (attributing Enron's failure to disclose its hedging transactions with its affiliated entities in part to "an absence of . . . objective and critical professional advice by outside counsel at Vinson & Elkins"); Deborah L. Rhode & Paul D. Paton, *Lawyers, Ethics, and Enron*, 8 STAN. J.L. BUS. & FIN. 9, 19 (2002) ("While questions about [Vinson & Elkins'] exposure to malpractice suits remain open, the facts available suggest that the firm was more than a bystander to corporate misconduct.").

75. See *Superseding Indictment, United States v. Fastow*, No. H-02-0665 (S.D. Tex. Apr. 30, 2003), 2003 WL 22331356 (charging Enron executives with 109 counts of fraud, conspiracy, obstruction of justice, and other crimes); POWERS ET AL., *supra* note 74, at 25–26, 44, 51, 65, 72, 100, 115, 158, 178, 181, 183, 187, 190 (documenting Vinson & Elkins' involvement in transactions and disclosure that became the subject of the indictments against Enron executives).

76. See Robert W. Gordon, *A New Role for Lawyers?: The Corporate Counselor After Enron*, 35 CONN. L. REV. 1185, 1207–15 (2003) (proposing a new conception of the corporate advisor's role in response to the Enron scandal); see also DEBORAH L. RHODE & DAVID LUBAN, *LEGAL ETHICS* 498–504 (4th ed. 2004) (discussing the flaws in traditional notions of the lawyer's counseling role).

77. The Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28 and 29 U.S.C.), passed in response to the Enron scandal, imposed new requirements requiring lawyers to report "evidence of a material violation of securities laws or breach of fiduciary duty" to the chief legal counsel or board of directors. *Id.* § 307, 116 Stat. at 784.

Enron's lawyers amounted to ethical or criminal violations.⁷⁸ The perception that the lawyers' failure to provide "objective and critical professional advice"⁷⁹ facilitated the company's crimes⁸⁰ provides another opportunity to distinguish between appropriate advising and advocacy that turns the advisor into an accomplice.⁸¹

Although the Enron transactions that ultimately provoked the ensuing scandal were highly complex,⁸² analysts who reviewed the transactions after the scandal erupted recognized that they fell within at least three basic categories.⁸³ In one network of transactions, Enron arranged the debt-financed purchase of a limited partnership by an Enron-related entity without consolidating the partnership onto its balance sheets, contrary to accounting rules that required consolidation of investment partnerships that lacked adequate equity capital.⁸⁴ In another group of transactions, Enron transferred debts to two partnerships managed by Enron executive Andrew Fastow shortly before reporting periods ended, only to purchase them back after the reporting period was over.⁸⁵ In a third category, Enron used the partnerships managed by Fastow to coordinate so-called hedging transactions, in which Enron would acquire assets from investment vehicles created by Enron using shares of Enron stock.⁸⁶ Although these exchanges involved no transfer of economic risk, the

78. See Rhode & Paton, *supra* note 74, at 17–24, 29 (describing the role of Enron lawyers and noting a lack of "appropriate standards of third-party liability for lawyers who passively acquiesce in client fraud" in the rules of professional conduct).

79. POWERS ET AL., *supra* note 74, at 17.

80. See *id.* at 26 ("Management and the Board relied heavily on the perceived approval by Vinson & Elkins of the structure and disclosure of the transactions. Enron's Audit and Compliance Committee, as well as in-house counsel, looked to it for assurance that Enron's public disclosures were legally sufficient. . . . Vinson & Elkins should have brought a stronger, more objective and more critical voice to the disclosure process."); see also Gordon, *supra* note 76, at 1216 (describing the pre-Sarbanes-Oxley "status quo" as one in which "lawyers effectively facilitate, or passively acquiesce in and enable corporate frauds, in the name of a noble idea of advocacy that has been ludicrously misapplied").

81. See Gordon, *supra* note 76, at 1204 (criticizing the use, as a defense of the Enron lawyers' conduct, of the notion of the corporate lawyer as "adversary-advocate").

82. See JERRY W. MARKHAM, A FINANCIAL HISTORY OF MODERN U.S. CORPORATE SCANDALS: FROM ENRON TO REFORM 99 (2006) ("The list of complex Enron structured finance transactions is simply too long to examine in any depth.").

83. See POWERS ET AL., *supra* note 74, at 6–17 (reporting findings on the "Chewco" transaction and the "LJM," "hedging," and "asset sale" transactions).

84. See *id.* at 6–7 (summarizing the structure and accounting implications of the Chewco transaction).

85. See *id.* at 11–12 (summarizing Enron's asset sale transactions).

86. See *id.* at 13–17 (summarizing issues raised by the hedging transactions).

investments received by Enron were reported as bona fide earnings.⁸⁷ When Enron finally restated its earnings in 2001 to comply with accounting rules, the firm reduced its reported net income by nearly twenty percent over the previous four years.⁸⁸

Attorneys at Vinson & Elkins advised Enron on each of the transactions that became the focus of the subsequent criminal prosecutions of the company's executives.⁸⁹ The law firm also advised the company on compliance with its obligations to disclose information about these transactions to the Securities and Exchange Commission.⁹⁰ After Enron Vice President Sherron Watkins raised concerns with Chairman Kenneth Lay about the legality of the hedging transactions, the company hired Vinson & Elkins to review its compliance with its disclosure obligations, even though the law firm had advised Enron on these disclosures initially.⁹¹ In its subsequent nine-page report, the law firm concluded that the company's actions required no further investigation.⁹² Although the law firm knew the details of Enron's hedging activities due to its role in advising Enron on its disclosure obligations,⁹³ the firm's report

87. *See id.* at 14–15 (describing abuses of accounting standards involved in the hedging transactions).

88. *See id.* at 3 (describing the financial consequences of Enron's restatement of earnings).

89. *See* Superseding Indictment, *supra* note 75, ¶¶ 10–47 (providing a factual basis for charges related to Enron executives' use of the fraudulent hedging transactions); *see also* POWERS ET AL., *supra* note 74, at 44, 51, 66, 72, 100, 115, 154, 178, 181, 183 (noting Vinson & Elkins' involvement in advising Enron on the Chewco, asset sale, and hedging transactions).

90. POWERS ET AL., *supra* note 74, at 26 (“[Vinson & Elkins] also assisted Enron with the preparation of its disclosures of related-party transactions in the proxy statements and the footnotes to the financial statements in Enron's periodic SEC filings.”).

91. *See id.* at 172–77 (discussing Watkins' objections and the decision to hire Vinson & Elkins). The decision to hire Vinson & Elkins and the firm's decision to take the job were made in spite of the fact that the firm would be reviewing its own work. Rhode & Paton, *supra* note 74, at 20 (“In agreeing to take on this investigation, Vinson & Elkins opened itself to accusations that it would be evaluating its own work.”).

92. *Destruction of Enron-Related Documents by Andersen Personnel: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, 107th Cong. 46–54 (2002) (letter from Max Hendrick, III, Partner, Vinson & Elkins LLP, to James V. Derrick, Jr., Executive Vice President & General Counsel, Enron Corp.) (containing Vinson & Elkins' report and recommendations).

