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The Unlawful Conduct Defense in Legal Malpractice

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I. Traditional Rejection of an “Outlaw” Doctrine

Not long ago, American tort law clearly rejected an “outlaw” doctrine: a plaintiff engaged in tortious or criminal acts was not treated as an outlaw who could be injured with impunity. As this principle was expressed in the American Law Institute's Restatement (Second) of Torts:

One is not barred from recovery for an interference with his legally protected interests merely because at the time of the interference he was committing a tort or a crime.

This was true regardless of whether the plaintiff’s claim was based on intent, recklessness,
negligence, or strict liability. The plaintiff’s unlawful conduct might give rise to a defense such as contributory or comparative negligence under ordinary tort principles, or might trigger a privilege assertable against the plaintiff, such as one “to prevent crime or to arrest a criminal.” However, unlawful conduct, by itself, did not inevitably bar the courthouse doors.

Various cases allowed plaintiffs to sue for harm that they suffered while engaged in illegal gambling, fornication, or doing unlicensed business, or while unlawfully present in the United States. Other suits permitted recovery by persons injured while trespassing on another's property, or while traveling unlawfully on Sunday or in an unregistered vehicle. Beyond American borders, other countries also eschewed an outlaw doctrine.

The second Restatement’s rejection of a rule making tortious or criminal conduct an absolute obstacle to recovery in tort was not surprising. The same position had been embraced four decades earlier by the first Restatement, and the most respected legal commentators had denounced the contrary view. In their classic treatise on the law of torts, Fowler V. Harper and Fleming James, Jr., wrote that treating the “violator of penal statutes . . . as something of an outlaw . . . disentitled to seek redress through the courts for any injury to which his criminal conduct contributed . . . [was] a barbarous relic of the worst there was in puritanism.” The same reasoning was later endorsed by the eminent torts scholar Oscar S. Gray. The co-authors of the Prosser treatise—perhaps the single most influential law book of the twentieth century—dismissed the outlaw theory as nonviable, stating that “the courts have long since discarded the doctrine that any violator of a statute is an outlaw with no rights against anyone.”

Much has changed in American tort law during the past thirty years, including the rules relating to unlawful conduct. Today, in an important range of cases, statutes and court decisions in many states now provide that injuries arising from the plaintiff’s serious unlawful conduct are not compensable under tort law. For example, the New York Court of Appeals has ruled that:

[When the plaintiff has engaged in activities prohibited, as opposed to merely regulated, by law, the courts will not entertain the suit if the plaintiff's conduct constituted a serious violation of the law and the injuries for which he seeks recovery were the direct result of that violation.]

Legal malpractice law now recognizes an outlaw doctrine in a variety of guises. Most notably, in a majority of states, a convicted criminal cannot recover for legal malpractice related to his or her defense without obtaining reversal of the conviction or, in some jurisdictions, proving factual innocence of the offense. However, there are other legal rules which seize on the plaintiff’s unlawful conduct as an insuperable obstacle to recovery for legal malpractice. Rulings deny relief from errant attorneys under the rubric of in pari delicto, unclean hands, and even proximate causation. Other cases, discussed below, have held that an “insider fraud” defense may preclude a legal malpractice action on behalf of a corporate entity.
There are questions as to how far the unlawful conduct defense extends. Suppose, for example, that a client is held civilly liable to investors for fraud, but never subject to criminal prosecution. Is a malpractice claim against the lawyer who provided legal representation related to those fraudulent activities barred by the fact that, at the time of the alleged malpractice, the client was engaged in serious unlawful conduct? On various rationales, a number of courts have answered that question in the affirmative on similar facts.27 In a typical passage, one court wrote:

Having been held personally liable for fraud, . . . [the client] is barred from suing his former attorney for damages based on either malpractice . . . or breach of fiduciary duty . . . in the advice that allegedly underlay . . . [the client's] actions. Courts have held that those who knowingly have engaged in fraudulent behavior may not subsequently maintain suit against their (former) professional advisors. 28

Taking into account the various rationales for denying relief, it is plain that there is an unlawful conduct defense—or what some have called a “wrongful-conduct defense”29 or “serious misconduct bar”30—which sometimes precludes recovery in a legal malpractice action. What is quite unclear are the contours of that obstacle to suit.31

Courts are in disagreement as to both the requirements of the unlawful conduct defense and whether the plaintiff or the defendant bears the burden of proof. These are vital questions, for what is at stake is the closing of courthouse doors to clients who have allegedly been victimized by the misconduct of attorneys who were duty-bound to protect their interests through the exercise of care and loyalty.

