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Jimmy Hoffa's Revenge: White-Collar Rights Under the McDade Amendment

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INTRODUCTION

On a hot July day in 1975, Jimmy Hoffa disappeared. Odds are he was lured to his death by a trusted friend.[1] Ironically, almost a decade before his disappearance, Hoffa had made his mark on the law in a case foreshadowing the very weakness that later may have killed him: an overconfident reliance on the loyalty of a confidant. In that 1966 case,[2] in which much of the evidence came from the mouth of a colleague whose allegiance had been secretly purchased by the FBI, Hoffa tried to convince the Supreme Court that the target of a criminal investigation enjoyed a constitutional right not to be contacted by government agents or informants in the absence of his counsel. At the time, Hoffa's claim had the advantage of judicial momentum. Only two years earlier, the Court had hinted at a broad "no-contact" right for criminal suspects under the Sixth Amendment.[3] But the Court switched gears in Hoffa's case, and that momentum came to an end. The decision in *Hoffa v. United States*[4] became the first in a series that effectively removed Sixth Amendment protection from suspects until the moment they are formally charged with a crime.[5] The end result is that, today, the Sixth Amendment

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[1] Hoffa's July 1975 disappearance remains shrouded in mystery. The FBI has theorized that a Hoffa confidante, Charles (Chuckie) O'Brien, lured Hoffa into a car and disposed of him under orders from a New Jersey mobster. *See* L.L. Brasier, *Oakland Gives Up on Hoffa Probe*, DETROIT FREE PRESS, Aug. 30, 2002, 2002 WL 22380668. Federal agents still have an open investigation but lack solid evidence to charge anyone with kidnaping or murder. *Id.* Last August, an Oakland County, Michigan grand jury investigation ended with no charges and little hope of solving the mystery. *Id.* For a detailed account of what is known about Hoffa's disappearance, see ARTHUR A. SLOANE, HOFFA 374–92 (1991).

[2] Hoffa v. United States, 385 U.S. 293 (1966).

[3] *See* Escobedo v. Illinois, 378 U.S. 478 (1964) (holding that, when police have focused on a suspect, any statements made during an interrogation — and after the request for a lawyer — are inadmissible).

[4] 385 U.S. 293 (1966).

[5] *See* Moran v. Burbine, 475 U.S. 412 (1986); Kirby v. Illinois, 406 U.S. 682 (1972); *Hoffa*, 385 U.S. at 309–10; Miranda v. Arizona, 384 U.S. 436 (1966).

offers virtually nothing to a suspect until he becomes a defendant.

But Hoffa's arguments outlived Hoffa. His constitutional claims were resurrected as a rule of legal ethics. That rule — now Rule 4.2 of the ABA Model Rules of Professional Conduct[6] — states that a lawyer may not communicate with the opposing party to a legal dispute when that person is represented by counsel. At the time of Hoffa's case, few lawyers and fewer courts would have believed that the "no-contact" rule of legal ethics had anything to do with efforts of FBI agents or informants to investigate crime, even when the suspect had retained counsel.[7] But today, with the assistance of a compliant Congress spurred on by a disgruntled target of an unsuccessful political corruption investigation, Rule 4.2 stands as a formidable shield between investigators and targets of white-collar investigations. Indeed, the protections which Hoffa claimed as a matter of constitutional right have expanded well beyond the limits of Hoffa's legal imagination, thanks to Rule 4.2 and Congressman Joseph McDade.[8]

This Essay focuses on the right that Hoffa sought but never won, and which now exists for a few criminal suspects by virtue of Rule 4.2. It is about the "white-collar right" to avoid contact with investigators and informants during a criminal investigation.[9] I use the term "white-collar right" because, as a practical matter, the

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[6] Rule 4.2 provides:

> In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002). The last phrase, "or a court order," was proposed by the ABA's "Ethics 2000 Commission" and approved by the ABA House of Delegates in February 2002. *See* 70 CRIM. L. REP. (BNA) 412 (Feb. 13, 2002).

[7] *See* William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 VA. L. REV. 1903, 1904 n.2 (1993); *cf.* Massiah v. United States, 377 U.S. 201, 210–11 (1964) (White, J., dissenting) (noting that the rule of ethics "deals with the conduct of lawyers and not with the conduct of investigators").

[8] McDade was the author and principal sponsor of the Citizens Protection Act, also known as the "McDade Amendment," 28 U.S.C. § 530B(a)–(b), which provided that federal prosecutors are subject to the ethical rules of each state in which they practice. For an excellent rendition of the genesis of the McDade Amendment, see Fred C. Zacharias & Bruce A. Green, *The Uniqueness of Federal Prosecutors*, 88 GEO. L.J. 207, 208–15 (2000).

[9] I focus on contacts by government investigators, rather than on direct contacts between suspects and prosecutors, for two main reasons. First, direct prosecutor-to-suspect contacts are comparatively rare, whereas contacts by investigators and informants are ubiquitous. As a result, Rule 4.2 principally impacts criminal investigations when it limits contacts by agents and informants. Second, I aim to compare the Rule 4.2 approach with Sixth Amendment case law that deals principally with contacts by investigating agents. Of course, much of what I argue *infra* would apply equally in the case of direct contact by prosecutors. Nevertheless, I should acknowledge that direct contacts in some settings can raise additional concerns not addressed here, particularly when the contact evolves from evidence gathering into plea

protection of Rule 4.2 is enjoyed almost exclusively by individuals and corporations during investigations of white-collar crimes. That protection is not available to most suspects of most police investigations, because most people suspected of a crime do not have lawyers before criminal charges are filed.[10]

I begin the Essay with a bit of comparative history. In Part I, I describe the death and burial of the Sixth Amendment no-contact rule espoused by Jimmy Hoffa. In Part II, I contrast the birth and expansion of an extra-constitutional no-contact rule under Model Rule 4.2 and the McDade Amendment. I begin with these contrasting histories because I believe they illustrate two critical points about the no-contact rule in criminal investigations. First, despite its place in codes of ethics, the no-contact rule in criminal investigations has little to do with ethics. Instead, today's debate over Rule 4.2 is simply the latest chapter in a debate over what is, and what is not, a fair tactic of criminal investigation — a debate that began even before Hoffa's case.[11] Second, this comparative history illustrates that, when it comes to shielding suspects from direct contacts with investigators, we treat white-collar suspects much more favorably than others, and we treat corporations more favorably than anyone. And that comparison leads to the central questions of Part III: Why should we treat white-collar suspects so differently? And, when we apply a broad no-contact rule to corporations, whose interests are we really protecting?

I. JIMMY HOFFA'S SIXTH AMENDMENT LEGACY — THE DEMISE OF A CONSTITUTIONAL RIGHT TO COUNSEL DURING CRIMINAL INVESTIGATION

The Sixth Amendment provides a right to counsel for the "accused" in "all criminal prosecutions."[12] The language implies an important limit to that right: It applies only when we have an "accused" in a "prosecution." The words suggest that a suspect has no Sixth Amendment right to counsel's protection during an investigation when he has not yet been "accused" by the filing of a criminal charge. Not surprisingly, that is how today's Supreme Court reads the Sixth Amendment,[13] but it was not always so.

At least for a few years in the mid-1960s, the Court signaled a broader reading, recognizing a right to counsel before the filing of a criminal charge. Counsel's

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negotiation.

[10] *See infra* Part III.A.

[11] The central questions in that debate are: (1) whether we should allow criminal investigators to seek incriminating information directly from the mouths of those we suspect of criminal activity, without the presence of an attorney to advise the suspect; and (2) whether we should allow investigators to deceive their targets in the process. Hoffa, of course, lost that debate on both counts. *See* Hoffa v. United States, 385 U.S. 293 (1966).

[12] U.S. CONST. amend. VI.

[13] *See* Kirby v. Illinois, 406 U.S. 682, 689–90 (1972) (holding that the Sixth Amendment attaches at the initiation of adversarial judicial proceedings).

assistance at trial would hardly matter, the Court reasoned, if the adversarial game was over before trial began.[14] A confession obtained in the absence of counsel, either by police questioning or by an informant's deceit, "would make the trial no more than an appeal from the interrogation."[15] Thus, to give practical effect to the right to counsel at trial, there must be some protection against contacts by investigators before trial. Pursuing that logic in its 1964 decision in *Massiah v. United States*,[16] the Court ruled that the government violated the Sixth Amendment by deliberately eliciting information from an accused in the absence of his counsel.[17] The Court was unimpressed with the government's claim that Massiah voluntarily chose to confide in a supposed friend without a lawyer present.[18] Massiah "'was more seriously imposed upon,'" the Court wrote, "'because he did not even know that he was under interrogation by a government agent.'"[19]

The prohibited undercover contact in *Massiah* took place after indictment.[20] Only a few months later, in *Escobedo v. Illinois*,[21] the Court further extended its Sixth Amendment no-contact rule to prohibit uncounseled interrogation of suspects who had become the "focus" of criminal investigation.[22] Because many — probably most — criminal investigations tend to "focus" on particular suspects, the potential reach of *Escobedo* was revolutionary. Criminal investigators might violate the Sixth Amendment by questioning a suspect in the absence of counsel, either directly or through an informant, well before charges were filed. Recognizing the potential breadth of the Court's ruling, Justice White argued in dissent that the prohibition on investigative contacts would be "wholly unworkable and impossible to administer unless police cars are equipped with public defenders and undercover agents and police informants have defense counsel at their side."[23] Despite that warning, the Court seemed poised to embark on a course that would revolutionize police work, largely eliminating criminal suspects as a source of information for investigators.