93. *See* POWERS ET AL., *supra* note 74, at 25–26, 115, 182–83 (describing Vinson & Elkins' role as providing “substantial advice” on the disclosures of transactions with Enron's affiliated entities).

dismissed illegal aspects of the transactions as nothing more than “[b]ad [c]osmetics.”⁹⁴

The Special Investigative Committee commissioned by the Enron Board of Directors issued a report (the Powers Report) refuting the law firm’s conclusions, finding that the firm’s review was “structured with less skepticism than was needed to see through these particularly complex transactions.”⁹⁵ Summarizing its conclusions, the Special Investigative Committee attributed the corporation’s failure to abide by its disclosure obligations in part to “an absence of . . . objective and critical professional advice by outside counsel at Vinson & Elkins.”⁹⁶ The publication of the Powers Report marked the beginning of speculation about whether the lawyers’ role as Enron’s advisor on the hedging transactions would expose them to criminal liability.⁹⁷ As one commentator framed the question, “Were V&E’s lawyers co-conspirators? Or were they merely scribes who unknowingly drafted documents that helped Enron fleece its shareholders?”⁹⁸ But the \$30 million settlement reached by Vinson & Elkins with Enron’s bankruptcy trustee in 2006 ensured that, in the absence of a criminal investigation, the scope of the lawyers’ complicity would remain a mystery.⁹⁹

When considered with the torture memo controversy, Vinson & Elkins’ role in Enron’s attempts to evade and abuse corporate accounting rules offers a second case in which lawyers were perceived as complicit in illegal conduct based on their failure to provide “objective and critical professional advice.”¹⁰⁰ The Special Investigative Committee’s criticism of Vinson & Elkins’ failure to

94. *Destruction of Enron-Related Documents by Andersen Personnel: Hearing Before the Subcomm. on Oversight and Investigations of the H. Comm. on Energy and Commerce*, *supra* note 92, at 53.

95. POWERS ET AL., *supra* note 74, at 177.

96. *Id.* at 17.

97. See, e.g., Dan Ackman, *Enron’s Lawyers: Eyes Wide Shut?*, FORBES.COM (Jan. 28, 2002, 12:16 PM), <http://www.forbes.com/2002/01/28/0128veenron.html> (noting that “plaintiffs and prosecutors could argue V&E ‘turned a blind eye’ . . . and use the [Vinson & Elkins report] to draw the lawyers even deeper inside the Enron circle” (quoting Richard Epstein, Professor, University of Chicago)); Mike France, Commentary, *Close the Lawyer Loophole*, BUS. WK., Feb. 2, 2004, at 70, 70 (“Corporate lawyers are almost never sent to jail for helping out white-collar criminals.”).

98. Michael Orey, *Lawyers: Enron’s Last Mystery*, BUSINESSWEEK.COM (June 1, 2006), http://www.businessweek.com/investor/content/may2006/pi20060531_972686.htm.

99. See *Ex-Enron Law Firm to Pay \$30 Million*, N.Y. TIMES, June 2, 2006, at C5 (reporting on the settlement with Enron).

100. POWERS ET AL., *supra* note 74, at 17.

adopt the necessary degree of skepticism toward their client's activities mirrors the criticisms of the torture memos' failure to "provide objective legal advice" in analyses that "seem[ed] to be arguments about what the authors . . . wanted the law to be rather than assessments of what the law actually is."¹⁰¹ Critics in both cases used the apparent bias in the lawyer's advice as a criterion for determining whether the lawyer was complicit in the client's conduct. This method of evaluating lawyers' advice appeared again in the Lincoln Savings & Loan investigation.

C. *Kaye Scholer and the Lincoln Savings & Loan Investigation*

As in the torture-memo and Enron controversies, the enforcement action brought by the Office of Thrift Supervision (OTS) against the law firm Kaye Scholer¹⁰² provoked fundamental questions about the nature of a lawyer's complicity in a client's illegal conduct. At issue in the disagreement between the firm's defenders and supporters of the enforcement action were the limits on a lawyer's liberty to present unfavorable facts in a favorable light when representing a client before a federal bank regulator. The law firm claimed that it represented Lincoln in an adversarial setting similar to litigation that justified its attempt to shade the facts in the manner most favorable to the client.¹⁰³ The OTS charged that this practice violated federal banking regulations that provided penalties for knowingly making false or misleading statements to the Federal

101. *Compare, e.g., id.* (attributing Enron's failure to comply with its disclosure obligations in part to the "absence of . . . objective and critical professional advice by . . . Vinson & Elkins"), with Clark, *supra* note 60, at 458 ("The [August 2002] memorandum purported to provide objective legal advice . . . Nevertheless, its assertions about the state of the law are so inaccurate that they seem to be arguments about what the authors . . . wanted the law to be rather than assessments of what the law actually is.").

102. *See* Notice of Charges and of Hearing for Cease and Desist Orders to Direct Restitution and Other Appropriate Relief; Notice of Intention to Remove and Prohibit from Participation in the Conduct of the Affairs of Insured Depository Institutions; Notice of Intention to Debar from Practice Before the Office of Thrift Supervision, *In re Fishbein*, OTS AP-92-10 (Mar. 1, 1992), *reprinted in* JONATHAN J. LERNER, *THE ATTORNEY-CLIENT RELATIONSHIP AFTER KAYE, SCHOLER* 237 (1992).

103. *See* Steve France, *Just Deserts: Don't Cry for Kaye, Scholer*, *LEGAL TIMES*, Apr. 6, 1992, at 28 (quoting Kaye Scholer's defense attorney's observation that the firm defined its obligations in terms of litigation because that characterization provided the "'broadest leeway' . . . to 'characterize facts in a light favorable to the client and even withhold damaging information, unless required by law to provide it'").

Home Loan Bank Board.¹⁰⁴ The distinction between the lawyer's role in advocacy and the lawyer's role in nonlitigation settings became the crux of the disagreement between commentators who supported and opposed the OTS investigation.

Kaye Scholer went to work for Lincoln in 1986, by which time the bank had become heavily steeped in the late-1980s savings-and-loan crisis.¹⁰⁵ The Kaye Scholer litigators took a highly aggressive stance toward the regulators' inquiries into the bank's liquidity, describing Lincoln as an "extraordinarily successful, financially healthy institution,"¹⁰⁶ despite the firm's knowledge that the bank had inflated its earnings through sham transactions, backdated investments to take advantage of grandfather clauses in banking regulations, and fabricated documents to mislead investigators about the bank's underwriting process.¹⁰⁷

The OTS complaint resulted in a forty-one-million-dollar settlement against the law firm and an injunction prohibiting two of its partners from practicing before bank regulatory authorities.¹⁰⁸ The firm never admitted any wrongdoing;¹⁰⁹ on the contrary, it maintained that its attorneys had acted within the limits proper to "litigation counsel" in an adversarial proceeding.¹¹⁰

The critics of Kaye Scholer's activities in its representation of Lincoln drew on the distinction between advising and advocacy to arrive at a notion of a lawyer's complicity in a client's illegal activity.

