

# REMORSE, RESPONSIBILITY, AND REGULATING ADVOCACY: MAKING DEFENDANTS PAY FOR THE SINS OF THEIR LAWYERS

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*The ethics laws traditionally have afforded criminal defense attorneys greater latitude than other lawyers in their use of aggressive strategies on behalf of their clients. Federal judges nonetheless attempt to regulate zealous, or what is perceived as over-zealous, advocacy by criminal defense lawyers. They do so by using the "acceptance of responsibility" provision of the United States Sentencing Guidelines to impose harsher sentences on criminal defendants whose attorneys engage in aggressive forms of representation, such as making factually or legally dubious arguments, seeking tactical delays, or misleading the court. Judges justify these higher sentences by equating a zealous defense with remorselessness. This interpretation of the sentencing laws chills zealous advocacy in a fashion that has escaped review by most courts and scholars. This Article explores this method of regulation and its troublesome implications for criminal defendants and the attorneys who represent them.*

## INTRODUCTION

During the course of representing clients, criminal defense lawyers must make countless strategic decisions. These decisions are channeled by some basic principles of ethics and professionalism. Foremost among these are the notions that attorneys will, first, represent the interests of their clients,<sup>1</sup> and second, will do so with zeal.<sup>2</sup> In most instances, a lawyer finds no conflict between promoting a client's interests and zealous advocacy; zeal is usually in a client's

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<sup>1</sup> Annotated Model Rules of Prof'l Conduct R. 1.3 cmt. 1 (5th ed. 2003) [hereinafter Model Rules] ("A lawyer must . . . act with commitment and dedication to the interests of the client . . ."); Model Code of Prof'l Responsibility and Code of Judicial Conduct DR 7-101(A)(1) (1980) [hereinafter Model Code] ("A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules.").

<sup>2</sup> Model Rules, *supra* note 1, R. 1.3 cmt. 1 ("A lawyer must also act . . . with zeal in advocacy upon the client's behalf."); Model Code, *supra* note 1, EC 7-1 ("The duty of a lawyer, both to his client and to the legal system, is to represent his client zealously within the bounds of the law.").

best interest.<sup>3</sup> This is the view from defense counsel's table, supported in great measure by the lore of the profession<sup>4</sup> as well as the laws of ethics and professionalism.

A different perspective emerges from the bench. Zealous advocacy, or what is perceived as overzealous advocacy, is a common target of judges' efforts to regulate their courtrooms. While judges recognize the importance of zealous advocacy, they realize too that zeal and efficiency in criminal proceedings are often inversely related. That is, zeal is a "cost" of judicial efficiency that judges have an incentive to minimize. Some forms of advocacy result in the inefficient administration of justice because they involve making arguments that are likely to lose, filing unusual or extensive motions, recharacterizing evidence to minimize harmful facts, declining to waive rights, and refusing to cooperate with court personnel or law enforcement in the prosecution of the case. Although some of this conduct might violate rules of ethical and professional conduct in extreme cases, much of it does not. The aggressive conduct on which I focus is largely permissible, and is at worst annoying or vexatious to judges and prosecutors. Even when zealous conduct does fall into the realm of unethical behavior, judges rarely take formal disciplinary action. This is not to suggest that either permissible or impermissible zealous advocacy by criminal defense lawyers goes unregulated; judges have found other ways in which to handle perceived infractions related to zeal.

This Article, the first of two Articles on the informal regulation of defense attorneys, makes the novel and perhaps audacious claim that federal trial judges deter criminal defense attorneys from engaging in what the judges perceive to be overzealous advocacy by imposing harsher sentences on their clients. This first Article is largely theoretical and is intended to expose the sentencing doctrines that permit judges to justify imposing higher sentences on defendants whose lawyers engage in aggressive tactics. The second Article, empirical in nature,

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<sup>3</sup> "Zealous advocacy requires counsel . . . to act in a manner consistent with the best interests of the client . . ." *In re Tutu Wells Contamination Litig.*, 162 F.R.D. 46, 53 (1995) (citing *Nat'l Hockey League v. Metro. Hockey Club, Inc.*, 427 U.S. 639, 640 (1976)).

<sup>4</sup> See Eugene R. Gaetke, *Lawyers as Officers of the Court*, 42 Vand. L. Rev. 39, 40 (1989) (arguing that image of lawyer as loyal advocate for beleaguered client is perpetuated by bar, media, literature, and common lore); George A. Riemer, *Zealous Lawyers: Saints or Sinners?*, Or. St. B. Bull., Oct. 1998, at 31, 32 (arguing that state bar should revise disciplinary rules to require expressly rather than merely encourage zealous representation); Murray L. Schwartz, *The Professionalism and Accountability of Lawyers*, 66 Cal. L. Rev. 669, 672 (1978) (arguing that media reinforces public view of lawyers as advocates within adversarial system); Abbe Smith, *Defending Defending: The Case for Unmitigated Zeal on Behalf of People Who Do Terrible Things*, 28 Hofstra L. Rev. 925, 934 (2000) (arguing that criminal defense lawyers must represent even most despicable cases with "utmost devotion and zeal").

provides detailed evidence of this judicial practice and explores its practical consequences based on the findings of a qualitative study.<sup>5</sup>

The use of adverse rulings to regulate conduct is not new in the criminal law arena. Prosecutors long have had to contend with the exclusionary rule<sup>6</sup> and other judicial practices that punish and deter government conduct by issuing rulings that handicap their cases. The question of whether courts use similar practices to influence defense attorney conduct has been ignored in the courtroom and in legal scholarship.<sup>7</sup>

There are three significant reasons for this gap in the literature. First, as an empirical matter this practice is not easily observed. Judges are unlikely to be transparent about the non-penological motives for their sentences for fear of reversal. Nonetheless, a handful of cases document the existence of this judicial means of regulating lawyers and confirm that it is more than a theoretical observation. I rely on these cases to begin uncovering the theoretical

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<sup>5</sup> Margareth Etienne, *The Declining Utility of the Right to Counsel in Federal Criminal Courts: An Empirical Study on the Role of Defense Attorney Advocacy Under the Sentencing Guidelines*, 92 Cal. L. Rev. (forthcoming March 2004). An early draft of the empirical article was presented at the 2003 Law and Society Association Conference.

<sup>6</sup> The exclusionary rule is a judicially created device under which courts disallow prosecutors from introducing evidence that was obtained directly or indirectly through government violations of the Fourth, Fifth, or Sixth Amendments to the U.S. Constitution. See John Deters, *The Exclusionary Rule*, 89 Geo. L.J. 1216, 1216 (2001). The rule seeks primarily to deter law enforcement from violating the constitutional rights of defendants. See Sharon L. Davies, *The Penalty of Exclusion—A Price or a Sanction?*, 73 S. Cal. L. Rev. 1275, 1275-76 (2000); see also *United States v. Calandra*, 414 U.S. 338, 348 (1974) (explaining that “the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect”); *Mapp v. Ohio*, 367 U.S. 643, 656 (1961) (stating that rule is designed to promote officers’ respect for Fourth Amendment’s “constitutional guaranty in the only effectively available way—by removing the incentive to disregard it” (quoting *Elkins v. United States*, 364 U.S. 206, 217 (1960))).

<sup>7</sup> The use of adverse sentencing rulings as a means of regulating defense attorney advocacy has escaped review in the courtroom and in legal scholarship because it is often couched in highly contextual legal doctrine, afforded great deference on appeal, and hidden beneath the veil of “inherent” judicial powers to manage courts. Federal courts possess the inherent powers to sanction counsel for misconduct and the abuse of judicial process. *Roadway Express, Inc. v. Piper*, 447 U.S. 752, 766-67 (1980); see also *Ramos Colon v. U.S. Att’y for Dist. of P.R.*, 576 F.2d 1, 3 (1st Cir. 1978) (“[T]he inherent power of the court to manage its affairs necessarily includes the authority to impose reasonable and appropriate sanctions upon errant lawyers practicing before it.” (citation omitted)); Lisa DiBartolomeo, *Sovereign Immunity Bars the Exercise of Supervisory Power for Fee-Shifting Against the Federal Government—United States v. Horn*, 29 Suffolk U. L. Rev. 915, 915 (1995) (stating that “United States federal courts may exercise their supervisory power to maintain judicial integrity and efficiency in criminal proceedings”). See generally Sara Sun Beale, *Reconsidering Supervisory Power in Criminal Cases: Constitutional and Statutory Limits on the Authority of the Federal Courts*, 84 Colum. L. Rev. 1433 (1984) (discussing history and application of supervisory power).

underpinnings of such rulings.<sup>8</sup> The second reason for this void in the literature stems from skepticism that judges would blatantly discard strong normative values of punishing defendants based solely on their crimes and personal circumstances. The situation, however, is more nuanced: Judges do not in fact violate accepted norms of punishment when they base their sentences in part on the remorselessness of a defendant. Rather, remorse is a well-established factor in sentencing considerations.<sup>9</sup> It is the leap in logic equating aggressive litigation with a lack of remorse that warrants close scrutiny and criticism. Third, many people assume that a judicial practice of punishing defendants for the perceived misdeeds of their attorneys would never exist because it simply could not overcome serious constitutional, not to mention moral and ethical, infirmities. I show, to the contrary, how lower court judges have survived legal challenges by conducting their informal regulation of defense lawyers in the sentencing terrain, where procedural rules are practically nonexistent,<sup>10</sup> where judges traditionally have been afforded great discretion,<sup>11</sup> and where constitutional limitations rarely are imposed.<sup>12</sup>

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<sup>8</sup> Additional claims regarding the frequency of and reactions to this practice must await empirical research. See Etienne, *supra* note 5.

<sup>9</sup> See Lisa F. Orenstein, Sentencing Leniency May Be Denied to Criminal Offenders Who Fail to Express Remorse at Allocution, 56 Md. L. Rev. 780, 780 n.8, 785-86 (1997) (listing cases in numerous jurisdictions upholding judge's consideration of defendant's remorse or lack thereof for sentencing purposes). Practically every jurisdiction treats remorse as a mitigating factor in capital sentencing. Theodore Eisenberg et al., But Was He Sorry? The Role of Remorse in Capital Sentencing, 83 Cornell L. Rev. 1599, 1604-05 (1998); see also Harmelin v. Michigan, 501 U.S. 957, 1007 (1991) (Kennedy, J., concurring in part and concurring in judgment) ("Mandatory sentencing schemes can be criticized for depriving judges of the power to exercise individual discretion when remorse and acknowledgment of guilt, or other extenuating facts, present what might seem a compelling case for departure from the maximum."); Michigan v. Tucker, 417 U.S. 433, 448 n.23 (1974) ("[C]ompletely voluntary confessions may, in many cases, advance the cause of justice and rehabilitation . . .").

<sup>10</sup> See generally The Law of Evidence in Federal Sentencing Proceedings, 177 F.R.D. 513 (1998) (criticizing lack of formal evidentiary rules, failure to allow defendants to confront evidence, and low burden of proof in federal sentencing procedures).

<sup>11</sup> See Mitchell v. United States, 526 U.S. 314, 338-39 (1999) (Scalia, J., dissenting) ("'[C]ourts in this country and in England,' we have said, have 'practiced a policy under which a sentencing judge [can] exercise a wide discretion in the sources and types of evidence used to assist him in determining the kind and extent of punishment to be imposed within limits fixed by law.' '[A] sentencing judge "may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."' (quoting Williams v. New York, 337 U.S. 241, 246 (1949); Nichols v. United States, 511 U.S. 738, 747 (1994))).

<sup>12</sup> See William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice, 107 Yale L.J. 1, 6 (1997) (arguing in part that substantive criminal law, including sentencing, largely has evaded constitutionalization as courts have deferred to legislatures rather than establishing important norms).

My primary thesis is that judges interweave regulation of criminal defense attorneys with what judges do best: issuing legal rulings on substantive matters. I argue that judges use their sentencing decisions simultaneously to punish defendants' conduct for the criminal act as well as to deter and punish lawyers' conduct during the course of the representation. My second thesis helps to illustrate the first. Judges lawfully may consider an attorney's aggressive advocacy as a factor in sentencing defendants because remorse widely has been accepted as a legitimate sentencing consideration, and sentencing judges assume a positive correlation between a zealous defense and a lack of contrition. In making this point, I focus on federal sentencing law as embodied in the United States Sentencing Guidelines<sup>13</sup>—a very mechanical and more or less transparent sentencing scheme<sup>14</sup>—to show how judges make use of the amorphous concept of remorse. I argue that the emphasis on remorse in sentencing, and in the "acceptance of responsibility" provision of the Federal Sentencing Guidelines in particular, is the loophole that permits judges to regulate defense attorney conduct with the threat of higher sentences for their clients. Once judges equate zealous advocacy by the defense lawyer with a lack of remorse by the defendant, the resulting dilemma is that zealous advocacy—unless it results in an acquittal or dismissal—often can lead to a higher sentence for the defendant. This forces the defense attorney to anticipate the effect of advocacy on the client's sentence and make a strategic decision about whether greater zeal is, as is generally believed, in the client's best interest.<sup>15</sup>

This means of regulation is terribly problematic. Perhaps most troublesome is the possibility that lawyers will be more likely to forego meritorious claims if they believe that a losing claim could result in a higher sentence for their clients. In addition, holding defendants accountable for their lawyers' actions presupposes a perfect agency relationship between client and attorney that rarely exists. The reality is that, with few exceptions, lawyers make most of the legal decisions during their representations, and the vigor with which a case is litigated is related only tangentially, if at all, to a defendant's level of contrition.

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<sup>13</sup> U.S. Sentencing Guidelines Manual § 3E1.1 (2002) [hereinafter U.S.S.G.].

<sup>14</sup> I have chosen to focus on the Federal Sentencing Guidelines because under guidelines sentencing schemes, judicial rulings and determinations have "precise and measurable significance." 1 Practice Under the Federal Sentencing Guidelines § 7.03[B] (Phylis Skloot Bamberger & David J. Gottlieb eds., 4th ed. Supp. 2003). This greater degree of formality in federal sentencing creates more transparency and is therefore particularly suited for study and analysis.

<sup>15</sup> See *supra* note 3.

More fundamentally, criminal defense lawyers are afforded greater latitude in advocacy strategies for good reasons. Permitting the federal sentencing laws or individual judges to undermine the accepted rationale behind the laws of ethics and professionalism is bad policymaking and results in poorly conceived norms of advocacy. Finally, like the exclusionary rule, this means of regulating defense attorney conduct by handicapping their cases is likely to be an inadequate deterrent even when the conduct warrants deterring.

Despite these significant flaws and numerous others, I argue that this means of regulating defense lawyers is not likely to be reversed on constitutional grounds. Not only do judges have broad constitutional authority to manage their courtrooms but they have embedded this particular regulatory practice in an otherwise legal—though easily manipulable—sentencing doctrine. Much like the judicially created exclusionary rule, this method of regulation seeks to influence attorney conduct through the issuance of adverse rulings that represent a convergence of substantive constitutional law and judges' legal authority to influence and regulate lawyers' behavior in their courtrooms.

This Article proceeds in four Parts. Part I considers the regulation of zeal. Informing the judge's perspective as a regulator of zeal is the conflict between a lawyer's duties as zealous advocate and as officer of the court. Judges tend to expect that lawyers will give priority to their roles as officers of the court, especially because the Model Rules make clear that lawyers have a great deal of discretion in determining how zealously they should approach a case. I conclude in this Part that zeal becomes a question of lawyers' legal strategy, which judges seek to influence through sentencing.<sup>16</sup>

Parts II and III are the heart of the project. Part II explores in some detail how the Sentencing Guidelines function and how they have been used by some sentencing courts to deter certain defense strategies such as frivolous arguments, delay, and failure to cooperate with court and government personnel. This Part gives primary atten-

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<sup>16</sup> The nexus between the amount of zeal and the sentencing decision is important for several reasons. Most interestingly, in the category of cases at issue in this Article, the correlation is precisely the opposite of what one intuitively might expect: the greater the zeal, the higher the sentence. This is because the court disapproves of, and seeks to deter, either the amount or the nature of the zealous advocacy exhibited. Second, linking the disciplinary action against the attorney to the sentencing decision suggests the potential breadth of this form of regulation. Because almost ninety percent of federal criminal cases end in convictions and sentences, judges can use this tool in the vast majority of cases that appear before them. Bureau of Justice Statistics, U.S. Dep't of Justice, *Sourcebook of Criminal Justice Statistics—2000*, 426, tbl.5.16 (Kathleen Maguire & Ann L. Pastore eds., 2001).

tion to the concept of remorse under the “acceptance of responsibility” provision of the Guidelines and considers that courts may view specific conduct or advice *by attorneys* as indicators of a lack of remorse *by defendants*. This absence of remorse is used to justify higher sentences.

Part III puts forth a detailed hypothetical that illustrates the problem with using zeal as an indicator of remorselessness. The “Jones Hypothetical” focuses on some of the different strategic decisions—decisions rightly viewed as advocacy decisions—made by a criminal defense attorney during the course of representing a typical client. It shows how courts can use the sentencing process to penalize defendants for some of the advocacy decisions of their lawyers. This Part also examines the legal authority for this judicial practice and the likely failure of constitutional challenges against it.

In Part IV, I present a detailed critique of this practice. I argue that despite its ability to withstand constitutional challenges grounded in the Fifth and Sixth Amendments, it threatens the core of our adversarial system. I focus on some of the most significant problems of regulating zealous advocacy through sentencing and the resultant ramifications for the federal criminal justice system.

## I

### ZEALOUS ADVOCACY

#### A. *Regulating Zealous Advocacy*

Federal judges have at their disposal a variety of tools to regulate the professional and ethical conduct of the lawyers who practice before them:<sup>17</sup> the traditional canons of ethical and professional codes as adopted by state legislatures,<sup>18</sup> local district practice rules,<sup>19</sup> and individual sanctions such as fines and contempt rulings.<sup>20</sup> These

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<sup>17</sup> See, e.g., Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 Vand. L. Rev. 381, 400-05 (2002) (discussing various methods used by federal judges to regulate prosecutors).

<sup>18</sup> With the exception of California, which has enacted its own ethical code governing lawyer conduct, all the remaining states and the District of Columbia have adopted some version of the Model Rules of Professional Conduct or the Model Code of Professional Responsibility. See Thomas D. Morgan & Ronald D. Rotunda, *2003 Model Rules of Professional Conduct and Other Selected Standards on Professional Responsibility* 173-75 (2003).

<sup>19</sup> Katherine M. Lasher, *A Call for a Uniform Standard of Professional Responsibility in the Federal Court System: Is Regulation of Recalcitrant Attorneys at the District Court Level Effective?*, 66 U. Cin. L. Rev. 901, 901-02 (1998) (explaining that every federal district court promulgates its own set of rules governing professional responsibility for lawyers practicing before it, which are enforced by judges in that district).

<sup>20</sup> See Tracey L. Meares, *Rewards for Good Behavior: Influencing Prosecutorial Discretion and Conduct with Financial Incentives*, 64 Fordham L. Rev. 851, 893-97 (1995)

formal statutory sanctions are not often used by judges.<sup>21</sup> This does not, however, mean that lawyers go unregulated. Instead, judges often rely on informal means to influence and penalize lawyer conduct in the courtroom.<sup>22</sup> Unfavorable rulings on substantive claims that are occasionally fatal to a case provide results that are swifter and more certain than the often cumbersome process of reporting lawyers to the state bar for disciplinary proceedings.

The use of adverse legal rulings as a means of policing attorneys is not unprecedented in criminal courts.<sup>23</sup> Judges can deter and punish unseemly or unethical conduct by police, prosecutors, or defense attorneys by issuing dismissals,<sup>24</sup> excluding otherwise admissible evidence,<sup>25</sup> or granting mistrials.<sup>26</sup> The exclusionary rule is perhaps the most widely studied example of this practice, and it provides an instructive, if controversial, model for understanding the basis for and mechanics behind using adverse rulings to regulate attorney conduct in the criminal defense context.

The exclusionary rule arises most often in Fourth Amendment search and seizure jurisprudence—an area in which basic contours of the law are well established, but in which similar facts often are open

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(discussing possible, though infrequent, use of contempt proceedings and fines to control prosecutorial misconduct).

<sup>21</sup> See Lonnie T. Brown, *Ending Illegitimate Advocacy: Reinvigorating Rule 11 Through Enhancement of the Ethical Duty to Report*, 62 Ohio St. L.J. 1555, 1559-60 (2001) (arguing that judges habitually tolerate lawyer misbehavior because they rationalize it as part of adversary process); Meares, *supra* note 20, at 893-96 (noting that judges are reluctant to use contempt powers to discipline prosecutors); see also Gideon Kanner, *Welcome Home Rambo: High-Minded Ethics and Low-Down Tactics in the Courts*, 25 Loy. L.A. L. Rev. 81, 83-92 (1991) (discussing judicial tolerance of overzealous and unethical lawyer conduct).

<sup>22</sup> Green & Zacharias, *supra* note 17, at 401-05 (noting that judges regulate lawyers using means outside of disciplinary mechanisms, such as adverse rulings, oral reprimands on record, and written opinions that chastise particular attorneys for their conduct).

<sup>23</sup> Many of the practices listed here are within the authority of the judiciary but rarely are used. Again, as with many forms of deterrence, it is the threat of these measures that is the controlling force.

<sup>24</sup> See, e.g., *United States v. Shaffer Equip. Co.*, 11 F.3d 450, 462 (4th Cir. 1993) (recognizing court's authority to dismiss case for misconduct of counsel); *Aoude v. Mobil Oil Corp.*, 892 F.2d 1115, 1118 (1st Cir. 1989) (same); *Halaco Eng'g Co. v. Costle*, 843 F.2d 376, 380 (9th Cir. 1988) (same); *United States v. Nat'l Med. Enters., Inc.*, 792 F.2d 906, 912 (9th Cir. 1986) (same); *United States v. Minn. Mining & Mfg. Co.*, 551 F.2d 1106, 1112 (8th Cir. 1977) (affirming dismissal of indictment due to prosecutorial breach).

<sup>25</sup> See, e.g., *Taylor v. Illinois*, 484 U.S. 400, 418 (1988) (affirming preclusion of defense witness from testifying as sanction for discovery violations); *United States v. Hammad*, 858 F.2d 834, 841-42 (2d Cir. 1988) (affirming suppression of evidence due to prosecutorial misconduct in procuring evidence); *United States v. Jacobs*, 547 F.2d 772, 773-74 (2d Cir. 1976) (affirming suppression of testimony due to prosecutorial failure to provide proper warnings to witness).

<sup>26</sup> See, e.g., *United States v. Enoch*, 650 F.2d 115, 116 (6th Cir. 1981) (noting that mistrial was granted due to prosecutorial prejudicial statements to jury).



to varying legal interpretations because the inquiries are highly fact driven, allowing courts considerable discretion. The exclusionary rule finds its authority in the judiciary's obligations to monitor the administration of justice and to deter constitutional violations. The rule permits a court to deliver an immediate and public reprimand to the offender along with a public warning to other potential violators that the very goals that they are pursuing will be frustrated if they do not comply with the Constitution's commands. As this Article discusses below, many parallels exist between the exclusionary rule and the use of federal sentencing law to impose higher sentences on defendants whose attorneys, from the judge's perspective, appear to be overzealous.<sup>27</sup>

Though zeal generally is required under the ethics laws, the degree of aggressiveness in making a claim or putting forth a defense is a strategic decision within the purview of the attorney.<sup>28</sup> The common assumption is that a more zealous lawyer will achieve better results—a release on bond, a lower sentence, an acquittal—for the defendant. Increasingly, however, criminal defense attorneys are facing a new paradigm under the Federal Sentencing Guidelines that turns that assumption on its head. Judges are using the “acceptance of responsibility” provision of the Federal Sentencing Guidelines to regulate advocacy by penalizing defendants for what courts perceive to be the overzealous conduct of their attorneys. This is possible in a criminal justice system that rewards remorse and equates it with immediate and complete supplication by a defendant and her attorney.<sup>29</sup> In such a system, a defendant whose attorney fights zealously is considered remorseless and deserving of greater punishment. Zealous advocacy is chilled because lawyers are forced to consider as part of their legal strategy how much zeal is appropriate in a particular

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<sup>27</sup> See *infra* Part III.B.2.

<sup>28</sup> See Model Rules, *supra* note 1, R. 1.3 cmt. 1 (“A lawyer is not bound, however, to press for every advantage that might be realized for a client. For example, a lawyer may have authority to exercise professional discretion in determining the means by which a matter should be pursued.”).