Enter Jimmy Hoffa. In the Fall of 1962, Hoffa was tried in Nashville,

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[14] Escobedo v. Illinois, 378 U.S. 478, 487 (1964).

[15] *Id.*

[16] 377 U.S. 201 (1964).

[17] *Id.* at 203–04.

[18] *Id.* at 211–12.

[19] *Id.* at 206 (quoting *United States v. Massiah*, 307 F.2d 62, 72–73 (2d Cir. 1962)).

[20] *Massiah*, 377 U.S. at 212.

[21] 378 U.S. 478 (1964).

[22] *Id.* at 490. The *Escobedo* majority stated its holding somewhat more narrowly, limiting the ruling to cases in which the suspect was in custody and demanded counsel. *Id.* at 491. But the Court's reasoning suggested broader application of the no-contact rule. As Justice White noted in dissent, "[t]he right to counsel now . . . stands as an impenetrable barrier to any interrogation once the accused has become a suspect." *Id.* at 496 (White, J., dissenting).

[23] *Id.* at 496.

Tennessee on federal racketeering charges.[24] The case ended in a hung jury.[25] Edward Partin, a Teamsters official from Louisiana, spent the months of the trial in and around the hotel where Hoffa and his lawyers plotted defense strategy.[26] Characteristically, Hoffa had a separate, extralegal, strategy of his own which he shared in conversations with Partin.[27] As "insurance" against conviction, Hoffa was seeking to bribe jurors.[28] But Hoffa had miscalculated. Partin was in Nashville only because federal agents had obtained his release from a Louisiana prison, arranged to drop state and federal charges against him, and made "expense" payments through Partin's wife.[29] In short, Partin was a paid government informant who reported to federal agents as Hoffa's jury tampering scheme developed.

Hoffa was later charged and convicted of jury tampering.[30] Partin was the government's chief witness.[31] Hoffa objected to Partin's testimony on a host of grounds,[32] including the Sixth Amendment. When his case made it to the Supreme Court in 1964, Hoffa sought to ride the crest of *Massiah* and *Escobedo*. Just as it had done in *Massiah*, Hoffa claimed, the government ignored his right to counsel when it contacted him through an informant and obtained incriminating statements in the absence of his lawyers.[33] He was the focus of a jury-tampering investigation. Therefore, under *Escobedo*, his right to counsel attached just as fully as if he had been arrested and charged.[34]

The Court, however, had other ideas. Giving barely a nod to *Massiah* and *Escobedo*, the Court dispatched Hoffa's Sixth Amendment claim with the pithy phrase, "[t]here is no constitutional right to be arrested."[35] The idea that the right to counsel's protection against government contacts might extend to earlier stages of investigation, before a suspect was arrested and charged, had just disappeared.

Hoffa's case was actually the second blow that the Court delivered in the Summer of 1966 to the developing notion that the Sixth Amendment might prohibit

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[24] *See* Hoffa v. United States, 385 U.S. 293, 294 (1966).

[25] *Id.*

[26] *Id.* at 296.

[27] *Id.*

[28] *Id.*

[29] *Id.* at 297–98.

[30] *Hoffa*, 385 U.S. at 298–88.

[31] *Id.* at 298.

[32] Aside from his Sixth Amendment claim, Hoffa argued that the government violated the Fourth Amendment when Partin, a government informant, entered his hotel suite under false pretenses and later reported private conversations. *Id.* at 300. He also claimed that the government violated the Fifth Amendment when Partin obtained incriminating admissions, *id.* at 303, and that the "totality" of government misconduct during the Nashville trial deprived him of due process, *id.* at 310. The Court rejected all of Hoffa's claims. *Id.* at 311.

[33] *Id.* at 309–10.

[34] *See* Escobedo v. Illinois, 378 U.S. 478, 485–86 (1964).

[35] *Hoffa*, 385 U.S. at 310.

investigative contacts with suspects in the absence of a lawyer. A few months earlier, the Court's ruling in *Miranda v. Arizona*[36] had marked a fundamental shift in the Court's approach to regulating contacts between police and suspects. Both sides had briefed and argued *Miranda* and its companion cases on the basis of the Sixth Amendment principles established in *Massiah* and *Escobedo*.[37] But when Chief Justice Warren delivered the *Miranda* opinion, the Court shifted constitutional gears. Perhaps because of the fears voiced by Justice White in *Escobedo*, the Court no longer insisted on counsel's presence during questioning of suspects who had become the focus of investigation.[38] Rather, the *Miranda* Court chose a Fifth Amendment approach that focused on custody and coercion.[39] Counsel had a role in the process, the Court acknowledged, but that role was to protect against coercion.[40] The decision whether to talk in the absence of counsel was left up to a properly warned suspect.[41]

Miranda and *Hoffa* effectively halted the momentum of the Sixth Amendment no-contact rule for criminal investigations. Still, it took another twenty years to clarify the Court's direction. By 1972, in *Kirby v. Illinois*,[42] the Court made explicit what was implicit in *Hoffa* and *Miranda*.[43] The Sixth Amendment right to counsel "attaches," the Court held, "only at or after the time that adversary judicial proceedings have been initiated."[44] In other words, the Sixth Amendment would provide no protection to suspects *before* they were charged with a crime.[45] In 1986, the Court buried the last trace of *Escobedo*'s no-contact rule.[46] In *Moran v. Burbine*,[47] a properly Mirandized suspect chose to answer police questions without

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[36] 384 U.S. 436 (1966).

[37] *See* JEROLD H. ISRAEL ET AL., CRIMINAL PROCEDURE AND THE CONSTITUTION 331 (2002).

[38] Indeed, in a brief footnote that can most charitably be described as revisionist history, the Court declared that its use of the term "focus" in *Escobedo* was intended to mean "custody." *Miranda*, 384 U.S. at 444 n.4.

[39] *Id.* at 462.

[40] *Id.* at 465–66.

[41] *Id.* at 444.

[42] 406 U.S. 682 (1972).

[43] *Compare* Hoffa v. United States, 385 U.S. 293, 310 (1966), *and Miranda*, 384 U.S. at 510, *with Kirby*, 406 U.S. at 688.

[44] *Id.* at 688.

[45] In *Kirby*, the Court finished one task that it had begun in *Miranda*: It distinguished *Escobedo* by rewriting it. *See Kirby*, 406 U.S. at 689. *Escobedo* was, quite explicitly, a Sixth Amendment opinion. Escobedo v. Illinois, 378 U.S. 478, 479 (1964). The *Kirby* Court, however, wrote that "the 'prime purpose' of *Escobedo* was not to vindicate the constitutional right to counsel as such, but, like *Miranda*, 'to guarantee full effectuation of the privilege against self-incrimination.'" *Kirby*, 406 U.S. at 689 (quoting *Johnson v. New Jersey*, 384 U.S. 719, 729 (1966)).

[46] *See* Moran v. Burbine, 475 U.S. 412 (1986).

[47] *Id.*

counsel present, not knowing that his family had retained a lawyer for him and that police had informed the lawyer that no interrogation would take place.[48] Because the suspect had not been formally charged, the Court held, there was no Sixth Amendment right to violate.[49] Further, the Court rejected Burbine's claim that retaining counsel had triggered his Sixth Amendment rights despite the absence of a formal charge.[50]

Hoffa's constitutional legacy was complete. Until charged with a crime, suspects simply had no Sixth Amendment right to counsel. And it did not matter whether, like Burbine, they managed to retain counsel at an earlier stage or, like Hoffa, they were already represented in a related matter. By 1986, the basic rationale for the Court's approach was relatively clear. It rested in part on the language of the Sixth Amendment, which applies when there is an "accused" in a "criminal prosecution."[51] The Court also recognized the practical impossibility of providing counsel to a vast array of uncharged suspects at different points during the police investigation.[52] It saw little prospect for drawing a line between permissible and impermissible police-suspect contacts at an earlier stage of investigation.[53] The moment of formal charging was, relatively speaking, a bright-line rule. It was, after all, the line that marked "the starting point of our whole system of adversary criminal justice."[54] Finally, the protections afforded by *Miranda* had left the Court with diminished concern that the presence of counsel was necessary to prevent abuses during investigative contacts with suspects.[55]

II. HOFFA'S REVENGE: THE RISE OF WHITE-COLLAR RIGHTS UNDER RULE 4.2 AND THE MCDADE AMENDMENT

A. The Birth of an Extra-Constitutional Tool for Limiting Contacts with Suspects

At the time Jimmy Hoffa brought his case to the Supreme Court, contacts

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[48] *Id.* at 417–18.