104. See William H. Simon, *The Kaye Scholer Affair: The Lawyer's Duty of Candor and the Bar's Temptations of Evasion and Apology*, 23 LAW & SOC. INQUIRY 243 app. (1998) (summarizing the OTS charges and the law firm's responses); see also Susan Beck & Michael Orey, *They Got What They Deserved*, AM. LAW., May 1992, at 68, 74 (characterizing Kaye Scholer's argument that they acted in the role of "litigation counsel" as "an attempt to avoid being charged under . . . [t]he bank board regulation in effect at the time").

105. See Simon, *supra* note 104, at 246-48 (providing background on the financial climate surrounding the Lincoln investigation).

106. Beck & Orey, *supra* note 104, at 68.

107. See Simon, *supra* note 104, at 248-51 (describing the OTS charges against Kaye Scholer); Beck & Orey, *supra* note 104, at 71 ("[N]umerous internal Kaye, Scholer memos describe in vivid detail problems with Lincoln's operations To the OTS looking for evidence that Kaye, Scholer knew about Lincoln's problems and helped its client hide them, these documents must have looked like smoking guns.").

108. France, *supra* note 103 (describing the terms of the settlement against the law firm and the court order against the Kaye Scholer partners who directed the firm's response to the OTS investigation).

109. David Margolick, *Lawyers Under Fire*, N.Y. TIMES, Mar. 10, 1992, at A1.

110. See Beck & Orey, *supra* note 104, at 74 (reporting the firm's use of the "litigation counsel" argument in its public statements).

Commentators who defended the law firm's conduct heaped criticism on the OTS enforcement action,¹¹¹ asserting that it improperly infringed upon the lawyers' duty of loyalty to their client.¹¹² Analysts who supported the enforcement action expressed grave doubts about the law firm's assertion that it represented the bank in an adversarial setting similar to litigation.¹¹³ According to one critic, "one prominent claim in the Kaye Scholer debate was extremely radical. This was the firm's . . . argument that because the firm was 'litigation' rather than 'regulatory' counsel, it had a lower standard of responsibility to the Bank Board."¹¹⁴ In the conflict between these opposing views, the advocacy-centered conception of the lawyer's undivided adherence to the client's interests¹¹⁵ and emphasis on the litigator's duty of zealous advocacy¹¹⁶ collided with allegations that the Kaye Scholer lawyers were central figures in a "picture . . . of a client rotten to the core and a law firm that knew it."¹¹⁷

In the torture-memo controversy, the Enron scandal, and the Kaye Scholer investigation, the distinction between the lawyer's roles as partisan advocate and as neutral advisor assumed central importance. Critics in each controversy focused on curtailing the scope of permissible advocacy in contexts outside traditional litigation settings.¹¹⁸ Despite substantial differences in the nature of the lawyers'

111. See, e.g., Edward Brodsky, *The 'Kaye, Scholer' Case*, N.Y. L.J., May 22, 1992, at 1 (criticizing the OTS's "extraordinary action" in freezing Kaye Scholer's assets during the investigation); W. John Moore, *Clubbing Counsel*, NAT'L J., July 25, 1992, at 1714 (quoting Proskauer Rose Goetz & Mendelsohn partners' position that the investigation "threatens to fundamentally change the role of lawyers for, and the relationship of lawyers to, federally insured financial institutions").

112. See Amy Stevens & Paulette Thomas, *Legal Crisis: How a Big Law Firm Was Brought to Its Knees by Zealous Regulators*, WALL ST. J., Mar. 13, 1992, at A1 (describing Kaye Scholer partner Peter M. Fishbein "as a litigator who measured his professional worth under a code of conduct that demanded unstinting loyalty to the client, [who] wasn't about to let some bureaucrat tell him otherwise").

113. See Simon, *supra* note 104, at 270–73 (discussing the flaws of Kaye Scholer's "litigation counsel" argument); Beck & Orey, *supra* note 104, at 74 ("[The] biggest weakness [in Kaye Scholer's position] is its very premise, that this was a litigation, rather than a regulatory, setting. Saying it was 'litigation' doesn't make it so").

114. Simon, *supra* note 104, at 270.

115. See, e.g., Stevens & Thomas, *supra* note 112 (invoking the notion of "unstinting loyalty to the client" as a defense of Kaye Scholer's conduct).

116. See *id.* (questioning whether a lawyer's role is "that of [a] zealous advocate for the client").

117. Beck & Orey, *supra* note 104, at 74.

118. See, e.g., Fred. C. Zacharias, *The Future Structure and Regulation of Law Practice: Confronting Lies, Fictions, and False Paradigms in Legal Ethics Regulation*, 44 ARIZ. L. REV.

work in each case,¹¹⁹ commentators in all three cases used the distinction between advice and advocacy to determine whether the lawyers were complicit in their clients' conduct. Although the critics arrived at a similar conception of the lawyer's complicity in each case, that notion of complicity has yet to be described normatively under the professional rules or the criminal law.

III. DISTINGUISHING THE PROFESSIONAL RULES AND THE CRIMINAL LAW

The difficulty that critics experienced in articulating a general standard of complicity in the torture-memo, Enron, and Kaye Scholer cases stems from the fact that both the criminal law and the professional rules are ill adapted to the problem of defining lawyers' complicity in general terms. The basic doctrines in these two systems remain in conflict over whether the lawyer who acts in a "good faith effort to determine the validity, scope, meaning or application of the law" should be excused.¹²⁰ As this Part argues, a general standard for lawyers' complicity that fails to accommodate the professional rules' and the criminal law's respective doctrines of complicity would be undesirable because both systems embody important considerations for regulating lawyers' behavior. At the same time, neither system adequately reflects the considerations that the other incorporates. Instead, their basic constitutive elements differ radically.¹²¹

A. *Origins of the Norms*

The legal profession regulates lawyers' conduct through disciplinary agencies administered by bar organizations or by

829, 855 (2002) ("[T]he *Kaye, Scholer* incident called into question the codes' paradigm of lawyers as advocates." (footnote omitted)); Gillers, *supra* note 71, at 65 ("As an advisor, a lawyer is not an advocate.").

119. This convergence is particularly notable in light of the disparate roles played by the lawyers in each case. The Kaye Scholer attorneys mediated between Lincoln Savings & Loan and a federal banking regulator, Vinson & Elkins advised on Enron's compliance with its disclosure obligations regarding transactions that were structured by the law firm, and the torture memos were penned by a government attorney interpreting the limitations imposed on interrogations of detainees held by the CIA and the military.

120. MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009). For a discussion of these doctrines, see *supra* Introduction.