<sup>29</sup> True acceptance of responsibility is judged both by its timeliness and by its comprehensiveness. A defendant who admits guilt or shows remorse too late in the process is much less likely to receive the sentencing reduction than one who does so very early on. See *United States v. Osborne*, 931 F.2d 1139, 1155 (7th Cir. 1991) (recognizing that defendant who shows remorse at sentencing justly can be denied sentencing adjustment for failure to show remorse prior to sentencing).

In addition, a court may not award a partial decrease for partial acceptance of responsibility. See, e.g., *United States v. Atlas*, 94 F.3d 447, 452 (8th Cir. 1996). Indeed, some circuits will withhold the sentencing reduction if a defendant acknowledges responsibility for the offense of conviction but fails to do so for uncharged conduct. See *United States v. Mourning*, 914 F.2d 699, 705 (5th Cir. 1990); *United States v. Ignacio Munio*, 909 F.2d 436, 439-40 (11th Cir. 1990); *United States v. Gordon*, 895 F.2d 932, 936 (4th Cir. 1990).

case. Lawyers are in effect forced to play a game of all-or-nothing by balancing the chance that zealous advocacy will result in acquittal against the potential negative consequences for their clients if it does not.

While encouraging self-policing by lawyers makes sense as a normative matter, an attorney's wrong decision on this strategic question can have high costs for the defendant. Even very good lawyers who are risk averse will press zealously only those claims that they are almost certain to win, while omitting other, potentially meritorious, claims. Lawyers who are more confident of their chances will press claims that are more likely to be viewed as frivolous and thereby jeopardize their clients' chances for an "acceptance of responsibility" sentence reduction. Moreover, lawyers and clients alike find themselves in the difficult position of predicting the success of their claims before they have the information necessary to make an intelligent assessment.

In either case, whether her lawyer has been too cautious or too zealous, a defendant's sentence will reflect factors that have little to do with the conventionally accepted goals of punishment. This is true because a lawyer's zealousness is simply a poor indicator of a defendant's remorse. Though the end result of having fewer borderline claims and fewer aggressively pursued claims may benefit courts from an efficiency standpoint, it does little to deliver the promise of the Fifth and Sixth Amendments: that all defendants—even those with mediocre claims—receive adequate representation and due process of law.<sup>30</sup>

### *B. The Boundaries of Zeal*

At the outset, it is worth defining zealous advocacy and what it requires in the criminal defense context. The general requirement of zealous advocacy set forth in the American Bar Association's Model Rules of Professional Conduct and in the Model Code of Professional Responsibility appears straightforward at first blush. Though neither document includes a black letter rule regarding zeal or a comprehensive definition of zeal, both recognize that lawyers have an ethical duty to represent their clients zealously.<sup>31</sup> The preamble to the Model Rules states that a lawyer is an advocate who "zealously asserts the client's position under the rules of the adversary system."<sup>32</sup> Canon 7

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<sup>30</sup> The Sixth Amendment guarantees the right to "assistance of counsel." U.S. Const. amend. VI. The Fifth Amendment guarantees that no person will "be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

<sup>31</sup> Model Rules, *supra* note 1, R. 1.3 cmt. 1; Model Code, *supra* note 1, Canon 7.

<sup>32</sup> Model Rules, *supra* note 1, pmbl. § 2.

of the Model Code likewise requires “zealous[ness] within the bounds of the law.”<sup>33</sup> Zeal requires diligence and competence but does not mandate a particular style or emotion.<sup>34</sup> Nor does the requirement for zeal on the client’s behalf demand that a lawyer “press for every advantage that might be realized for a client.”<sup>35</sup>

Though they mandate zealous advocacy as a general normative principle, neither the Rules nor the Code provides much practical guidance to attorneys regarding the limitations on zeal.<sup>36</sup> Yet there are clear contextual limits suggested implicitly throughout the Rules. The proscription that zeal be kept “within the bounds of the law” or contained “under the rules of the adversary system” implies that there is a point at which this ethical requirement, if pushed too far, becomes unethical conduct. For example, the preamble to the Model Rules states that “when an opposing party is well represented, a lawyer can be a zealous advocate on behalf of a client and at the same time assume that justice is being done.”<sup>37</sup> One can only assume that what constitutes acceptable zealousness in one context (when the opponent is well represented) may be unethical, unprofessional, or overzealous in another (when the opponent is not well, or even adequately, represented).

The requirements regarding zealous advocacy are even less clear in the criminal defense context. For example, although Rule 3.1 of the Model Rules prohibits lawyers generally from making frivolous arguments on behalf of their clients, that rule is relaxed for criminal defense attorneys.<sup>38</sup> Criminal defense lawyers are therefore allowed to use strategies and make arguments that oftentimes place real strains on their obligations as officers of the court. Although the ethics laws make clear that the obligations under Rule 3.1 may be different for criminal defense attorneys, they offer little consensus about what the precise obligations ought to be or where the boundaries lie with regard to the limits of zealous advocacy.

The debate among academics about the proper amount of zeal or aggressiveness a criminal defense attorney ought to demonstrate is

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<sup>33</sup> Model Code, *supra* note 1, EC 7-1.

<sup>34</sup> Restatement (Third) of the Law Governing Lawyers ch. 2, § 16 cmt. (2000).

<sup>35</sup> Model Rules, *supra* note 1, R. 1.3 cmt. 1.

<sup>36</sup> See 1 Geoffrey C. Hazard, Jr. & W. William Hodes, *The Law of Lawyering* § 1.3:101 (2d ed. Supp. 1994) (discussing failures of Code and Rules in clarifying zealousness requirement).

<sup>37</sup> Model Rules, *supra* note 1, pmbl. § 8.

<sup>38</sup> See *infra* notes 107-09 and accompanying text.

perhaps best captured in the noteworthy exchange<sup>39</sup> between Professors William Simon and David Luban on the ethical obligations of criminal defense lawyers.<sup>40</sup> Simon argues that criminal defense lawyers should not be permitted to do “anything arguably legal to advance the client’s ends” without regard to legal merit, justice, the public, or third parties; rather, they should be subjected, for the most part, to the same adversarial ethics expected of other lawyers.<sup>41</sup> He questions the propriety of aggressive criminal defense tactics that are not clearly prohibited by ethical rules—such as delaying proceedings, impeaching testimony they know to be true, or embarrassing adverse witnesses with information irrelevant to the merits of the case—and that neither assist the trier of fact in discovering the truth nor assist the defendant in vindicating procedural rights.<sup>42</sup> In short, Simon rejects the assumption that criminal defense lawyers ought to be exempt from the responsibility to seek substantive justice. Luban counters that many of the examples of aggressive lawyering cited by Simon are not too aggressive given the significant imbalance of power and resources favoring the State,<sup>43</sup> and he adds that, moreover, as a practical matter underzealousness among criminal defenders is a greater threat to justice than overzealousness.<sup>44</sup> In significant ways, this poignant exchange captures the conflict between the defense attorney’s dual roles as officer of the court and as zealous advocate.

This controversy is not one that I plan to revisit in significant detail or to resolve in this Article. The very fact that this issue is unsettled is of great consequence in a world where lawyers and defendants are penalized for certain forms of advocacy. When judges are left to decide on a case-by-case basis whether a lawyer has acted impermissibly, the resulting uncertainty further complicates the lawyer’s role as zealous advocate. Though criminal defense lawyers must be allowed some degree of zeal in advocating on behalf of clients, that a clear line be drawn between permissible and impermissible advocacy is perhaps as important as where that line is drawn.

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<sup>39</sup> See Darryl K. Brown, *Criminal Procedure, Justice, Ethics, and Zeal*, 96 Mich. L. Rev. 2146, 2147-48 (1998) (describing exchange as notable contribution in understanding ethical issues prosecutors and defense lawyers confront in light of scarcity of resources).

<sup>40</sup> See William H. Simon, *The Ethics of Criminal Defense*, 91 Mich. L. Rev. 1703 (1993) [hereinafter Simon, *Ethics of Criminal Defense*]; David Luban, *Are Criminal Defenders Different?*, 91 Mich. L. Rev. 1729 (1993); William H. Simon, *Reply: Further Reflections on Libertarian Criminal Defense*, 91 Mich. L. Rev. 1767 (1993) [hereinafter Simon, *Reply*].

<sup>41</sup> Simon, *Ethics of Criminal Defense*, *supra* note 40, at 1703.

<sup>42</sup> *Id.* at 1704-05.

<sup>43</sup> Luban, *supra* note 40, at 1730-52.

<sup>44</sup> *Id.* at 1762-66.

*C. The Lawyer's Conflicting Duties as Zealous Advocate  
and as Officer of the Court*

Among a lawyer's obligations, her duty to the legal system as an officer of the court is the one most likely to come into conflict with her duties on behalf of her client.<sup>45</sup> Indeed, the model of the lawyer as zealous advocate on behalf of a client's interests is often antagonistic to the model of the lawyer as an officer of the court.<sup>46</sup> As officers of the court,

lawyers owe a special duty to the judicial system or, perhaps, to the public that other participants in the legal process do not owe. At least implicitly, this special duty elevates the interests of the judicial system or of the general public above those of the client or lawyer. So viewed, the officer of the court model contemplates that clients hire something other than a pure zealous advocate when they enlist the services of a lawyer. Rather, they hire a legal representative whose obligations to the judicial system at times supersede the undivided fidelity and enthusiasm an agent owes to his principal.<sup>47</sup>

For example, if a lawyer knows that a judge has misread a sentencing statute in a way that benefits her client, giving primacy to her duty as zealous advocate over her duty as officer of the court could lead to a different result in the case.

The dominant view, supported by Professor Luban, is that, with few exceptions, lawyers are not required to subordinate their clients' interests to those of the judicial system.<sup>48</sup> Although the ethics laws aspire to create a balance between the obligations of zealous advocacy and the obligations to the justice system, they also strongly suggest that in the final analysis, a lawyer's first priority in nearly every situation is to seek her client's best interest.

The criminal defense bar perpetuates this view and glorifies lawyers who advocate aggressively for their clients.<sup>49</sup> Criminal lawyers

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<sup>45</sup> Model Rules, *supra* note 1, pmb. § 6 (“[A] lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession.”); *id.* pmb. § 9 (“In the nature of law practice, however, conflicting responsibilities are encountered. Virtually all difficult ethical problems arise from conflict between a lawyer's responsibilities to clients, to the legal system and to the lawyer's own interest in remaining an ethical person while earning a satisfactory living.”).

<sup>46</sup> See Gaetke, *supra* note 4, at 40-41.

<sup>47</sup> *Id.* at 43-44 (citations omitted).

<sup>48</sup> Luban, *supra* note 40, at 1756 (arguing that aggressive advocacy by criminal defenders, even when it conflicts with common morality, is justified by need to protect individuals from state). Cf. David Luban, *Lawyers and Justice: An Ethical Study* 129-33 (1988) [hereinafter Luban, *Lawyers and Justice*] (arguing that “role obligations” may trump obligations to society at large).

<sup>49</sup> See Bruce A. Green, *The Criminal Regulation of Lawyers*, 67 *Fordham L. Rev.* 327, 367 (1998) (discussing common strategy used by criminal defense lawyers of replacing

are seen as being obligated to do everything legally possible to promote their clients' interests. This view does not necessarily eschew the importance of the administration of justice but rather contends that the lawyer's duty to promote justice is coextensive with forceful advocacy. A lawyer is understood to serve the judicial system best when she represents her client zealously, and zeal is counted on to make the system truly adversarial.<sup>50</sup>

On the other hand, courts continue to emphasize their expectations that lawyers have duties as legal officers. Like Professor Simon, many judges are reluctant to exempt criminal defense lawyers from honoring their obligations to the legal system and to the administration of justice.<sup>51</sup> Judges expect lawyers to temper their zeal and strate-

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defendant at counsel table to test accuracy of witness identification); see also Smith, *supra* note 4, at 934 (arguing that "criminal defense lawyers must represent the accused at full tilt, with 'utmost devotion and zeal'" even if this means exploiting racism, sexism, homophobia, and other ethnic bias in serving their clients (footnote omitted)). See generally Bruce A. Green, *Zealous Representation Bound: The Intersection of the Ethical Codes and the Criminal Law*, 69 N.C. L. Rev. 687 (1991) [hereinafter Green, *Zealous Representation Bound*] (arguing that criminal defense attorneys are given insufficient guidance regarding limits of their duty to represent clients zealously); Luban, *supra* note 40 (arguing that vigorous defenses should be encouraged in criminal defense bar); Riemer, *supra* note 4 (arguing that zeal requirement should not be removed from state ethics statute). But see Albert W. Alschuler, *How to Win the Trial of the Century: The Ethics of Lord Brougham and the O.J. Simpson Defense Team*, 29 McGeorge L. Rev. 291, 318-21 (1998) (criticizing overzealousness and lack of professionalism by criminal defense attorneys); Simon, *Ethics of Criminal Defense*, *supra* note 40, at 1704-05 (condemning misleading and unethical practices used by criminal defense attorneys); Gordon Van Kessel, *Adversarial Excesses in the American Criminal Trial*, 67 Notre Dame L. Rev. 403, 435-45 (1992) (criticizing deceptive and frivolous tactics used by defense attorneys).

<sup>50</sup> See Monroe H. Freedman, *Understanding Lawyers' Ethics* 13 (1990) ("An essential function of the adversary system . . . is to maintain a free society in which individual rights are central. In that sense, the right to counsel is 'the most pervasive' of rights, because it affects the client's ability to assert all other rights."); Michael E. Tigar, *Defending*, 74 Tex. L. Rev. 101, 108-10 (1995) (discussing importance of criminal defense lawyers to adversary system); Fred C. Zacharias, *Reconciling Professionalism and Client Interests*, 36 Wm. & Mary L. Rev. 1303, 1314-15 (1995) (recalling Lord Brougham's "classic early statement of the lawyer's function" that "the lawyer 'knows but one person in all the world, and that person is his client'").

<sup>51</sup> Simon, *Ethics of Criminal Defense*, *supra* note 40, at 1703 (criticizing popular view that criminal defense lawyers ought to be exempt from same ethical obligations as other lawyers). Simon's views exemplify the actions of some judges who sanction criminal defense lawyers for conduct that is legal, but aggressive and arguably unprofessional. See, e.g., *Taylor v. Illinois*, 484 U.S. 400, 417 (1988) (finding that attorney's discovery violations amounting to willful misconduct justified excluding defense evidence); *United States v. Thoreen*, 653 F.2d 1332 (9th Cir. 1981) (affirming contempt charges against defense attorney for substituting someone at counsel's table in place of client with intent to cause misidentification); *United States v. Kouri-Perez*, 8 F. Supp. 2d 133 (D.P.R. 1998) (sanctioning defense lawyer for filing motion to change locale of deposition that included personal attacks against prosecutor and remarks about her ancestry). But see *United States v. Oliver*, 470 F.2d 10, 13 (7th Cir. 1972) (reversing contempt charges based on questions

gies when these conflict with the efficient administration of justice.<sup>52</sup> Criminal defense lawyers who persist in aggressive litigation tactics, even when those tactics are fundamentally truth-seeking in nature, are chastised for being lawless and without integrity. Interestingly, neither Simon nor Luban recognizes that judges are now weighing in on the conflict. Although ethics scholars may be reluctant to divert a defense lawyer's loyalty from client to court, judges have redefined a lawyer's loyalty to the client to make it more consistent with loyalty to the court, by making overzealousness as potentially damaging to a defendant's case as underzealousness. Unfortunately, they have done so at great cost to defendants.

#### *D. Zeal as a Matter of Legal Strategy*

While setting forth both the importance of zealous advocacy and the importance of acting as an officer of the court, the laws of ethics permit attorneys to determine to some extent where the line ought to be drawn between the two. For example, under the Model Rules, the question of whether or not to press for a particular advantage is a professional decision that falls within the discretion of the lawyer, not the client.<sup>53</sup> Thus a lawyer will not violate the ethical and professional rules by deciding against a particular tactic that might help her client but that she finds distastefully close to impeding the administration of justice. The absence of a clear directive in these circumstances converts the requirement of zealous advocacy into a mere suggestion of zealous advocacy. A lawyer is not penalized for declining to take a sufficiently aggressive or zealous stance in arguing a particular claim. Indeed, criminal defendants who argue that they did not receive the effective assistance of counsel guaranteed to them by the Sixth Amendment are often reminded by appellate courts that they have no right to zeal.<sup>54</sup> The decision to act with greater or lesser zeal generally

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asked by defense attorney during cross-examination on grounds of "extreme liberality" afforded trial counsel in representing clients).

<sup>52</sup> Such strategies include those identified by Luban and Simon such as unnecessary delay and impeaching evidence believed to be true, see *supra* notes 39-42 and accompanying text, but they also may include strategies like filing numerous motions, allowing the court to proceed on incorrect information, and making borderline frivolous arguments.

<sup>53</sup> Model Rules, *supra* note 1, R. 1.2.

<sup>54</sup> The standard articulated by the Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), for evaluating claims of ineffective assistance of counsel requires a showing that counsel's performance was seriously deficient and that the deficient performance was so prejudicial as to deprive the defendant of a fair trial. *Id.* at 687. The absence of zealous advocacy is not presumed sufficient to satisfy the prejudice prong of the *Strickland* test. Indeed, even affirmative errors by counsel are not sufficient to show ineffectiveness without further evidence of prejudice. *Id.* at 691-92. See also *United States v. Brooks*, 125 F.3d 484, 496 (7th Cir. 1997) (finding decision by defense attorney not to recall inconsistent

is assumed to be a strategic decision by an attorney that courts are reluctant to second-guess.<sup>55</sup> Moreover, as explained above, the Model Rules make clear that the failure to act zealously in certain situations does not constitute an ethical breach.<sup>56</sup>

Characterizing zeal as a tactical decision by the lawyer is a useful concept for the regulator. Judges who perceive zealous representation as a defendant's entitlement might be reluctant to limit it. But when zeal is viewed as part of a legal strategy, it is framed as a matter of choice for the lawyer rather than a right of the defendant. Penalizing lawyers for making bad choices seems more reasonable than penalizing them for advocating zealously or too aggressively on behalf of their clients. By creating a distinction between decisions that should be made by the lawyer and those that should be left to the client, the Model Rules reinforce the view that there should be a division of labor between attorney and client.<sup>57</sup> For instance, the client has ultimate authority in determining the purposes to be served by legal representation, but the lawyer determines the means to be employed.<sup>58</sup> Accordingly, the client decides whether to go to trial or enter a guilty plea, but the lawyer determines which witnesses to present at trial or what pretrial or trial motions to file or legal arguments to make at sentencing. The lawyer should consult with the client and should defer to the client on issues of costs to be incurred during the representation or on aspects of the representation that might affect third

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witness for further questioning "tactical decision" reflecting reasonable professional judgment that cannot be considered ineffective assistance); *Bashor v. Risley*, 730 F.2d 1228, 1241 (9th Cir.) (holding that tactical decisions are not ineffective simply because in retrospect better tactics are known to have been available), cert. denied, 469 U.S. 838 (1984); *United States v. Mayo*, 646 F.2d 369, 375 (9th Cir.) (stating that "nothing more than a difference of opinion" as to trial tactics does not establish denial of effective assistance), cert. denied sub nom. *Dondich v. United States*, 454 U.S. 1127 (1981); *Gallo v. Kernan*, 933 F. Supp. 878, 881-82 (N.D. Cal. 1996) (establishing that defense counsel's decision not to use inconsistent statements to impeach witness was "tactical" and holding that it is "well settled" that impeachment strategy is matter of trial tactics).

<sup>55</sup> The *Strickland* test used by the Supreme Court in assessing an attorney's ineffectiveness excludes unsuccessful tactical decisions by lawyers as evidence of ineffectiveness. *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986) (stating that appellate courts are to be "highly deferential" when reviewing tactical decisions of defense attorneys for purposes of assessing ineffective assistance of counsel).

<sup>56</sup> See *supra* notes 34-35 and accompanying text.

<sup>57</sup> Model Rules, *supra* note 1, R. 1.2, cmts. 1-2; see also Model Code, *supra* note 1, DR 7-101(A)(1) ("A lawyer shall not intentionally . . . [f]ail to seek the lawful objectives of his client through reasonably available means permitted by law . . . . A lawyer does not violate this Disciplinary Rule, however, . . . by avoiding offensive tactics . . . ."); *Id.* EC 7-7 ("In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own.").

<sup>58</sup> Model Rules, *supra* note 1, R. 1.2(a) & cmt. 1.



parties.<sup>59</sup> Generally, however, “[i]n questions of means, the lawyer should assume responsibility for technical and legal tactical issues.”<sup>60</sup> When the quantum of zeal to be used becomes a legal or tactical issue, judges can influence the lawyer’s choice of legal strategy by creating a negative correlation between the use of a particular strategy and a lower sentence for the defendant.

## II

### ZEAL AS A SENTENCING FACTOR UNDER THE FEDERAL SENTENCING GUIDELINES

Federal trial court judges influence defense attorneys’ strategic “choices” regarding how aggressively to represent their clients by making overzealousness an unstated sentencing factor. In regulating what they perceive as overzealous behavior by equating it with a defendant’s failure to accept responsibility for her offense, judges presume that a defendant who is truly repentant will be complicit in her prosecution by not wasting court and prosecution resources,<sup>61</sup> and by not frivolously contesting the factual and legal allegations against her. In essence, some judges consider zealous representation inconsistent with remorse and thus deserving of a higher sentence under the Sentencing Guidelines.<sup>62</sup> In attempting better to understand this argument, a brief overview of the Federal Sentencing Guidelines system would be helpful.

#### *A. The Federal Sentencing Guidelines*

Since the Federal Sentencing Guidelines were promulgated on November 1, 1987, they have governed virtually all sentencing in federal district courts. They were designed to promote fairness and uniformity in sentencing among the nation’s federal courts.<sup>63</sup> The Guidelines are simple in terms of their overall concept, but highly complex and technical in their details.<sup>64</sup> Under the Guidelines, the

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<sup>59</sup> *Id.* at R. 1.2 cmt. 2.

<sup>60</sup> *Id.*

<sup>61</sup> Much of this is embodied in the guideline provision concerning “Acceptance of Responsibility.” See U.S.S.G., *supra* note 13, § 3E1.1.

<sup>62</sup> The cases confirm this finding. See *infra* Part II.C.

<sup>63</sup> The overarching goal of the Sentencing Reform Act of 1984, which authorized the Sentencing Guidelines, was the reduction of sentencing disparities among federal district courts. See 18 U.S.C. § 3553(a); 28 U.S.C. § 991(b)(1)(B); see also Kate Stith & José A. Cabranes, *Fear of Judging* 51, 104 (1998).

<sup>64</sup> See Stith & Cabranes, *supra* note 63, at 84 (describing Guidelines and guideline sentencing process as “dry, complicated, mechanistic, and frequently incomprehensible”); Michael Tonry, *Sentencing Matters* 98-99 (1996) (discussing high error rate in applying Guidelines’ complicated and enormous forty-three level sentencing grid).

most important factors in calculating a sentence are the nature of the offense and the defendant's prior criminal history. Every federal crime, from drug trafficking to antitrust violations, is catalogued in the Guidelines manual and is assigned a certain number of points—a preliminary “base offense level.”<sup>65</sup> Similarly, every defendant is categorized on a scale ranging from one to six based on prior criminal history.<sup>66</sup>

Therefore, although all the sections of the Guidelines are important, Chapters Two through Five make up the heart of the sentencing scheme.<sup>67</sup> Chapter Two categorizes every federal offense and provides a schedule of points to be assessed against a defendant for almost every conceivable characteristic of the offense. A sentencing judge, or more likely a probation officer assigned to the case, thus begins the sentencing calculation by referring to the relevant section of Chapter Two.

A sentencing judge or probation officer must also determine criminal history, which is set out in Chapter Four.<sup>68</sup> The Guidelines provide a sentencing table with six criminal history categories—based on the number and severity of prior convictions—along one axis and forty-three offense levels—based on the nature and characteristics of each federal crime—along the other axis.<sup>69</sup> For example, kidnapping has a base offense level of 24,<sup>70</sup> whereas counterfeiting has a base offense level of 6.<sup>71</sup> Points can be added or subtracted for specific offense characteristics that attempt to assess the severity of the crime. For example, if the kidnapping victim is released within twenty-four

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<sup>65</sup> U.S.S.G., *supra* note 13, ch.2, introductory cmt. (“Each offense has a corresponding base offense level and may have one or more specific offense characteristics that adjust the offense level upward or downward.”).