It makes a world of difference, both to the individual litigant and to the fairness of the justice system, whether unlawful conduct is treated as an affirmative defense on which the defendant bears the burden of proof, as opposed to an aspect of proximate causation that precludes a plaintiff from establishing a prima facie case. So too, it is tremendously important to define what types of criminal or tortious conduct trigger the defense, how closely that conduct must be related to the legal malpractice for which recovery is sought, and how convincingly the plaintiff’s default must be established. It is one thing to bar a cause of action based on the plaintiff’s prior criminal conviction established by proof beyond a reasonable doubt, another thing to rely on an earlier civil judgment established by a preponderance of the evidence, and something else to allow allegations of criminal or tortious conduct to be adjudicated for the first time as part of the plaintiff’s legal malpractice case.

Judicial recognition of a generally applicable unlawful conduct defense in legal malpractice law could have a tremendous impact on many disputes, including the viability of efforts by corporate clients and their successors, such as bankruptcy trustees,32 to recoup from law firms the costs of corporate wrongdoing.33 During the past two decades, that kind of claim has been a major theme in the lawsuits that followed the savings and loan crisis34 or the collapse of major businesses such as Enron.35 Today, such claims are increasing in number.36
This article explores whether there is a sound legal basis for a general unlawful conduct defense in legal malpractice cases and whether recognition of such a defense would be a desirable development in this area of the law. Part II begins by examining the recent emergence of the unlawful conduct defense in areas of tort law not necessarily involving legal malpractice, including statutes passed in a number of jurisdictions, related decisions, and opinions recognizing the defense as a matter of common law. This broad perspective is useful because in many respects the law of lawyer liability is not an independent construct unrelated to basic tort rules, but an evolving set of standards animated to a great extent by the principles and policies that have evolved in other areas of tort law.37

Part III considers decisions holding that some types of unlawful conduct preclude a legal malpractice action. The discussion focuses, first, on the exoneration or innocence requirement that many states now impose on malpractice claims by criminal defendants; second, on the in pari delicto defense; third, on the unclean hands defense; fourth, on decisions, including some in the corporate context, indicating that fraud on the part of the plaintiff is a complete defense to a malpractice action; and finally, on cases treating unlawful conduct as an aspect of proximate causation..

Finally, Part IV addresses the appropriateness of an all-or-nothing unlawful conduct defense in the current age of comparatives principles. The discussion explores those considerations that should limit and shape future development of the unlawful conduct defense in the legal malpractice context.

II. The Rise of the Unlawful Conduct Defense in American Tort law

A. Statutory Defenses

A number of states have enacted statutes which foreclose lawsuits seeking damages for injuries resulting from serious unlawful conduct. These laws hearken back to harsh common law rules, which, at various times in Anglo-American history, have denied legal protection to an outlaw.38 Some of the new laws are short and elegant. One California statute, enacted by a voter initiative,39 provides simply that:

In any action for damages based on negligence, a person may not recover any damages if the plaintiff’s injuries were in any way proximately caused by the plaintiff’s commission of any felony, or immediate flight therefrom, and the plaintiff has been duly convicted of that felony.40

Similarly, an Ohio statute provides that:

Recovery on a claim for relief in a tort action is barred to any person or the person’s legal representative if the person has been convicted of or has pleaded guilty to a felony, or to a misdemeanor that is an offense of violence, arising out of criminal conduct that was a proximate cause of the injury or loss for which relief is claimed in the action.41
Other state laws are more detailed. For example, an Alaska statute addresses with great specificity the types of criminal activity that give rise to an unlawful conduct defense, the significance of pleas of guilty or *nolo contendere*, and how the rule operates in cases where there has been no prior conviction.\textsuperscript{42}