121. See Susan P. Koniak, *The Law Between the Bar and the State*, 70 N.C. L. REV. 1389, 1409-27 (1992) (discussing how the law and the professional rules advance different conceptions of the lawyer's role and appropriate behavior).

independent state agencies.¹²² Although each state bar configures its professional-discipline system differently, standards promulgated by the American Bar Association (ABA) have influenced both the substantive rules for lawyer discipline and the procedures for administering these rules.¹²³ The ABA standards impose sanctions for violations of a lawyer's duties to clients, to the public, to the legal system, and to the profession.¹²⁴ In most jurisdictions, a bar disciplinary agency hears allegations of lawyer misconduct and then brings a complaint upon finding sufficient preliminary evidence of misconduct.¹²⁵ The hearing "is a relatively formal version of administrative law procedure," and the lawyer is afforded procedural guarantees such as assistance of counsel, limited discovery, and the right to subpoena and cross-examine witnesses.¹²⁶ The authority of the bar agency to bring these complaints and of the courts to hear them derives from the traditional assertion by the courts of an inherent authority to regulate the conditions of legal practice.¹²⁷

The standards of professional discipline reflect the legal profession's view of the limits of permissible conduct by lawyers.¹²⁸ The judgments of wrongdoing and the consequences assigned to these wrongful acts originate with the members of the profession, acting without input from or modification by the general public.¹²⁹ Although a primary goal of the professional-discipline system is to protect the

122. See RHODE & LUBAN, *supra* note 76, at 951 ("[A]bout half the states have disciplinary agencies that are nominally independent of the organized bar . . .").

123. See *id.* at 965 ("The ABA Standards are the most common source of guidance in the sanctioning process.").

124. See STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.1 (1992) (identifying enforcement of duties owed "to clients, the public, the legal system, and the legal profession" as the purpose of disciplinary proceedings).

125. See GEOFFREY C. HAZARD, JR., SUSAN P. KONIAK & ROGER C. CRAMTON, *THE LAW AND ETHICS OF LAWYERING* 918 (3d ed. 1999) (describing the use of a "preliminary prosecutorial review to determine probable cause" in lawyer disciplinary proceedings conducted in most jurisdictions).

126. *Id.* (quoting Geoffrey C. Hazard, Jr. & Cameron Beard, Comment, *A Lawyer's Privilege Against Self-Incrimination in Professional Disciplinary Proceedings*, 95 *YALE L.J.* 1060, 1066-67 (1987)).

127. See COMM. ON DISCIPLINARY ENFORCEMENT, AM. BAR ASS'N, *LAWYER REGULATION FOR A NEW CENTURY* 1-9 (1992) (providing background in support of the recommendation that the judiciary, rather than the legislature, should conduct professional regulation of lawyers).

128. See ANNOTATED MODEL RULES OF PROF'L CONDUCT pmbl. annot. (2007) ("The Rules of Professional Conduct govern lawyer discipline.").

129. See RHODE, *supra* note 37, at 145 ("Bar codes of conduct claim to protect the public, but the public has had almost no voice in their formulation or enforcement.").

public from the peculiar forms of harm that lawyers can inflict,¹³⁰ the rules reflect the bar's conception of the public's interest in protection from this harm, rather than the public's assessment of its vulnerability to lawyer misconduct and the appropriate norms and punishments that regulate such behavior.¹³¹

In contrast, publicly accountable legislatures enact criminal laws through a process designed to reflect public attitudes.¹³² Although not every piece of legislation successfully embodies these attitudes, the criminal law as a whole may be expected to better reflect the public's views as a consequence of this public accountability.¹³³

B. *The Interests Served*

The criminal law and the professional rules differ in terms of the interests that each system is intended to serve. Lawyers occupy a position of privilege¹³⁴ and responsibility¹³⁵ in relation to the rest of the public. Their tenure in this position continues with the permission of the general public,¹³⁶ which could curtail or eliminate this privilege at any time. The professional-discipline system therefore serves the

130. See STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.1 (1992) (“The purpose of lawyer discipline proceedings is to protect the public and the administration of justice from lawyers who have not discharged . . . their professional duties.”).

131. See RHODE, *supra* note 37, at 143 (arguing that the legal profession’s “freedom from external accountability too often serves the profession at the expense of the public”); Koniak, *supra* note 121, at 1395–1402 (describing the law and the professional rules as distinct but interdependent normative systems).

132. See MELVIN ARON EISENBERG, THE NATURE OF THE COMMON LAW 150 (1988) (“In terms of structure, the combination of a representative conception, highly diverse training and experience, and responsiveness and accountability to the citizenry on an ongoing basis provides legitimacy to legislative rules . . .”).

133. See, e.g., *Lawrence v. Texas*, 539 U.S. 558, 571 (2003) (confronting the limitations on the power of a political majority to use the criminal laws to enforce its moral views); JOEL FEINBERG, DOING AND DESERVING 100 (1970) (“[I]t can be said that punishment expresses the judgment . . . of the community that what the criminal did was wrong.”); Henry M. Hart, Jr., *The Aims of the Criminal Law*, 23 LAW & CONTEMP. PROBS. 401, 404 (Summer 1958) (“What distinguishes a criminal from a civil sanction and all that distinguishes it . . . is the judgment of community condemnation which accompanies and justifies its imposition.”).

134. See STANDARDS FOR IMPOSING LAWYER SANCTIONS theoretical framework, para. 1 (recognizing that, by virtue of their expertise, lawyers have been given the power to make certain types of decisions for the public).

135. See MODEL RULES OF PROF'L CONDUCT pmb., para. 1 (2009) (acknowledging that lawyers have a “special responsibility for the quality of justice” in relation to the general public).

136. See *id.* para. 12–13 (recognizing that government regulation of the legal profession is unnecessary “[t]o the extent that lawyers meet the obligations of their professional calling” and that failure to observe these obligations “compromises the independence of the profession” (emphasis added)).

interest of the profession in ensuring that the public does not become so outraged by lawyers' abuses of their privileged status that it curtails or eliminates these privileges.¹³⁷ In this respect, the professional-discipline system protects the legal profession from the public as much as it protects the public from the legal profession.¹³⁸

The criminal law's scope is broader: it serves the interests of the public in enforcing behavioral norms that the public regards as necessary to maintain the integrity of the polity.¹³⁹ General public norms and enforcement systems, criminal and otherwise, have a superior status to the professional-discipline system because the legal profession exists only by virtue of the presence of substantive law.¹⁴⁰ Thus, although both the professional-discipline system and the criminal law are concerned with protecting the public's interests, the criminal law's role is more primary.

C. *The Subject of Sanctions*

The professional-discipline system and the criminal law differ also in the subject upon which each imposes sanctions as a consequence of violating their respective norms. The most vivid expression of the bar's self-regulatory powers is its ability to limit a lawyer's permission to continue in the practice of law. The ABA has approved a spectrum of sanctions, from private admonition and limited probation at the lenient end of the spectrum to disbarment at the severe end.¹⁴¹ These penalties exert their power over the lawyer

137. See WOLFRAM, *supra* note 37, at 79 ("There is reason to think . . . that a strong motivation for lawyer discipline is to reassure a doubtful public that notorious instances of lawyer depredation are being handled appropriately.").

138. See Zacharias, *supra* note 118, at 858 ("[O]ne of the ABA's express goals in developing professional regulation has been to supplant and obviate the need for regulation by lay institutions."); James C. Turner & Suzanne M. Mishkin, *Time for a Whupping: Across the Country, Attorney Discipline Systems Disgrace the Profession*, LEGAL TIMES, Aug. 18, 2003, at 58 (noting that the District of Columbia Bar Agency's mission to "protect the public and the courts from unethical conduct by" lawyers while also "protect[ing] members of the D.C. Bar" requires disciplinary bodies to perform "conflicting missions").