<sup>66</sup> *Id.* § 4A1.1, cmt. (“The total criminal history points from §4A1.1 determine the criminal history category (I-VI) . . .”).

<sup>67</sup> In addition to these critical chapters, the Sentencing Guidelines manual is laid out as follows: Chapter One is a user's guide explaining the mission, approach, and mechanics of the Guidelines, and Chapters Six, Seven, and Eight deal respectively with sentencing procedures, violations of probation and supervised release, and the sentencing of organizations, as opposed to individual defendants.

<sup>68</sup> Chapter Four sets forth six categories of criminal history and establishes the criteria by which the sentencing court must group each defendant. A range of zero to three points is assessed for each prior sentence based primarily on its length. See U.S.S.G., *supra* note 13, § 4A1.1. A defendant with thirteen or more points is placed in Category VI, the highest criminal history category. See U.S.S.G., *supra* note 13, ch.5, pt.A; Sentencing Table, *infra app.*

<sup>69</sup> U.S.S.G., *supra* note 13, ch.5, pt.A, cmt. n.1. See also Sentencing Table, *infra app.*

<sup>70</sup> U.S.S.G., *supra* note 13, § 2A4.1(a).

<sup>71</sup> *Id.* § 2B1.1(a). To give another example, robbery begins at a base offense level of 20, *id.* § 2B3.1(a), whereas insider trading begins at a base offense level of 6, *id.* § 2B1.1(a).

hours, the offense level decreases by one point, but if a dangerous weapon was used, the offense level increases by two points.<sup>72</sup>

Chapter Three permits additional upward or downward adjustments to the initial Guidelines calculation. Many of these additional adjustments attempt to consider the mental state or culpability of the defendant by taking into account factors such as whether the offense was motivated by hate, the vulnerability of the victim, or whether the defendant played a mitigating or aggravating role in the offense. This chapter also instructs the sentencing court how to determine the combined offense level when multiple offenses are involved. The “acceptance of responsibility” provision on which this Article focuses is a Chapter Three adjustment.

Since the sentencing adjustments considered in Chapter Two generally address the defendant’s conduct during the offense,<sup>73</sup> the Chapter Three adjustments are the court’s first opportunity to consider post-offense conduct in determining the sentence. Interestingly, post-offense conduct is often conduct that occurs during the course of representation, if not upon the advice of counsel. It includes sentencing mitigation factors such as whether the defendant has accepted responsibility and aggravating factors such as whether the defendant has obstructed the administration of justice.<sup>74</sup> Not surprisingly, it is during the consideration of acceptance of responsibility under Chapter Three that judges have the opportunity to express displeasure with how a defendant and her attorney have handled a case. In essence, the decisions made during the course of representation are judged and scrutinized as part of the defendant’s post-offense conduct.

Once the court has determined the base offense level under Chapter Two, the relevant adjustments under Chapter Three and the criminal history category under Chapter Four, it uses the resulting coordinates on the sentencing grid found in Chapter Five<sup>75</sup> to determine the prescribed sentencing guideline range for a particular case.

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<sup>72</sup> Compare U.S.S.G., *supra* note 1, § 2A4.1(b)(4)(C), with § 2A4.1(b)(3).

<sup>73</sup> U.S.S.G., *supra* note 13, ch. 2, introductory cmt. (stating that offense “may have one or more specific characteristics that adjust the offense level upward or downward”).

<sup>74</sup> Compare U.S.S.G., *supra* note 13, § 3E1.1 (decreasing offense level based on acceptance of responsibility), with § 3C1.1 (increasing offense level by two levels if defendant has “willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice”).

<sup>75</sup> In addition to the sentencing table, Chapter Five deals with some mechanics of sentencing, including the conditions under which a probationary sentence is authorized, the imposition of restitution, fines, and post-incarceration supervision (i.e., supervised release), and the limited application of departures from the mandated sentencing range or statutory minimums. See U.S.S.G., *supra* note 13, ch.5.

The court must, with few exceptions, sentence the defendant within the prescribed range.<sup>76</sup> In essence, the Federal Sentencing Guidelines permit the Sentencing Commission to micromanage the sentencing function of federal judges when it comes to assessing the severity of a defendant's criminal record or the severity of the crime. Federal judges lament the lack of discretion they are given in these matters.<sup>77</sup> Judges can find some refuge in one of the few remaining areas of judicial discretion—the determination of Chapter Three adjustments such as the “acceptance of responsibility” provision.

### *B. The “Acceptance of Responsibility” Provision*

As mentioned above, although federal judges are directed by Chapter Two precisely how to weigh the offense itself, as well as pre-offense conduct, the Guidelines give judges great latitude in assessing post-offense conduct. Once a defendant has been apprehended for a crime, therefore, though she can do little to affect her preordained range under Chapter Two, the Sentencing Guidelines provide two significant means by which post-arrest conduct can lead to a lower sentence: providing “substantial assistance” to law enforcement authorities, and demonstrating “acceptance of responsibility” for the offense.

The “substantial assistance” provision, found in section 5K of the Guidelines, allows the court to depart from the predetermined Guideline range when the defendant “has provided substantial assistance in the investigation or prosecution of another person who has committed an offense.”<sup>78</sup> An additional reduction may be awarded to defendants who have also “assisted authorities in the investigation or prosecution of [their] own misconduct.”<sup>79</sup>

The “acceptance of responsibility” provision in section 3E1.1 of the Guidelines requires the court to decrease the precalculated offense level by two or three points if the court finds that “the defendant clearly demonstrates acceptance of responsibility for his

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<sup>76</sup> Departures from the range established by the Guidelines are permissible only in the unusual circumstance that the court finds “an aggravating or mitigating circumstance of a kind, or to a degree, not adequately taken into consideration by the Sentencing Commission in formulating the guidelines.” U.S.S.G., *supra* note 13, § 5K2.0.

<sup>77</sup> See, e.g., Daniel J. Freed, *Federal Sentencing in the Wake of Guidelines: Unacceptable Limits on the Discretion of Sentencers*, 101 *Yale L.J.* 1681, 1720 (1992); Stith & Cabranes, *supra* note 63, at 90, 126.

<sup>78</sup> U.S.S.G., *supra* note 13, § 5K1.1. See *infra* Part II.C.3 for a more extensive discussion of this reduction.

<sup>79</sup> U.S.S.G., *supra* note 13, § 3E1.1(b).

offense.”<sup>80</sup> Receiving or not receiving the “acceptance of responsibility” reduction can result in a difference between probation and prison time on the low end of the Sentencing Table, or between twenty and thirty years on the higher end of the Sentencing Table.<sup>81</sup>

At its core, “acceptance of responsibility” is a means of rewarding both remorse and efficiency. The provision requires judges to make highly subjective and often shifting determinations. It is an ambiguous catchall category that awards a defendant with a two- or three-level sentence reduction based on a wide range of factors. According to the nonexhaustive list in the Commentary, these factors range from whether a plea was entered in a timely fashion,<sup>82</sup> to whether frivolous legal arguments were made,<sup>83</sup> to whether the defendant agreed to be

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<sup>80</sup> Id. § 3E1.1(a). Although Congress recently has voted to amend the “acceptance of responsibility” guidelines, the previous and current versions each require that the “defendant clearly demonstrate acceptance of responsibility for his offense.” Id. Discussions and citations to § 3E1.1 throughout this Article refer to the prior version of the provision because there are very few cases or commentaries available interpreting the amended version. Moreover, the recent changes to the provision will not significantly affect the arguments or analysis presented. If anything, the increased power provided to prosecutors in the amendment will likely aggravate the problems raised in this Article. See generally Margareth Etienne, *The Elusive Third Point for Acceptance of Responsibility After Feeney and Its Effect on Pleas and Plea Bargaining*, Fed. Sentencing Rep. (forthcoming December 2003).

Nonetheless, a brief discussion of the amendment is appropriate here. The earlier provision states, in its entirety:

- (a) If the defendant clearly demonstrates acceptance of responsibility for his offense, decrease the offense level by 2 levels.
- (b) If the defendant qualifies for a decrease under subsection (a), the offense level determined prior to the operation of subsection (a) is level 16 or greater, and the defendant has assisted authorities in the investigation or prosecution of his own misconduct by taking one or more of the following steps:
  - (1) timely providing complete information to the government concerning his own involvement in the offense; or
  - (2) timely notifying authorities of his intention to enter a plea of guilty, thereby permitting the government to avoid preparing for trial and permitting the court to allocate its resources efficiently, decrease the offense level by 1 additional level.

U.S.S.G., *supra* note 13, § 3E1.1.

The new amendment to the provision, known popularly as the Feeney Amendment, alters subsection (b) above by changing the rules by which a defendant may receive an additional third-level reduction. The amendment abolished the (b)(1) requirement that the defendant provide complete information to the government and conditioned the third-level decrease on a government motion for the reduction. See *Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003*, Pub. L. No. 108-21, § 401(g), 117 Stat. 650, 671 (2003). See also Alan Vinegrad, *The New Federal Sentencing Law*, 15 Fed. Sentencing Rep. 310, 312-13 (2003) (summarizing changes brought about by the Feeney Amendment).

<sup>81</sup> See Sentencing Table, *infra* app.

<sup>82</sup> U.S.S.G., *supra* note 13, § 3E1.1(b)(2); see also *infra* Part II.C.2.

<sup>83</sup> U.S.S.G., *supra* note 13, § 3E1.1, cmt. n.1(a); see also *infra* Part II.C.1.

interviewed by the court's probation officer<sup>84</sup> or to participate in other activities contributing to the administration of justice.<sup>85</sup>

Moreover, the post-arrest conduct that can potentially lead to a sentence reduction under either the "substantial assistance" or the "acceptance of responsibility" provisions is generally conduct that takes place with the assistance or at the behest of counsel.<sup>86</sup> For this reason, these two provisions present the most convenient and most logical venues for a judge to exercise influence over the manner in which a defense attorney handles a case post-arrest by rewarding or penalizing attorney conduct.

Of the two provisions, the "acceptance of responsibility" provision is more amenable to this sort of judicial practice. First, it rests solely on the *court's* factual determination that the defendant has accepted responsibility. The "substantial assistance" provision, on the other hand, requires a motion from the government's attorney that the defendant has provided substantial assistance in an investigation or prosecution.<sup>87</sup> Although the court has the authority to deny the government's motion for a reduction pursuant to section 5K1.1, it is in an inferior position as a factfinder to dismiss the defendant's assistance as insubstantial in the face of government assertions to the contrary. Accordingly, it would be difficult for courts to use the "substantial assistance" provision in the broad and unilateral manner in which they now can apply the "acceptance of responsibility" provision. In addition, because appellate courts consistently have held that prosecutors can themselves decline to make a section 5K1.1 motion

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<sup>84</sup> See *infra* notes 176-85 and accompanying text.

<sup>85</sup> See *id.*

<sup>86</sup> For example, agreements to provide police with information about a defendant's offense and co-conspirators are typically negotiated between counsel for the government and counsel for the defendant.

<sup>87</sup> A court may not reduce a sentence pursuant to the substantial assistance provision, section 5K1.1, absent a motion by the government. See *United States v. Spears*, 965 F.2d 262, 281 (7th Cir. 1992); *United States v. Kelley*, 956 F.2d 748, 751-57 (8th Cir. 1992) (en banc). It is noteworthy that a defendant who provides the police with information about her offense and co-conspirators is considered merely to have volunteered a detailed confession and does not typically get a reduction for substantial assistance under U.S.S.G. section 5K1.1 unless the information was offered pursuant to an enforceable promise. See *United States v. De la Fuente*, 8 F.3d 1333, 1340-41 (9th Cir. 1993); *United States v. Favara*, 987 F.2d 538, 540 (8th Cir. 1993); *United States v. Isaac*, 11 F.3d 477, 481 (3d Cir. 1992). Unless the defendant has an explicit agreement from a government attorney offering to make a motion for a sentencing reduction pursuant to section 5K1.1 in exchange for assistance, the sentencing court has no authority to inquire into the government's refusal to file a motion for departure. *Id.*; see also *Wade v. United States*, 504 U.S. 181, 184-86 (1992).

It is worth noting that under the amended provision for acceptance of responsibility, a motion by the government will be required for the third-level reduction, but not for the initial reduction of two levels. See *supra* note 80.

for almost any reason rationally related to a legitimate government end<sup>88</sup>—presumably including lack of professionalism by the attorney or client—the opportunities for a judge to withhold the reduction would be few. In other words, because section 5K1.1 is in itself a prosecutor's tool for policing the defense, the cases in which it is invoked leave little opportunity or authority for policing by the court.

Second, unlike “acceptance of responsibility” reductions, “substantial assistance” reductions are not at issue in every case. Rather, the section 5K1.1 motion is made by the government in only a relatively small portion of all federal prosecutions. For example, in 2000, 17.9% of all federal criminal defendants received a sentence reduction for having provided substantial assistance to the government.<sup>89</sup> By contrast, the Guidelines require federal sentencing courts to consider *in every case* whether the defendant has demonstrated acceptance of responsibility.<sup>90</sup>

Third, the structure and ambiguity of the “acceptance of responsibility” provision also render it more susceptible to use as a regulatory device. Although the “acceptance of responsibility” provision does not expressly mention the word remorse, courts generally treat it as a proxy for regret or contrition.<sup>91</sup> This permits an open-ended inquiry into the motivations of all post-offense conduct, including the conduct of the defendant's agent or attorney. Some of the factors that are

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<sup>88</sup> *Wade*, 504 U.S. at 185-86 (stating that district courts can review prosecutor's refusal to file substantial assistance motion if refusal is not “rationally related to any legitimate Government end”).

<sup>89</sup> Office of Policy Analysis, U.S. Sentencing Comm'n, 2000 Datafile, OPAFY00, tbl.8 (2000), available at <http://www.ussc.gov/judpack/2000/oke00.pdf>.

<sup>90</sup> In the introductory instructions on how the Guidelines are to be applied, the Commission lists as an obligatory step: “Apply the adjustment as appropriate for the defendant's acceptance of responsibility from Part E of Chapter Three.” U.S.S.G., *supra* note 13, § 1B1.1(e).

<sup>91</sup> See, e.g., *United States v. Wells*, 154 F.3d 412, 413-14 (7th Cir. 1998) (noting that court may consider defendant conduct that undermines “inference of remorse or repentance”); *United States v. O'Neil*, 936 F.2d 599, 600-01 (1st Cir. 1991) (explaining that court may look to various factors to determine if defendant “is truly sorry for the crimes he is charged with”); *United States v. Royer*, 895 F.2d 28, 30 (1st Cir. 1990) (“[A]cceptance of responsibility necessitates candor and authentic remorse.”); see also Michael M. O'Hear, Remorse, Cooperation and “Acceptance of Responsibility”: The Structure, Implementation, and Reform of Section 3E1.1 of the Federal Sentencing Guidelines, 91 Nw. U. L. Rev. 1507, 1524 (1997) (noting that “virtually all appellate case law on the subject equates acceptance of responsibility with remorse” and describing remorse as central element of section 3E1.1). As a test for remorse, “section 3E1.1 calls for an inquiry into the defendant's state of mind and is thought to reward an appropriate attitude” considering factors such as “whether the defendant fully and freely admits to committing the offense, whether the defendant accepts punishment as an appropriate consequence of the offense, whether the defendant regrets what was done, and whether the defendant is sincerely committed to avoiding future criminal activity.” *Id.* at 1511, 1515-16.

considered to be indicators of acceptance include the entry and timing of a guilty plea,<sup>92</sup> assisting the investigation or prosecution of one's misconduct,<sup>93</sup> truthful admission of the offense and all conduct relevant to the offense,<sup>94</sup> the absence of frivolous legal or factual challenges,<sup>95</sup> voluntary payment of restitution,<sup>96</sup> post-offense rehabilitation such as drug treatment,<sup>97</sup> behavior permitting the government and the courts to avoid expending their resources,<sup>98</sup> and other steps that generally promote "legitimate societal interests" as determined by the court, such as the efficient administration of justice.<sup>99</sup> Judges can weigh all of these factors or only some of them; none of the factors is dispositive, and little guidance is provided as to what weight to give the different factors. For example, although the entry of a guilty plea constitutes significant evidence of acceptance, a "defendant who enters a guilty plea is not entitled to an adjustment . . . as a matter of right."<sup>100</sup> Alternatively, a defendant can meet all but one factor and still be denied the reduction if the court finds that her conduct is in some other way inconsistent with acceptance of responsibility.

A final and related reason why courts can use this provision in regulating defense attorney conduct is the great amount of discretion given to courts in determining acceptance of responsibility. The Guidelines manual explicitly states as part of the Application Notes for section 3E1.1 that "[t]he sentencing judge is in a unique position to evaluate a defendant's acceptance of responsibility. For this reason, the determination of the sentencing judge is entitled to great deference on review."<sup>101</sup> Appellate courts generally honor this edict and only reluctantly overturn a lower court's determination on the question of acceptance of responsibility.<sup>102</sup> For most appellate courts, acceptance of responsibility is a question of fact reviewed only for

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<sup>92</sup> U.S.S.G., *supra* note 13, § 3E1.1, cmt. nn.1(h), 3.

<sup>93</sup> *Id.* § 3E1.1(b).

<sup>94</sup> *Id.* § 3E1.1, cmt. n.1(a).

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* § 3E1.1, cmt. n.1(c).

<sup>97</sup> *Id.* § 3E1.1, cmt. n.1(g).

<sup>98</sup> *Id.* § 3E1.1(b)(2) & cmt. n.2.

<sup>99</sup> *Id.* § 3E1.1, cmt. background.

<sup>100</sup> *Id.* § 3E1.1, cmt. n.3 (stating that while entry of guilty plea constitutes significant evidence of acceptance of responsibility, conduct inconsistent with doctrine may outweigh it).

<sup>101</sup> *Id.* § 3E1.1, cmt. n.5.

<sup>102</sup> See, e.g., *United States v. Lghodaro*, 967 F.2d 1028, 1031-32 (5th Cir. 1992) (stating that review of acceptance of responsibility determinations is highly deferential). As further support of the significant deference given to sentencing judges on the issue of acceptance of responsibility, recent statistics reveal that the affirmance rate on all appeals of the acceptance of responsibility findings is 95.2%. Office of Policy Analysis, U.S. Sentencing



clear error.<sup>103</sup> At least one circuit has held that the standard of review is “even more deferential than clear error,”<sup>104</sup> while another has stated that it will overturn such a determination only if it is completely without foundation.<sup>105</sup> Because judges enjoy some insulation from reversals on issues of acceptance of responsibility, they can freely engage in a subjective assessment of whether the defendant’s conduct demonstrates overall that she has accepted responsibility for her behavior.

*C. The Convergence of Ethics, Professionalism and Acceptance of Responsibility in the Case Law*

As discussed above, criminal law and ethics scholars disagree about whether and to what extent criminal defense attorneys ought to be exempt from certain duties to the legal system as officers of the court in zealously pursuing their clients’ interests.<sup>106</sup> Should criminal defense attorneys be allowed to make frivolous arguments or otherwise aggressively pursue their clients’ interests in ways that impede the administration of justice? The Model Rules suggest so; although they forbid frivolity, they allow significant flexibility for those engaged in defending the criminally accused.<sup>107</sup> Much of the literature has fol-

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Comm’n, 2000 Datafile, OPAFY00, tbl.59 (2000), available at <http://www.ussc.gov/annrpt/2000/table59.pdf>.

<sup>103</sup> See, e.g., *United States v. Morris*, 76 F.3d 171, 175 (7th Cir. 1996).

<sup>104</sup> *United States v. Spires*, 79 F.3d 464, 467 (5th Cir. 1996) (explaining that standard of review of “acceptance of responsibility” determinations is more deferential than clear error “[b]ecause the trial court’s assessment of a defendant’s contrition will depend heavily on credibility assessments”); *Lghodaro*, 967 F.2d at 1031-32 (5th Cir. 1992) (applying same standard of review).

<sup>105</sup> *United States v. Boothe*, 994 F.2d 63, 70 (2d Cir. 1993).

<sup>106</sup> See *supra* Part I.C.

<sup>107</sup> The Model Rules state:

A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or a respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Model Rules, *supra* note 1, R. 3.1.

lowed this lead,<sup>108</sup> but other scholars advocate the curtailment of overzealousness among criminal defense lawyers.<sup>109</sup>

While this debate rages on among academics, judges are quietly addressing the question on a case-by-case basis in their courtrooms. They are regulating the zealous advocacy of criminal defense attorneys. The case law shows that this regulation is nearly invisible because judges are merely doing what they have always done in criminal court—sentencing defendants using a wide range of discretionary factors.

### 1. *Censuring Frivolity*

The use of frivolous arguments and motions is only one of many ways in which a lawyer can be overzealous. The Model Rules of Professional Conduct prohibit frivolous challenges, stating that “[a] lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous.”<sup>110</sup> The main rationale for the prohibition on frivolity is that it wastes societal and court resources while imposing financial and reputational costs on the opposing party.<sup>111</sup> Interestingly, however, Rule 3.1 expressly exempts lawyers engaged in defending crim-

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<sup>108</sup> Deborah L. Rhode, *Ethical Perspectives on Legal Practice*, 37 *Stan. L. Rev.* 589, 605 (1985); Simon, *Ethics of Criminal Defense*, *supra* note 40, at 1703 (citing Luban, *Lawyers and Justice*, *supra* note 48, at 58-66); Richard Wasserstrom, *Lawyers as Professionals: Some Moral Issues*, 5 *Hum. Rts. Q.* 1, 12 (1975); see also Alan M. Dershowitz, *Reasonable Doubts: The O.J. Simpson Case and the Criminal Justice System* 145 (1996) (“A zealous defense attorney has a professional obligation to take every legal and ethically permissible step that will serve the client’s best interest—even if the attorney finds the step personally distasteful.”).

<sup>109</sup> Alschuler suggests revising the rules of professional responsibility to include something like the following:

A lawyer is not obliged to do everything helpful to a client that ethical rules and other legal provisions allow. Instead, he or she should exercise a sound, independent judgment concerning the propriety of the means that he or she employs on a client’s behalf. A lawyer’s duty of faithful representation does not justify his or her departure from ordinary social norms of civility and fair dealing.

Alschuler, *supra* note 49, at 319.

<sup>110</sup> Model Rules, *supra* note 1, R. 3.1. Rule 11 of the Federal Rules of Civil Procedure also prohibits frivolous legal actions. See William H. Fortune, et al., *Modern Litigation and Professional Responsibility Handbook: The Limits of Zealous Advocacy* 61-67 (2d ed. 2001) (discussing requirements of Rule 11 regarding frivolous legal claims).

<sup>111</sup> As Nathan Crystal explains:

When people waste their resources on foolish endeavors, others are generally not deprived of any legally-protected right. By contrast, if a person brings a frivolous legal proceeding, societal resources—court personnel and facilities, judicial time, jury time—must be devoted to the proceeding. Further, a legal proceeding imposes costs on the other party, including time, legal fees, and in some cases unwanted publicity. An analogy to nuisance law is appropriate. . . .

inal cases.<sup>112</sup> Criminal defense attorneys are presumably permitted to make frivolous contentions in order to ensure that a defendant's constitutional rights to an attorney and the presumption of innocence are not unduly limited.<sup>113</sup> This does not mean that judges ignore the squandering of court and societal resources in criminal cases. They must, however, regulate frivolity using tools other than the laws of ethics and procedure.

As an illustration, consider *United States v. Purchess*,<sup>114</sup> in which the federal judge applied the Federal Sentencing Guidelines. Ashavan Purchess and several other people were involved in a conspiracy to transport cocaine and marijuana from Jamaica to Wisconsin and distribute it.<sup>115</sup> The participants made several trips, usually transporting the contraband by swallowing pellets and later discharging them upon arrival in the United States. During one trip, of which Purchess was aware but which the government agreed was not part of the overarching conspiracy, one of the participants ingested seventy-seven pellets of drugs for transport, intending to sell the drugs for his own profit.<sup>116</sup> This participant died from a drug overdose resulting from one or more ruptured pellets.<sup>117</sup>

The government charged Purchess with a single conspiracy comprising four of the trips, not including the trip that resulted in the death of one his co-conspirators. Purchess pled guilty and substantially admitted the conduct charged—that is, the conduct relating to the four trips. Though Purchess was not indicted for conduct involved in the fifth trip, the sentencing court would be required to consider it (and increase Purchess's sentence significantly) if the court deter-

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[I]f a person misuses the judicial system for purposes other than dispute resolution, he should be subject to sanctions.