Statutes creating an unlawful conduct defense are animated by a common theme. They seek to punish persons who have engaged in serious wrongdoing by curtailing their rights to sue for damages and preventing them from shifting responsibility for their anti-social conduct.\textsuperscript{43} The text of the Proposition that led to the enactment of the California law quoted above\textsuperscript{44} included a blunt statement of findings and purpose, which obviously the voters found appealing. That statement read:

\begin{quote}
Insurance costs have skyrocketed for those Californians who have taken responsibility for their actions. . . . [C]riminal felons are law breakers, and should not be rewarded for their irresponsibility . . . . However, under current laws, . . . criminals have been able to recover damages from law-abiding citizens for injuries suffered during the commission of their crimes. . . . Californians must change the system that rewards individuals who fail to take essential personal responsibility to prevent them from seeking unreasonable damages or from suing law-abiding citizens.\textsuperscript{45}
\end{quote}

One might conclude that the Proposition was intended to protect only “law-abiding citizens,” persons who were blameless, innocent of fault. However, a subsequent case addressing the quoted language made clear that the initiative had a broader reach: “[l]aw abiding cannot and does not mean free of all blame.”\textsuperscript{46} “In expressly barring negligence claims, the initiative presupposes that the defendants, in fact, may have been negligent.”\textsuperscript{47}

At least one state, more than a quarter century ago, passed legislation rejecting an outlaw doctrine with language paralleling the rule of the *Restatement (Second) of Torts*,\textsuperscript{48} quoted above in the text.\textsuperscript{49} That Massachusetts statute provides:

\begin{quote}
The violation of a criminal statute, ordinance or regulation by a plaintiff which contributed to said injury, death or damage, shall be considered as evidence of negligence of that plaintiff, but the violation of said statute, ordinance or regulation shall not as a matter of law and for that reason alone, serve to bar a plaintiff from recovery.\textsuperscript{50}
\end{quote}

However, the recent trend is to the contrary.

In general, state statutes that bar a civil action for damages based on the plaintiff’s own unlawful conduct vary in five important respects. Those variations concern: (1) the nature of the unlawful conduct that triggers the rule; (2) the theories of recovery that are barred; (3) types of damages that may not be recovered; (4) how closely the unlawful conduct must be related to the injuries for which recovery is sought; and (5) whether there must have been a prior adjudication of criminal responsibility.
1. Nature of Unlawful Conduct

Statutory versions of the unlawful conduct defense require proof of a serious criminal act. Typically, the act must be a felony, or a particular type of felony. However, in some cases, certain misdemeanors, such as “operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance,” may suffice to foreclose relief in a civil cause of action.

In the overall scheme of things, some crimes, though denominated felonies, are based on relatively minor conduct, such as theft of a small amount of money. So too, criminal laws have recently lowered the level of alcohol that constitutes legal intoxication. It is reasonable to ask whether it is unnecessarily harsh for laws that treat all forms of felonious conduct, or all degrees of legal intoxication, as total bar to compensation for injuries relating to another's tortious conduct.

2. Theories of Recovery Barred

One California statute establishing an unlawful conduct defense refers only to negligence claims arising from felonious conduct. Quite logically, that provision has been interpreted as not precluding intentional tort actions. However, another California law provides that in certain circumstances an owner of real property shall not be liable for injuries that occur upon the property during or after the injured person's commission of any one of twenty-five specified felonies. That statute has been held to bar not only suits for negligent conduct, but also for intentionally injurious acts that were justifiable under the circumstances.

The Ohio statute quoted above in the text, which broadly precludes “relief in a tort action,” expressly states that it “does not apply to civil claims based upon alleged intentionally tortious conduct.” However, beyond that limitation, it is possible that the Ohio statute does not preclude a legal malpractice action at all. The Ohio law expressly provides that:

[a] “tort action” means a civil action for damages for injury, death, or loss to person or property other than a civil action for damages for a breach of contract or another agreement between persons.

A legal malpractice action, even if based on tort theories rather than contract principles, might be treated as a “civil action for damages for a breach of . . . [an] agreement” between the lawyer and client, and therefore not the type of “tort action” that is barred by the statute. This question has not yet been decided by the Ohio courts, whose reported decisions seem to have seldom considered the state's statutory bar in any context. Interestingly, an action against a lawyer by a nonclient, such as one for negligent misrepresentation or aiding and abetting a breach of fiduciary duties, might be treated differently than a claim by a client under the Ohio law. There is no “contract or another agreement” between a nonclient and lawyer, and therefore the nonclient's claim might qualify as a “tort action” that is barred by the plaintiff's felonious conduct. In that case, a question would arise as to why equally serious forms of unlawful
conduct are sufficient to cut off a non-client's rights, but not the rights of a client. These issues, too, have not been resolved by the Ohio courts.