[49] *Id.* at 428–29.

[50] *Id.* at 430 ("As a practical matter, it makes little sense to say that the Sixth Amendment right to counsel attaches at different times depending on the fortuity of whether the suspect or his family happens to have retained counsel prior to interrogation.").

[51] U.S. CONST. amend. VI; *see Burbine*, 475 U.S. at 430.

[52] *Burbine*, 475 U.S. at 430.

[53] *Id.* at 426–27.

[54] Kirby v. Illinois, 406 U.S. 682, 689 (1972).

[55] Instead, in marked contrast to the tone of both *Massiah* and *Escobedo*, the post-*Hoffa* Court seemed to applaud the use of non-coercive investigative contacts, even in counsel's absence, because they produced reliable evidence. "The Sixth Amendment's intended function is not to . . . protect a suspect from the consequences of his own candor." Moran v. Burbine, 475 U.S. 412, 430 (1986).

between prosecuting attorneys and criminal suspects were seldom a matter of concern in the world of legal ethics. White-collar prosecution was in its infancy.[56] For the most part, the police handled the dirty business of gathering evidence and interrogating suspects. When luck or the policeman's cunning allowed it, that business included tricking suspects into incriminating disclosures by using informants or undercover officers.[57] Both prosecutors and defense counsel typically entered the picture at a later stage, at or after the time when criminal charges were filed.[58] Legal ethics seldom came into play largely because lawyers were not central players in criminal investigations.

The traditional picture of police investigation began to change at about the time Hoffa was released from federal prison. Accelerating through the 1970s, especially after the Watergate disclosures, federal prosecutions of white-collar crime multiplied in numbers and grew in size and complexity.[59] The growth of white-collar prosecutions thrust more lawyers into criminal investigations at earlier stages. In white-collar investigations, prosecutors control the grand jury subpoena process,[60] question witnesses before the grand jury,[61] assess the evidence as it develops over weeks or months, and advise agents on the wide range of legal issues that a complex investigation can present. Likewise, on the defense side, white-collar investigations bring lawyers into the picture early. Unlike suspects in more routine cases, white-collar suspects and their corporate employers typically have the means to hire counsel, and they do so at the first hint of trouble.[62] Not surprisingly, the expansion of white-collar prosecutions in the 1970s gave rise to corresponding

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[56] *See* KENNETH MANN, DEFENDING WHITE COLLAR CRIME 19–20 (1985).

[57] The use of informants, and judicial approval of the practice, are of ancient origin. Judge Learned Hand wrote that "[c]ourts have countenanced the use of informers from time immemorial; in cases of conspiracy, or in other cases when the crime consists of preparing for another crime, it is usually necessary to rely upon them or upon accomplices because the criminals will almost certainly proceed covertly." United States v. Dennis, 183 F.2d 201, 224 (2d Cir. 1950).

[58] With the exception of grand jury investigations in white-collar crime cases, that pattern remains true today. *See* Stuntz, *supra* note 7, at 1905–06 ("[M]ost defendants do not see their lawyers until sometime after arrest."); Roberta K. Flowers, *A Code of Their Own: Updating the Ethics Codes to Include the Non-Adversarial Roles of Federal Prosecutors*, 37 B.C. L. REV. 923, 924 (1996) ("Historically, the prosecutor has played a limited role in the investigation of cases.").

[59] *See* Mann, *supra* note 56, at 19.

[60] *See* Flowers, *supra* note 58, at 936.

[61] Under Rule 6(e) of the Federal Rules of Criminal Procedure, an investigating agent is not even permitted in the grand jury room during a witness's testimony. FED. R. CRIM. P. 6(e).

[62] *See* David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 152 (2000).

growth in the defense bar.[63] By 1977, a prominent litigator commented that "[w]hite-collar crime is the fastest growing legal specialty in the United States."[64]

White-collar specialists quickly learned that preventing indictment was the first line of defense. Limiting the government's opportunity to contact suspects and witnesses became a key defense strategy.[65] *Hoffa*, *Kirby* and *Burbine* effectively removed the Sixth Amendment as an element in that strategy by holding that the right to counsel attaches only when charges are filed. As a result, white-collar defenders sought a new tool for achieving the same end. That tool was already in the code of ethics for lawyers.[66] Government lawyers had become the principal managers of white-collar investigations, but there was still a disconnect. What remained was the significant challenge of turning a no-contact rule designed principally to regulate lawyers in civil litigation[67] into a prohibition on police interviews and the use of informants in criminal investigations.

Given the wide gap between the traditional purpose of the ethical rule and its application to police investigation, it is hardly surprising that the courts were slow to accept the connection. Through most of the 1980s, and continuing in some jurisdictions today, courts generally rebuffed efforts to suppress evidence or discipline government attorneys because of contacts between agents or informants and represented suspects or witnesses. The reasons were varied. Some courts refused to apply a rule of legal ethics to the conduct of non-lawyer investigators, despite the advisory or supervisory roles of prosecutors.[68] Others believed the rule did not apply to criminal investigations in which contacts were allowed as a matter of constitutional law and had long been accepted practice. Those courts typically ruled that such contacts were "authorized by law" within the meaning of the ethical rule.[69] Many courts accepted the basic application of the rule to prosecutors — and even to agents working with them — but still declined to apply the rule before

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[63] Mann, *supra* note 56, at 21.

[64] *Id.*

[65] "Information control entails keeping documents away from and preventing clients and witnesses from talking to government investigators, prosecutors and judges." *Id.* at 7.

[66] The basic rule now comprising Rule 4.2 of the ABA Model Rules of Professional Conduct appeared as DR 7-104(A)(1) of the ABA Model Code of Professional Responsibility. Before that, the rule appeared as Canon 9 of the ABA Canons of Professional Ethics. For a description of the rule's history, see John Leubsdorf, *Communicating with Another Lawyer's Client: The Lawyer's Veto and the Client's Interest*, 127 U. PA. L. REV. 683, 684–86 (1979).

[67] *See* Stuntz, *supra* note 7, at 1903–04 (discussing traditional application of no-contact rule in civil cases and contrasting more recent efforts to apply the rule in criminal investigations).

[68] People v. White, 567 N.E.2d 1368 (Ill. App. Ct. 1991).

[69] United States v. Hammad, 858 F.2d 834, 839 (2d Cir. 1988); *see* United States v. Ryans, 903 F.2d 731, 738–39 (10th Cir. 1990).

indictment.[70] After all, those courts reasoned, the then-existing ethical rule forbid contact with "parties" represented in a "matter"; no one is a "party" in a "matter," they held, until his name appears on an indictment.[71] Finally, when the issue arose on a motion to suppress evidence or to dismiss an indictment, some courts held that rules of ethics created no substantive rights for criminal defendants.[72] The sanction for ethical breaches, they held, was to discipline the government lawyer.[73]

Then, in 1988, shortly after the *Burbine* Court slammed the last door on the constitutional right to counsel before indictment, the Second Circuit opened a window for proponents of an extra-constitutional right under the rules of ethics.[74] In *United States v. Hammad*,[75] the court rejected the government's position that preindictment contacts with represented persons were beyond the reach of DR 7-104, the predecessor to Model Rule 4.2.[76] Though the *Hammad* court declined to suppress evidence obtained through such contacts,[77] its interpretation of the ethical rule sent shock waves through the Department of Justice.[78] In theory at least, the law licenses of federal prosecutors were in jeopardy for doing what they had done for most of two decades: managing grand jury investigations that included preindictment interviews by investigators, and sometimes covert contacts with suspects using undercover agents or informants.

The Department reacted to *Hammad* with the now infamous "Thornburg Memorandum."[79] Lawyer discipline was largely a function of state disciplinary

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[70] *E.g.*, United States v. Whittaker, 201 F.R.D. 363, 369 (E.D. Pa. 2001).

[71] This interpretation conveniently equates the ethical rule with the constitutional standard. Contacts before indictment are unregulated, but efforts to elicit information from a represented defendant are forbidden. In response to this limitation on the no-contact rule, the ABA amended Rule 4.2 to change "party" to "person." Some jurisdictions made the change even before the ABA. *See, e.g., In re* Disciplinary Proceeding, 876 F. Supp. 265, 266–67 (M.D. Fla. 1993).

[72] *E.g.*, United States v. Crook, 502 F.2d 1378, 1380–81 (3d Cir. 1974). The Third Circuit "share[d] the district court's unease with the practice of talking to a represented defendant behind his attorney's back," but the court declined to suppress the evidence because it did not believe it could disregard the mandate in 18 U.S.C. § 3501(a). *Crook*, 502 F.2d at 1380–81.