Nathan M. Crystal, *Limitations on Zealous Representation in an Adversarial System*, 32 Wake Forest L. Rev. 671, 679 (1997); see also *In re Bithoney*, 486 F.2d 319, 321 (1st Cir. 1973) (referring lawyer for disciplinary proceedings for filing frivolous petitions in immigration cases and stating that frivolous case "'consumes time, and inconveniences the opposite party and the court'" (quoting *Panagopoulos v. INS*, 434 F.2d 602, 603-04 (1st Cir. 1970))).

<sup>112</sup> Model Rules, *supra* note 1, R. 3.1.

<sup>113</sup> *United States v. Purchess*, 107 F.3d 1261, 1266-67 (7th Cir. 1997).

<sup>114</sup> See *id.* at 1263.

<sup>115</sup> See *id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* at 1263-64.

mined that the fifth trip qualified as “relevant conduct”<sup>118</sup> under the Sentencing Guidelines.<sup>119</sup>

On advice of counsel, Purchess remained silent at his sentencing regarding the fifth trip and allowed his lawyer to decide the legal strategy and make the legal arguments.<sup>120</sup> Purchess’s lawyer understood, as any competent lawyer would, that much of his job in this case would entail convincing the court that the fifth trip was not “relevant conduct” as defined in the Guidelines and thus should not be used to enhance Purchess’s sentence. He presented no evidence to support his position but made long, detailed objections to the government’s descriptions of Purchess’s role in that trip. The district court—frustrated with defense counsel’s argument—disagreed. The court not only ruled that the fifth trip was relevant conduct but also found that the arguments made on behalf of Purchess were “frivolity at best.”<sup>121</sup> The district court held Purchess accountable for the death of his co-conspirator as well as for the drugs that were imported by the co-conspirator during the fifth trip and increased his sentence accordingly.<sup>122</sup>

But the court did not stop there. Because of the frivolous arguments made by Purchess’s lawyer, the sentencing court gave Purchess a higher sentence than he would have received absent these arguments. Although the court recognized that Purchess himself admitted substantially all the conduct with which he was charged, said “I’m sorry” when given an opportunity to speak on his own behalf, and remained otherwise silent at his sentencing hearing, the court also reasoned that the frivolous arguments presented by his attorney were a strong indication that Purchess had not accepted responsibility for his conduct.<sup>123</sup> The court denied Purchess the sentencing reduction for “acceptance of responsibility,” though it is routinely awarded to the

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<sup>118</sup> A finding of relevant conduct requires a judge to sentence a defendant not only for charged conduct but also for “any additional criminal behavior related to the present offense.” Stith & Cabranes, *supra* note 63, at 70. This includes other “uncharged (or even acquitted)” crimes that the defendant may have committed or other crimes committed by her accomplices in jointly undertaken activities. *Id.*; see also U.S.S.G., *supra* note 13, § 1B1.3. Such relevant conduct need only be proven by a preponderance of the evidence at sentencing and plays as significant a role in the final sentence calculation as conduct that has been proven beyond a reasonable doubt at trial or that has been admitted by the defendant during a plea. See Stith & Cabranes, *supra* note 63, at 70.

<sup>119</sup> The principle of relevant conduct, which originated with the Federal Sentencing Guidelines, is complicated in its application and has confounded many courts and litigants. See Stith & Cabranes, *supra* note 63, at 96-97, 157-58.

<sup>120</sup> *Purchess*, 107 F.3d at 1264.

<sup>121</sup> *Id.*

<sup>122</sup> *Id.* at 1265.

<sup>123</sup> *Id.*

vast number of defendants who enter a guilty plea rather than go to trial. The district court concluded from the conduct of Purchess's attorney that Purchess "showed no remorse and was simply trying to get a lower sentence without actually accepting responsibility for his actions."<sup>124</sup>

The sentencing court ignored the potential problem of penalizing the defendant for what can be properly characterized as the strategic decisions or professional conduct of his attorney. Rather, the court found troublesome the notion that defendants whose lawyers engage in frivolous arguments on their behalf as they remain silent would be judged just as remorseful, and equally entitled to a finding of "acceptance of responsibility," as defendants whose lawyers did not engage in such challenges.<sup>125</sup>

The United States Court of Appeals for the Seventh Circuit agreed with Purchess that his attorney's arguments should not be attributed to him in determining his sentence. According to the appellate court, the sentencing court should have ascertained whether "the defendant understands and agrees with his attorney's argument before using counsel's challenge as a basis for denying the defendant a reduction for acceptance of responsibility."<sup>126</sup> Interestingly, the Seventh Circuit nonetheless affirmed the lower court's denial of acceptance of responsibility, thus confirming the great latitude afforded to sentencing judges in determining acceptance of responsibility. The appellate court, in declining to vacate the sentence, explained that the district court was "uniquely suited" to decide as it did that—even aside from his lawyer's conduct—there was sufficient evidence that "Purchess was insincere in his apology to the court, and that he did not actually accept responsibility for his offense."<sup>127</sup>

Consequently, Purchess's partial success before the appellate court has not done much to deter sentencing courts from penalizing defendants for arguably frivolous factual arguments made by their lawyers. While the *Purchess* court purported to reject the notion that judges should use the "acceptance of responsibility" provision to penalize defendants for the frivolous factual arguments of their law-

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<sup>124</sup> Id.

<sup>125</sup> The sentencing court explained:

[T]he denial of acceptance of responsibility is indeed one which has been bothering this Court for some time where a defendant remains silent, frivolous and/or less than substantial arguments are made on the client's behalf and then we address it only as lawyer talk and say, Well, that really isn't the denial of relevant conduct.

Id. at 1266 (citation omitted).

<sup>126</sup> Id. at 1269.

<sup>127</sup> Id.

yers, the case ultimately reinforced the power of district judges to use the provision in that way without meaningful review. Not surprisingly, therefore, defendants who have cited *Purchess* have not fared well before the Seventh Circuit.<sup>128</sup>

The *Purchess* case does an excellent job of highlighting the problem of agency when courts hold defendants accountable for the words of their lawyers: To what extent can courts hold the defendant responsible for the arguments of her agent, without specific evidence that the defendant has adopted or acquiesced in the lawyer's arguments? The *Purchess* court's hesitation seemed only to be that there was little proof that *Purchess* adopted or even understood his lawyer's frivolous factual arguments. Other circuits, readily accepting what the Seventh Circuit called into question, have attributed attorneys' factual arguments to their clients.<sup>129</sup> Perhaps the assumption here is that factual arguments made by the lawyer are likely to be abetted and even driven by the defendant. Though this makes some sense, to the extent that the lawyer rarely has personal knowledge of the crime or its circumstances, such reasoning ignores several real-world features of the attorney-client relationship. First, lawyers collect information from witnesses, expert reports, and many other investigative sources beside the defendant. Second, lawyers and their clients do not always take the time or have the opportunity prior to appearing in court to discuss all the information and arguments the lawyer will present. Moreover, whether or not such a conversation between attorney and client takes place is generally within the control of the attorney, not the client. Furthermore, the decisions regarding what arguments to make—factual or otherwise—fall within the lawyer's purview. This is true as a formal matter under the Model Rules but also as a practical matter, since a lawyer can generally convince the client to follow the lawyer's recommendation and expertise.

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<sup>128</sup> The Seventh Circuit has since qualified *Purchess*'s holding that trial judges should ensure that defendants understand and agree with their lawyers' decisions before attributing those decisions to the client, albeit in unpublished opinions. See, e.g., *United States v. O'Hearn*, 210 F.3d 376, 2000 WL 217538, at \*2 (7th Cir. Feb. 22, 2000) (concluding that procedure recommended in *Purchess*—that sentencing courts determine whether defendant endorses frivolous arguments of his attorney—was based on fact that defendant there had fifth grade education and difficulty understanding English and should not be applied to more sophisticated defendants).

<sup>129</sup> See *United States v. Peery*, 977 F.2d 1230, 1234 (8th Cir. 1992) (denying "acceptance of responsibility" reduction to defendant based on arguments made by counsel during opening arguments, trial, and closing arguments); *United States v. Garcia*, 917 F.2d 1370, 1378 (5th Cir. 1990) (affirming denial of "acceptance of responsibility" reduction where defendant's guilty plea was rejected for being against advice of counsel and trial concerning factual elements of guilt ensued).

Even harder to justify than holding defendants accountable for their attorneys' frivolous factual arguments is the argument that defendants should be held accountable for their attorneys' frivolous *legal* arguments. Unlike factual arguments, legal arguments are almost always lawyer-driven and lawyer-controlled. The Seventh Circuit, however, has held in at least one case that even frivolous legal arguments can justify the withholding of the "acceptance of responsibility" reduction.<sup>130</sup> At least one other circuit also has allowed the denial of the sentence reduction in cases where the frivolous challenge was legal and not factual.<sup>131</sup>

In *United States v. Wright*, the defendant pled guilty to the illegal possession of machine guns and unregistered destructive devices pursuant to 18 U.S.C. § 922(o) and 26 U.S.C. § 5861(d).<sup>132</sup> Despite Wright's plea of guilty and his admission to all factual and legal elements of the offense, Wright's attorney made constitutional challenges to the statutes under the Second and Ninth Amendments. The district judge denied Wright the "acceptance of responsibility" reduction, arguing in part that his legal arguments suggested that he did not recognize the illegality of his conduct or feel sincere remorse for violating the law.<sup>133</sup> Wright appealed, arguing that the district court improperly penalized him for the constitutional challenges asserted by his lawyer.

The Eleventh Circuit affirmed the district court's ruling, stating that the law permits a district court to deny a defendant a sentencing reduction under section 3E1.1 for any conduct that appears inconsistent with accepting responsibility, "even when that conduct includes the assertion of a constitutional right."<sup>134</sup> Not surprisingly, the appellate court also based its affirmance on the fact that the sentencing court's observations regarding Wright's lack of remorse for violating

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<sup>130</sup> See *United States v. Taliaferro*, 211 F.3d 412, 414 (7th Cir. 2000) (upholding denial of "acceptance of responsibility" reduction because defendant filed related false tort claim against Bureau of Prisons).

<sup>131</sup> *United States v. Wright*, 133 F.3d 1412 (11th Cir. 1998).

<sup>132</sup> *Id.* at 1413 & n.1.

<sup>133</sup> *Id.* at 1413. The district court judge stated:

I think what really bothers me in this case is that Mr. Wright has put forward through counsel an assertion that he believed he was entitled to possess all of these weapons, and apparently the pipe bombs as well . . . [and that] he thought he was constitutionally able to have these things. And that assertion that he is making through counsel to me is not credible, and that's what bothers me. . . . It appears to me that what has happened is counsel has identified some of the publications that seem to be consistent with the idea of defending one's countrymen, and you [counsel] have attempted to assert an argument building on his possession of these items.

*Id.* at 1415 (citing trial record).

<sup>134</sup> *Id.* at 1414 (quoting *United States v. Smith*, 127 F.3d 987, 989 (11th Cir. 1997) (en banc)).

the law amounted to factual findings entitled to great deference.<sup>135</sup> This was held to be so despite the prosecution's recommendation that Wright receive the reduction for acceptance of responsibility<sup>136</sup> and despite the "significant evidence" of Wright's acceptance of responsibility discussed by the dissent.<sup>137</sup> Accordingly, district courts in the Seventh and Eleventh Circuits have found a virtually reversal-proof tool to deter frivolous legal arguments in criminal cases—a practice not commonly prohibited by the laws of ethics and professionalism.<sup>138</sup>

Although most other circuits have not specifically authorized sentencing courts to rule against defendants on the issue of acceptance of responsibility when their lawyers engage in legally frivolous challenges,<sup>139</sup> they have affirmed sentencing court decisions penalizing defendants whose lawyers engage in factually frivolous challenges or challenges that involved mixed questions of law and fact. Unlike the *Purchess* court, these circuits do not require sentencing courts to determine whether a defendant agrees with the factual statements made by her lawyer.<sup>140</sup> Rather, presumably because the attorney acts as the legal agent of the criminal defendant, courts are free to attribute the attorney's conduct to her principal. This is troublesome because, as discussed in Part I and Part III, the attorney-client relationship in the criminal context is not paradigmatic of the agent-principal relationship.

## 2. *Regulating Delay and Time Wasting*

Judges also use federal sentencing laws to discourage lawyer behavior resulting in delay and inefficiency in the courtroom. One of the recognized purposes of the acceptance of responsibility provision

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<sup>135</sup> Id. at 1413.

<sup>136</sup> Id.

<sup>137</sup> Id. at 1414 (Kravitch, J., dissenting) (explaining that Wright admitted his possession of illegal items upon his arrest, led law enforcement to location of these weapons, voluntarily permitted them to search his residence, never denied his conduct throughout proceedings, pled guilty in timely manner after denial of his constitutional challenges, and has not possessed any weapons since his arrest).

<sup>138</sup> See *supra* note 94 and accompanying text.

<sup>139</sup> Though these courts have not explicitly recognized that frivolous legal challenges can justify denial of acceptance of responsibility, they nonetheless tend to affirm the trial court's denial on other grounds. See, e.g., *United States v. Casterline*, 103 F.3d 76, 79 (9th Cir. 1996) (stating that although defendant went to trial only to contest constitutionality of charge under Commerce Clause rather than factual guilt, he was not entitled to sentence reduction because he failed to demonstrate his remorse in other ways); see also *United States v. Wilson*, 159 F.3d 280, 292-93 (7th Cir. 1998) (holding, prior to *United States v. Taliaferro*, 211 F.3d 412 (7th Cir. 2000), that although defendant went to trial to contest constitutionality of statute rather than his factual guilt, court was within its discretion to withhold reduction based on defendant's statements).

<sup>140</sup> See *United States v. Purchess*, 107 F.3d 1261, 1269 (7th Cir. 1997).



is to reward defendants who do not put the government to its burden of proof at trial.<sup>141</sup> Thus, defendants may receive a sentence reduction if they help conserve government and court resources by assisting authorities in the investigation or prosecution against them, provide information to the government regarding their involvement in the offense, or enter a timely guilty plea.<sup>142</sup> Traditionally these factors have been considered indicators of whether the defendant has truly accepted responsibility for her offense. As one court put it, the timing of a defendant's statement or plea is material in "determining if his acceptance was genuine."<sup>143</sup> Even a plea of "not guilty" at arraignment, when the formal charges are first revealed, followed by a later guilty plea may be relevant to the determination of acceptance of responsibility.<sup>144</sup>

However, timeliness by the defendant must be coupled with timeliness by her attorney to be deemed a reliable indicator of the defendant's sincere remorse. An attorney's zeal or tenacity in negotiating a plea has been interpreted as the defendant's failure to accept responsibility. In cases where there is evidence of a defendant's early intention to plead, courts have nonetheless withheld the sentencing reduction if the attorney engaged in prolonged plea negotiations or legal challenges before the plea actually took place.<sup>145</sup> Some courts have ignored the language of the Guidelines, which requires only that a defendant notify authorities of her intentions to plead, and have required instead that the plea be consummated in a timely fashion.<sup>146</sup>

In *United States v. Hamzat*,<sup>147</sup> three defendants, Hamzat included, were prosecuted for drug trafficking violations. Hamzat's two co-defendants contested their guilt at trial, but Hamzat informed the government early of his intention to plead guilty. Hamzat did not actually enter his plea in court until one week before the rescheduled trial date of his co-defendants.<sup>148</sup> The trial court accepted his plea but refused to reduce his sentence by the three levels authorized by the

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<sup>141</sup> U.S.S.G., *supra* note 13, § 3E1.1.

<sup>142</sup> *Id.*

<sup>143</sup> *United States v. Wach*, 907 F.2d 1038, 1040 (10th Cir. 1990).

<sup>144</sup> See *United States v. Wilson*, 878 F.2d 921, 923 (6th Cir. 1989) (holding that defendant's eventual guilty plea does not entitle him to "sentencing reduction as a matter of right" for "acceptance of responsibility" where defendant originally denied guilt).

<sup>145</sup> See *United States v. Lancaster*, 112 F.3d 156, 159 (4th Cir. 1997) (affirming denial of full reduction for acceptance of responsibility when defendant does not plead guilty until after suppression hearing; defendant's constitutional right to challenge admissibility of evidence is no justification for delay).

<sup>146</sup> See, e.g., *United States v. Wallace*, 114 F.3d 652, 655 (7th Cir. 1997); *United States v. Chatman*, 119 F.3d 1335, 1342 (8th Cir. 1997).

<sup>147</sup> 217 F.3d 494 (7th Cir. 2000).

<sup>148</sup> *Id.* at 498.

guidelines. On appeal, Hamzat explained that “he was being penalized for the hard negotiations of his lawyers.”<sup>149</sup> He argued that the government did not have to prepare for his case because it had known for some time that he was going to plead guilty, and that moreover, no unnecessary resources were expended by the court or the government because they had to try his co-defendants anyway.<sup>150</sup>

The appellate court rejected Hamzat’s contentions that his plea was timely, stating in part that a defendant or lawyer who holds out for a better deal is not demonstrating acceptance of responsibility but rather is making a strategic decision. According to the court, Hamzat could not be heard to complain because of a “strategic decision that turned out badly.”<sup>151</sup> The suggestion here is that had Hamzat and his attorney tried a different, less zealous strategy, he might have received a lower sentence. This assumes that wanting the lowest sentence that the prosecutor is willing to negotiate is antithetical to taking responsibility for one’s conduct. Interestingly, neither the district court nor the appellate court sought to distinguish, as some other courts have done, delays caused by defendants from those caused by their attorneys.<sup>152</sup>

In addition to imposing higher sentences when defendants fail to enter pleas in a timely manner, courts also have done so when delays were caused by the zealous pursuit of a legal challenge. An attorney who files a motion to suppress,<sup>153</sup> a motion for a change of venue,<sup>154</sup> or other pretrial motions<sup>155</sup> can expect to litigate the acceptance of responsibility issue at sentencing, even if the defendant enters a guilty

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<sup>149</sup> *Id.*

<sup>150</sup> *Id.*

<sup>151</sup> *Id.* at 499.

<sup>152</sup> See *Ramos v. United States*, No. 97 CIV.7066 (DLC), 1998 WL 60941, at \*3 (S.D.N.Y. Feb. 13, 1998) (informing defendant *sua sponte* that sentencing court would hold hearing to determine if late plea was due to defendant’s delay in making decision or due to attorney’s delay).

<sup>153</sup> See *United States v. Gilbert*, 138 F.3d 1371, 1374 (11th Cir. 1998) (affirming higher sentence when defendant pleads guilty only after denial of motion to suppress evidence because fact that “the Government had to prepare for trial and did not benefit from avoiding trial preparation, defeats the purpose of §3E1.1(b)”). But see *United States v. Kimple*, 27 F.3d 1409, 1413 (9th Cir. 1994) (finding that denial of one-level reduction for timely acceptance of responsibility was improper because passage of time should not be only consideration in sentence reduction).

<sup>154</sup> *United States v. Robinson*, 20 F.3d 270, 274 (7th Cir. 1994) (affirming denial of full reduction for acceptance of responsibility when delay in entering guilty plea is due to motion for change of venue under Federal Rule of Criminal Procedure 21, suggesting intent to go to trial).

<sup>155</sup> See *United States v. McIntosh*, 198 F.3d 995 (7th Cir. 2000) (finding that denial of “acceptance of responsibility” reduction was proper in case where defendant made motions raising speedy trial issues, challenged defective indictment, filed other dismissal motions, and engaged in repetitive pattern of conduct causing delay).

plea immediately after the legal issues have been exhausted. Courts consider the filing of a motion to suppress simply to be part of trial strategy,<sup>156</sup> and therefore something that defendants and their lawyers can (and should) forego if they want to benefit from the full sentence reduction available under section 3E1.1.

For example, in *United States v. Godwin*,<sup>157</sup> the Seventh Circuit rejected a defendant's claims of ineffective assistance of counsel that were based in large part on his lawyer's failure to file any pretrial motions, failure to object to inconsistencies in the presentence report, insistence on entering an early guilty plea, and general cooperation with the government.<sup>158</sup> The court found that, rather than being indicators of sloppy lawyering, these were strategic decisions designed to earn Godwin a three-level sentence reduction for acceptance of responsibility. Godwin's complaint that perhaps his lawyer was too quick to acquiesce to the government and was insufficiently zealous on his behalf fell on deaf ears.<sup>159</sup>

A recent amendment to the "acceptance of responsibility" provision will give even greater weight to considerations of timeliness and efficiency in assessing whether a defendant receives a full reduction for acceptance of responsibility. While leaving intact the criteria for obtaining a two-point reduction, Congress has limited the additional third-point reduction to defendants who notify authorities of their intention to plead guilty, "thereby permitting the government to avoid preparing for trial and permitting the government and the court to allocate their resources efficiently."<sup>160</sup> A defendant cannot obtain a three-level reduction unless the prosecutor agrees that she was alleviated of the burdens of trial preparation and expressly makes a motion for the additional reduction.<sup>161</sup> Once the prosecutor makes the requisite motion, the court can nonetheless deny the motion if it finds that the defendant's conduct did not permit the conservation of court resources. Though it remains to be seen exactly how these new amendments will be applied, there is little doubt that they will render a grant of the full reduction even more contingent on a finding of timeliness.

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<sup>156</sup> See *Gilbert*, 138 F.3d at 1374 (describing "choice to file a motion to suppress" as part of "defendant's trial strategy," even though such decision would fall under province of attorney's decisions).

<sup>157</sup> 202 F.3d 969 (7th Cir. 2000).

<sup>158</sup> *Id.* at 973.

<sup>159</sup> *Id.*

<sup>160</sup> Prosecutorial Remedies and Other Tools to End the Exploitation of Children Today (PROTECT) Act of 2003, Pub. L. No. 108-21, §401(g) (1), 117 Stat. 650, 671.

<sup>161</sup> A defendant can only receive the additional reduction "upon motion of the government." *Id.*

### 3. *Lack of Cooperation*

A frictionless courtroom is conducive to the efficient administration of justice. Organizational behaviorists have studied courtroom workgroups and the dynamics that develop between the participants as a salient factor in explaining case outcomes.<sup>162</sup> They posit that despite the adversarial nature of the court system, the participants learn early on to work together in order to move cases along efficiently.<sup>163</sup> A certain degree of cooperation between the various players in the courtroom—judges, prosecutors, probation officers, attorneys, and court employees—is considered a key aspect of professionalism. A defense lawyer who does not learn this lesson early runs the risk of making life difficult for both herself and her clients.<sup>164</sup>

The “acceptance of responsibility” provision acknowledges the value of a different type of cooperation by rewarding defendants with a sentence reduction if they assist the government in investigating or prosecuting the charged conduct.<sup>165</sup> The difficulty is that if the client also inadvertently reveals information regarding uncharged crimes, and the judge discovers this information through the client’s probation officer or any other source, the Guidelines require the judge to sentence the defendant for the additional conduct.<sup>166</sup> The Guidelines account for this conflict insofar as they do not require a defendant “to volunteer, or affirmatively admit, relevant conduct beyond the offense of conviction in order to obtain a reduction.”<sup>167</sup> Because any good attorney will try to limit her client’s liability, the lawyer’s task here is to help the defendant walk the fine line between thoroughly discussing the offense of conviction in order to assist the government, and volunteering information regarding other crimes. This is consistent with the defendant’s Fifth Amendment right not to divulge inculpatory information.<sup>168</sup>

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<sup>162</sup> James Eisenstein & Herbert Jacob, *Felony Justice* 9-11 (1982) (arguing that conceptualizing courts as organizations provides way to study courtroom work as type of group activity).

<sup>163</sup> *Id.* at 24-28 (describing courtroom norms that reinforce group cohesion, reduce uncertainty, and accelerate caseload disposition).

<sup>164</sup> *Id.* at 27 (“For instance, the occasional defense attorney who violates routine cooperative norms may be punished by having to wait until the end of the day to argue his motion; he may be given less time than he wishes for a lunch break in the middle of a trial; he may be kept beyond usual court hours for bench conferences.”).

<sup>165</sup> See U.S.S.G., *supra* note 13, § 3E1.1. Under an altogether different provision, see *id.* § 5K1.1, the Guidelines also authorize an additional and unrestricted reduction for defendants who substantially assist authorities in solving other crimes.

<sup>166</sup> *Id.* § 1B1.2.

<sup>167</sup> *Id.* § 3E1.1, n.1(a).

<sup>168</sup> See U.S. Const. amend. V.