3. Types of Damages Precluded

Statutory unlawful conduct defenses sometimes specify what types of damages may not be recovered by a plaintiff, rather than what theories of liability (e.g., negligence) are foreclosed. For example, an Alaska law provides that if the person has engaged in certain forms of criminal conduct (such as “a felony . . . [of which] the person has been convicted”), that person, or the person's personal representative, “may not recover damages for the [resulting] personal injury or death.” Legal malpractice by a lawyer is seldom alleged to have caused the death of a client—although cases have raised that argument. The more relevant question with respect to a provision such as the one found in the Alaska statute is whether a claim for legal malpractice is an action seeking damages for “personal injury.” That specific issue has not been addressed by Alaska courts. However, in other areas, the law sometimes treats legal malpractice as a “personal injury.” That is why some courts hold that legal malpractice claims are not assignable or that prejudgment interest is available to a successful plaintiff. Yet, in other cases, the law has declined to characterize legal malpractice as a “claim for personal injury.” Thus, some courts have held that a provision in a lawyer-client contract mandating arbitration of a legal malpractice claim is not governed by provisions in the state arbitration act. It is not possible to generalize about whether a legal malpractice action seeking damages is, or is not, a claim for personal injury for purposes of a statutory unlawful conduct defense. The answer inevitably depends on such matters as the relevant statutory language, legislative history, and case precedent. Nevertheless, it is important to recognize that the applicability of a statutory unlawful conduct defense to a legal malpractice action may turn upon the resolution of this type of question.

4. Nexus Between the Unlawful Conduct and Injuries

Statutes barring a plaintiff’s action based on unlawful conduct do so only if that conduct is sufficiently linked to the damages the plaintiff seeks to recover. Yet, how strong that link must be varies with the language of the statute. Some statutes say that the plaintiff's injuries must have been “proximately cause[d]” by the criminal conduct of the plaintiff. Other statutes use language which might be found to be less demanding, requiring simply that the plaintiff’s conduct must have “substantially contributed” to the injuries for which recovery is sought. As any law student knows, the principles of proximate causation cover broad territory. However, a nexus requirement framed in terms of whether the plaintiff’s conduct “substantially contributed” to the plaintiff’s harm might deny judicial relief in an even wider range of cases. To the extent that the unlawful conduct defense forecloses all civil redress, it is reasonable to ask whether “proximate causation” or “substantial contribution” are sufficiently demanding standards for ascertaining whether the plaintiff’s unlawful conduct and injuries are so closely related that recovery should be denied.

Interestingly, court decisions embracing an unlawful conduct defense as a matter of
common law\textsuperscript{81} sometimes impose what seems to be a more demanding causation requirement than found in many statutes. According to the New York Court of Appeals, “a serious violation of the law” bars recovery only for those injuries which are “the \emph{direct} result” of that violation.\textsuperscript{82} Although what “\emph{direct}\textsuperscript{83} means has not been definitively charted by New York courts, the language suggests a connection closer than mere proximate causation is required.\textsuperscript{84}

5. \textbf{Proof of the Plaintiff's Responsibility}

Some statutes creating an unlawful conduct defense only bar a civil action for damages if the injured party was previously found guilty of a criminal offense.\textsuperscript{85} This obviously poses difficulties to an assertion of the defense in a wrongful death or survival action arising from fatal injuries which caused death too soon for prosecution to be commenced and completed.\textsuperscript{86}

Other statutes allow the injured person's criminal responsibility for a crime of which the person was not convicted to be established in the civil action itself.\textsuperscript{87} To the extent that the standard of proof applicable in the civil suit is less demanding than the “beyond a reasonable doubt” standard applicable in a criminal prosecution, there is less certainty that the plaintiff in fact engaged in unlawful conduct inimical to the interests of society. Yet this has not troubled some legislatures. Alaska, for example, applies a “clear and convincing evidence” standard.\textsuperscript{88} Nor has certainty “beyond a reasonable doubt” been a serious concern to certain courts that have recognized the unlawful conduct defense as a matter of common law.\textsuperscript{89} In one New York case, where a child sought recovery for personal injuries arising from the construction of a pipe bomb, the court held that the action was barred by the unlawful conduct defense notwithstanding the fact that the child had not been convicted of the crime and, indeed, because of his age, could “not be held criminally responsible for his conduct.”\textsuperscript{90} The court took what some would regard as a pragmatic view. Finding that the child, fifteen years of age, had “never claimed that he was ignorant of the fact that his conduct was wrongful,”\textsuperscript{91} the court concluded that “the fact remains that constructing a bomb is prohibited by law.”\textsuperscript{92}