[73] *See, e.g.*, United States v. Heinz, 983 F.2d 609, 613 (5th Cir. 1993) (holding that suppression of evidence is not the appropriate remedy for Rule 4.2 violation); United States v. Grass, 2003 U.S. Dist LEXIS 646 (M.D. Pa. 2003) (holding that disciplinary action by the state's bar was the appropriate sanction, not suppression of evidence).

[74] United States v. Hammad, 858 F.2d 834 (2d Cir. 1988).

[75] *Id.*

[76] *Id.* at 838.

[77] Id. at 842 ("[T]he district court abused its discretion in suppressing the recordings and audiotapes . . . .").

[78] Rory K. Little, *Who Should Regulate the Ethics of Federal Prosecutors?*, 65 FORDHAM L. REV. 355, 362 (1996).

[79] Memorandum from Richard L. Thornburgh, United States Attorney General, to All

bodies, administered by state bar associations and overseen by state supreme courts.[80] Relying on the federal Supremacy Clause, the Thornburg Memorandum asserted that preindictment contacts were "authorized by law" and not subject to state discipline, in essence, because the Department of Justice approved of them.[81] In 1994, Attorney General Janet Reno codified the Department's Supremacy Clause position by issuing formal regulations specifying that preindictment contacts were authorized if they complied with constitutional standards.[82] The express aims of both Thornburg and Reno were to preempt state regulation of federal investigations.[83]

The Department's Supremacy Clause approach turned out to be a serious tactical error in the ongoing national debate over prosecutors and the no-contact rule. When prosecutors had argued to limit the substantive reach of Rule 4.2 and its predecessor, DR 7-104, they had decades of history and favorable constitutional precedent on their side.[84] How could it be unethical, they could argue, merely to advise investigators to observe constitutional limits in their investigations? The Supremacy Clause argument, however, threatened the traditional power of states to regulate the practice of law. It also threatened the institutional power of the organized bar. A debate over investigative tactics suddenly became a debate over the power to regulate the practice of law. Worse yet, the Department's argument for self-regulation was ill-timed, coming in an age of growing concern over abuses of police and prosecutorial power.[85] The result was a series of setbacks in a handful of well-publicized cases.[86] The idea that the Department of Justice should be a law unto itself was a hard sell.

Then came Joseph McDade, a Pennsylvania Congressman and erstwhile

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Justice Department Litigators (June 8, 1989), *reprinted in In re* Doe, 801 F. Supp. 478, 489–93 (D.N.M. 1992).

[80] *See In re Doe*, F. Supp. at 484 ("Since the founding of the Republic, the licensing and regulation of lawyers has been left exclusively to the States and the District of Columbia within their respective jurisdictions."); Bruce A. Green & Fred C. Zacharias, *Regulating Federal Prosecutors' Ethics*, 55 VAND. L. REV. 381, 390–400 (2002) (discussing sources of state regulation of prosecutor's ethics).

[81] *In re Doe*, 801 F. Supp. at 493.

[82] 28 C.F.R. § 77 (1994). For an account of the origins of the Thornburgh Memorandum and the Reno Rule, as well as the controversy they sparked, see Corinna Barrett Lain, *Prosecutorial Ethics under the Reno Rule: Authorized by Law?*, 14 CRIM. JUST. ETHICS 17, 22–24 (1995); Little, *supra* note 78, at 361–62, 375–77.

[83] *See In re Doe*, 801 F. Supp. at 489–93; 28 C.F.R. § 77.1.

[84] *See supra* notes 42–50 and accompanying text.

[85] *See* Little, *supra* note 78, at 359–60 (discussing rising concern with prosecutorial power during the 1980s).

[86] *See, e.g.*, United States v. McDonnell-Douglas Corp., 132 F.3d 1252, 1257 (8th Cir. 1998); United States v. Lopez, 4 F.3d 1455, 1457–58 (9th Cir. 1993).

defendant in a political corruption case.[87] When his four-year battle with federal prosecutors ended in an acquittal in 1996, he wasted no time in proposing legislation to curb the "overzealousness and excessiveness of Federal prosecutors."[88] His bill was aimed broadly at the supremacy arguments of the Reno Regulation, though the committee hearings focused almost exclusively on the rules governing contact with represented parties.[89] After an unsuccessful two-year odyssey through the legislative process, McDade's personal crusade resulted in a rider to a 1998 appropriations bill.[90] The McDade Amendment, euphemistically styled the "Citizens Protection Act" (CPA), passed by a substantial margin and was signed into law in October 1998.[91]

The CPA was deceptively simple, providing that: "An attorney for the Government shall be subject to State laws and rules, and local Federal court rules, governing attorneys in each State where such attorney engages in that attorney's duties, to the same extent and in the same manner as other attorneys in that State."[92] Congress had buried the Department's supremacy claim with a single sentence. States were free to apply their own versions of the no-contact rule to federal prosecutors, agents, and informants. [93]

B. The Scope of White-Collar Rights After the McDade Amendment

As we saw in Part I, the Sixth Amendment now provides suspects no protection against investigative contacts until the time charges are brought.[94] The Fifth Amendment and the Due Process Clause may protect them from coercive interrogation, but except for suspects who demand counsel while in police custody,[95] those provisions do not stop police from asking questions in the absence

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[87] United States v. McDade, 28 F.3d 283 (3d Cir. 1994).

[88] *Ethical Standards for Federal Prosecutors Act of 1996: Hearing on H.R. 3386 Before the Subcommittee on Courts and Intellectual Property of the House Comm. on the Judiciary*, 104th Cong. 7 (1996) (testimony of Rep. Joseph McDade). For a comprehensive account of the McDade Amendment's odyssey through Congress, see Zacharias & Green, *supra* note 8, at 211–15.

[89] *Hearings*, *supra* note 88, at 10.

[90] H.R. 4276, 106th Cong. (1999); *see* Zacharias & Green, *supra* note 8, at 215 & nn.49–50.

[91] Zacharias & Green, *supra* note 8, at 215 n.53.

[92] 28 U.S.C. § 530B(a) (2000).

[93] The CPA caused an uproar at the Department of Justice, sparked widespread debate within the organized bar, and gave rise to an outpouring of scholarly commentary. Most of the recent academic literature has dealt primarily with structural questions of federalism and regulatory power. For an excellent discussion of the competing claims on regulatory power, see Green & Zacharias, *supra* note 80.

[94] *See supra* text accompanying notes 44–45.

[95] *See* Edwards v. Arizona, 451 U.S. 477, 485–86 (1981).

of counsel. Nor do they impose significant restraints on the acquisition of information by deception through the use of informants.[96]

By contrast, the ethical rule forbidding contacts with represented persons prevents a prosecutor from "communicating" with a represented suspect either directly or through government agents or informants, in the absence of counsel.[97] Before addressing the wisdom or the fairness of that rule, we should pause to understand its potential breadth in the post-McDade world.

That is no simple feat, of course, because the rules of ethics differ from state to state. Under the CPA, a federal prosecutor might be subject simultaneously to the ethical rules of a host of states.[98] An Assistant United States Attorney (AUSA) admitted to the bar in Washington, D.C., who directs a grand jury investigation in Houston by advising FBI agents in New York about their contacts with witnesses on Wall Street, must conform to the no-contact rules of New York, Texas, and the District of Columbia. That kind of overlapping regulation has a ratcheting effect: The most restrictive rule tends to govern every case.[99]

1. Investigators and Informants

At the time of *Massiah*, the notion that the no-contact rule of legal ethics might govern the conduct of an undercover agent or informant seemed — to some on the Supreme Court at least — contrary to the basic purpose of the rule.[100] Today that is no longer the case. Whereas Rule 4.2 explicitly addresses only the conduct of

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[96] The use of deceptive undercover tactics in criminal investigations has survived constitutional challenge several times, both before and after *Hoffa*. *See, e.g.*, Weatherford v. Bursey, 429 U.S. 545 (1977); Hoffa v. United States, 385 U.S. 293 (1966); On Lee v. United States, 343 U.S. 747 (1952).

[97] MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

[98] One of the principal criticisms of the McDade Amendment has been that it subjects federal prosecutors to multiple sources of sometimes conflicting regulation. Note, *Federal Prosecutors, State Ethics Regulations, and the McDade Amendment*, 113 HARV. L. REV. 2080 (2000).

[99] For example, when a corporation is represented by counsel, jurisdictions differ substantially over which employees are covered by the rule. *Compare* Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll., 764 N.E.2d 825, 833 (Mass. 2002) (forbidding contact with employees who exercise managerial responsibility in the matter, those who committed acts at issue in the litigation, and those who have authority to make decisions about the litigation), *with* Palmer v. Pioneer Hotel & Casino, 19 F. Supp. 2d 1157, 1162 (D. Nev. 1998) (combining the ABA standard, which covers any employees whose statements qualify as admissions by the corporation, with a "'managing-speaking agent'" standard) (quoting *Wright by Wright v. Group Health Hosp.*, 691 P.2d 564, 569–70 (Wash. 1984)). An AUSA in Boston, advising agents about undercover contacts in Las Vegas, would need to comply with the more restrictive Nevada rule rather than the comparatively generous Massachusetts approach.