Some courts have broadened the type of cooperation needed to earn the sentencing reduction<sup>169</sup> to include not only the provision of information about the instant offense but also other cooperative behavior that leads to a more frictionless criminal justice process. This other behavior, usually involving oral or written statements by charged defendants in response to questions by authorities, almost always requires the presence, if not advice, of counsel.<sup>170</sup> A defendant can receive a higher sentence if she follows her attorney's advice to remain silent regarding her finances,<sup>171</sup> the source or location of any contraband she is charged with possessing,<sup>172</sup> her role in a criminal scheme,<sup>173</sup> or the identities of others involved in criminal activity.<sup>174</sup>

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<sup>169</sup> In regards to what information a defendant may be required to provide, the conduct comprising the offense of conviction may be "broader than the conduct that meets the statutory elements of the offense." *United States v. Larkin*, 171 F.3d 556, 558 (7th Cir. 1999) (citing *United States v. Hammick*, 36 F.3d 594, 599-600 (7th Cir. 1994)); see also *United States v. Patino-Cardenas*, 85 F.3d 1133, 1136 (5th Cir. 1996); *United States v. Reyes*, 9 F.3d 275, 279-80 (2d Cir. 1993).

<sup>170</sup> Once a criminal defendant has invoked her right to counsel, she cannot be questioned by law enforcement authorities without counsel present unless she waives her rights or reinitiates communication. See *Minnick v. Mississippi*, 498 U.S. 146, 153 (1990); *Edwards v. Arizona*, 451 U.S. 477, 484 (1981).

<sup>171</sup> *United States v. Daniels*, No. 90-30415, 1991 WL 268903, at \*4 (9th Cir. Dec. 13, 1991) (affirming denial of reduction where defendant refused to provide information to probation office regarding his financial condition or assist in recovering assets); *United States v. Trujillo*, 906 F.2d 1456, 1460-61 (10th Cir. 1990) (finding that defendant's refusal to cooperate with probation officer, even on advice of counsel, can justify denial of "acceptance of responsibility" reduction); *United States v. Cross*, 900 F.2d 66, 70 (6th Cir. 1990) (affirming denial of reduction for failure to provide financial information to court).

<sup>172</sup> *Larkin*, 171 F.3d at 558-59 (finding that defendant's refusal to reveal drug source was grounds to withhold sentence reduction); *Hammick*, 36 F.3d at 601 (holding that defendant's silence regarding source of counterfeit credit cards is grounds for denial of reduction); *United States v. Jackson*, 25 F.3d 327, 332 (6th Cir. 1994) (reasoning that defendant's refusal to divulge location of fraudulently purchased vehicles is grounds for denial of reduction). At least one circuit has diverged from this rule. See, e.g., *United States v. Watt*, 910 F.2d 587, 593 (9th Cir. 1990) ("We agree with Watt that the District Court erred in concluding that Watt's failure to assist in the recovery of the fruits and instrumentalities of a crime 'counts against him.' Assisting in the recovery of the fruits and instrumentalities of a crime involves a waiver of fifth amendment rights. Penalizing a defendant for failing to provide evidence against himself or to make incriminating statements violates his constitutionally protected rights."), overruled on other grounds, *United States v. Anderson*, 942 F.2d 606, 614 (9th Cir. 1991). Cf. *United States v. Austin*, 17 F.3d 27 (2d Cir. 1994) (finding that defendant's refusal to assist government in recovering fruits or instrumentalities of criminal activities improperly was considered as basis for denial of "acceptance of responsibility").

<sup>173</sup> *United States v. Meacham*, 27 F.3d 214, 217 (6th Cir. 1994) (affirming higher sentence because defendant, on advice of counsel, refused to discuss his role in offense with probation officer).

<sup>174</sup> *United States v. Nuñez-Rodriguez*, 92 F.3d 14, 19-22 (1st Cir. 1996) (finding that defendant's refusal to name accomplices may be considered in denying section 3E1.1 reduction); *United States v. Phibbs*, 999 F.2d 1053, 1080 (6th Cir. 1993) (reasoning that even though defendant admitted all culpability, he can be denied "acceptance of responsi-

Information supplied to a probation officer that is false or incorrect can be the basis for the denial of the acceptance of responsibility reduction, even if that information is legally immaterial.<sup>175</sup>

Also critical to the smooth operation of the federal criminal justice system is cooperation with the probation officer, whose role has increased in importance since the advent of the Sentencing Guidelines.<sup>176</sup> Following a conviction, a probation officer is required by statute to prepare a presentence report.<sup>177</sup> The officer investigates the offense as well as the offender, conducts interviews of the law enforcement officers, the defendant, the defendant's family, and sometimes the victim, and determines an initial calculation for the court. The probation officer is required to present a copy of the report to the parties at least thirty-five days before the sentencing hearing so that they may file any written objections to the report prior to sentencing.<sup>178</sup> Objections not made prior to sentencing are considered waived and will not be heard by the court at the sentencing hearing without a showing of good cause to do so.<sup>179</sup> This process greatly has streamlined the sentencing procedure in federal court and has transformed the role of the probation officer.<sup>180</sup>

Because the court relies so heavily on the probation officer under the Sentencing Guidelines regime, failure to cooperate fully with the probation officer is tantamount to failure to cooperate with the court. Despite the obviously critical nature of the presentence interview to

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bility" reduction for refusing to testify against his co-defendants and refusing to reveal names of higher-ups in cocaine smuggling ring); *United States v. Ransbottom*, 914 F.2d 743, 747 (6th Cir. 1990) (affirming court denial of reduction where defendant refused to incriminate accomplices); *United States v. Davis*, 878 F.2d 1299, 1300 (11th Cir. 1989) (same); cf. *Anderson*, 942 F.2d at 614 (indicating that increase in offense level based on defendant's role in offense, pursuant to section 3B1.1, applies only when offense is committed by more than one criminally responsible person); *United States v. Escobar-Mejia*, 915 F.2d 1152, 1153 (7th Cir. 1990) (finding that although "defendant may accept responsibility . . . without helping the government to convict others . . . a demand for information about sources and colleagues . . . may be consistent with the proper implementation of § 3E1.1").

<sup>175</sup> *United States v. DeFelippis*, 950 F.2d 444, 447 (7th Cir. 1991) (finding that immaterial information provided to probation officer, if false, can warrant denial of sentencing reduction).

<sup>176</sup> Practice Under the Federal Sentencing Guidelines, *supra* note 14, § 7.03[A][2] ("[D]istrict courts have come increasingly to rely on the recommendations of the probation officer who prepares the presentence report. Consequently, it is a sad but true fact of life under the Guidelines that many of the crucial judgment calls in sentencing are now made, not by the court, but by the probation officers. . . ." (quoting *United States v. O'Meara*, 895 F.2d 1216, 1223 (8th Cir. 1990) (Bright, J., dissenting in part))).

<sup>177</sup> Fed. R. Crim. P. 32(b)(1).

<sup>178</sup> Fed. R. Crim. P. 32(b)(6)(A).

<sup>179</sup> Fed. R. Crim. P. 32(b)(6)(B)-(D).

<sup>180</sup> *Stith & Cabranes*, *supra* note 63, at 85-91, 128.

the outcome of the case,<sup>181</sup> attorneys often have been viewed as a hindrance to an efficient interview process. Until recently, many courts did not recognize a defendant's right to counsel during the probation interview, contending that it was not part of the adversarial process and thus not a critical stage under Sixth Amendment doctrine.<sup>182</sup> A defendant's refusal to offer complete disclosure to the probation office has been considered sufficient grounds in many courts to deny the acceptance of responsibility reduction even when the defendant has pleaded guilty and has demonstrated contrition in other ways.<sup>183</sup>

In *United States v. Larkin*, for example, a defendant charged with possession of marijuana received a higher sentence because "acting on the advice of his lawyer, [he] refused to tell the probation office or the court where he got the marijuana."<sup>184</sup> The court rejected his lawyer's concerns that further statements by the defendant could subject him to prosecution for conspiracy to distribute the drugs—a more serious

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<sup>181</sup> See Practice Under the Federal Sentencing Guidelines, *supra* note 14, § 7.03[A][3] ("Admissions made during the [presentence] interview can result in a higher guideline range, provide a basis for an upward departure, or undermine chances for a downward departure. Decisions on whether a defendant should be credited for acceptance of responsibility or penalized for obstructing justice by furnishing material misinformation to the probation officer will be made in large part from the interview.").

<sup>182</sup> Federal Rule of Criminal Procedure 32(b)(2) codified the defendant's right to counsel during the presentence interview in 1994. Prior to that, most courts deciding the issue found that defendants who were interviewed by probation officers without *Miranda* warnings or without their attorneys present did not suffer a violation of their Fifth or Sixth Amendment rights. Although *Massiah v. United States*, 377 U.S. 201, 204-06 (1964) established that the Sixth Amendment right to counsel becomes effective upon indictment, these courts reasoned that counsel was no longer necessary in this post-conviction setting, after formal adversarial proceedings had ostensibly concluded. See *United States v. Tisdale*, 952 F.2d 934, 939-40 (6th Cir. 1992) (holding that there is no Sixth Amendment right to counsel at presentence interview); *United States v. Woods*, 907 F.2d 1540, 1543 (5th Cir. 1990) (finding no Fifth or Sixth Amendment rights at presentence interview); *United States v. Rogers*, 899 F.2d 917, 921, 924 (10th Cir. 1990) (same).

<sup>183</sup> See *United States v. Reid*, 997 F.2d 1576, 1580 (D.C. Cir. 1993) (finding refusal to discuss case with probation officer was one of several permissible reasons for denying sentence reduction); *United States v. Daniels*, No. 90-30415, 1991 WL 268903, at \*4 (9th Cir. Dec. 13, 1991) (affirming denial of reduction where defendant refused to provide information to probation office regarding his financial condition or assist in recovering assets); *United States v. Chambers*, 944 F.2d 1253, 1270 (6th Cir. 1991) (affirming denial of reduction, even though defendant pled guilty, because he failed to provide detailed statement of his role to probation officer). But see *United States v. Enquist*, 745 F. Supp. 541, 545 (N.D. Ind. 1990) (holding that defendant's refusal to provide version of events to probation officer did not preclude finding of acceptance of responsibility).

<sup>184</sup> 171 F.3d 556, 558 (7th Cir. 1999) (footnote omitted). But see *United States v. Austin*, 17 F.3d 27 (2d Cir. 1994) (reversing district court's denial of acceptance of responsibility reduction, based on defendant's refusal to disclose whereabouts of thirty-one firearms following conviction of dealing firearms without license, because defendant's role in traffic of thirty-one firearms was distinct from offense of conviction).

offense.<sup>185</sup> To be sure, the Sentencing Guidelines require defendants to admit fully to the crimes with which they are charged. It is reasonable to expect that before one can accept responsibility for one's conduct, one has to first admit the conduct. Yet the *Larkin* court seems to go beyond requiring admission to requiring cooperation in assisting the government in apprehending others. The defendant's attorney is usually the gatekeeper of that form of cooperation, as it is a rare defendant who will ignore her attorney's advice to remain silent or ignore particular requests or questions.

One scholar has aptly described the "acceptance of responsibility" provision as a means of punishing antisocial behavior by the defendant beyond the commission of the crime itself.<sup>186</sup> In a sense, the "acceptance of responsibility" provision draws a fault line between convicted persons who have some respect for the law and will likely abide by it in the future, and those who do not respect the law and are destined to flout it repeatedly.<sup>187</sup> Here, respect for the law is measured by one's reluctance to challenge it. In addition to admitting guilt, entering a guilty plea, and conserving societal resources, a defendant can demonstrate on which side of the line she falls by siding with law enforcement in its attempts to investigate crimes. The decision to remain silent is perceived as selfish and antisocial behavior. Similarly, a defense attorney working in a courtroom environment can demonstrate antisocial behavior by resisting requests for cooperation by other members of the working group. In this instance, the denial of "acceptance of responsibility" is based on the combined conduct of attorney and client, considered to have morphed into one entity, in refusing to cooperate with the court and law enforcement authorities.

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<sup>185</sup> *Larkin*, 171 F.3d at 558 n.2, 559.

<sup>186</sup> Daniel Givelber, Punishing Protestations of Innocence: Denying Responsibility and Its Consequences, 37 Am. Crim. L. Rev. 1363, 1387-89 (2000) (describing sentencing differential involved in acceptance of responsibility determination as punishment for antisocial behavior because those who fail to admit their guilt "attempt to subvert justice" and commit selfish acts that "wastes scarce resources"). Although Givelber describes mostly the decision to go to trial, the same analysis can apply to the decision not to cooperate with authorities in assisting them to capture others. A defendant who chooses silence in a sense chooses to abide by the rules of the criminal trade (no ratting out others) rather than the rules of good citizens (societal duty to prevent crimes, including making citizen's arrests if needed).

<sup>187</sup> Interestingly, defendants can be denied a sentencing reduction for failure to accept responsibility based on conduct in legal proceedings that are distinct from their criminal cases. See *United States v. Janusz*, 135 F.3d 1319, 1325 (10th Cir. 1998) (finding that defendant who failed to provide documents in related civil case was not entitled to sentencing reduction in criminal case); cf. *United States v. Bennett*, 161 F.3d 171, 197 (3d Cir. 1998) (noting that defendant's cooperation with bankruptcy trustee may constitute evidence of acceptance of responsibility).



### III

#### OVERZEALOUSNESS AS A NEGATIVE SENTENCING FACTOR IN FEDERAL COURT

As explained above, some federal courts have interpreted the “acceptance of responsibility” provision of the Federal Sentencing Guidelines in such a way as to make an attorney’s conduct a *de facto* sentencing consideration. Most sentencing schemes attempt to base a sentence primarily on the conduct of the offender during and after the crime and on the offender’s personal characteristics. The Federal Sentencing Guidelines are no exception. However, because attorneys are presumed to act as agents of their clients, some federal judges have applied the rationale of agency law by attributing the conduct of the defense attorney to the defendant.

Federal Sentencing Guidelines section 3E1.1, the “acceptance of responsibility” provision, requires courts to consider as a sentencing factor whether the defendant’s conduct has been consistent with acceptance of responsibility—a term that is never specifically defined in the manual. Some courts, in ruling against defendants on the “acceptance of responsibility” issue, have found that a lawyer’s aggressive tactics demonstrate a lack of remorse on the part of the defendant and thus a failure to accept responsibility.<sup>188</sup> Applying the principles of agency in a way that results in the convergence of attorney conduct with client conduct appears inconsistent with the ethics rules that recognize a clear division of roles between criminal lawyers and their clients.<sup>189</sup> Yet a lawyer who knows that the defendant might be held accountable for some of the legal decisions made during the course of the representation will likely incorporate this fact into her overall strategy.

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<sup>188</sup> As discussed above, the types of overzealous lawyering that have been found to be inconsistent with “acceptance of responsibility” include making frivolous factual and legal arguments and filing frivolous motions, see *supra* Part II.C.1, causing unnecessary delay, see *supra* Part II.C.2, or advising defendants not to cooperate with law enforcement or court investigations, see *supra* Part II.C.3.

<sup>189</sup> The American Bar Association’s standards for ethical and professional conduct make clear that “[c]ertain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel.” A.B.A. Standards for Criminal Justice, Standard 4-5.2 (3d ed. 1993). Even with this division of responsibility between attorney and client, the attorney is ethically and professionally obligated to advise and counsel the defendant regarding matters that are presumed to be within the province of the defendant, such as what plea to enter, whether to waive jury trial and whether to testify. See *Alvord v. Wainwright*, 469 U.S. 956, 959-60 (1984) (Marshall, J., dissenting from denial of petition for certiorari); *McMann v. Richardson*, 397 U.S. 759, 769-70 (1970).

### A. *The "Jones" Hypothetical*

To illustrate the point, consider the following hypothetical scenario. A defense lawyer is appointed to represent a defendant, Michael Jones. Mr. Jones is a nineteen-year-old who has been charged with possession of a firearm. Before paying the client a visit at the local jail, the attorney reviews the police report. The arresting officer's report notes that the officer stopped Mr. Jones because he noticed that his pants were hanging low and suspected that this was due to the weight of a concealed weapon. The officer searched Mr. Jones, in what the officer asserts was a consensual search, and discovered that Mr. Jones was carrying a handgun. The officer ran Mr. Jones's criminal history on his computer and discovered that Mr. Jones had a prior conviction for possession of marijuana with intent to distribute. Mr. Jones was arrested for being a convicted felon in possession of a firearm.<sup>190</sup>

The attorney reviews Mr. Jones's criminal history sheet and is relieved to discover Mr. Jones has only two minor prior felony convictions. Had Mr. Jones had three prior convictions, this new charge could constitute an additional "strike" for which he would face a mandatory minimum sentence of fifteen years in prison under the Armed Career Criminal Act (ACCA).<sup>191</sup> During an initial meeting between attorney and client, Mr. Jones confides to his attorney that he has a sealed juvenile record for purse snatching at knifepoint.<sup>192</sup> As far as the attorney can tell, neither the prosecutor nor the probation officer knows of the juvenile conviction. Mr. Jones ends the meeting by admitting tearfully that he did possess a gun but only to protect

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<sup>190</sup> Assume a charge under 18 U.S.C. § 922(g) that makes it unlawful for any person "who has been convicted in any court of a crime punishable by imprisonment for a term exceeding one year . . . to . . . possess in or affecting commerce, any firearm."

<sup>191</sup> See 18 U.S.C. § 924(e) (2000).

<sup>192</sup> Purse snatching has been found in some jurisdictions to be a violent felony that can serve as a predicate offense, or a "strike" under the Armed Career Criminal Act (ACCA). See *United States v. Payne*, 163 F.3d 371, 374-75 (6th Cir. 1998) (finding that larceny from victim's person falls within definition of violent felony for purposes of career offender status under Sentencing Guidelines); *United States v. Wofford*, 122 F.3d 787, 794 (9th Cir. 1997) (finding that grand theft from victim's person is violent felony under section 924(e)); *United States v. De Jesus*, 984 F.2d 21, 24-25 (1st Cir. 1993) (finding that larceny from victim's person is violent felony because risk of ensuing struggle is omnipresent).

Whether an offense qualifies as a predicate for ACCA purposes depends on whether its statutory definition in the jurisdiction in which it was charged satisfies the definition of "violent felony" under the ACCA. The Act defines "violent felony" as "any crime punishable by imprisonment for a term exceeding one year, or any act of juvenile delinquency involving the use or carrying of a firearm, knife, or destructive device that would be punishable by imprisonment for such term if committed by an adult, that has as an element the use, attempted use, or threatened use of physical force against the person of another . . . ." 18 U.S.C. § 924(e)(2)(B)(i) (2000).

himself and his family because he lives in a high crime area. He says that he is sorry for possessing the firearm, but he implores the lawyer to help him secure as low a sentence as possible.

Despite the client's single directive to secure the lowest possible sentence, the zealous advocate handling such a case will identify a myriad of issues that deserve immediate attention: bond, the propriety of the stop and search, minimizing the effect and admissibility of prior convictions evidence at trial, the use of juvenile convictions for ACCA purposes, and other sentencing issues. The Federal Sentencing Guidelines' treatment of lack of remorse and uncooperativeness as negative sentencing factors, combined with courts' willingness to attribute a lawyer's strategic decisions to her client, however, add a countervailing strategic consideration to these traditional concerns: A defense lawyer must also anticipate the effect of aggressive advocacy regarding these matters on the client's sentencing.

In this scenario, Mr. Jones's attorney files a bond motion and loses. The attorney approaches the prosecutor for a plea agreement, but the prosecutor insists that Mr. Jones plead to the indictment with no sentencing recommendation. It is worth noting that the guideline sentence under such a plea would range from forty-one to fifty-one months,<sup>193</sup> reduced to a range of thirty to thirty-seven months if the court found that Mr. Jones accepted responsibility for his offense.<sup>194</sup> Assuming that a flurry of motions will improve Jones's bargaining position, Mr. Jones's attorney files numerous pretrial motions, including a motion to suppress evidence of the firearm. The suppression hearing is scheduled a month away. After a hard-fought hearing, the government prevails on the suppression issue and the attorney announces to the government that Mr. Jones will enter a guilty plea. By entering a plea rather than going to trial, Mr. Jones will be much more likely to receive a lower sentence based on the "acceptance of responsibility" guidelines.<sup>195</sup> At the plea hearing, Mr. Jones admits

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<sup>193</sup> This hypothetical assumes that Mr. Jones is in a Criminal History Category III based on one recent felony conviction for which he is still on parole, see U.S.S.G., *supra* note 13, § 4A1.1, and a base offense level of twenty based on a single prior conviction for a controlled substance offense, see *id.* § 2K2.1(a)(4). Under the Guidelines Sentencing Table, see Sentencing Table, *infra app.*, a defendant with a Criminal History Category III and a base offense level of twenty faces forty-one to fifty-one months in prison.

<sup>194</sup> Such a defendant is eligible for a three-point offense level reduction if the court finds that she has accepted responsibility for her crime. Such a reduction could lower her sentence from a range of forty-one to fifty-one months (or a maximum of 4.25 years) to thirty to thirty-seven months (or a minimum of 2.5 years). See Sentencing Table, *infra app.*

<sup>195</sup> U.S.S.G., *supra* note 13, § 3E1.1. Although the Guidelines clearly state that the "acceptance of responsibility" reduction will not be automatically awarded for merely pleading guilty, see *id.*, many courts and practitioners have come to think of the reduction as a plea discount because the vast majority of defendants who plead guilty receive the

that he possessed a firearm illegally despite his status as a convicted felon. He apologizes to the court and explains that he possessed the gun only to protect himself and his family and not to assist him in the commission of further crimes.

The next step in the federal criminal justice process requires the probation office to prepare a presentence report for the court.<sup>196</sup> The officer asks to interview Mr. Jones, in the presence of his attorney, as part of the presentence investigation. The attorney tells Mr. Jones to be truthful and cooperative but advises him not to discuss his criminal history—as is his right under the Fifth Amendment. All goes smoothly until sentencing.

At sentencing, the probation officer reveals that she has discovered Mr. Jones's juvenile conviction and therefore wants to amend her report to classify him as an "Armed Career Criminal." As the defense feared, this revelation raises Mr. Jones's sentence from a range of 2.5 to 3 years for being a felon in possession of a firearm, assuming a reduction for acceptance of responsibility, to a sentence in the range of 11.25 to 14 years under the Armed Career Criminal enhancement,<sup>197</sup> again assuming a reduction for acceptance of responsibility. To add insult to injury, the court declines to award Mr. Jones the reduction for acceptance of responsibility and thus Mr. Jones, a nineteen-year-old, faces the next nineteen years in prison. This is the same sentence he would have faced had he challenged the government to a lengthy trial.

The judge reasons that Mr. Jones has not shown remorse and has not behaved in a manner consistent with acceptance of responsibility for his actions. He fought the case at almost every point in the prosecution against him, thereby requiring the marshaling of significant government and court resources. He filed numerous motions requiring detailed hearings, including a motion to suppress during which he challenged the police officer's claim that the search was consensual. In addition, Mr. Jones was not forthcoming with the probation officer regarding his prior criminal history, which required the probation officer to undergo the arduous process of unsealing juvenile

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reduction for doing nothing more. Mark Osler, *Must Have Got Lost: Traditional Sentencing Goals, the False Trail of Uniformity and Process, and the Way Back Home*, 54 S.C. L. Rev. 649, 667-68 (2003).

<sup>196</sup> Fed. R. Crim. P. 32(b); 18 U.S.C. § 3552(a) (2000).

<sup>197</sup> The change is based on a Criminal History Category of IV and a base offense level of thirty-three—the minimum category and offense level for an Armed Career Criminal. See U.S.S.G., *supra* note 13, §§ 4B1.4(c), 4B1.4(b)(3)(B). These scores result in a guideline range of 188 to 235 months (15.6 years to 19.6 years) without acceptance of responsibility and 135 to 168 months (11.25 to 14 years) with acceptance of responsibility. See Sentencing Table, *infra* app.

records. Overall, the court finds that Mr. Jones's conduct and demeanor, expressed largely through his attorney, do not reflect sincere remorse. Thus, though the Model Rules allow a criminal defense attorney significant latitude to advocate zealously on behalf of her client,<sup>198</sup> the potential negative consequences of doing so greatly may outweigh the advantages.

Not only does Mr. Jones's lawyer have much explaining to do to a client who asked for little more than the lowest possible sentence, the attorney also has to reconsider what strategies to pursue in future cases. The lawyer will have to weigh the likelihood that a particular strategy will be perceived as hindering the administration of justice and thus become a negative sentencing factor under an "acceptance of responsibility" provision that rewards remorse and total cooperation with the government.