139. See Hart, *supra* note 133, at 410 ("[I]t is the criminal law which defines the minimum conditions of man's responsibility to his fellows and holds him to that responsibility.").

140. See HAZARD & HODES, *supra* note 8, § 5.12 (describing the professional rules' incorporation of and deference to criminal norms). *But see* Koniak, *supra* note 121, at 1410 (observing that the public law may depend upon the legal profession for its existence as much as the bar depends upon the law).

141. See STANDARDS FOR IMPOSING LAWYER SANCTIONS § 2.1 (1992) (defining the scope of sanctions); RHODE & LUBAN, *supra* note 76, at 965 ("The ABA standards are the most common source of guidance in the sanctioning process.").

through his or her license to practice law.¹⁴² In this respect, the professional-discipline system's sanctions address the lawyer's license and coerce the lawyer by limiting his or her permission to use that license,¹⁴³ while leaving more fundamental entitlements, such as freedom of movement and civic participation, untouched.

In contrast, the criminal law exerts a coercive influence that reaches deeper and more widely than the scope of professional sanction. Instead of targeting the lawyer's privileges as a lawyer, the criminal law's sanctions target the lawyer's privileges as a citizen. As a corollary of this wider spectrum of available penalties, the criminal law can vindicate a broader array of social interests by imposing reciprocal penalties in response to violations of those interests.¹⁴⁴ Moreover, because the criminal law's penalties limit the individual's ability not merely to ply a trade but also to continue to participate in the community, those penalties have a deeper coercive influence on the individual.¹⁴⁵ The criminal law thus exceeds the professional-discipline system in the breadth of interests it serves and the potency of the penalties it imposes in response to violations of those interests.

D. The Purposes of Sanctions

In a section entitled "Purposes of Lawyer Discipline Proceedings," the authors of the draft ABA Standards for Imposing Lawyer Sanctions asserted that courts do not perceive punishment as the purpose of the disciplinary system.¹⁴⁶ This perception is puzzling in light of the similarity of the means and purposes of imposing sanctions in the criminal and professional systems.¹⁴⁷ According to the

142. The penalties imposed by lawyer disciplinary proceedings apply only to the lawyer's professional privileges. *See* STANDARDS FOR IMPOSING LAWYER SANCTIONS §§ 2.2–2.8 (listing forms of sanctions).

143. *Id.*

144. *See* 18 U.S.C. § 3553(a)(2)(A) (2006) (instructing the sentencing judge to consider the need for the sentence imposed "to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense").

145. *See* Herbert Wexler, *The Challenge of a Model Penal Code*, 65 HARV. L. REV. 1097, 1098 (1952) ("[P]enal law governs the strongest force that we permit official agencies to bring to bear on individuals."); *cf.* *United States v. Bass*, 404 U.S. 336, 347–48 (1971) (explaining that the rule of lenity originates partly in recognition of the especially severe effects of criminal punishment in constraining the individual).

146. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.1; *see also* WOLFRAM, *supra* note 37, at 81 ("Modern courts have repeatedly observed that 'lawyer discipline is not intended to punish the offending lawyer but to protect the public.'" (citation omitted)).

147. *See* RHODE & LUBAN, *supra* note 76, at 956 ("[M]uch lawyer discipline seems to fit within the classic justifications of punishment: incapacitation, rehabilitation, and deterrence.").

ABA Standards, an overriding purpose of the professional-discipline system is to protect the public.¹⁴⁸ As subsidiary purposes, this system also seeks to protect the “integrity of the legal system,” to “deter further unethical conduct,” to “rehabilitate” the lawyer being sanctioned, and to “deter unethical behavior among all members of the profession” through the example set by penalizing individual lawyers.¹⁴⁹

This commentary confuses means with ends. Although protecting the public and the legal system are appropriately viewed as ends, the methods of deterrence and rehabilitation are better understood as means of achieving these ends. Like the professional-discipline system, the criminal-justice system pursues the purpose of public protection in administering penalties¹⁵⁰ and uses the means of deterrence and rehabilitation to achieve these ends. In both systems, the fundamental aim of the imposition of a penalty is to realign the individual’s behavior with the requirements of the normative framework that the penalty enforces.¹⁵¹ In light of these substantive similarities, the sanctions imposed by the professional-discipline system should be recognized as a form of punishment to the same extent as the sanctions imposed by the criminal law.

E. The Means of Enforcement

Standards for the professional conduct of lawyers are enforced through state disciplinary systems.¹⁵² The ABA’s standards of professional discipline, which serve as the basis for the disciplinary systems in most jurisdictions,¹⁵³ are predicated on the theory that a lawyer’s primary responsibility runs to the client.¹⁵⁴ As a consequence, the mechanics of the state professional-discipline systems are

148. STANDARDS FOR IMPOSING LAWYER SANCTIONS § 1.1.

149. *Id.*

150. See SANFORD H. KADISH, STEPHEN J. SCHULHOFER & CAROL S. STEIKER, CRIMINAL LAW AND ITS PROCESSES 1 (8th ed. 2007) (“The criminal justice system is society’s primary mechanism for enforcing standards of conduct designed to protect the safety and security of individuals and the community.”).

151. See LAFAVE & SCOTT, *supra* note 3, at 12 (“[C]riminal law[] aims to shape people’s conduct along lines which are beneficial to society . . .”).

152. See STANDARDS FOR IMPOSING LAWYER SANCTIONS preface, para. 2 (noting that many states have adopted the ABA Standards and that the ABA’s Standing Committee on Professional Discipline continues to assist state discipline systems in implementing the standards).

153. See *supra* note 9.

154. STANDARDS FOR IMPOSING LAWYER SANCTIONS theoretical framework, para. 3.

designed primarily to vindicate the grievances of clients harmed by lawyers' misconduct.¹⁵⁵

The state professional-discipline systems' reliance on complaints by clients renders them incapable of dealing with situations in which lawyers aid and abet their clients' crimes.¹⁵⁶ Because the client is, by definition, the primary criminal actor, the client has no incentive to refer the lawyer's role as aider and abettor to the bar. Moreover, because the practitioners who are most likely to have information about the lawyer's misconduct are the lawyer's closest associates, personal loyalties often deter other attorneys from referring cases to the bar.¹⁵⁷

Bar counsel can obtain information from other sources that mitigates this dependency on client referrals. In some states, for example, bar counsel may initiate investigations independently, although the lack of adequate resources frequently prevents them from exercising this power.¹⁵⁸ Consumer organizations also may detect instances of misconduct or assist members of the public in submitting complaints.¹⁵⁹ But although these additional resources supplement client complaints as sources of information about lawyer misconduct,

155. See RHODE, *supra* note 37, at 159 (“[B]ar agencies depend almost entirely on complaints from clients . . . as a basis for disciplinary investigations.”); see also RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS §§ 49–50 (1998) (describing duties owed to clients); *id.* § 51 (limiting the range of nonclients to whom a lawyer owes a duty of care).