6. \textbf{Application to Malpractice Actions}

A search of reported cases indicates that statutes barring actions for damages based on criminal conduct have seldom been invoked in legal malpractice cases.\textsuperscript{93} Yet, the text of some laws is broad enough to permit the argument that a legal malpractice action may not be maintained by a plaintiff who engaged in serious criminal conduct. In a legal malpractice action against a public defender, the California Supreme Court held that the client had to prove innocence of the charge on which he was convicted.\textsuperscript{94} The court supported its opinion with a “cf.” citation to California Civil Code § 3333.3, quoted above in the text,\textsuperscript{95} which holds that a negligence action may not be maintained for injuries caused by a felony of which the plaintiff was convicted.\textsuperscript{96} The suggestion implicit in the citation is that such laws are not irrelevant to issues of attorney liability.

At least one California case has considered whether felonious conduct bars an action for
medical malpractice. In that suit, the plaintiff, Nakauchi, who was convicted of assault and false imprisonment, sued his psychiatrist alleging that improper medication had caused him to commit the crimes which led to his liability for a civil judgment to his victim, Quan, and to his own damages in the form of lost earnings and diminished earning capacity as a result of his incarceration. The intermediate court concluded that a “[l]iteral application of the broad language” of California Civil Code § 3333.3 “would appear to preclude” the plaintiff’s tort action against the psychiatrist “since the injury for which he now seeks damages . . . (the Quan civil judgment and Nakauchi’s own loss of earnings and earning capacity) was substantially caused by Nakauchi’s commission of his felony assault on Quan.” However, the court concluded that “the ballot materials circulated with Proposition 213 make it clear section 3333.3 is limited to circumstances in which a convicted felon accidentally suffers a personal injury while actually committing a crime or fleeing from the crime scene (for example, a burglar slips and falls on a slippery floor while robbing a convenience store).” Other courts might reach a different conclusion in deciding whether statements in ballot materials trump the express language of a ballot initiative. Moreover, some statutory unlawful conduct defenses may arise from contexts that support a broad application of the rule as precluding a legal malpractice suit for damages.

B. Common Law Defenses

1. Generally

Even in the absence of a statute specifying that serious criminal conduct forecloses a civil action for damages, courts have denied redress as a matter of common law to persons whose claims were based on their own illegal acts. According to one court:

This rule promotes the desirable public policy objective of preventing those who knowingly and intentionally engage in an illegal or immoral act involving moral turpitude from imposing liability on others for the consequences of their own behavior. Even so, such a rule derives principally not from consideration for the defendant, “but from a desire to see that those who transgress the moral or criminal code shall not receive aid from the judicial branch of government.”

As explained by another court, if a common law unlawful conduct defense were not recognized by the judiciary, several unacceptable consequences would result:

First, by making relief potentially available for wrongdoers, courts in effect would condone and encourage illegal conduct . . . . Second, some wrongdoers would be able to receive a profit or compensation as a result of their illegal acts. Third, . . . the public would view the legal system as a mockery of justice. Fourth, . . . wrongdoers would be able to shift much of the responsibility for their illegal acts to other parties.

An unlawful conduct defense has been applied as a matter of common law in a wide range of cases. Decisions have held, for example, that a suspect shot during a robbery could
not sue the police for failing to arrest him prior to the robbery; that the owner and manufacturer of a vending machine were not liable to the estate of a minor who was killed when the machine fell on him during his attempt to steal drinks; and that a guide who was convicted of transporting hunters without a license could not sue the state for damages in the form of lost business that were allegedly attributable to the state's negligence in responding to the guide's request for a license. Likewise, courts have held that the perpetrator of manslaughter had no claim against the manufacturer and seller of the shotgun for direct personal losses alleged to have resulted from the shooting, nor a customer against a bar that had served him liquor in violation of a dramshop law, nor a passenger against a driver for injuries resulting from the operation of a stolen vehicle.