### *B. Is There Legal Authority for This Form of Judicial Regulation of Lawyers?*

The Jones hypothetical raises several important issues. Perhaps the most important question concerns the legality of the court's conduct. There are numerous ways to conceptualize the legal basis for the hypothetical *Jones* and the real cases like it; this Section will provide an analysis of some of the legal and normative concerns surrounding this form of regulation.

#### *1. Judicial Power*

It is well established that judges have the power to regulate attorney conduct in their courtrooms.<sup>199</sup> Conduct that stems from

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<sup>198</sup> Model Rules, *supra* note 1, R. 3.1. Any one of these "strategies" alone could have been used as grounds to deny Mr. Jones the sentencing reduction. I constructed a hypothetical with several of these issues to illustrate the varying concerns that might arise at each step of the representation.

<sup>199</sup> *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991) (finding that "inherent powers" doctrine allowing courts "to impose silence, respect, and decorum" is "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases" (citations omitted)); *McNabb v. United States*, 318 U.S. 332, 341 (1943) (finding that in exercise of judiciary's supervisory powers over courts, court may formulate rules regarding procedure and evidence that are not specifically required by Constitution or by Congress); *United States v. Kouri-Perez*, 187 F.3d 1, 7 (1st Cir. 1999) ("Article III courts were imbued with an array of 'inherent powers' in performing their case-management function . . . . These implicit powers include the judicial authority to sanction counsel for litigation abuses which threaten to impugn the district court's integrity or disrupt its efficient management of the proceedings." (citations omitted)); see also Amy R. Mashburn, *A Clockwork Orange Approach to Legal Ethics: A Conflicts Perspective on the Regulation of Lawyers by Federal Courts*, 8 Geo. J. Legal Ethics 473, 551 (1995) (noting reality that district courts have inherent power to regulate lawyers).

zealous or overzealous advocacy is not shielded from judicial regulation merely because our ethical rules mandate that lawyers represent their clients zealously. To the extent that some defense strategies affect the efficiency and integrity of the court proceedings, judges try to deter them (as they should—when they can do so without unduly sacrificing the court's primary goal as a justice-seeking institution).

This concession should not, however, be taken to suggest that judges should be permitted to enforce professional and ethical norms for criminal attorneys with impunity or by whatever means they elect. Rather, there must be limits to the ways in which judges can go about regulating lawyer conduct. Yet the broad discretion afforded to the judiciary in the informal regulation of lawyer conduct makes it difficult to regulate the regulators. This task is rendered even more difficult for, say, appellate courts, when judicial regulation is embedded in district courts' substantive legal decisions that purport to have nothing to do with the policing of lawyer conduct. Though judges should be afforded some power in this area, the use of adverse sentencing rulings raises constitutional and policy concerns that arguably outweigh any judicial supervisory authority to manage the courtroom.

Even if some disagree about whether the judiciary is the most appropriate institution to determine the proper quantum of zeal to be used in a particular instance, it would be difficult to rid it of the power to do so. Judges have tremendous power over the functioning of the courtroom. They decide mundane issues, like where lawyers stand and how loudly they speak, as well as more significant issues, like which party ought to prevail on a particular matter.

Judges are . . . the formal leaders of the court and have the formal responsibility for making decisions that affect the flow of cases. They set dates for motions, hearings, trials, and other proceedings. The courtroom's work load is affected by their willingness to grant or deny extensions of deadlines, the time they take to render decisions on motions and in hearings, the procedures they use to empanel juries, the degree to which they cut short attorneys' examination of witnesses, and the amount of time they are willing to work. Judges also govern courtroom conduct. They are responsible for the actual behavior of attorneys, witnesses, spectators, and defendants; for example, they regulate voice level and physical movement, and decide when conversations will be allowed.<sup>200</sup>

Federal judges are thus imbued with the powers to manage the many aspects of the courtroom. Though these powers are not specifi-

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<sup>200</sup> Eisenstein & Jacob, *supra* note 162, at 21 (employing organizational model to examine how interactions between participants of criminal court system affect outcome of cases).

cally enumerated in the Constitution, the Supreme Court repeatedly has held that they are inherent in the exercise of all other judicial powers.<sup>201</sup> Courts have stressed that the judiciary's supervisory authority extends broadly to the regulation of lawyers in and out of the courtroom.<sup>202</sup> Some of these powers implied in Article III have been codified in procedural and disciplinary rules that provide judges with a wide array of sanctions, including criminal and civil contempt.<sup>203</sup> Yet judges have been reluctant to rely on their criminal contempt powers for all but the most severe ethics and disciplinary violations, because criminal contempt requires proving a criminal mens rea beyond a reasonable doubt.<sup>204</sup> Nor have judges been quick to employ Rule 11 to sanction lawyers civilly for less severe breaches of professionalism.<sup>205</sup> Despite the increased availability of disciplinary tools, judges continue to rely on inherent and less formal means to punish and deter lawyer misconduct.

These inherent powers are exercised in ways that are highly particularized and context-specific. Courts often criticize and condemn lawyers in judicial opinions in an attempt both to shame lawyers and to blemish their legal careers.<sup>206</sup> A public reprimand can easily make its way to a lawyer's supervisor, opposing counsel, and clients. More specifically, in the criminal context, Article III judges increasingly regulate prosecutors by ruling against them on issues that affect the outcome of the case.<sup>207</sup>

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<sup>201</sup> *United States v. Hudson*, 11 U.S. (7 Cranch) 32, 34 (1812); see also *Chambers*, 501 U.S. at 43-44 (specifying as inherent powers control over courtroom decorum, attorney admission and discipline, and ability to punish for contempt); *Link v. Wabash R.R. Co.* 370 U.S. 626, 630-31 (1962).

<sup>202</sup> *Chambers*, 501 U.S. at 43 (stating that federal district court has inherent power to "control admission to its bar and to discipline attorneys who appear before it"); *Kouri-Perez*, 187 F.3d at 7 ("These implicit powers include the judicial authority to sanction counsel for litigation abuses which threaten to impugn the district court's integrity or disrupt its efficient management of the proceedings.").

<sup>203</sup> *Kouri-Perez*, 187 F.3d at 8 (discussing criminal contempt and noncontempt sanctions such as Rule 11 of Federal Rules of Civil Procedure).

<sup>204</sup> *Id.* at 8 (citing *Chambers*, 501 U.S. at 47).

<sup>205</sup> *Brown*, supra note 21, at 1560.

<sup>206</sup> Lyn M. Morton, *Seeking the Elusive Remedy for Prosecutorial Misconduct: Suppression, Dismissal, or Discipline?*, 7 *Geo. J. Legal Ethics* 1083, 1083-84 (1994) (offering examples of judicial reprimand of overly aggressive prosecutors in legal opinions).

<sup>207</sup> *Greene & Zacharias*, supra note 17, at 401-02 ("A judge who wishes to make an example of particular prosecutorial . . . misconduct may dismiss a case, exclude evidence, instruct the jury in a way benefiting the defense, or make other trial and pretrial rulings that respond to the prosecutorial conduct. By reacting to prosecutorial behavior, the judge sets a standard—whether or not the reaction ever is memorialized in a formal opinion that serves as precedent. The judge, in effect, tells this prosecutor and others who learn of the judge's courtroom practice that the particular prosecutorial conduct will not be tolerated.").

In a sense, it is misleading to call such methods of regulation informal. As noted above, federal judges trace their inherent power to police lawyers to the United States Constitution. Moreover, although this form of judicial sanction is not based on doctrinal ethics laws or disciplinary rules, it embeds itself in the substantive legal area in which the misconduct occurred and thus becomes part of the common law. For example, it is widely accepted that a judge can determine the substantive outcome of a case by granting a mistrial in response to improper attorney statements under common law evidence rules, by excluding illegally obtained evidence in the criminal law context, or by limiting a witness's testimony in response to discovery violations as an equitable common law remedy for improper attorney conduct in both the civil and criminal contexts.

In addition to judges' broad power to manage their courtrooms and regulate attorneys, they historically have enjoyed broad discretion in the sentencing arena. Since the colonial period, sentencing judges have exercised great latitude in determining appropriate sentences within a defined legal range and in determining the procedural and evidentiary rules to be applied in sentencing.<sup>208</sup> For instance, the evidentiary standards for sentencing are far less stringent than those used at trial.<sup>209</sup> In order to effectuate individualized sentencing, courts have the discretion to consider factors beyond the nature of the offense, such as the character of the offender, the circumstances of the offense, and the propensity to commit crimes in the future.<sup>210</sup> The breadth of judicial liberty in the sentencing realm has been statutorily reinforced by Congress's decree that "[n]o limitation shall be placed on the information concerning the background, character, and conduct of a person convicted of an offense which a court of the United States may receive and consider for the purpose of imposing an appropriate sentence."<sup>211</sup>

Because judges can take into account just about any factor that potentially serves to individualize a defendant's sentence, and because they have broad authority to manage the courts, it is not surprising that the convergence of these two powers would create an awesome mechanism with which to regulate attorney conduct. Moreover, both of these areas of discretion—judicial management of the courts and sentencing—are ones in which appellate courts are reluctant to inter-

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<sup>208</sup> *Williams v. New York*, 337 U.S. 241, 246 (1949) (citations omitted).

<sup>209</sup> *Id.* (citing *Snyder v. Massachusetts*, 291 U.S. 97, 107, 128-29 (1934), overruled in part on other grounds by *Malloy v. Hogan*, 378 U.S. 1, 3 (1964)).

<sup>210</sup> *Pennsylvania ex rel. Sullivan v. Ashe*, 302 U.S. 51, 55 (1937); *Burns v. United States*, 287 U.S. 216, 220 (1932).

<sup>211</sup> 18 U.S.C. § 3661 (2000).



fere and in which lower courts are therefore unlikely to suffer reversal.

The convergence of the substantive area of sentencing and the procedural area of sanctioning attorney conduct in the courtroom is an interesting, but not unique, union. The exclusionary rule in criminal law is an excellent example of a sanction that both springs from criminal constitutional law and shapes it.<sup>212</sup> Understanding the exclusionary rule as a model of judicial regulation illuminates how judges use another area of criminal law to sanction parties in a different context.

In the next two Sections, I take a closer look at the exclusionary rule as a model of judicial sanctioning in the context of criminal prosecutions and then consider the use of federal sentencing law as a means for regulation in the context of criminal defense.

## 2. *Finding Legal Precedent: The Exclusionary Rule as an Instructive Precedential Regulatory Model*

The amount of scholarship that is dedicated to criticizing the exclusionary rule is far too extensive to document comprehensively here. Suffice it to say that the doctrine has withstood criticism on fairness grounds (the exclusionary rule provides an unwarranted windfall to criminals),<sup>213</sup> on ethical grounds (it encourages police perjury and judicial hypocrisy),<sup>214</sup> on checks and balances grounds (it promotes

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<sup>212</sup> See generally John Barker Waite, Comment, Evidence—Police Regulation by Rules of Evidence, 42 Mich. L. Rev. 679 (1944) (examining exclusionary rule as convergence of substantive evidence rules and procedural sanctions).

<sup>213</sup> See, e.g., Myron W. Orfield, Jr., Deterrence, Perjury and the Heater Factor: An Exclusionary Rule in the Chicago Criminal Courts, 63 U. Colo. L. Rev. 75, 77 (1992); Richard A. Posner, Excessive Sanctions for Governmental Misconduct in Criminal Cases, 57 Wash. L. Rev. 635, 638 (1982). For a contemporary example of public outcry following the application of the exclusionary rule, see *United States v. Bayless*, 913 F. Supp. 232 (S.D.N.Y. 1996), vacated, 921 F. Supp. 211 (S.D.N.Y. 1996). Judge Harold Baer, Jr. ruled that eighty pounds of cocaine and heroin were seized unlawfully from the trunk of the defendant's car and subsequently were inadmissible because the police did not have reasonable suspicion to stop the defendant or to conduct the warrantless search. Then—New York City Mayor Rudolph Giuliani sounded the general public disbelief at this ruling by publicly calling the suppression “very, very disturbing.” Clifford Krauss, Giuliani and Bratton Assail U.S. Judge's Ruling in Drug Case, N.Y. Times, Jan. 27, 1996, § 1, at 25. The Clinton Administration also put tremendous pressure on Judge Baer to reconsider, as White House Press Secretary Michael D. McCurry claimed that President Clinton's decision as to whether he would ask for the judge's resignation turned upon reconsideration of the motion. Alison Mitchell, Clinton Pressing Judge to Relent, N.Y. Times, Mar. 22, 1996, at A1.

<sup>214</sup> Donald Dripps, The Case for the Contingent Exclusionary Rule, 38 Am. Crim. L. Rev. 1 (2001) (citing Office of Legal Policy, U.S. Dep't of Justice, Report to the Attorney General on the Search and Seizure Exclusionary Rule, Truth in Criminal Justice Rep. No. 2 (1986), reprinted in 22 U. Mich. J.L. Reform 573, 613 (1989)); see also Jerome H. Skolnick,

judicial overreaching in substantive criminal law),<sup>215</sup> on policy grounds (it fails to deter future illegal conduct by law enforcement and prosecutors),<sup>216</sup> on legal grounds (it has no basis in the Constitution),<sup>217</sup> and on systemic grounds (it generates disrespect for the law and the administration of justice).<sup>218</sup> Despite the compelling arguments against the exclusionary rule, federal courts consider it a crucial tool in controlling unethical and unprofessional behavior by government agents.<sup>219</sup> By setting clear limits for police, the rule in turn limits prosecutorial use of some illegally or unethically obtained evidence. This is especially useful in federal court, where prosecutors continue

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Justice Without Trial 216 (1967) (describing police officer perjury to prevent exclusion of evidence).

<sup>215</sup> See Stuntz, *supra* note 12 (arguing that judicial regulations that strengthen defendant's procedural rights have led legislatures to toughen substantive criminal laws as countermeasure).

<sup>216</sup> See Wayne R. LaFare, *Improving Police Reform Through the Exclusionary Rule—Part I: Current Police and Local Court Practices*, 30 Mo. L. Rev. 391 (1965) (arguing that rule is ineffective at improving police performance); Dallin H. Oaks, *Studying the Exclusionary Rule in Search and Seizure*, 37 U. Chi. L. Rev. 665, 667-68 (1970) (providing early and seminal discussion on lack of empirical evidence supporting deterrent effect of exclusion); Richard A. Posner, *Rethinking the Fourth Amendment*, 1981 Sup. Ct. Rev. 49, 54 (questioning deterrent effect of rule); see also *Stone v. Powell*, 428 U.S. 465, 492-93 (1976) (noting absence of empirical evidence that exclusion has effect of deterring constitutional violations by law enforcement officers and questioning premise that additional deterrence will follow from allowing federal habeas corpus review of search and seizure claims); *United States v. Janis*, 428 U.S. 433, 454 (1976) (finding deterrent effect of rule insufficient to justify excluding evidence unlawfully seized by state law enforcement officers from federal *civil* trial); *United States v. Calandra*, 414 U.S. 338, 348 n.5 (1974) (discussing lack of reliable evidence regarding rule's deterrent effects); *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 416 (1971) (Burger, C.J., dissenting) (same); *Elkins v. United States*, 364 U.S. 206, 217 (1960) (same); cf. Critique, *On the Limitations of Empirical Evaluations of the Exclusionary Rule: A Critique of the Spiotto Research and United States v. Calandra*, 69 Nw. U. L. Rev. 740 (1974).

<sup>217</sup> Akhil Reed Amar, *Fourth Amendment First Principles*, 107 Harv. L. Rev. 757, 758-59 (1994) (arguing that exclusionary rule is not constitutionally based); Henry J. Friendly, *The Bill of Rights as a Code of Criminal Procedure*, 53 Cal. L. Rev. 929, 951-53 (1965) (same); cf. Tracey Maclin, *When the Cure for the Fourth Amendment is Worse than the Disease*, 68 S. Cal. L. Rev. 1, 42-56 (1994) (discussing constitutional and policy justifications for exclusionary rule); Carol S. Steiker, *Second Thoughts About First Principles*, 107 Harv. L. Rev. 820 (1994) (questioning use of originalism to challenge exclusionary rule).

<sup>218</sup> *Stone*, 428 U.S. at 491.

<sup>219</sup> See *Colorado v. Connelly*, 479 U.S. 157, 169 (1986); *United States v. Leon*, 468 U.S. 897, 906-13 (1984). See generally Maclin, *supra* note 217, at 45 (presenting reasons in support of rule such as controlling police discretion and protecting public from baseless intrusions); Orfield, *supra* note 213, at 124-27 (discussing research findings suggesting widespread support for exclusionary rule among judges, lawyers, and law enforcement); William J. Stuntz, *The Virtues and Vices of the Exclusionary Rule*, 20 Harv. J.L. & Pub. Pol'y 443 (1997) (discussing overall benefits of exclusionary rule in light of its drawbacks); Comment, *The Exclusionary Rule and Deterrence: An Empirical Study of Chicago Narcotics Officers*, 54 U. Chi. L. Rev. 1016 (1987) [hereinafter *Exclusionary Rule*] (discussing effectiveness of rule among narcotics officers).

to question whether they are subject to the same state and federal ethics rules as other lawyers.<sup>220</sup>

What makes the exclusionary rule a noteworthy model in shaping our thinking about judicial policing practices is that it finds its authority in the broad and ill-defined power of the judiciary to manage the integrity of legal proceedings and deter unlawful conduct. The Supreme Court has responded to challenges regarding the basis of the judiciary's authority to apply the exclusionary rule by explaining that it is not a constitutionally or statutorily mandated rule.<sup>221</sup> The Court has upheld the rule while recognizing it to be a wholly "judicially created remedy" designed to deter violations of the Fourth Amendment.<sup>222</sup>

Trials courts engage in a cost-benefit analysis between deterrence of illegal law enforcement behavior (thereby safeguarding the Fourth Amendment) and society's faith in the criminal justice system. This analysis is similar to determining the balance between zealous advocacy (along with a defendant's concomitant Sixth Amendment right to effective representation and a fair trial) and the expeditious administration of justice.

Also similar is the manner in which courts have placed the incentive to engage in judicially-preferred conduct in the area of substantive law that lies at the heart of each attorney's practice.<sup>223</sup> Establishing the necessary evidence to prove a case against a criminal defendant is the linchpin of a prosecutor's task. The exclusionary rule impedes the government's attorney by limiting the evidence at her disposal to meet the requisite burden of proof. Similarly, the bulk of a defense attorney's job is related to sentencing. Almost ninety percent of federal criminal cases end in convictions<sup>224</sup> and therefore require sentencing under the federal guidelines. Moreover, among those cases that end in convictions, approximately ninety-five percent are resolved by pleas with approximately five percent resolved by trials.<sup>225</sup>

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<sup>220</sup> See Green & Zacharias, *supra* note 17, at 401.

<sup>221</sup> See *Pa. Bd. of Prob. & Parole v. Scott*, 524 U.S. 357, 363 (1998); *Stone*, 428 U.S. at 486.

<sup>222</sup> *United States v. Calandra*, 414 U.S. 338, 348 (1974).

<sup>223</sup> Interestingly, not only do judges use substantive sentencing laws under the guidelines as a tool in creating equitable sanctions and remedies for attorney misbehavior, but such sanctions play a role in reinforcing substantive sentencing doctrines. The exclusionary rule serves a similar dual function.

<sup>224</sup> Bureau of Justice Statistics, U.S. Dep't of Justice, *supra* note 16, tbl.5.16.

<sup>225</sup> Office of Policy Analysis, U.S. Sentencing Comm'n, *Distribution of Sentenced Guideline Offenders by Select Primary Offense Category*, 2000 Datafile, OPAFY00, tbl.2 (2000), available at <http://www.ussc.gov/judpack/2000/oke00.pdf> (showing that in 2000, 95.5% of convictions were obtained with pleas and 4.5% were obtained after trial); Office of Policy Analysis, U.S. Sentencing Comm'n, 1999 Datafile, OPAFY99, tbl.10 (1999), avail-

In the vast majority of cases in which no trial takes place, sentencing concerns will take up a much larger proportion of a defense lawyer's efforts.

Having found unfavorable rulings to be a moderately effective tool in controlling government conduct, federal judges understandably may be tempted to use similar means in dealing with defense conduct. But logic alone cannot explain the reverse application of the types of practices underlying the exclusionary rule. Federal judges surely appreciate that the use of adverse rulings against a criminal defendant's interests raises constitutional concerns that are absent in the traditional exclusionary rule context. After all, the parties represented by the prosecution in a criminal case, the government and arguably the victim, have no constitutional right to a fair trial. The exclusionary rule, therefore, violates no constitutionally guaranteed rights but presumably safeguards a defendant's constitutional rights, whereas applying a similar regulatory mechanism against the defendant's agents would infringe on the defendant's constitutional rights.

At first blush this looks a lot like a case of judicial lawlessness. However, my premise is not that judges act lawlessly—though arguably some do<sup>226</sup>—in controlling their courtrooms. Most judges attempt to follow the law and consequently seek to justify their decisions in legal doctrine. Accordingly, in order for judges comfortably to issue rulings that prejudice a defendant's case, they are likely to justify (to themselves and others) those rulings as consistent with established doctrines in that area of law. Finding a legal doctrine that would permit a court to penalize the defendant for the missteps of her agent is not as difficult as one critical of the practice might hope. Though technical and seemingly rigid, the Federal Sentencing Guidelines maintain sufficient opportunities for judicial manipulation. The "acceptance of responsibility" provision in particular is a fairly easily manipulable legal doctrine that has permitted courts to penalize defendants for the missteps of their legal agents.

Additionally, the "acceptance of responsibility" provision has proven an excellent locus for the convergence of substantive sentencing law and judicial regulation of lawyer conduct because it is highly subjective, involves a noncomprehensive multifactor test, requires a great deal of judicial discretion, must be determined in

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able at <http://www.ussc.gov/annrpt/1999/table10.pdf> (showing that in 1999, 94.6% of convictions were obtained with pleas and 5.4% were obtained after trial).

<sup>226</sup> See Ward Farnsworth, "To Do a Great Right, Do a Little Wrong": A User's Guide to Judicial Lawlessness, 86 Minn. L. Rev. 227, 228 (2001) (arguing that judges engage in extra-legal decisionmaking by basing their rulings on pragmatic considerations rather than legal doctrine).

every sentencing on a case-by-case basis, and is rarely reversed on appeal.

### 3. *Constitutional Concerns*

Challengers to the legality of this means of regulating lawyers inevitably will raise constitutional questions. Are the constitutional rights of a criminal defendant violated when she receives a higher sentence than a similarly situated defendant simply because her attorney has acted in a way that a judge would like to deter or punish? Such a defendant might allege that her Fifth<sup>227</sup> and Sixth<sup>228</sup> Amendment rights have been violated. These allegations are likely to fall on deaf ears given the appellate courts' jurisprudence regarding such issues.

Two Fifth Amendment claims are possible here. First, a defendant could argue that being punished for conduct not her own (and conduct over which she had little control) results in a deprivation of liberty without due process of law. A second argument would be that when a defendant is penalized for her failure to cooperate with the government or to provide information, this penalty unfairly restricts her right against self-incrimination.

Courts' responses to the due process concern reveal the ingenuity of using sentencing laws to regulate courtroom conduct of defense lawyers and their clients. Potential due process claims are weakened by the fact that defendants and their attorneys have statutory notice that the sorts of information that judges can use to determine a defendant's character, background, and propensities for sentencing purposes are unlimited.<sup>229</sup> The Supreme Court has stated expressly that a "judge may appropriately conduct an inquiry broad in scope, largely unlimited either as to the kind of information he may consider, or the source from which it may come."<sup>230</sup> Rarely, therefore, will appellate courts sustain a due process challenge based on the nature of the information considered by the court,<sup>231</sup> especially if the court justifies

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<sup>227</sup> The Fifth Amendment provides, in relevant part, "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law." U.S. Const. amend. V.

<sup>228</sup> Under the Sixth Amendment, "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. Const. amend. VI.

<sup>229</sup> 18 U.S.C. § 3661 (2000).

<sup>230</sup> *United States v. Grayson*, 438 U.S. 41, 50 (1978) (quoting *United States v. Tucker*, 404 U.S. 443, 446 (1972)); see also *Williams v. New York*, 337 U.S. 241, 246 (1949).