156. Cf. RHODE & LUBAN, *supra* note 76, at 952 (“[R]elatively few clients have sufficient incentives or information to initiate disciplinary proceedings.”).

157. See STANDARDS FOR IMPOSING LAWYER SANCTIONS preface, para. 9 (“[In 1970], [o]ne of the most significant problems in lawyer discipline was the reluctance of lawyers and judges to report misconduct. That same problem exists today.”); HAZARD ET AL., *supra* note 125, at 927 (noting that the duty to report professional misconduct imposed by the Model Rules of Professional Conduct “is widely ignored” among lawyers); RHODE, *supra* note 37, at 160 (describing a “‘there but for the Grace of God go I’ attitude” among judges and bar leaders that deters reporting).

158. See RHODE & LUBAN, *supra* note 76, at 952. (“[D]isciplinary agencies are generally underfunded and understaffed. . . . The absence of resources also prevents agencies from undertaking independent investigations and limits the assistance that they can provide to individuals who wish to file grievances.”).

159. See, e.g., Using a Lawyer: *Don't Hire a Legal Professional Before Reading this Book*, LEGAL REFORMER, Jan.–Mar. 2009, at 1, available at http://www.halt.org/the_legal_reformer/2009/pdf/TLR-Winter09.pdf (advertising legal consumer resource providing information about professional discipline). Civil society groups have referred complaints to state bar associations about the conduct of lawyers involved in creating the United States' interrogation policies under the Bush administration, including John Yoo. See Justin Blum, *Activists Seek Disbarment of Bush Lawyers Over Interrogations*, BLOOMBERG (May 18, 2009, 2:00 PM EDT), <http://www.bloomberg.com/apps/news?pid=washingtonstory&sid=aIpMTqMafwrw> (reporting the submission of complaints against Yoo and Jay Bybee).

they cannot displace bar disciplinary agencies' primary reliance on client referrals.¹⁶⁰

In the absence of effective protections in the professional-discipline system against lawyers' facilitation of their clients' crimes, the role of the criminal law in preventing lawyers from acting as accomplices increases in importance.¹⁶¹ The imposition of criminal liability upon lawyers acting as accomplices furthers the purposes of both the criminal law and the professional rules, which prohibit lawyers from assisting their clients in committing crimes.¹⁶² The lack of incentive for lawyers and clients to refer cases to the bar, however, severely hampers the bar's efficacy in addressing cases where lawyers act as accomplices. These structural shortcomings in the professional-discipline system distinguish criminal prosecution as the better method of enforcing the prohibition on assisting criminal conduct.

IV. A GENERAL STANDARD FOR LAWYER COMPLICITY

The dissimilarity between the origins of the criminal law and the professional rules, the means of their enforcement, the subject of their sanctions, and the interests they serve¹⁶³ raises the problem that if one system operates without regard for the values embedded in the other, the application of that system in individual cases might undermine the values served by its counterpart.¹⁶⁴ Under the professional rules, the concept of advising in good faith may shield the lawyer from sanction, particularly if the advice was given in

160. See RHODE & LUBAN, *supra* note 76, at 949 (“[D]isciplinary complaint processes . . . rely almost exclusively on clients as a source of information about ethical violations.”).

161. Cf. RHODE, *supra* note 37, at 144 (“Without external checks, [lawyers who regulate other lawyers] too often lose perspective about the points at which occupational and societal interests conflict.”).

162. See MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2009) (“A lawyer shall not counsel a client to engage, or assist a client, in conduct that the lawyer knows is criminal or fraudulent . . .”).

163. See *supra* Part III.A–E.

164. See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 FORDHAM L. REV. 327, 353 (1998) (“In some situations . . . there is a tension between the criminal law and professional norms derived from other sources. In the rare case, this occurs because the criminal law proscribes conduct that would otherwise be . . . required by professional norms.”); cf. Koniak, *supra* note 121, at 1478–87 (describing conflicts between professional norms and the law); Zacharias, *supra* note 118, at 870 (“[T]he failure to identify either the policies or reality of disciplinary enforcement makes more difficult the task of coordinating discipline with other methods of sanctioning misconduct.”).

regard to a complex legal question;¹⁶⁵ however, in most situations, the basic doctrine of accomplice liability in the criminal law does not recognize this legal mistake as a defense.¹⁶⁶

The torture-memo controversy, Vinson & Elkins' role in the Enron scandal, and the debate surrounding the OTS investigation of Kaye Scholer call for a reconsideration of the standard of complicity that applies to lawyers.¹⁶⁷ Unless the professional-discipline system is wrong to excuse the lawyer who advises in good faith, the standard of complicity that developed in these cases must be refined to preserve consistency with the professional rules' exception for lawyers acting in good faith.

A. *The Advising-Complicity Standard*

In the torture-memo, Enron, and Kaye Scholer controversies, the distinction between the lawyer's roles as advisor and as advocate pervaded the commentators' critiques.¹⁶⁸ These critics' distinction between advice and advocacy separates the lawyer who influences a client to commit a crime or facilitates a client's criminal conduct from the lawyer whose advice respects the limits that the law imposes upon the client's wishes.¹⁶⁹

The central challenge for courts and prosecutors in distinguishing between appropriate advice and advocacy of criminal activity is determining an evidentiary standard that can assist in evaluating whether the lawyer intended to further the client's illegal activity. A

165. See *supra* Part I.

166. See Kadish, *supra* note 1, at 346 (discussing the derivative nature of accomplice liability).

167. See *supra* Part III.

168. Other commentators have analyzed this distinction using the language of "boundaries" and "edges," implying that the lawyer who blurs the distinction engages in misconduct. See, e.g., WOLFRAM, *supra* note 37, at 692 (examining the obligations of lawyers advising their clients at the "knife's-edge limits of the law"); Joel S. Newman, *Legal Advice Toward Illegal Ends*, 28 U. RICH. L. REV. 287, 290 (1994) ("In substantive law cases, courts have struggled to draw the line between mere advice, which does not involve the lawyer in criminal activity and liability, and some further, active participation, which does."); Michael E. Tigar, *What Lawyers, What Edge?*, 36 HOFSTRA L. REV. 521, 527 (2007) (proposing the distinction between advice and advocacy as a "duality" that contributes to a definition of permissible and impermissible lawyer conduct). This conception is also featured in some model rules. See, e.g., RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 8 cmt. b (1998) (observing that a lawyer acting as an advisor "may . . . cross the divide between appropriate counseling and criminal activity").