[100] *See* Massiah v. United States, 377 U.S. 201, 210–11 (1964) (White, J., dissenting).

lawyers,[101] Rule 5.3(b) notes that "a lawyer having direct supervisory authority over [a] nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer."[102] The same rule adds that a lawyer is "responsible" for the conduct of nonlawyers if the lawyer "orders" or "ratifies" the conduct of the nonlawyer.[103]

If you were to ask most FBI agents if they were "supervised" or "ordered" to act by AUSAs or other Justice Department lawyers, you might receive a cold stare, a polite chuckle, or an officially accurate response that said "only by the Attorney General." As a practical matter in white-collar cases, however, the relationship between prosecutor and investigator includes elements of both management and partnership.[104] Today, unless the agent acts independently of the prosecutor, or contrary to her advice, odds are strong that courts and bar disciplinary committees will hold the lawyer responsible for investigative contacts.[105] The same may be true of informants operating at the direction of government investigators.[106] In the post-McDade world of white-collar investigation, the rules of ethics can hold prosecutors responsible for the type of undercover contacts that brought down Jimmy Hoffa, as well as for interviews of represented persons by federal agents.

2. What is "Communication" with a Represented Party?

Rule 4.2 instructs a lawyer not to "communicate" with a represented party.[107] But what if an informant is in a position simply to listen to a suspect who willingly

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[101] By contrast, DR 7-104 provided that "a lawyer shall not . . . [c]ommunicate *or cause another to communicate* on the subject of the representation with a party he knows to be represented by a lawyer." MODEL CODE OF PROF'L RESPONSIBILITY DR 7-104 (1990) (emphasis added).

[102] MODEL RULES OF PROF'L CONDUCT R. 5.3 (2002).

[103] *Id.* R. 5.3(c).

[104] *See* Flowers, *supra* note 58, at 934–39 (discussing how, in undercover investigations, prosecutors help to "assure the legality of the investigation by advising law enforcement agencies" and that "courts have recognized the importance of the involvement of the prosecutor in the investigative stage").

[105] *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 95-396, at 19–21 (1995) [hereinafter ABA Opinion].

[106] As a general proposition, Rule 5.3 would hold prosecutors responsible for the conduct of informants to the same degree that they might be responsible for the conduct of agents, as long as the informants are "supervised" or their conduct "ratified" by the prosecutor. Some courts, however, have balked at extending the rule to cover all contacts by informants, noting the long history of court approval of undercover tactics in criminal investigation. The *Hammad* court, for example, concluded that at least some types of informant contact were "authorized by law" within the meaning of Rule 4.2. United States v. Hammad, 858 F.2d 834, 840 (2d Cir. 1988).

[107] MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

speaks? In the Sixth Amendment arena — where the protection arises after a defendant is charged — passive listening is allowed even when informants are deliberately placed in jails or holding cells for the purpose of being near the accused.[108] The Constitution only prohibits efforts to "deliberately elicit" incriminating statements in counsel's absence.[109] The ethical rule, however, is broader, at least in the eyes of some courts. A prosecutor, directly or through an agent, may violate the rule simply by listening, even when the represented party initiates the communication.[110]

3. "Subjects," "Matters," and Continuing Crimes

The no-contact rule forbids communication "about the subject of the representation" with a person "represented . . . in the matter."[111] Again, even after indictment, the Sixth Amendment draws an extremely narrow zone of protection based on subject matter. The right to counsel attaches with respect to the particular crime charged.[112] In most cases, it does not extend even to closely related offenses.[113]

By contrast, in some jurisdictions, Rule 4.2 applies during an investigation, well before an indictment formally defines the "matter" at issue.[114] Prosecutors seldom announce the aims and boundaries of a grand jury investigation while it is underway. As a result, Rule 4.2 provides significantly broader protection to suspects at the investigative stage than the Sixth Amendment provides even for those formally charged with a crime.[115] If prosecutors or agents are interested enough to make the investigative contact, then chances are strong that it will be covered by the Rule.

The breadth of Rule 4.2 causes particular problems for prosecutors when evidence suggests that a target is continuing his criminal activity or committing new

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[108] *See* Kuhlmann v. Wilson, 477 U.S. 436, 456–57 (1986). In *Kuhlmann*, the Court determined that "the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Id.* at 459.

[109] *Id.* at 457.

[110] *See In re* Howes, 940 P.2d 159, 165–66 (N.M. 1997); *see also* ABA Opinion, *supra* note 105, at 18–19.

[111] MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

[112] Texas v. Cobb, 532 U.S. 162, 167–72 (2001).

[113] *See id.* (holding that defendant's confession in the absence of counsel was admissible in murder prosecution, even though counsel had been appointed for a burglary charge and murder had occurred during burglary).

[114] *See* United States v. Hammad, 858 F.2d 834 (2d Cir. 1988).

[115] Rule 4.2 covers all communication "about the subject of the representation." MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002). The "subject" of the representation typically would be the investigation itself.

crimes in an effort to obstruct the investigation. When a whistleblower inside a represented corporation calls the FBI to report that his boss is shredding documents, a prosecutor may sense an important break in the case. But she should also sense the looming possibility of an ethical violation if she encourages agents to meet privately with the insider, or to offer the insider a recording device for his next conversation with the boss.[116] The dilemma is compounded for the prosecutor because she knows that ethics authorities ultimately will judge her choices with the benefit of hindsight.[117] If the allegations of continuing crimes or obstruction are unfounded or impossible to prove, or if the whistleblower conveniently rediscovers his loyalty to his employer, then the prosecutor's choice will look like a calculated end-run around corporate counsel.

4. Communication Initiated by the Client: A Rule of Waiver or Permission?

Waiver of Sixth Amendment rights presents a difficult puzzle for courts. If the right includes an opportunity to be advised by counsel, how can police ask a defendant to waive it when counsel is not present? But even in the murky area of Sixth Amendment waivers, one thing seems clear: A suspect can waive the right by initiating the communication himself.[118]

The no-contact rule of ethics is more restrictive. In the eyes of the ABA and some courts,[119] the rule applies even when a represented person picks up the phone and contacts the FBI, and even when he says that he does not want his lawyer

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[116] In the Ninth Circuit, at least, a prosecutor might take some comfort from *United States v. Talao*, 222 F.3d 1133 (9th Cir. 2000). In that case, the court found that California's no-contact rule did not prohibit an AUSA from listening when a corporate bookkeeper initiated a conversation in which she disclosed that corporate officers were attempting to suborn perjury. *Id.* at 1140.

[117] *See, e.g.*, 66 Crim. L. Rep. (BNA) 573, 592 (Mar. 29, 2000) (reporting views of an AUSA that he would not even try to determine which corporate employees might be subject to investigative contact under Rule 4.2 for fear of later losing the case based on "misperception").

[118] *See* Michigan v. Jackson, 475 U.S. 625 (1986) ("[A]n accused person in custody who has 'expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, *unless the accused himself initiates further communication, exchanges, or conversations with the police.*'") (quoting *Edwards v. Arizona*, 451 U.S. 477, 484–85 (1981) (emphasis added)).

[119] *Compare* People v. Green, 274 N.W.2d 448, 453 (Mich. 1979) (noting that a represented person's willingness to talk will "not excuse compliance with . . . DR 7-104(A)(1)"), *and* ABA Opinion, *supra* note 105, at 17 (noting that a represented person may not be able to make an informed waiver without counsel's assistance), *with* United States v. Talao, 222 F.3d 1133, 1140 (9th Cir. 2000) (holding that the no-contact rule did not prohibit prosecutor from listening when represented person initiated conversation in order to disclose ongoing crime).

involved. Though the ABA recognizes that this approach seems "paternalistic," it argues that the rule is designed to prevent uninformed waiver and to protect the "effectiveness" of the lawyer's representation.[120] Under that view, until the client takes the formal step of discharging the lawyer, the client has no power to waive the rule. The lawyer must give permission for any contact.

5. Corporations, Officers and Employees

The broadest application of the no-contact rule — and accordingly the most troublesome for prosecutors — occurs when a corporation is represented during criminal investigation. The rule prohibits contact with a represented "person," a term that includes corporations.[121] But who within the corporation is protected from contact? Jurisdictions are divided on this critical issue.[122] Prior to a 2002 revision, the official Comment to ABA Model Rule 4.2 stated that a represented "person" includes not only top corporate managers within the so-called control group, but also any employee "whose statement may constitute an admission on the part of the organization."[123] Under the law of evidence, a current employee's statement is an admission of the corporation if it relates to a matter within the scope of his employment.[124] Therefore, as a practical matter, the ABA rule prohibited contact with almost any employee who has useful information, except when corporate counsel consents or is present.[125] In those jurisdictions that still adhere to this broad version of the rule, a corporation effectively can shield all of its employees from direct contact with investigators simply by hiring an attorney.[126]

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[120] ABA Opinion, *supra* note 105, at 17.