<sup>231</sup> *United States v. Rightsell*, 40 Fed. Appx. 360 (9th Cir. 2002) (holding that due process is not violated by court's decision to consider undisclosed probation recommendation); *United States v. Zlatogur*, 271 F.3d 1025, 1028-29 (11th Cir. 2001) (finding no due process violation when court considers hearsay in sentencing, where it is shown by preponderance of evidence that defendant's misconduct brought about unavailability of witness); *United States v. Abreu*, 962 F.2d 1425, 1437 (10th Cir. 1992) (finding no violation when

its decision on a traditional sentencing factor such as remorse.<sup>232</sup> The principal due process limitations imposed on a sentencing court apply traditionally to extreme circumstances such as reliance on gross misinformation<sup>233</sup> or the imposition of a sentence above the statutory maximum.<sup>234</sup>

The second Fifth Amendment claim—that the denial of a sentence reduction for the refusal to cooperate with and assist the government infringes on the right against self-incrimination—is also not promising in light of Supreme Court precedent. In *United States v. Roberts*,<sup>235</sup> the Court held that the federal district court properly considered the defendant's failure to assist the government in investigating other suspects as a legitimate factor in sentencing.<sup>236</sup> Interestingly, the Court noted that the defendant's failure to assist is relevant to the defendant's prospects for rehabilitation because it raises the inference that he is unwilling "to shape up and change his behavior."<sup>237</sup> In addition, *Roberts* suggests that reliance on the right to silence may be inappropriate absent an assertion that the cooperation sought actually would incriminate the defendant.<sup>238</sup> Presumably a defendant making a Fifth Amendment claim in this context would have to show that the information would implicate her personally in

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court considers conduct not charged in indictment); *Serapo v. United States*, 595 F.2d 3, 4 (9th Cir. 1979) (no violation when judge draws on his or her knowledge of defendant and activities).

<sup>232</sup> See *supra* note 9 and accompanying text.

<sup>233</sup> See *Dorszynski v. United States*, 418 U.S. 424, 431 & n.7 (1974) ("We begin with the general proposition that once . . . a sentence falls within the limitations set forth in the statute under which it is imposed, appellate review is at an end."). The use of misinformation by courts in sentencing is generally reversible only if the misinformation is of "constitutional magnitude." See *United States v. Tucker*, 404 U.S. 443, 447 (1972); *Townsend v. Burke*, 334 U.S. 736, 741 (1948). For example, in *Tucker* and *Townsend*, the defendants challenged their sentences on the grounds that the sentences were based on prior convictions that had been unconstitutionally obtained. *Tucker*, 404 U.S. at 592 (explaining that sentences in both *Tucker* and *Townsend* were based on constitutionally infirm prior convictions).

<sup>234</sup> See *Smith v. Wainwright*, 664 F.2d 1194, 1196 (11th Cir. 1981) (stating that severity of sentence within statutory maximum will not be reviewed); *United States v. Cavazos*, 530 F.2d 4, 5 (5th Cir. 1976) ("We . . . do not review the severity of a sentence imposed within the statutory limits."); *United States v. Rauhoff*, 525 F.2d 1170, 1179 (7th Cir. 1975) ("As a general rule, so long as a sentence is within the statutory maximum, the court will not exercise its supervisory powers to inquire into the propriety of a sentence." (citing *Hill v. United States*, 368 U.S. 424, 430 (1962))).

<sup>235</sup> 445 U.S. 552 (1980).

<sup>236</sup> *Id.* at 552, 558-59.

<sup>237</sup> *Id.* at 557 (citation omitted).

<sup>238</sup> *Id.* at 562 (Brennan, J., concurring) ("[B]ecause the Government questioning to which he failed to respond was not directed at incriminating him, petitioner may not stand upon a Fifth Amendment privilege that he never invoked at the time of his silence.").

further criminal activity. This is a nearly impossible showing to make without actually divulging the potentially inculpatory information.

The Sixth Amendment claim is in some respects similar to the Fifth Amendment claim against self-incrimination. Both allege, applying the “unconstitutional conditions” doctrine,<sup>239</sup> that the defendant is unjustly penalized for the exercise of a constitutional right. In the Sixth Amendment context, a defendant could contend that the denial of the “acceptance of responsibility” sentence reduction for certain forms of attorney conduct—frivolous or not—improperly limits her Sixth Amendment right to counsel. The threat of a higher sentence arguably improperly interferes with attorney decisions and chills zealous advocacy. Courts have heard variations of such constitutional claims when reviewing cases involving the “acceptance of responsibility” section and consistently have answered them in the negative.<sup>240</sup>

Courts rejecting such Sixth Amendment claims have reasoned that the “acceptance of responsibility” sentencing reduction is a benefit rather than a penalty.<sup>241</sup> While it would be improper to penalize the exercise of a constitutional right, it is wholly permissible to reward the voluntary waiver of a constitutional right.<sup>242</sup> Appellate courts tend to look at section 3E1.1 as a special leniency provision for defendants who have demonstrated remorse, even if it requires the waiver

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<sup>239</sup> The unconstitutional conditions doctrine recognizes that the imposition of a penalty for exercising a constitutional right creates an unconstitutional condition. See Anne L. Showalter, Penalties, Benefits, and Baselines: The Constitutional Controversy Surrounding the Federal Sentencing Guidelines Acceptance of Responsibility Provision, 3 Va. J. Soc. Pol’y & L. 147, 156-57 (1995) (citing *Sherbert v. Verner*, 374 U.S. 398, 404 n.6 (1963) and documenting history of unconstitutional conditions doctrine).

<sup>240</sup> See *United States v. Saunders*, 973 F.2d 1354, 1362 (7th Cir. 1992); *United States v. Cordell*, 924 F.2d 614, 619 (6th Cir. 1991); *United States v. Ross*, 920 F.2d 1530, 1537 (10th Cir. 1990); *United States v. Parker*, 903 F.2d 91, 105 (2d Cir. 1990); *United States v. Henry*, 883 F.2d 1010, 1011-12 (11th Cir. 1989); *United States v. Reed*, 882 F.2d 147, 150 (5th Cir. 1989); *United States v. Young*, 875 F.2d 1357, 1360 (8th Cir. 1989).

<sup>241</sup> See *United States v. Portillo-Valenzuela*, 20 F.3d 393, 395 (10th Cir. 1994) (“[D]enying the reduction for acceptance of responsibility is not a penalty for exercising any rights . . . [but] simply a reward for those who take full responsibility.”); *United States v. Trujillo*, 906 F.2d 1456, 1460 (10th Cir. 1990) (“[T]he denial of a downward adjustment under § 3E1.1 does not constitute a penalty or an enhancement of sentence. There is a difference between increasing the severity of a sentence for failure to demonstrate remorse and refusing to grant a reduction from the prescribed base offense level.”).

<sup>242</sup> See *United States v. Brown*, 761 F.2d 1272, 1278 (9th Cir. 1985) (finding no constitutional violation merely because defendant failed to get leniency for exercise of Fifth and Sixth Amendment rights); *Smith v. Wainwright*, 664 F.2d 1194, 1196-97 (11th Cir. 1981) (holding that it was not unconstitutional to deny defendant, because he elected to go to trial, reduction reserved for those who show remorse).

of certain rights.<sup>243</sup> The common view among the circuits is that “although [section] 3E1.1 rewards a defendant who demonstrates contrition . . . , it does not impose any new penalty on a defendant” who insists on the exercise of her constitutional or other entitlements.<sup>244</sup>

As one court put it in an early case challenging the constitutionality of the acceptance of responsibility provision, “the provision may well affect how criminal defendants choose to exercise their constitutional rights . . . [b]ut not every burden on the exercise of a constitutional right, and not every encouragement to waive such a right is invalid.”<sup>245</sup> Having satisfied themselves that the sentencing reduction is not an entitlement, courts have little difficulty concluding that denial based on sound judicial discretion is not a deprivation of constitutional importance.

This distinction between a benefit and a penalty surely must seem meaningless to a criminal defendant who suffers the imposition of a higher sentence even after she has admitted guilt and waived the right to a trial. One federal judge said of the distinction, “[T]o discern a meaningful difference between [a penalty and a denial of a benefit] can only induce vertigo.”<sup>246</sup>

The claims raised under the Sixth Amendment right to counsel in the context of acceptance of responsibility are, moreover, analogous to those that have been rejected by the courts under the Sixth Amendment right to trial in the context of plea bargaining. A number of defendants have argued that plea bargaining infringes on the Sixth Amendment right to trial because defendants who plead guilty receive lower sentences than those who choose to exercise their trial rights. The Supreme Court firmly and consistently has rejected these constitutional claims in upholding plea bargains.<sup>247</sup> Courts have argued in the plea bargaining context, as they have in the case of sentencing reductions for defendants who accept responsibility, that although “confronting a defendant with the risk of more severe punishment clearly may have a discouraging effect on the defendant’s assertion of

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<sup>243</sup> See, e.g., *United States v. McQuay*, 7 F.3d 800, 802 (8th Cir. 1993); *United States v. Gordon*, 4 F.3d 1567, 1573 (10th Cir. 1993); *United States v. Wagner*, 996 F.2d 906, 915 (7th Cir. 1993); *United States v. Frazier*, 971 F.2d 1076, 1080 (4th Cir. 1992); *United States v. Bryser*, 954 F.2d 79, 89 (2d Cir. 1992).

<sup>244</sup> *United States v. Larkin*, 171 F.3d 556, 559 n.4 (7th Cir. 1999) (citing *Ebbole v. United States*, 8 F.3d 530, 535-37 (7th Cir. 1993)).

<sup>245</sup> *Henry*, 883 F.2d at 1011 (quoting *Corbitt v. New Jersey*, 439 U.S. 212, 218 (1978)).

<sup>246</sup> *United States v. Jones*, 997 F.2d 1475, 1483 (D.C. Cir. 1993) (Mikva, C.J., dissenting).

<sup>247</sup> *Corbitt*, 439 U.S. at 219.



his trial rights, the imposition of these difficult choices” is permissible and constitutionally legitimate.<sup>248</sup>

The predictable failure of Fifth and Sixth Amendment claims challenging the use of remorse and efficiency to justify higher sentences for frivolous or uncooperative defense conduct suggests that lower courts will not be reversed when they employ this means of regulating defense attorneys. To the extent that judges equate remorse and acceptance of responsibility with waiving the right to trial or other privileges, they will continue to consider these factors in sentencing. And as long as judges find zealous attorney conduct to be a reliable indicator of the defendant’s remorse, the denial of the acceptance of responsibility adjustment will continue to evade constitutional challenge on appeal. Despite the anticipated failure of legal challenges based either on limits on the authority of the courts or a defendant’s constitutional rights, there remain significant policy implications that militate strongly against this means of judicial regulation. I address these consequences in the next Part of this Article.

#### IV

#### THE JUSTIFICATIONS AND CONSEQUENCES OF REGULATING ZEAL THROUGH SENTENCING

Regulating zeal is a difficult business. Few would disagree that the criminal justice system ought to discourage frivolity, needless delay, the subornation of perjury, or other improper conduct that might stem from overzealousness. Nothing in this Article should be construed as defending such forms of advocacy. Once the decision is made to regulate zeal, however, two important normative questions arise that help to capture the complexities. First, where should the line be drawn between appropriately zealous conduct and improper overzealous representation? Second, how can zealous advocacy be regulated without either sacrificing good lawyering and effective representation or creating other negative collateral effects? That criminal defense lawyers long have been exempt from certain ethical obligations is recognition of the difficulty in striking the right balance between deterring unethical behavior and encouraging quality representation. The propriety of such exemptions, debated elsewhere by

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<sup>248</sup> *Bordenkircher v. Hayes*, 434 U.S. 357, 361; see also *Corbitt*, 439 U.S. at 218; *United States v. Brown*, 761 F.2d 1272, 1278 (9th Cir. 1985); *Smith v. Wainwright*, 664 F.2d 1194, 1196 (11th Cir. 1981); Robert E. Scott & William J. Stuntz, *Plea Bargaining as Contract*, 101 *Yale L.J.* 1909, 1965-66 (1992) (discussing *Bordenkircher* and potentially coercive plea differential).

others,<sup>249</sup> is beyond the scope of this Article. Rather, taking as my starting point that judges do in fact seek to regulate defense lawyer advocacy, I argue that the use of adverse legal rulings against defendants is an unjustifiable, ineffective, and undesirable means of regulation.

My arguments proceed in the following two Sections. In the first Section, I examine the possible justifications for regulating the conduct of defense lawyers through the use of adverse sentencing rulings against their clients. In addition to being consistent with precedent in the exclusionary rule context as discussed above, this method of regulation is consistent with certain long-standing sentencing principles of accounting for remorse in punishment and has seemed to judges a more efficient means of regulating zeal than some possible alternatives. In the following Section, I consider the significant, yet largely unintended, countervailing negative consequences of regulating lawyers through adverse sentencing. I discuss in some detail the unpredictability of sanctions, the effects on the attorney-client relationship, the increase in sentencing disparity, and the chilling of appropriate advocacy. I conclude that, on balance, the demerits of this form of regulation far outweigh its possible benefits.

#### *A. Weighing the Justifications of Regulating Lawyers Through Adverse Sentences*

Those seeking to justify using the “acceptance of responsibility” sentencing provision to regulate attorney behavior might do so on several important grounds. First, the swift and efficient resolution of cases is a worthy goal that will lead to the significant improvement of a criminal justice system that already is bogged down with needless bureaucracy. Frivolity, delay, and hindrance of the administration of justice are not without heavy costs. Second, the expression of remorse is and traditionally has been an important sentencing factor.<sup>250</sup> Retributivists consider remorse in order to assess blameworthiness and culpability,<sup>251</sup> while utilitarians value it as an indicator of either

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<sup>249</sup> See Green, *Zealous Representation Bound*, supra note 49, at 688-702 (explaining that advising unrepresented and damaging witness to assert Fifth Amendment right to silence can be viewed either as zealous and required by ethics rules or as criminally prohibited as obstruction of justice); Luban, *Lawyers and Justice*, supra note 48, at 58-66; Rhode, supra note 108, at 605.

<sup>250</sup> See supra note 9.

<sup>251</sup> Russell L. Christopher, *Deterring Retributivism: The Injustice of “Just” Punishment*, 96 Nw. U. L. Rev. 843, 845 n.1 (2002) (discussing importance of assessing blameworthiness as central tenet of retributive justifications for punishment and quoting John Rawls, *Two Concepts of Rules*, 64 Phil. Rev. 3, 4-5 (1955)).

the possibility of rehabilitation or the need for incapacitation.<sup>252</sup> Because remorse is a highly fact-intensive determination, it is appropriate for sentencing courts to have broad discretion under which they can consider factors ranging from a defendant's demeanor and body language to the manner in which she has defended herself. Third, defenders of this means of regulation would argue for less squeamishness about what I call the "agency problem"<sup>253</sup>—the concern that defendants are punished unfairly for the conduct of agents over which they exercise less control than is assumed in the typical principal-agent relationship. Defenders of the practice might point out that defendants are made to suffer the consequences of their lawyers' decisions, which may be suboptimal for a variety of reasons that range from skill to poor strategic choices. The law should interfere neither with the benefits of services rendered by a defendant's lawyer nor with the harms of such services, but should instead remain agnostic as long as the harms and benefits remain within constitutional limits. Finally, defenders could argue that judges are better situated than state and local bars or disciplinary committees to police improper attorney behavior and can do so at relatively low cost.

### 1. *The Costs of Zeal*

Consider first the contention that inappropriate or overzealous advocacy among criminal defense lawyers imposes high costs on the criminal justice system that must be limited. It may be that the costs, when they occur, are high, but the assumption that this is a widespread problem seems unfounded. The consensus among criminal law and ethics scholars has consistently been that underzealous representation among criminal defense lawyers is a far greater concern than overzealous representation.<sup>254</sup> The need for a radical solution, if any, to the problem of aggressive and inefficient lawyering strategies is seemingly overstated.

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<sup>252</sup> Id. at 848 (explaining importance of deterrence, incapacitation, and rehabilitation to utilitarian or consequentialist theories of punishment).

<sup>253</sup> See *infra* Part IV.B.2.

<sup>254</sup> Donald A. Dripps, *Ineffective Assistance of Counsel: The Case for an Ex Ante Parity Standard*, 88 J. Crim. L. & Criminology 242, 246-47 (1997) (cataloguing widespread state of crisis in quality of criminal defense bar and discussing various commissions, studies, and reports with similar findings); Luban, *supra* note 40, at 1762 (stating that "no defense at all" rather than aggressive defense is norm among most criminal defense lawyers who represent low-income or indigent defendants); Simon, Reply, *supra* note 40, at 1771 (recognizing claims by defense lawyers that insufficiently, rather than overly, aggressive defense, is real problem).

## 2. *Assessing and Rewarding Remorse*

That remorse is an important variable in individualized sentencing will find no argument here. The question is whether an aggressive defense should be allowed to serve as an indicator of remorselessness. The notion that a defendant lacks contrition when she challenges the government's evidence, alleges violations of her rights, or disagrees with her sentence is baseless. There is an odd logic to denying the reduction to a defendant whose attorney is perceived by the court as overzealous. It assumes that because a truly remorseful person exhibits some degree of self-reproach or even self-condemnation, she would accept whatever punishment is coming to her rather than seek to protect herself with the machinations of a fast-talking lawyer. The sentencing judge in *Purchess* suggested as much when he insisted that the defendant "showed no remorse and was simply trying to get a lower sentence,"<sup>255</sup> as though genuine remorse and the desire for a lower sentence were inherently incompatible sentiments. The court held *Purchess* accountable for the "lawyer talk"<sup>256</sup> and determined that the degree of zeal demonstrated by his lawyer signaled his lack of remorse.

Moreover, the idea that true remorse can be elicited with an incentive or rewarded with a lower sentence is a dubious one. Feelings of remorse either exist or they do not. Like all emotions, remorse is messy and unpredictable. True remorse cannot be scheduled to appear precisely at the time of the crime or on the sentencing date. Surely some defendants experience contrition immediately while others experience it years after the offending conduct. The irony of rewarding remorse is that the greater the reward, the greater the likelihood of malingering or falsification. Some of the difficulties in assessing remorse have led some to call for the elimination of the remorse requirement from the acceptance of responsibility provision.<sup>257</sup>

Finally, some of the problems with using remorse as a sentencing factor are epistemological. Who can tell what is in another's heart or mind? If courts continue to rely on remorse as a basis for sentencing, as they likely will, it is clear that they will need to find more reliable

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<sup>255</sup> United States v. *Purchess*, 107 F.3d 1261, 1265 (7th Cir. 1997).

<sup>256</sup> *Id.* at 1266.

<sup>257</sup> See, e.g., O'Hear, *supra* note 91, at 1560 (1997) (urging that considerations of remorse be eliminated from or minimized in application of acceptance of responsibility guideline); Ellen M. Bryant, Section 3E1.1 of the Federal Sentencing Guidelines: Bargaining with the Guilty, 44 Cath. U. L. Rev. 1269, 1296-97 (1995) (proposing to amend "acceptance of responsibility" provision to include automatic reduction for guilty pleas without consideration of factors like remorse).

proxies for remorse. It is unreasonable to assume that the attempts of a lawyer to advocate zealously on behalf of her client are an indicator of the client's views regarding her offense. While it may be reasonable to assume that a defendant's choice to plead guilty is her own, much of what happens before and after the plea—the conduct for which she could lose the “acceptance of responsibility” reduction—is based on the lawyer's strategic decisions and influential professional advice, and not on any true assessment of the defendant's level of remorse.

### 3. *The Principal-Agent Problem*

It hardly seems worth belaboring the obvious point that this method of regulating advocacy is patently unjust to defendants who are made to pay for their lawyers' offenses in addition to their own. Though the practice is rendered fairer if the defendant is actually responsible for the lawyer's behavior, there are serious doubts about the extent to which the client has control over many aspects of the representation.<sup>258</sup> Even if there were a perfect agency relationship between criminal defense lawyers and their clients, however, reliance on it here to penalize defendants would still be improvident. There are surely other situations in which defendants suffer for the mistakes of their attorneys. For example, a lawyer may fail to make an argument at the trial level that results in a procedural bar from asserting the claim on appeal, or may implement a legal strategy in impeaching a witness that backfires, or may miss an important filing deadline. These examples are all distinguishable from the aggressive lawyer whose zealotry causes the defendant to lose the acceptance of responsibility reduction. A lawyer making all of these other strategic decisions is not necessarily directed by the law regarding what decision to make. Zealous advocacy, on the other hand, is a clear aspiration, if not a requirement, of our ethics laws.<sup>259</sup> No lawyer should be made to choose between following the rules of ethics and obtaining the lowest sentence possible for her client.

### 4. *Judges as Regulators of Attorney Conduct*

Judges may be best situated to regulate lawyers who practice before them,<sup>260</sup> but they ought not do so simultaneously with sentencing and cannot do so effectively without proper guidance from

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<sup>258</sup> See *supra* notes 52-55 and accompanying text.

<sup>259</sup> See *supra* notes 1-3.

<sup>260</sup> Cf. *supra* text accompanying notes 17-20 (discussing general reluctance of judiciary to use many existing tools to regulate lawyer misconduct).

ethics commissions, scholars, or legislatures. The exercise of inherent judicial authority and of broad discretionary sentencing powers in an unrestrained and unpredictable manner is a formula for bad disciplinary policy. There is no reason to assume that judges who are making piecemeal and highly contextual determinations about lawyer conduct will adequately weigh the various interests at stake.

Those who take seriously the need to regulate defense attorney aggressiveness in the face of ambiguous ethical requirements<sup>261</sup> should support the articulation and enforcement of clear disciplinary standards rather than the muddled standards resulting from the case-by-case approach to regulation.<sup>262</sup> Rules of ethics and professionalism—particularly because they tend to dictate conduct on issues of morality over which reasonable minds could differ—should be founded on meaningful debate and consensus.<sup>263</sup> For instance, there must be some agreement over the meaning of frivolity in the specific context of defense attorney advocacy. Whatever one decides about the desirability of regulating lawyer advocacy or about this means of doing so, the Simon-Luban debate<sup>264</sup> over the normative issue of where to draw the line between appropriately zealous and overzealous conduct must be resolved. The absence of clear rules born of careful policy considerations leads to a lack of uniform standards among regulators, confusion for legal advocates regarding appropriate conduct, and unintended harmful consequences to the broader criminal justice system. In such cases, the regulatory remedy may be worse than the conduct it seeks to control.

### *B. Unintended Adverse Consequences of Regulating Lawyers Through Sentencing*

The potential justifications for regulating zealous advocacy among criminal defense attorneys and for this method of regulation based on imposing higher sentences on defendants are highly overstated. Even assuming, however, that this sort of regulation were war-

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<sup>261</sup> See *supra* notes 35-37, 94 and accompanying text (discussing reduced obligations for defense lawyers under Model Rules).

<sup>262</sup> See Mashburn, *supra* note 199, at 474-75 (stating that case-by-case approach to attorney regulation “encourages the creation and interpretation of the law of professional responsibility in isolation from the broader regulatory concerns ethics issues often implicate”).

<sup>263</sup> “[L]awyers are increasingly subjected to conflicting and particularized standards of conduct that may have been created without proper authority and in the absence of meaningful debate and consensus. That such a situation is likely to create due process and fairness problems for lawyers is apparent, but its potential effects upon the consumers of legal services and the public is more subtle.” *Id.* at 478.

<sup>264</sup> See *supra* notes 40-44 and accompanying text.

ranted on the grounds discussed above or on other grounds, it creates adverse collateral consequences too great to ignore. For this reason, I focus in this Section on these consequences and the systemic problems that arise from punishing defendants for the conduct of their lawyers, and mention only briefly the ramifications for the individual defendants.

The “Jones” hypothetical illustrates several systemic flaws with the approach of regulating lawyer advocacy by issuing more severe sentences to their clients. Four flaws are particularly troubling and merit detailed discussion. First, the difficulty in defining the appropriate limitations of zealousness undermines the ability of lawyers and judges to police themselves—a factor often hailed as a unique and positive attribute of the legal profession. Lawyers cannot be expected to conform their behavior to certain standards if they do not know what those standards are. Moreover, lawyers may take the safe approach in the face of confusing ethical expectations about zeal and opt for reduced zealousness in the advancement of defendants’ interests.

Second, because a number of the strategic decisions that lead to higher sentences are made by the lawyer, the defendant is punished based on criteria that have little to do with her criminal conduct or criminal history. The effect of this problem is twofold. It assumes, as previously discussed, a perfect principal-agent relationship between attorney and client that rarely exists in reality. It also requires lawyers to consult with clients on every single complicated and difficult legal decision that could result in a loss of the sentence reduction for acceptance of responsibility, even though most of these decisions are outside of the client’s legal expertise and abilities.