Like statutory versions of the unlawful conduct outlaw doctrine, which often require proof of a felony, some common law versions of the defense also require clear proof of criminal conduct. However, other common law formulations of the defense are broadly worded and may encompass conduct that does not amount to a felony or even a serious misdemeanor. For example, as stated by the Supreme Court of Iowa, the general rule is that:

a person cannot maintain an action if, in order to establish his cause of action, he must rely, in whole or in part, on an illegal or immoral act or transaction to which he is a party, or to maintain a claim for damages based on his own wrong or caused by his own neglect, . . . or where he must base his cause of action, in whole or in part, on a violation by himself of the criminal or penal laws . . . .

Moreover, while many statutes bar a civil action for damages only where the defendant has been previously convicted of a specified criminal offense, cases have held that a common law defense predicated on unlawful conduct bars tort claims even in the absence of prior prosecution and conviction. Thus, the rule has been found applicable where unlawful conduct resulted in the death of the lawbreaker. Broad application of the common law defense based on unlawful conduct has even been held to bar claims by persons who did not engage in unlawful conduct, such as a surviving spouse's claim for loss of consortium.

A Michigan court endeavored to offer a detailed outline for the common law defense:

[W]hen a plaintiff's action is based on his own illegal conduct, the claim is generally barred . . . . This maxim, known as the wrongful-conduct rule, has its exceptions. The mere fact that a plaintiff engaged in illegal conduct at the time of his injury does not mean that his claim is automatically barred. . . . To fall under the bar of the rule, the plaintiff's conduct must be prohibited or almost entirely prohibited under a penal or criminal statute. . . . There must also be a sufficient causal nexus between the plaintiff's illegal conduct and the plaintiff's asserted damages. . . . Another possible exception to the wrongful conduct rule is where both the plaintiff and the defendant have engaged in illegal conduct, but the defendant's culpability for the damages is greater than the plaintiff's culpability . . . . This may occur, for example, where the plaintiff has acted “under
circumstances of oppression, imposition, hardship, undue influence, or great inequality of condition or age." . . . Finally, a plaintiff's claim is not barred by his wrongful conduct if a statute violated by the defendant explicitly authorizes recovery by a person similarly situated as the plaintiff . . . . 117

As the quotation suggests, common-law versions of an unlawful conduct defense are not necessarily simple. In one recent case, the Fifth Circuit reversed a judgment for the defendants, finding that, under Texas law, "there are multiple versions of the unlawful acts rule, versions which emphasize different links between a plaintiff's illegal acts and injuries suffered . . . [and that] the contours of the unlawful acts rule are simply too unclear to say that because of this rule, Plaintiffs have no possibility of recovery." 118

As with statutory unlawful conduct defenses, the plaintiff's bad conduct must be sufficiently closely linked to the damages for which recovery is sought to make it fair to bar recovery. Where that nexus is lacking, the defense will be rejected by the court. 119

2. Application to Malpractice Actions

A number of decisions in the medical malpractice field have applied a common law unlawful conduct defense to bar civil actions for damages. Thus, courts have held that allegedly negligent psychologists, 120 psychiatrists, 121 pharmacists, 122 physicians, 123 and other mental health care professionals 124 or their employers 125 were not liable for damages suffered by patients as a result of crimes committed by those patients. 126 Notably, several of these cases have expressly rejected arguments that a defendant should not be permitted to assert the unlawful conduct defense if the defendant took charge of the plaintiff with knowledge of the plaintiff's dangerous tendencies. 127

Actions for medical malpractice and legal malpractice are in many respects governed by similar principles. 128 Thus, it is reasonable to suggest that the common law unlawful conduct defense that has been applied to bar medical malpractice claims might also, on appropriate facts, preclude an award of relief to a legal malpractice plaintiff. 129

Some cases have held that a common-law unlawful conduct defense will defeat a claim against an attorney. In one recent suit, the court ruled that because an individual had no legal right to remove documents that employees of third parties had placed in a trash dumpster on private property, the unlawful acts rule precluded the individual from bringing an action for fraud against the third parties' attorney, based on allegations that the attorney had defrauded the individual into turning the documents over to the attorney. 130

III. Defenses to Legal Malpractice Based on Unlawful Conduct

A. The Exoneration/Innocence Requirement

In the legal malpractice field, the unlawful conduct defense finds its clearest endorsement in the decisions that have required persons alleging defective criminal representation to first
overturn their convictions and, in some states, prove their innocence of the crimes for which they were prosecuted. Although these cases do not use the term “unlawful conduct defense,” they clearly seize upon the defendant's unlawful conduct to insulate attorneys from liability.