[121] *See* MODEL RULES OF PROF'L CONDUCT R. 4.2, cmt. 7 (2002).

[122] *See supra* note 99; *see also* Jerome N. Krulewitch, *Ex Parte Communications with Corporate Parties: The Scope of the Limitations on Attorney Communications with One of Adverse Interest*, 82 NW. U. L. REV. 1274, 1275 (1988) (noting that differences in interpretation of the no-contact rule have "made it virtually impossible . . . to determine the ethical limit of ex parte interviews when the opposing party is a corporation").

[123] MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 4 (2001). That language was omitted from the official Comment to Rule 4.2 in the 2002 Edition of the Model Rules of Professional Conduct as a consequence of the ABA's "Ethics 2000" project. *See* MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. (2002).

[124] *See* FED. R. EVID. 801(d)(2)(D).

[125] As one court noted, the ABA test would "effectively prohibit the questioning of all employees who can offer information helpful to the litigation." Messing, Rudavsky & Weliky, P.C. v. President & Fellows of Harvard Coll., 764 N.E.2d 825, 833 (2002).

[126] After the 2002 revisions, the ABA's official comment to Rule 4.2 provides, in part:

> In the case of a represented organization, the Rule prohibits communications with a constituent of the organization who supervises, directs or regularly consults with the organizations' lawyer concerning the matter or has authority to obligate the organization with respect to the matter or whose act or omission in connection with the matter may be imputed to the organization for purposes

III. RETHINKING WHITE-COLLAR RIGHTS

A. Unequal Protection: Rule 4.2 as a White-Collar Right

By definition, the rule restricting communication with "represented persons" protects only those who are "represented."[127] But very few suspects have counsel before they are charged. As a practical matter, therefore, the no-contact rule protects only a small percentage of those under investigation for crime. For reasons outlined below, it protects corporations and individuals suspected of white-collar crimes, but almost no one else.

For three principal reasons, most suspects are unrepresented before the time of arrest and formal charge. First, many suspects do not know they are suspects. Investigations of violent crimes and drug crimes, in particular, are likely to remain covert until the moment of arrest because of concerns over flight from prosecution, witness intimidation, or worse. Undercover techniques — which typically require the investigation to remain a secret — are used in those cases more often than in the investigation of financial crimes.[128] Second, many routine criminal investigations simply happen too fast for lawyers to get involved. Police typically respond to a report of crime in progress, the blue lights flash, and pursuit is immediate. The police make contact with the suspect at the time of arrest and sometimes for several hours afterward in an interrogation room. Lawyers on both sides hear about the case just before an arraignment or bail hearing the following day. Third, few suspects of criminal investigations can afford a lawyer.[129] The vast majority of criminal defendants, even those charged with the most serious crimes, are represented at trial by appointed counsel.[130] To my knowledge, no American jurisdiction routinely appoints counsel at public expense for those who have not yet been charged with

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of civil or criminal liability.

MODEL RULES OF PROF'L CONDUCT R. 4.2 cmt. 7 (2002). While slightly narrower than the previous version, the revised comment still includes a wide array of corporate officers and agents. A corporate agent's act may be "imputed to the organization for purposes of civil or criminal liability" if the agent acted within the scope of employment and, at least in part, with the intent to benefit the corporation. *See* United States v. Automated Med. Labs., 770 F.2d 399 (4th Cir. 1985).

[127] MODEL RULES OF PROF'L CONDUCT R. 4.2 (2002).

[128] The nature of the investigative tactics in white-collar crime may be changing. Tactics such as wiretaps and search warrants, traditionally employed to investigate street crime and narcotics cases, are appearing more often in white-collar investigations. *See* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 10 (2001).

[129] *See* William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 28–29 (1997).

[130] Approximately eighty percent of felony defendants are represented by appointed counsel. *Id.* at 7 nn.7, 28 (1997) (citing Steven K. Smith & Carol J. DeFrances, *Indigent Defense*, BUREAU JUST. STAT. SELECTED FINDINGS, Feb. 1996, at 1, 4).

crime.[131] Thus, for both practical and financial reasons, most suspects in most investigations must go it alone, at least until the handcuffs are applied and the complaint or indictment is filed.

In white-collar investigations, by contrast, suspects and even witnesses with little criminal exposure are much more likely to be represented by counsel during an investigation.[132] White-collar investigations often stretch for months, even years.[133] They seldom remain covert for long. Target corporations and individuals typically learn of the investigation through the arrival of a subpoena and respond by hiring counsel.[134] Unlike suspects of common street crime, suspects of Wall Street or Main Street crime often have the means to hire a lawyer.[135] Even more significant, major white-collar investigations typically involve the conduct of one or more business organizations.[136] Target corporations generally hire a lawyer — often many lawyers — to respond to the investigation.[137] As we have seen, once the corporation retains a lawyer, the no-contact rule can shield virtually all of its officers and employees from any contact not pre-approved by corporate counsel.

I overgeneralize only slightly when I suggest that, as a practical matter, Rule 4.2 and the CPA create a category of "white-collar rights." The shield of the no-contact rule is available to corporations and individuals suspected of major financial crimes, but to few others. At least when it comes to Rule 4.2, Congressman McDade's "Citizens Protection Act" protects only a select portion of the citizenry: corporations, their managers, and others with the means to hire counsel before they are charged with any crime.[138]

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[131] For example, the federal Criminal Justice Act (CJA) calls for representation only for persons "charged" with a felony or class A misdemeanor. 18 U.S.C. § 3006(a)(1)(A) (2000). The statute has been applied flexibly in those few cases where federal prosecutors provide written notice to a suspect that he is about to be charged and advising him to obtain counsel for plea discussions. In such cases, the Administrative Office of the United States Courts (AOUSC) has viewed the prosecutor's notice as a "charge" under the CJA, thereby allowing for pre-indictment appointment of counsel. *See* Letter from Paul E. Denicoff, Staff Attorney, AOUSC, to Mary Elizabeth Manton, Federal Public Defense (June 3, 1992) (on file with author).

[132] Stuntz, *supra* note 129, at 30 n.103.

[133] *See* O'SULLIVAN, *supra* note 128, at 13–14.

[134] *Id.*

[135] Stuntz, *supra* note 129, at 29–30 & n.103 ("Almost by definition, white collar crime tends to involve defendants with money.") (citing DAVID WEISBURD ET AL., CRIMES OF THE MIDDLE CLASSES 100–01 & tbl.5.2 (1991)).

[136] *See* O'SULLIVAN, *supra* note 128, at 13–14.

[137] *Id.* at 14.

[138] H.R. 4276, 106th Cong. (1999).

B. Asking the Wrong Question About "Parity": Shouldn't We Treat Prosecutors Like Other Lawyers?

Ever since the Justice Department chose to oppose state bar regulation of federal investigations on Supremacy Clause grounds,[139] the focus of the debate over the no-contact rule has shifted in a direction almost certain to doom the Department's position. Proponents of the McDade approach ask simply, "Why shouldn't federal prosecutors be held to the same ethical standards as other attorneys?"[140] When the question is framed in that manner, the "right" answer seems unavoidable.

But when it comes to deciding how — or whether — to apply Rule 4.2 to forbid investigative contacts with represented persons, the "parity of ethics" question puts the debate in a false light. Applying the no-contact rule to criminal investigators does not result in equal treatment of prosecutors in comparison to other lawyers. To the contrary, in criminal investigations, the rule operates almost exclusively in one direction. As a practical matter, it limits only the conduct of the prosecutor and government agents. With rare exceptions, it does nothing to limit the access of white-collar defense counsel to anyone.[141]

The debate over Rule 4.2 in criminal investigations has little to do with insuring parity of ethics among different segments of the bar. It is primarily a struggle over "information control" in white-collar investigations. As Kenneth Mann's study of white-collar practitioners observed, "[t]he defense attorney's first objective is to prevent the government from obtaining evidence that could be inculpatory of his client."[142] Keeping investigators away from suspects and potential witnesses is an

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[139] *See supra* text accompanying notes 81–86.

[140] *See, e.g.*, Sapna K. Khatiwala, Note, *Toward Uniform Application of the "No-Contact" Rule: McDade is the Solution*, 13 GEO. J. LEGAL ETHICS 111, 128 (1999) (suggesting that federal prosecutors could be "bound by state ethics rules as are all other attorneys" and still function effectively).