169. Cf. Newman, *supra* note 168, at 290 (locating the "critical distinction" between culpable and innocent advising activity referred to in Comment 6 to Model Rule 1.2 in the content of the advice given by the lawyer).

successful standard would address the evidentiary problem of establishing what facts and circumstances provide evidence that the lawyer intended to advance actions by the client that the lawyer knew to be illegal.¹⁷⁰ This Note proposes a standard for determining whether a lawyer's conduct crossed the boundary from advice into complicity that focuses on three elements of the lawyer's activity: first, the lawyer's knowledge of the client's intended course of conduct; second, the lawyer's knowledge of the indeterminacy of the law governing the client's conduct;¹⁷¹ and third, the nature of the legal advice provided by the lawyer to the client. If the legal advice is highly imbalanced in relation to the lawyer's knowledge of both the client's purpose and the indeterminacy of the law, this standard would allow the inference that the advice could not have been intended to aid the client in conforming to the law. Under these circumstances, a jury could find that the lawyer intended to aid the client in accomplishing the client's criminal purposes.¹⁷²

This advising-complicity framework attempts to replicate the success of the criminal law's prohibitions of fraud by focusing judicial analysis on elements of mens rea that effectively foreclose the possibility that the lawyer acted in good faith. Just as proof of fraudulent intent is necessary to sustain a fraud conviction,¹⁷³ the advising-complicity framework requires a combination of factors that, if proven, tend to negate any claim of good faith. By requiring proof of a mental state that precludes a finding of good faith, this framework achieves the effect of the basic definitions of complicity found in both the criminal law and the professional standards. It embraces criminal norms to the extent that it provides a methodology for determining the circumstances in which a lawyer intentionally facilitates a client's crime, while simultaneously incorporating the interests of professional discipline by refining the analysis of the

170. See generally LAFAVE & SCOTT, *supra* note 3, at 225–27 (discussing proof of intent and the doctrine of “presumed intent”).

171. Cf. WOLFRAM, *supra* note 37, at 695 (identifying the elements of knowledge and legal indeterminacy as principal factors in determining whether a lawyer intentionally engaged in criminal conduct in violation of Model Rule 1.2(d)).

172. See *id.* at 693 (“[L]awyers can indeed be accomplices in crimes by giving their clients legal advice for the purpose of aiding or assisting the client in a project known to consist of acts constituting a criminal offense.”).

173. See, e.g., *United States v. Cavin*, 39 F.3d 1299, 1306 (5th Cir. 1994) (requiring proof of fraudulent intent to sustain a conviction of conspiracy to commit fraud).

lawyer's intent and thereby shielding from criminal liability the lawyer who advises a client in good faith.

1. *The First Element: Knowledge of the Client's Intended Conduct.* To have the requisite mental state for accomplice liability, the alleged accomplice must have had the intention to assist the client in carrying out a criminal objective.¹⁷⁴ Direct proof of intent is difficult to obtain in the case of a lawyer acting in an advisory capacity.¹⁷⁵ Therefore, the factfinder must make an inference of the lawyer's intent to assist the commission of a crime from the circumstances.¹⁷⁶ The advisor who has been notified of the client's proposed course of conduct satisfies a prerequisite for accomplice liability, namely that the accomplice know the goal pursued by the primary actor.¹⁷⁷ The lawyer's knowledge in this situation enables the lawyer to better assess the client's motives in requesting the advice and to anticipate how the advice will be used.¹⁷⁸ In this position, the lawyer is able to evaluate how an opinion on the legality of the client's proposed conduct must be written to steer the client away from illegal action.

Knowledge in this scenario is a question of degree. The extent of the lawyer's factual knowledge may vary from having no knowledge at all of what the client intends to do, to having a basic understanding of the range of possible actions the client is contemplating, to having intimate knowledge of the details of the conduct in question, perhaps because the client is already engaged in the conduct or because of the lawyer's involvement in planning it.¹⁷⁹

174. Kadish, *supra* note 1, at 346–49.

175. See HAZARD & HODES, *supra* note 8, § 1.23 (“It is impossible to look into a lawyer’s head, and it is unacceptable simply to take her word for her state of mind when the probity of her own conduct is at issue.”).

176. See *id.* (“[C]ircumstantial evidence must also be the (sole) basis for inferring a lawyer’s actual knowledge or belief . . .”); see also LAFAVE & SCOTT, *supra* note 3, at 226 (noting that a criminal defendant’s intentions “must be gathered from his words (if any) and actions in the light of all the surrounding circumstances”).

177. See Kadish, *supra* note 1, at 346–49 (discussing the accomplice’s intent to further the primary actor’s goal).

178. See HAZARD & HODES, *supra* note 8, § 5.13 (“[T]he problem [in providing advice on suspicious activity] is to assess . . . the level of certainty that the client will actually misuse the information.”); WOLFRAM, *supra* note 37, at 696 (“A lawyer, on the basis of then known facts, might legitimately begin a representation in furtherance of a client enterprise thought to be lawful. If the lawyer later discovers facts indicating that the enterprise is unlawful, the latter state of knowledge generates a new duty and the lawyer may no longer assist the client.”).

179. Cf. Hazard, *supra* note 16, at 672 (“It is sometimes suggested that . . . a lawyer cannot ‘know’ what a client intends. This suggestion is either disingenuous or absurd. . . . [T]he practice

As the detail and specificity of the lawyer's knowledge increases, the lawyer's understanding of how the advice must be tailored to avoid illegal activity also increases. Moreover, as the extent of the lawyer's knowledge increases, the propriety of characterizing the lawyer's opinions as advocacy increases, because advocating a certain course of conduct becomes more feasible as one's understanding of that conduct improves. Knowledge of the client's intended conduct constitutes one prerequisite to showing that the lawyer has crossed the advising-complicity line.

2. *The Second Element: Knowledge of the Risk of Illegality.* The second element required to demonstrate that the advising lawyer acted as an accomplice is proof that the legal doctrine governing the client's activities alerted the lawyer to the heightened probability that the client's conduct was illegal. This element requires a factfinder's inference that the lawyer actually became aware of the risk of illegality.¹⁸⁰

This element of the evidentiary standard assumes that, where the legality of the proposed course of conduct poses a new question of law or is otherwise highly contested or unclear, the lawyer would understand that the need for balanced advice would be greater than if the law were settled. A standard that requires the lawyer to provide a more balanced view of the law in such instances is entirely consistent with the lawyer's duty to give the client a complete assessment of the risk that the client's conduct will be determined to be illegal.¹⁸¹ Failure to discharge this obligation in spite of knowledge of the law would corroborate the inference that the lawyer intended to assist the client in acting outside the boundaries of the law.

A lawyer advising a client to engage in contemplated action that is similar to crimes that are considered *mala in se* would also support the inference that the advising lawyer was aware of the risk that the conduct was criminal.¹⁸² *Mala in se* crimes—like burglary or murder—

of law is based on practical knowledge The question, therefore, is what degree of certainty imposes legal obligations on one who 'knows'?).

180. See HAZARD & HODES, *supra* note 8, § 1.23 ("Even where a violation requires proof of [actual] 'knowledge,' the circumstances may be such that a disciplinary authority will infer that a lawyer *must* have known.").

181. See Clark, *supra* note 60, at 466–67 (discussing the advisor's professional obligation to advise the client of the potential that the client's proposed course of conduct is illegal).