What is most striking about state exoneration or innocence requirements is how broadly they sweep. Any kind of criminal conduct (misdemeanors as well as felonies), however established (whether by plea or conviction), wholly bars an action for professional negligence (regardless of the gravity of the attorney's misconduct). This is a broad formulation of what, for legal malpractice purposes, amounts to an “outlaw” doctrine. It is easy to doubt the wisdom of these formidable obstacles to recovery for attorney wrongdoing. Not surprisingly, exoneration or innocence requirements have been widely criticized and their supposed rationales have sometimes been shown as wanting.

To begin with, these obstacles to recovery—which are not affirmative defenses, but additional requirements in the plaintiff's prima facie case—are simply doctrinal overkill. If the concern is that an undeserving claim will succeed, there is little cause for worry. It is difficult for even appealing and sympathetic plaintiffs with good facts to prevail on malpractice claims. Presumably, it is all the more challenging for one carrying the stigma of actual or apparent criminality to do so. The difficulty of finding an attorney to initiate a malpractice action, the nature of the jury system, the demanding requirements of the “trial within a trial” causation analysis, and the rules that protect a lawyer's exercise of discretion all conspire to defeat a malpractice claim raised by one charged with or convicted of a crime. Is it really necessary or appropriate to erect additional barriers to liability in the form of exoneration or innocence requirements? Probably not. Indeed, in some cases it is simply impossible for a convicted criminal to obtain post-conviction relief for procedural reasons.

During the American Law Institute's debate over whether the Restatement (Third) of the Law Governing Lawyers should endorse an exoneration requirement, one member told the assembled judges, lawyers, and law professors:

I have seen . . . an actual case, where you have a clear Miranda violation, where the defense lawyer, for whatever reason, does not raise it. To me that is clearly malpractice, yet, in a post-conviction proceeding, because the point was not raised [at trial], it would almost certainly be held procedurally barred. . . . Requiring that the conviction be set aside, in a post-conviction proceeding, is a very unrealistic and unworkable idea.

In addition, exoneration or innocence requirements are of dubious value from the standpoint of legal deterrence. In the sphere of criminal defense work, there are virtually no legal mechanisms for enforcing the standards of conduct that should be observed by attorneys. Requests for post-conviction relief based on ineffective assistance of counsel seldom succeed. Disciplinary sanctions against errant criminal defense lawyers are a rarity. And motions for disqualification or disgorgement of fees are essentially unheard of in the
world of criminal representation. The threat of malpractice liability—however difficult it may be for a claim to succeed—can serve a salutary purpose. That risk tends to ensure some form of lawyer accountability to the professional obligations—including the duties of diligence, competence, and communication—that should animate the zealous and faithful representation of all clients, including criminal defendants who are guilty.

The cynical explanation for the rush by states to adopt exoneration and innocence requirements that bar malpractice actions is that this is just another effort to limit the rights of criminals and those suspected of crimes. In other words, one might argue, these requirements are just another part of the ongoing “war on crime.”

However, a more convincing explanation is that proponents of these rules were concerned about the risk of poorly-compensated criminal defense attorneys, often appointed by courts, being deluged with malpractice claims filed by prisoners. When the American Law Institute adopted its variation of the exoneration requirement, one member argued, in terms that others have voiced:

Most of the litigants will be prisoners, and . . . litigation can be at least a form of therapy, if not recreation. This will result in . . . suits against lawyers, and it will cause congestion of the courts in terms of a huge host of frivolous litigation . . . .

Another member echoed the same theme, urging that:

The social consequence of enabling . . . [a flood of litigation] from prisoner libraries to go against a handful of lawyers who get into this area [of criminal representation] and defend these people, at great value to the community, is to deter lawyers from getting into this area. It is bad public policy . . . .