[141] Normally, defense counsel is not limited by the rule because her opponent, the prosecutor, does not represent any "person." She is free to contact any witness who will talk to her, including government employees and agents. The one-sided application of Rule 4.2 in criminal investigations is evident from the track record of the rule. Virtually all of the reported cases involve conduct by prosecutors, not by white-collar defense counsel. *See, e.g., supra* notes 68–78 and accompanying text. Of course, in a few cases, the rule will restrict defense counsel, who represents one individual suspect, from contacting another individual witness or suspect if that person is represented separately. *See* United States v. Franklin, 177 F. Supp. 2d 459 (E.D. Va. 2001). As a practical matter, however, there is a high level of coordination and cooperation among defense counsel representing multiple suspects in white-collar cases. *See* Mann, *supra* note 56, at 175–76. Joint defense agreements and other cooperative approaches allow for sharing of information within the defense camp, and make the rule's limits less burdensome. *Id.*

[142] Mann, *supra* note 56, at 6.

effective means of preventing the government from obtaining evidence, and that is the principal function of Rule 4.2 in white-collar investigations.

The relevant question is not whether federal prosecutors should adhere to the same "ethical" standards as others. We can answer "yes" to that question without beginning to address the real — non-ethical — issues raised by the no-contact rule. Instead, the relevant Rule 4.2 question should focus on the lack of parity in treatment of those individuals subject to criminal investigation. Quite simply, due to Rule 4.2 and the McDade Amendment, white-collar suspects can buy more favorable treatment than others. As Congress, the courts, and state bar disciplinary committees continue the debate over Rule 4.2, they should ask whether the interests served by the no-contact rule are sufficient to justify that difference in treatment.

C. The Real Question of Parity: Shouldn't We Treat White-Collar Suspects Like Other Suspects?

In theory, the primary interest served by the no-contact rule is to protect the client from an overreaching opponent.[143] The rule prevents lawyers from "taking advantage" of lay persons who lack special skill and training in legal matters.[144] That rationale may ring true when we imagine the process of negotiating a settlement in a civil case. However, when we apply it to criminal investigations, in which the contact typically comes through an informant or a detective, the rationale begins to lose force. Informants may take advantage of suspects. Indeed they may deliberately deceive them. But that deception has nothing to do with the informant's legal training. Nor does that rationale make much sense when applied to police questioning. Though some investigators may be skilled in legal matters, and even more skilled in taking advantage of suspects,[145] those skills are not the concern of codes of legal ethics.

The white-collar prosecutor's involvement at a supervisory level does little to change this equation. The prosecutor's principal supervisory role is to ensure that investigators operate within constitutional limits.[146] To punish prosecutors for doing that job is to twist the concept of "ethics" beyond recognition. As a policy matter, it makes little sense to apply rules of legal ethics for this purpose. Over the long haul, the likely effect of the rule will be to remove prosecutors from undercover investigations and leave agents on their own.[147] Indeed, given a little

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[143] Leubsdorf, *supra* note 66, at 686–87.

[144] *Id.*

[145] Police, of course, are trained in interrogation methods that aim to take advantage of the psychological weaknesses of a suspect or to deceive him into believing that he will benefit from talking. Indeed, the *Miranda* opinion devoted pages to describing such tactics. *See* Miranda v. Arizona, 384 U.S. 436, 448–55 (1966).

[146] *See* Flowers, *supra* note 58, at 934–35.

[147] *See* Note, *supra* note 98, at 2091 ("One of the greatest dangers of the McDade

time and the current incentives under the McDade Amendment, the FBI would be wise to set up a new office of "undercover supervision" and staff it fully with nonlawyers.

For our "parity" analysis, the more critical point is that the same police tactics that the no-contact rule may prohibit in white-collar cases — direct questioning by agents and undercover approaches by informants[148] — are widely used and permitted by courts in other cases.[149] When it comes to advantage-taking, there is no reason to favor a white-collar target, who is represented by counsel, over an unrepresented suspect in a routine street-crime investigation. The teenage suspect interrogated by a narcotics detective is no less likely to be taken advantage of than is the corporate executive accosted on his front porch by an FBI agent.[150] It is hard to explain why the law should protect the executive and not the teenager. Yet that is exactly what the no-contact rule does.

In an effort to make the no-contact rule sound more like a rule of ethics, its purpose is sometimes articulated in terms of counsel's effectiveness.[151] The rule promotes the effectiveness of counsel, in theory, by preventing the client from making unwise and damaging admissions that will then make the lawyer's efforts futile. At its core, this is essentially the "taking advantage" claim in slightly different clothing.[152] It amounts to an argument that once a suspect has been fortunate enough to retain a lawyer, he should be protected against the consequences of any foolish choice that he makes by ignoring his lawyer's advice. There is, of course, no such right for ordinary criminal suspects under the Sixth Amendment. In many criminal cases, counsel's ultimate "effectiveness" — meaning her ability to achieve a favorable result through trial or plea — is undermined by foolish choices made by her client in her absence. Aside from its temporary detour in *Escobedo*,[153] the Court's reaction to such cases has been a

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Amendment . . . is that federal prosecutors may feel compelled to dissociate themselves from undercover investigations . . . .").

[148] *See supra* Part II.B.5.

[149] *See, e.g.*, Illinois v. Perkins, 496 U.S. 292 (1990); United States v. White, 401 U.S. 745 (1971); Hoffa v. United States, 385 U.S. 293 (1966).

[150] Indeed, the white-collar suspect has a distinct advantage that the common burglar does not: The white-collar suspect has a lawyer who has told him not to talk to anyone about the case.

[151] *See* ABA Opinion, *supra* note 105, at 332–33. The "effectiveness of counsel" articulation of the rule's purpose should sound familiar in light of our Sixth Amendment history lesson. *See supra* Part I. It is essentially the same claim that the *Escobedo* Court adopted when it held that the suspect's trial should not be "an appeal from the interrogation." Escobedo v. Illinois, 378 U.S. 478, 487 (1964). Of course, that is a rationale that the Court has abandoned for the purposes of Sixth Amendment analysis. *See supra* Part I.

[152] *See supra* text accompanying notes 143–45.

[153] *Escobedo*, 378 U.S. at 491–92 (holding the petitioner's confession inadmissible because it was obtained after he became the focus of investigation and requested the

rather explicit, "So what?"[154] It is hard to see why the rule should be different for a white-collar suspect simply because he retains counsel before, rather than after, the opportunity to put his foot in his mouth. When an as-yet-unrepresented street drug dealer sells cocaine to a police informant, he handicaps his trial counsel's future effectiveness no less than the already-represented accountant who asks her secretary to shred documents, not knowing that the secretary is concealing a government-issued recording device. In either case, counsel's "effectiveness" is equally "impaired," yet the no-contact rule would shield the crooked accountant but not the street dealer.

In sum, when it comes to protecting a suspect from "advantage taking" or from the consequences of foolish choices, there is little reason for distinguishing the typical, unrepresented suspect from the represented target of a white-collar investigation. Both individuals are imposed upon equally by the process of investigation. Indeed, by virtue of education, status, and access to legal advice, the white-collar suspect probably is less vulnerable to the guile of investigators and therefore less in need of the shield of a no-contact rule. But he is the one who gets its protection.

Of course, protection against advantage-taking is not the only purpose of the no-contact rule. The rule is supposed to serve two other important functions: (1) to protect the attorney-client relationship from an opponent's interference;[155] and (2) to protect against disclosure of privileged communications and waiver of privilege.[156] On the surface, these seem like serious concerns. A suspect should have access to his counsel and full opportunity for confidential communication. A suspect also should have the right to protect those communications from disclosure. Significantly, for purposes of our "parity" analysis, these interests would separate the represented suspect from the unrepresented suspect in a meaningful way. After all, the unrepresented suspect has no relationship and no privilege to protect.

It seems unlikely, however, that the no-contact rule really serves these interests in most cases. Direct contacts by investigators or informants do not limit a suspect's access to counsel,[157] nor do they limit his opportunities for confidential consultation. The client is free to rebuff the investigator's approaches or to decline to speak about the matter when asked by a colleague-turned-informant. After all, that is exactly what his lawyer would have told him to do. When a client can avoid damaging admissions by following his lawyer's advice, it is hard to see how an

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assistance of counsel).

[154] *See* Moran v. Burbine, 475 U.S. 412, 430 (1986) ("The Sixth Amendment's intended function is not . . . to protect a suspect from the consequences of his own candor.").

[155] *See* ABA Opinion, *supra* note 105, at 2–3.

[156] *See id.*; Leubsdorf, *supra* note 66, at 686.