The third difficulty with this approach to regulating advocacy is that the overly broad nature of the “acceptance of responsibility” provision of the Sentencing Guidelines confuses the purpose of the Guidelines. The two most important factors in determining eligibility for the acceptance of responsibility adjustment—remorse and efficiency—are extensively tangled with disciplinary concerns regarding advocacy decisions. This unanticipated effect of the Guidelines undermines their primary goal of reducing unwarranted sentencing disparities.

Finally, there is the possibility that lawyers will forego making meritorious claims. This obviously can be detrimental to the individual defendant, and also has farreaching consequences for the development of the criminal laws and thus for criminal defendants as a class. To the extent that the failure of lawyers to raise colorable claims leads to underdevelopment of the body of criminal law, the

truth-seeking function of the criminal justice system is altered in unforeseen and dangerous ways.

### 1. *The Unpredictability of Sanctions for Overzealousness*

The disagreement among scholars and practitioners regarding its appropriate limitations renders the regulation in the criminal defense context particularly difficult. The questions raised by Luban and Simon—whether criminal defense lawyers should be able to do just about anything legal to advance their cases, including delaying cases, embarrassing witnesses, making dubious arguments, and so forth—only begin to touch upon the controversy of differentiating between zealous conduct that is legal and ethical, and zealous conduct that is illegal and unethical. Others maintain further that the distinction between zealous advocacy and illegal conduct can be equally blurred.<sup>265</sup> If experts cannot agree on the boundaries of zeal, the task of self-policing by lawyers and of regulation by judges becomes increasingly difficult. It seems doubly inappropriate to penalize defendants for decisions made by their lawyers in an arena in which there is little guidance.

The lack of guidance on this matter is worsened by the fact that zeal is in the eye of the beholder. What is acceptably zealous to some may be obstructionist, unprofessional, and even illegal to others. For judges, strategies that significantly diminish courtroom efficiency—regardless of whether they commensurately increase a defendant's likelihood of success—will tend to be viewed as overzealous rather than zealous. As discussed earlier, however, for many defense attorneys and their clients, zealous advocacy suggests that a lawyer has taken every legal action available to further her client's interests.

The impossibility of predicting whether certain conduct is proper or improper is a critical flaw in this system as a practical matter. If lawyers are unable to predict what conduct will lead to sanctions, deterrence in this area cannot be effective.<sup>266</sup> Lawyers will be either

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<sup>265</sup> Green, *Zealous Representation Bound*, supra note 49, at 690-704 (explaining that advising unrepresented witness who may damage defendant's case to assert Fifth Amendment right to silence can be viewed either as zealous and required by ethics rules or as criminally prohibited as obstruction of justice).

<sup>266</sup> The use of the Sentencing Guidelines to regulate criminal defense attorneys is likely to be ineffective for another reason. It operates in theory much like the exclusionary rule. See supra notes 213-26 and accompanying text. The exclusionary rule has long been criticized for its ineffectiveness in regulating government misconduct. See, e.g., *United States v. Leon*, 468 U.S. 897, 907 n.6 (1984) (finding little evidence that rule deters violations); see also *Bivens v. Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388, 415-16 (1971) (Burger, C.J., dissenting) (arguing that exclusionary rule lacks deterrent effect). Though police officers care that the cases they build ultimately succeed, there is little evidence that they are deterred by the judicial handicapping of these cases. *Id.* Similarly, it is



underdeterred or overdeterred in their advocacy and will make poor strategic choices if the boundaries of zeal remain undefined.

## 2. *Complicating the Attorney-Client Relationship*

The use of more severe sentences to regulate attorney conduct relies on a faulty assumption regarding the attorney-client relationship. The notion that a lawyer's conduct is indicative of a defendant's level of contrition presupposes a perfect agent-principal relationship in which the lawyer, as agent, can make decisions for which her principal is held fully accountable. Although this describes some attorney-client relationships, it does not capture the vast majority of the interactions between the criminal defendant and her attorney. The imbalance of power can be stark between criminal defense lawyers and criminal defendants, who are often young, poor, undereducated, isolated by being in police custody, non-English speakers, or members of some marginalized group. Lawyers thus often control many of the legal decisions in the case and still wield immense influence over the decisions traditionally made by the defendants.<sup>267</sup>

Lawyers rationally might attempt to resolve this agency problem and insulate themselves from blame by passing on their decision-making roles to clients. But we should not expect nonlawyers to make certain legal and strategic decisions, because they are unlikely to truly appreciate the consequences of their choices. The decision about whether to file a motion to suppress, for example, is different in kind and complexity from a decision about whether to plead guilty. A defendant who must decide whether to accept a plea bargain or go to trial is faced with a complex cost-benefit analysis, weighing the unknown likelihood of success at trial against the guarantee of a lower sentence with a plea agreement. See Figure 1 below.

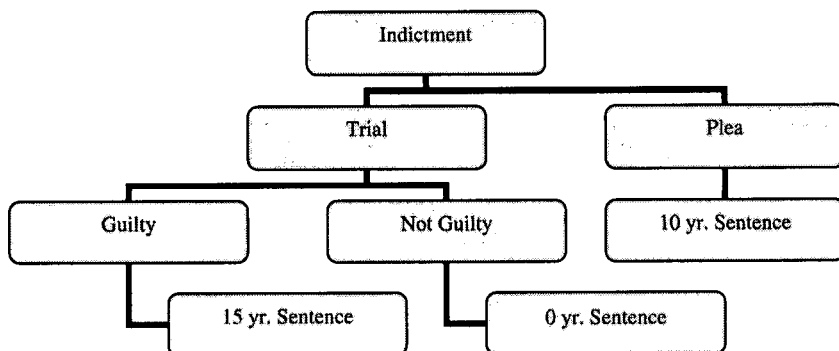
Even at its most complicated, as when the plea contains uncertainties or when there are numerous factors involved in trial, such a decision is made only once during a case. Contrast this with the numerous decisions to be made during the course of defending a case. For instance, in the "Jones" hypothetical, the defense must decide whether to file a suppression motion, whether to divulge a prior record, whether to challenge the applicability of the enhancement, and of course whether and when to enter a plea. The two-dimensional decision tree takes on crystalline complexities when the client has to

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unclear that bad outcomes such as higher sentences in particular cases will effectively deter defense lawyers from zealous or overzealous advocacy. Obviously, this empirical question would benefit from further study.

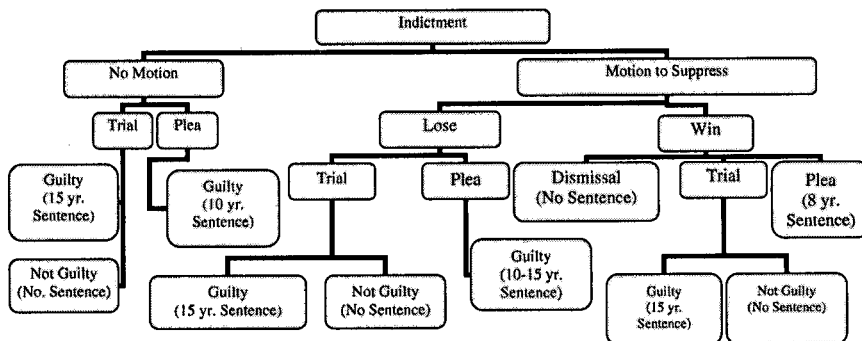
<sup>267</sup> See *supra* text accompanying notes 53-54.

FIG. 1—DECISION TREE 1



consider the complicated legal issues in the context of the effect on her sentence. See Figure 2 below. The decision illustrated in Figure 2 reflects only one strategic advocacy decision. Such decisions generally have to be made several times over in most cases and have to be assessed in relation to one another. For instance, an attorney might decide that filing a motion to suppress alone will not lead to a sanction via the “acceptance of responsibility” provision but that it might lead to such a sanction if accompanied by three other motions. The attorney and her client would then have to engage in a triage of arguments to decide which were worth making depending on potential individual and aggregate outcomes.

FIG. 2—DECISION TREE 2



Even after the defendant has made the decision to waive all rights to a trial in exchange for a plea and a potentially lower sentence, the defendant faces losing the lower sentence at various points in the case if she makes the wrong decision. Yet how can a defendant be expected to weigh the advisability of, say, a suppression motion or an

argument about drug quantity based on anything other than what she learns from her lawyer? It seems that any attempt by the lawyer to distance herself from the strategic decisions in a case will be ineffective without violating her obligations to provide advice and counsel.<sup>268</sup> Moreover, a court's attempt to decipher a defendant's state of mind or attitude about her crime based on the strategies employed in a case will likewise be futile.

Having to make this strategic decision about which claims to pursue also requires lawyers to pressure defendants into deciding earlier in the process whether they will go to trial and seek an acquittal or whether they will plead guilty. An earlier decision to plead guilty and proceed directly to sentencing is more efficient for the court, as it eliminates the need for the litigation of trial-related issues. For example, an attorney might decide not to file a motion for a change of trial venue if a plea were certain. Absent a concern about being penalized for filing meritless or time-consuming motions, a lawyer alternatively might seek to have the trial venue changed, even if she did not anticipate a trial, if she thought that a change in venue would secure a better bargaining position with the prosecutor. Courts and defendants understandably might have a very different view of whether such a strategic motion is a waste of time. A defendant who receives a better plea bargain likely would think it was time well spent, but the judge who allocates several days from her docket for a hearing on the matter might have a different view if it becomes obvious that the defense does not anticipate a trial.

### 3. *Undermining the Goals of Sentencing and of the Sentencing Guidelines*

Regulating lawyer advocacy is wholly unrelated to any of the traditionally accepted justifications of punishment, retribution, and utilitarianism. Controlling lawyer advocacy is likewise not among the statutorily defined purposes of federal sentencing.<sup>269</sup> There is no evi-

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<sup>268</sup> Model Code, *supra* note 1, EC 7-3 (“[A] lawyer serving as adviser primarily assists his client in determining the course of future conduct and relationships.”); *id.* EC 7-5 (“A lawyer as adviser furthers the interest of his client by giving his professional opinion as to what he believes would likely be the ultimate decision of the courts on the matter at hand and by informing his client of the practical effect of such decision.”).

<sup>269</sup> In imposing all federal sentences, judges are required to consider:

- (1) the nature and circumstances of the offense and the history and characteristics of the defendant;
- (2) the need for the sentence imposed—
  - (A) to reflect the seriousness of the offense, to promote respect for the law, and to provide just punishment for the offense;
  - (B) to afford adequate deterrence to criminal conduct;
  - (C) to protect the public from further crimes of the defendant; and,

dence that the Sentencing Guidelines, as originally envisioned, were intended to control, reward, or punish lawyer advocacy.<sup>270</sup> Nonetheless, in permitting a defendant's post-offense conduct to be considered as a factor in sentencing, the Sentencing Commission made no effort to insulate defendants from decisions that are properly attributable to their lawyers. Instead, "acceptance of responsibility" is so broadly defined that it invites courts to consider a number of subjective factors, including in some cases how vigorously a case is defended. Courts weigh this consideration in two ways. Courts can consider litigation strategy as a factor in determining remorsefulness or as a factor in determining the inefficient use of government resources. There may be some significant benefits to the government, in terms of conserving resources, that justify granting a plea discount or sentencing reduction to defendants who waive their rights to a trial. The efficiency gains are minimal when lawyers raise dubious factual and legal claims, request hearings, or delay court proceedings.

The unbridled discretion afforded to judges in determining whether a defendant has accepted responsibility contributes to the misuse of the Sentencing Guidelines as a means of regulating lawyers and undermines some of the foundational goals of the system. Most judges consider remorsefulness as a critical factor in deciding whether a defendant merits a sentencing reduction for acceptance of responsibility. Yet the Guidelines never define remorse; they leave it to individual judges to lend content to the word. This not only leads to a disparity of sentencing factors—undermining the very uniformity the Guidelines were created to minimize<sup>271</sup>—but also to varied interpretations of how these different factors ought to be weighed. One court might consider a guilty plea dispositive in determining acceptance of responsibility in one case, while another court might view cooperation with the government as a better indicator in a similar case. Still a

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(D) to provide the defendant with needed educational or vocational training, medical care, or other correctional treatment in the most effective manner.

18 U.S.C. § 3553 (2000).

<sup>270</sup> The motivations behind the Federal Guidelines, like most sentencing guideline schemes, were wholly penological in nature. The Guidelines seek to codify sentencing practices to create determinate sentencing. At the crux of determinate sentencing are predictability, uniformity, and "just sentencing." See Stith & Cabranes, *supra* note 63, at 2 (articulating goals of guidelines as "certainty and fairness" and elimination of "unwarranted disparity"); Tonry, *supra* note 64, at 4 (discussing various motivations for determinate sentencing reforms).

<sup>271</sup> Stith & Cabranes, *supra* note 63, at 104 ("Reduction of 'unwarranted sentencing disparities' was a—probably the—goal of the Sentencing Reform Act of 1984."); Tonry, *supra* note 64, at 25 (stating that idea of sentencing commissions was introduced as device for reducing sentencing disparities and judicial "lawlessness").

third court might consider a slew of factors, but weigh them differently in each case before it. Appellate courts repeatedly have upheld a variety of ways of determining acceptance of responsibility and remorse. This wide range in acceptable interpretations and applications of section 3E1.1 has been criticized,<sup>272</sup> as it further weakens an already controversial sentencing scheme.

#### 4. *Foregoing Meritorious or Important Claims*

Perhaps the most troublesome consequence of denying the acceptance of responsibility reduction to defendants based on the aggressive advocacy of their attorneys is the likelihood that attorneys may forego meritorious arguments rather than risk a higher sentence for their clients. For instance, an attorney in federal court generally must file most motions within ten days of receiving the formal charge. Because this is barely enough time to get to know a client, let alone to investigate a case, cautious lawyers often file numerous motions to preserve potential issues. It is unreasonable to expect conscientious lawyers to choose between foregoing admittedly uncertain claims and the chance of a sentencing reduction.

For both lawyers and their clients, once they realize that certain arguments may result in the loss of the two- or three-level sentencing reduction, many will decline to make arguments worth fewer than two or three points even when those arguments are not frivolous. For instance, under the Guidelines, a defendant charged with trespass faces a two-level enhancement if she possessed a weapon at the time of the offense.<sup>273</sup> Assume that a witness who saw the defendant states to the police that she believed she saw a weapon but the police find no weapon at the time of arrest. If the defendant denies the possession in the face of a witness whom the judge believes, the judge is likely to find that no acceptance of responsibility reduction is warranted. Prior to making a decision about whether or not to challenge such an allegation, a defendant and her lawyer likely will consider the fact that the acceptance of responsibility reduction is worth three points whereas the weapon enhancement is worth only two. This example raises two important concerns. As a substantive matter, there is a possibility that

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<sup>272</sup> See O'Hear, *supra* note 91, at 1522 (noting that ambiguities in determining what conduct justifies reduction for acceptance of responsibility have prompted calls for fundamental reform) (citing Letter from Maryanne Trump Barry, Chair of Committee on Criminal Law of the Judicial Conference of the United States, to Judge Richard P. Conaboy, Chairman of United States Sentencing Commission 1 (Dec. 5, 1995) (proposing changes to section 3E1.1 and noting that continued confusion with how acceptance of responsibility guideline has come to be interpreted generates needless litigation)).

<sup>273</sup> U.S.S.G., *supra* note 13, § 2B2.3(b)(2).

the defendant will be punished for conduct of which she is innocent—trespass with the possession of a weapon. As a procedural matter, this situation has effectively caused a shift in the burden of proof between the defense and prosecution. Although the government traditionally has the burden of proving guilt, the fear of reprisal means that the prosecution is not scrupulously held to the standards of meeting its burden.

Certainly individual defendants will be disadvantaged in many of these cases. There is a greater likelihood that innocent people will be convicted if their lawyers are hesitant to engage fully in the adversarial process. Beyond the effect of this hesitance on individual cases, a more worrisome effect is the possibility that criminal defendants in general will suffer if lawyers are reluctant to test the boundaries of the law.<sup>274</sup>

A lawyer faced with the “Jones” hypothetical described above will make future decisions about which motions and how many motions to file based on their likelihood of success. Filing a motion on a credible claim that offers only a small chance of success is a poor strategic decision if the act of filing can lead to a higher sentence. Thus rational lawyers will be less willing to risk the dangers of aggressive lawyering on unproven, lengthy, or complicated claims that might be meritorious. Defense advocates and adversaries alike will then come to define zeal more universally as vigorous representation only on strong claims, while they define overzealousness as the same vigorous representation on less certain claims. Assessing whether a claim will be meritorious or even the likelihood that it will be perceived as frivolous is not always easy to do *a priori*. Moreover, these decisions are rightly for the judge to make, and the cost of making the wrong determination should not be shifted to the defendant.

### CONCLUSION

At least one commentator has described section 3E1.1 of the Federal Sentencing Guidelines, the “acceptance of responsibility” provision, as a means of punishing or curtailing antisocial behavior among defendants, explaining that a court sees defensive behavior such as demanding a trial or selfishly wasting societal resources as antisocial behavior.<sup>275</sup> I conclude that the same provision is used to punish perceived antisocial behavior among defense *lawyers*, where putting forth

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<sup>274</sup> For example, if law enforcement officials believe that defendants and their lawyers are reluctant to challenge illegal searches and seizures under the Fourth Amendment, they will be less deterred from engaging in such misconduct.

<sup>275</sup> Givelber, *supra* note 186, at 1387-89; see also *United States v. Roberts*, 445 U.S. 552, 557-58 (1980) (stating that defendant who declined to assist police in investigating other

a zealous defense of the criminally accused is seen by some as antisocial behavior in the courtroom. While this undoubtedly creates serious problems for the criminal defendant, it also creates problems for the criminal defense attorney who must temper zealous or aggressive advocacy to account for the realities of judicial power and discretion in federal sentencing. Zealous advocacy is recast as a question of strategy to be balanced against other strategic considerations rather than as a requirement of ethical and professional representation. The defense attorney's conflict is complicated by the fact that the line between zeal and frivolity is troublesomely thin. And one could say that it is equally difficult to draw the line between zeal and wasting time, zeal and misrepresentation, or zeal and obstruction of justice.<sup>276</sup> Undoubtedly, this also complicates the judiciary's ability to serve as regulators of zeal.

Finally, the case for regulating lawyers through sentencing is evidence that certain things are better left unregulated. This is an area in which the cost of the regulatory practice may be higher than the costs of the behavior it seeks to regulate. While I condemn adverse sentencing rulings against defendants as a particularly unattractive method of regulation, it stands to reason that any means of regulating zealous advocacy might suffer from some of the harms described above. Lawyers who are threatened with contempt motions, fines, or other disciplinary actions for overzealous representation may be just as likely to refrain from making claims that would benefit their clients. In other words, the agency problem remains secondary to the failure to reach some consensus regarding what types of arguments fall under the category of permissible and encouraged arguments for criminal defense lawyers.

This Article is a first step in chronicling an uneasy convergence between federal sentencing law, the laws of ethics and professionalism, and the authority of judges to use informal measures in managing their courtrooms. It is altogether unclear that this is a sensible method of regulating zealous advocacy, or that any method is needed

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known criminals demonstrated "badge of irresponsible citizenship" for which higher sentence was justified).

<sup>276</sup> Consider the example of *United States v. McIntosh*, 198 F.3d 995 (7th Cir. 2000). There the district court found, although McIntosh admitted his guilt, that his decision to file a speedy trial motion and his challenge to the indictment on jurisdictional grounds could not be reconciled with acceptance of responsibility. *Id.* at 1000-01. These strategies were described by the prosecution as an attempt to waste time and "manipulate the system." *Id.* McIntosh's lawyer, on the other hand, described these claims as being born of his client's desire to be "treated justly and fairly," rather than a desire to deny responsibility. *Id.* What McIntosh's lawyer saw as zealous advocacy on behalf of his client, others viewed as obstreperous, delaying, and remorseless behavior.

at all. Some of the criticisms levied against the exclusionary rule—that it is too costly to the parties and is ineffectual in deterring misconduct<sup>277</sup>—seem particularly salient in this context. Under this scheme, defendants not only pay for the sins of their lawyers, but they also pay for the sins of a system that has failed to develop reasonable and effective sentencing procedures.

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<sup>277</sup> See Harry M. Caldwell & Carol A. Chase, *The Unruly Exclusionary Rule: Heeding Justice Blackmun's Call to Examine the Rule in Light of Changing Judicial Understanding About Its Effects Outside the Courtroom*, 78 Marq. L. Rev. 45, 53 (1994) (concluding that police officers break laws and lie in order to allow their constitutional violations to go unanswered); Oaks, *supra* note 216, at 754-55 (1970) (finding that there is little empirical evidence to support deterrent effect of exclusionary rule on law enforcement and theorizing that rule creates incentives for lying by police officers); L. Timothy Perrin et al., *If It's Broken, Fix It: Moving Beyond the Exclusionary Rule: A New and Extensive Empirical Study of the Exclusionary Rule and a Call for a Civil Administrative Remedy to Partially Replace the Rule*, 83 Iowa L. Rev. 669, 710 (1998) (presenting data that strongly undermine support for exclusionary rule as cost-effective deterrent for police misconduct).



## APPENDIX

**SENTENCING TABLE**  
 (in months of imprisonment)  
 Criminal History Category (Criminal History Points)

	Offense	I	II	III	IV	V	VI
	Level	(0 or 1)	(2 or 3)	(4, 5, 6)	(7, 8, 9)	(10, 11, 12)	(13+)
<b>Zone A</b>	1	0-6	0-6	0-6	0-6	0-6	0-6
	2	0-6	0-6	0-6	0-6	0-6	1-7
	3	0-6	0-6	0-6	0-6	2-8	3-9
	4	0-6	0-6	0-6	2-8	4-10	6-12
	5	0-6	0-6	1-7	4-10	6-12	9-15
	6	0-6	1-7	2-8	6-12	9-15	12-18
	7	0-6	2-8	4-10	8-14	12-18	15-21
	8	0-6	4-10	6-12	10-16	15-21	18-24
<b>Zone B</b>	9	4-10	6-12	8-14	12-18	18-24	21-27
	10	6-12	8-14	10-16	15-21	21-27	24-30
<b>Zone C</b>	11	8-14	10-16	12-18	18-24	24-30	27-33
	12	10-16	12-18	15-21	21-27	27-33	30-37
<b>Zone D</b>	13	12-18	15-21	18-24	24-30	30-37	33-41
	14	15-21	18-24	21-27	27-33	33-41	37-46
	15	18-24	21-27	24-30	30-37	37-46	41-51
	16	21-27	24-30	27-33	33-41	41-51	46-57
	17	24-30	27-33	30-37	37-46	46-57	51-63
	18	27-33	30-37	33-41	41-51	51-63	57-71
	19	30-37	33-41	37-46	46-57	57-71	63-78
	20	33-41	37-46	41-51	51-63	63-78	70-87
	21	37-46	41-51	46-57	57-71	70-87	77-96
	22	41-51	46-57	51-63	63-78	77-96	84-105
	23	46-57	51-63	57-71	70-87	84-105	92-115
	24	51-63	57-71	63-78	77-96	92-115	100-125
	25	57-71	63-78	70-87	84-105	100-125	110-137
	26	63-78	70-87	78-97	92-115	110-137	120-150

27	70-87	78-97	87-108	100-125	120-150	130-162
28	78-97	87-108	97-121	110-137	130-162	140-175
29	87-108	97-121	108-135	121-151	140-175	151-188
30	97-121	108-135	121-151	135-168	151-188	168-210
31	108-135	121-151	135-168	151-188	168-210	188-235
32	121-151	135-168	151-188	168-210	188-235	210-262
33	135-168	151-188	168-210	188-235	210-262	253-293
34	151-188	168-210	188-235	210-262	235-293	262-327
35	168-210	188-235	210-262	235-293	262-327	292-365
36	188-235	210-262	235-293	262-327	292-365	324-405
37	210-262	235-293	262-327	292-365	324-405	360-life
38	235-293	262-327	292-365	324-405	360-life	360-life
39	262-327	292-365	324-405	360-life	360-life	360-life
40	292-365	324-405	360-life	360-life	360-life	360-life
41	324-405	360-life	360-life	360-life	360-life	360-life
42	360-life	360-life	360-life	360-life	360-life	360-life
43	life	life	life	life	life	life

November 1, 1994