182. See Hazard, *supra* note 16, at 672 ("The narrowest connotation of illegality is conduct violative of the criminal law that is *mala in se*. Although *mala in se* has no precise definition, it generally comprehends conduct that any civilized society would regard as obnoxious . . .").

are intuitively recognized as wrongful and were usually proscribed at common law, in contrast with offenses that are wrongful simply because they are created by statute or regulation.¹⁸³ Criminal violations of *jus cogens* norms under international law, such as the prohibition against torture, are also proscribed due to their fundamental wrongfulness rather than their incompatibility with a regulatory system and should be included among the crimes that are considered *mala in se*.¹⁸⁴ The similarity of the proposed conduct to *mala in se* crimes would constitute notice for the lawyer that the conduct in question was actually criminal.¹⁸⁵

3. *The Third Element: Imbalance or Extremity in the Presentation of the Legal Opinion.* Whereas the first two elements of the framework address the lawyer's knowledge and therefore go to the question of *mens rea*, the final element considers the lawyer's actions taken in light of that knowledge. The key determinant in this portion of the advising-complicity analysis is the quality of imbalance in the advice given by the lawyer.¹⁸⁶ This element addresses the difference between the advisor's duty to present a neutral assessment of how the law applies to the client's proposed course of conduct and the advocate's license to argue the law in a manner that favors the conduct that the client seeks to defend in court.¹⁸⁷ The more imbalanced the lawyer's advice becomes, the less it retains the

183. See generally LAFAVE & SCOTT, *supra* note 3, at 32–35 (distinguishing *mala in se* offenses from those that are *mala prohibita*).

184. See, e.g., Prosecutor v. Furundžija, Case No. IT-95-17/1-T, Judgment, ¶ 154 (Int'l Crim. Trib. for the Former Yugoslavia Dec. 10, 1998) (“[T]he *jus cogens* nature of the prohibition against torture articulates the notion that the prohibition has now become one of the most fundamental standards of the international community.”).

185. Cf. Stephen L. Pepper, *Counseling at the Limits of the Law: An Exercise in the Jurisprudence and Ethics of Lawyering*, 104 YALE L.J. 1545, 1578 (1995) (proposing a rule making the *malum in se* status of a client's proposed activity a factor in determining whether the lawyer must refuse to give advice).

186. Cf. WOLFRAM, *supra* note 37, at 692 (“[A] client may be impelled . . . to aggressively push legality to its limits, and possibly beyond. It would be improbable that a lawyer could perform the lawyerly function of advice-giving in such a situation in the same way in which a lawyer advises on legally and morally unquestionable transactions.”).

187. See Fuller & Randall, *supra* note 38, at 1161 (“Partisan advocacy plays [an] essential part [in litigation], and the lawyer pleading his client's case may properly present it in the most favorable light. A similar resolution of doubts in one direction becomes inappropriate when the lawyer acts as counselor. The reasons that justify and even require partisan advocacy in the trial of a cause do not grant any license to the lawyer to participate as legal adviser in a line of conduct that is . . . of doubtful legality.”).

neutrality implicit in the advisory role¹⁸⁸ and the more it assumes the bias inherent in advocacy.¹⁸⁹ Of course, the more the lawyer's work resembles advocacy, the more it becomes appropriate to attribute to the lawyer an intent to influence, induce, or provoke the client to engage in particular conduct.¹⁹⁰ Thus, the more the lawyer's advice resembles advocacy, the more appropriate it becomes to conclude that the lawyer acted as an accomplice.

Determining whether the lawyer's advice violated the advising-complicity standard depends upon the three factors discussed in this Part. The question is whether, in light of the lawyer's knowledge of the client's conduct and of the status of the law, the advice given by the lawyer is so imbalanced as to support an inference that it was intended not to assist the client in complying with the law but to assist the client in violating it.¹⁹¹ An affirmative answer to this question would indicate that the lawyer had breached the distinction between advising and advocacy and participated as an accomplice in the client's illegal act.

B. Impossibility of Good Faith Under the Proposed Advising-Complicity Standard

By requiring that the lawyer knew the client's intended purpose and knew that the law governing that purpose was ambiguous or unsettled and yet gave advice that failed to warn of the probability that the client's conduct was illegal, the advising-complicity framework adds to the criminal law's basic doctrine of complicity by requiring proof that tends to exclude the possibility that the lawyer acted in good faith. In doing so, the framework replicates the effect of

188. See Hazard, *supra* note 16, at 671 (describing "unsuggestive advice" as "the least instrumental form of assistance that a lawyer can provide a client" in pursuing an unlawful objective).

189. See WOLFRAM, *supra* note 37, at 697 ("[A] lawyer must avoid replacing a sound professional judgment about the limits of the law with a wished-for ambiguity in legal proscriptions in a one-sided search for justification for a client's dubious projects.").

190. This advocacy, whether it is characterized as deliberate influence, inducement, or provocation, amounts to more than mere "advice." See MONROE H. FREEDMAN, *LAWYERS' ETHICS IN AN ADVERSARY SYSTEM* 60 (1975) (asserting that Code of Professional Responsibility DR 7-102(A)(7), which prohibits lawyers from counseling or assisting their clients in conduct that the lawyer knows to be illegal, requires "an active kind of participation in the client's illegal act, going beyond merely giving advice about the law").

191. Cf. Clark, *supra* note 60, at 458 ("[The torture memo's] assertions about the state of the law are so inaccurate that they seem to be arguments about what the authors . . . wanted the law to be rather than assessments of what the law actually is.").

fraud statutes, which impose mens rea requirements that exclude the possibility that the defendant acted in good faith.¹⁹²

The lawyer would not be considered complicit in the client's crime if any of the proposed standard's three required elements were not met. If the lawyer did not have sufficient knowledge of the client's purpose to appreciate the risk that it was illegal, the lawyer would not be complicit. Conversely, if the lawyer had intimate knowledge of the client's purpose but did not understand the controlling law, the lawyer would not be complicit. Finally, even if the lawyer possessed detailed knowledge of the client's purpose and possessed expert familiarity with the relevant law, if the lawyer gave advice that warned of the risk that the conduct in question was illegal, no inference of intent to further a criminal purpose could follow. Only when all three elements are present could a jury determine that the lawyer knowingly intended to facilitate a criminal act and convict the lawyer as an accomplice to the client's crime.

CONCLUSION

Formulating a general standard of complicity for the lawyer acting in an advising role raises difficult problems in reconciling the criminal law's model of complicity with the professional rules' excuse for the advisor who acts in good faith. In spite of these difficulties, the inconsistency between the standards of complicity in the criminal law and the professional rules must be confronted if the different norms and interests preserved by either system of rules are to remain uncompromised. By developing a normative standard that draws on the distinction between advice and advocacy to address the problem of determining the lawyer's intent, this Note has attempted to show how the public's interest in punishing harmful conduct according to its own standards of culpability can be vindicated consistently with the profession's interest in discharging its traditional functions without fear of sanction. If such a standard takes root, academic critics, judges, bar disciplinary counsel, and prosecutors alike will have a better method to distinguish innocent advising activity from complicity in illegal or criminal conduct. Without a normative standard in place, questions about the scope of lawyers' complicity that arose in the torture-memo, Enron, and Kaye Scholer

192. *See supra* Part I.

controversies will remain unanswered, ready to surface again in some future crisis.