[157] Massiah, after all, could speak with his lawyer all he wanted. *See* Massiah v. United States, 377 U.S. 201 (1964).

investigator has interfered with the attorney-client relationship.[158]

As for disclosure of privileged information, that concern seems unlikely to arise in most cases. A client's knowledge does not become privileged merely because he may have told his lawyer what he knows. If the client tells the same story to an investigator, there has been no breach of any privilege. Certainly there is no breach where the client lies to his lawyer but admits the truth to a friend who turns out to be an informant. Concern over privilege may be a more serious matter when the person contacted is herself an attorney or an attorney's assistant. In those presumably rare cases, however, the client who holds the privilege has additional protections, including the ethical rules governing the contacted attorney.[159]

Finally, in addition to considering the interests that the no-contact rule may be designed to protect, it is worth pausing to recognize the interests that it threatens. The most obvious, of course, is the interest in determining the truth. There are serious "information costs" to a no-contact rule in criminal investigations. The Fifth Amendment allows most suspects to deflect most questions. Lawyers defending white-collar suspects use the privilege liberally,[160] and they would be foolish to do otherwise. "[A]ny lawyer worth his salt," the Court has noted, will advise a client not to speak if there is a serious risk that his words will hurt him.[161] When witnesses speak with counsel at their side, they choose their words carefully, often having rehearsed them beforehand under counsel's tutelage. Impromptu contacts are favored by investigators because witnesses and suspects are more likely to speak, and to speak candidly. Undercover contacts are especially favored, because an unsuspecting suspect is most likely to discuss wrongdoing with someone he believes to be a partner in crime. Massiah may have been duped, but his candid words to a co-conspirator revealed the truth.[162]

One clear cost of a no-contact rule is that it makes guilt easier to hide. The flip side is equally true but too seldom acknowledged by proponents of a no-contact rule: The rule also makes it harder to identify innocence.[163]

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[158] Of course, the client may ignore counsel's advice and make admissions that he later regrets. In those cases, there may be a problem in the attorney-client relationship, but it is not the result of the contact. Indeed, the contact and the regrets that follow will merely reinforce the attorney's advice.

[159] MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2002) (concerning confidentiality of information).

[160] *See* Mann, *supra* note 56, at 7–8, 135.

[161] Watts v. Indiana, 338 U.S. 49, 59 (1949) (Jackson, J., concurring in part and dissenting in part).

[162] *See* Massiah v. United States, 377 U.S. 201, 203 (1964).

[163] For a compelling argument that applying a rigid no-contact rule in criminal investigations tends to benefit the guilty at the expense of innocent parties, see Stuntz, *supra* note 7, at 1944–54.

D. Should We Treat Corporations Most Favorably of All?

Major white-collar investigations typically involve the conduct of business organizations.[164] The corporation itself may be a target, and most of the individual suspects as well as the potential witnesses are likely to be corporate officers or employees. The key documents are largely within their control. They have formed bonds of loyalty to one another and to their corporate employer, and they have strong financial incentives to remain loyal. As a result, finding a candid insider may be the most significant roadblock to unearthing wrongdoing inside the corporation. In this environment, the "information cost" of the no-contact rule takes on special significance.

When the "represented person" is the corporation itself, the no-contact rule grants protections far more extensive than those afforded any represented individual.[165] At least in those jurisdictions which accept the ABA's broad reading, the rule grants corporate counsel a veto power over government interviews or undercover contacts with virtually all of the key witnesses in the case.[166] Given the broad reach of the rule's protection for corporations, it is worth asking why we should embrace a rule with such potential to stymie the investigation of insiders.

As I suggested above, arguments about overreaching and advantage-taking with regard to represented individuals have little force when we compare the law's treatment of most criminal suspects. Those claims sound particularly hollow when we apply them to corporations. Individuals at least have the Fifth Amendment right not to be forced to talk. Most of the "special skill" brought to bear when criminal investigators "take advantage" of individuals is aimed at circumventing that privilege.[167] A principal function of counsel during a criminal investigation is to

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[164] *See supra* note 136 and accompanying text.

[165] Those protections may be limited in some instances when individual employees retain their own counsel. But as a practical matter, corporate counsel often still exercises a high degree of control over government access to witnesses. After all, it is often the corporation that retains counsel for individual suspects, and it is corporate counsel who often helps select those attorneys. Not surprisingly, defense efforts tend to present a united front to the government, with the multiple defendants sharing information internally through joint defense agreements. *Cf.* Stuntz, *supra* note 7, at 1949–50 (regarding counsel's ability to maintain a "wall of silence" in organized crime investigations). When corporate counsel employs the no-contact rule to erect a wall of silence, the government's only access to insiders may be through the grand jury subpoena process. That approach can be time-consuming and inefficient at best. It may be ineffectual when witnesses have been carefully prepared to avoid damaging disclosures.

[166] *See* Frank O. Bowman, III, *A Bludgeon by Any Other Name: The Misuse of "Ethical Rules" Against Prosecutors to Control the Law of the State*, 9 GEO. J. LEGAL ETHICS 665, 669–70 (1996).

[167] *See* Miranda v. Arizona, 384 U.S. 436, 448–55 (1966) (describing the techniques interrogators use to cause a suspect to confess).

give advice with respect to that privilege. Corporations, however, have no Fifth Amendment privilege.[168] Compelling a corporation to assist with a criminal investigation is hardly "taking advantage," and it has nothing to do with circumventing the Fifth Amendment.

Corporations *are* protected by an attorney-client privilege,[169] and proponents of the no-contact rule suggest that it protects that privilege.[170] But, almost by definition, statements by corporate employees to investigators or informants are not privileged.[171] And except in unusual cases,[172] such statements are unlikely to disclose anything privileged. A broad no-contact rule is both unnecessary and overbroad when it comes to protecting the privilege.

In one sense, the no-contact rule can have a perverse effect on privilege. Corporate counsel often will conduct her own "internal investigation" when allegations of corporate wrongdoing surface.[173] Counsel's interviews with employees are subject to the attorney-client privilege, but it is the corporation's privilege.[174] In part because of Rule 4.2, the government's efforts to contact those same witnesses may be stymied. When the government's investigation moves to a stage of plea bargaining with the corporation, the price of the bargain quite often is a waiver of that corporate privilege.[175] In effect, the government can demand to receive through the bargain what the no-contact rule had denied during the investigation. If the bargain is struck with the corporation, as it often is, the individuals who had "confidential" communications with corporate counsel are left out in the cold. Their conversations may be disclosed to the government when the corporation waives its privilege.[176] In this indirect fashion, a rule designed to protect privilege may actually have the opposite effect.

Finally, we should consider an even more central question that arises when we apply the no-contact rule to protect corporations as "represented persons." Whose interests does the rule protect? The answer cannot, or at least should not, be that it protects individual insiders. After all, it is not their interest that corporate counsel

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[168] Braswell v. United States, 487 U.S. 99, 105 (1988); *see* Bellis v. United States, 417 U.S. 85 (1974).

[169] Upjohn Co. v. United States, 449 U.S. 383, 397 (1981) (extending the attorney-client privilege to corporate communications).

[170] *See* ABA Opinion, *supra* note 105, at 2–3.

[171] *See supra* text accompanying notes 158–59.

[172] The greatest risk of disclosure would arise where the person contacted by investigators was herself an attorney or assistant to a corporate attorney. Of course, that kind of contact could be regulated by a rule much narrower than Rule 4.2.

[173] *See, e.g., Upjohn*, 449 U.S. at 386–87.

[174] *Id.* at 392–97.

[175] *See* David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147–48 (2000).

[176] *See id.*

is hired to protect. The short answer might be "the corporation's interest," but that answer simply begs the real question. A better answer might be "the shareholders," but even that one has some rough edges. At least in publicly traded companies, shareholders may have a variety of interests, even conflicting interests, with respect to a criminal investigation. Depending upon the time they chose to invest, and the reasons for investing, some may be the victims while others may be the beneficiaries of the very conduct under investigation. Some may sell and others may buy while an investigation is underway. As several recent and widely publicized investigations suggest, some shareholders may benefit when an investigation unearths wrongdoing by insiders, especially when those insiders have substantial assets that may be recouped for the benefit of shareholder-victims.[177]

In that environment, it is far from clear that a no-contact rule — which generally serves to inhibit disclosure of information regarding the conduct of corporate insiders — should be regarded as a tool that protects the "corporate" interest. It is worth considering, at least, whether the interests of shareholders specifically, and the investing public generally, would be better served by a rule that promotes candid disclosure.

CONCLUSION

Jimmy Hoffa died without getting what he sought from the Supreme Court: a no-contact rule that would keep investigators and informants away from criminal suspects whenever they were savvy enough, or wealthy enough, to hire counsel. But Rule 4.2 and the McDade Amendment have revived Hoffa's dream in the form of a new white-collar right: a broad protection for corporations and their managers against the sort of investigation that brought Hoffa down. In a world that suddenly seems beset by corporate scandal, it is worth asking whether special treatment for white-collar suspects makes sense. Jimmy Hoffa might enjoy the irony in the way things have worked out. But he would be laughing at our expense.

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[177] In the investigation of Enron Corporation, for example, a plea agreement with former executive Michael J. Kopper resulted in his surrender of $12 million. *See* Carrie Johnson, *Ex-Enron Official Will Plead Guilty: First Case Against a Company Executive*, WASH. POST, Aug. 21, 2002, at A1.