These are legitimate concerns. Yet, whether they are strong enough to always trump society's interest in affording a damages remedy to persons harmed by negligent criminal representation is far from clear. Other alternatives are available. Appointed lawyers could be protected by some variety of immunity. Criminal defense lawyers who charge a full fee could be expected to protect themselves from the costs of claims the way other lawyers do: by practicing preventive lawyering and purchasing malpractice insurance.

A plaintiff’s unlawful conduct should bar recovery in a tort action only in cases where the plaintiff's default is great and only if that misdeed is related to the attorney's negligence in such a way that it is fair to totally foreclose recovery. The cases imposing an exoneration or innocence requirement on plaintiffs suing for malpractice arising from criminal defense work sweep much too broadly to honor these important factors.

B. In Pari Delicto
Another indication that legal malpractice law already endorses an unlawful conduct obstacle to recovery is that cases hold that an action for damages is barred by the affirmative defense of *in pari delicto*.\textsuperscript{164} Parties stand “*in pari delicto*” when they are equally at fault.\textsuperscript{165} According to the Latin maxim *in pari delicto potior est conditio defendentis*, “in a case of equal or mutual fault . . . the position of the [defending] party . . . is the better one."\textsuperscript{166} Put differently, “[i]n the familiar economic language of the Chicago School, among wrongdoers equally at fault the law ought not to redistribute losses caused by the wrong itself, but rather should leave the parties where it finds them.”\textsuperscript{167} Under the rule of *in pari delicto*, the “[s]uit is barred not because the defendant is right, but rather because the plaintiff, being equally wrong, has forfeited any claim to the aid of the court.”\textsuperscript{168}

The *in pari delicto* defense “is grounded on two premises: first, that courts should not lend their good offices to mediating disputes among wrongdoers; and second, that denying judicial relief to an admitted wrongdoer is an effective means of deterring illegality.”\textsuperscript{169} The effect of the *in pari delicto* doctrine is that generally “there is no recourse between wrongdoers.”\textsuperscript{170}

Numerous legal malpractice claims have been barred by the *in pari delicto* doctrine.\textsuperscript{171} Generally, those cases have involved clients who lied to courts on their attorneys’ advice. A client who has engaged in such knowingly wrongful conduct is typically barred from recovering damages in a malpractice action for losses that arise from the perjury.\textsuperscript{172}

The doctrine of *in pari delicto* covers some of the same ground as the general wrongful conduct defense discussed above.\textsuperscript{173} Thus, one court wrote simply, without reference to the defendant's degree of fault, that “[t]he doctrine of *in pari delicto* is the 'principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.'”\textsuperscript{174}

As an aid to legal analysis, a carefully conceptualized wrongful conduct defense has two advantages over the doctrine of *in pari delicto*. The first is clarity and the second is focus. Courts recognizing a wrongful conduct defense (at least in tort cases not involving legal malpractice) often endeavor to be clear about what type of conduct gives rise to the defense and how closely that conduct must be related to the injuries for which the plaintiff seeks recovery.\textsuperscript{175} The same has not always been true of courts applying the *in pari delicto* doctrine. Courts sometimes say that the doctrine is applicable to any case involving “an immoral or illegal transaction . . . [entailing] moral turpitude.”\textsuperscript{176} By referring to “immorality,” those courts greatly and imprecisely expand the range of offending conduct that might trigger the defense and, by requiring “moral turpitude,” they raise all of the issues and disagreements that have surrounded that phrase.\textsuperscript{177} Moreover, the Latin name of the *in pari delicto* doctrine itself and the maxim quoted above\textsuperscript{178} do little to enhance clarity in analysis or certainty in application.

More significantly, by focusing on whether the parties are “equally at fault,” the *in pari
delicto doctrine misorients the analysis. The question is not whether the plaintiff is equally at fault with the defendant. Indeed, any rule framed in terms of an equality requirement would be both rarely useful and the subject of frequent dispute. In only one in a hundred cases—the fifty-fifty case—will the plaintiff and defendant be equally at fault. If recovery were barred only in such instances, there would be endless litigation over whether the plaintiff and defendant were to blame to precisely the same extent. Yet this is generally not what modern courts are looking for when they speak of in pari delicto. In some cases, what the courts mean is that the plaintiff’s knowing participation in unlawful conduct was so serious and so closely connected to the damages for which recovery is sought that it is fair to foreclose recovery. If that is so, it is far preferable to address those considerations (the seriousness of the plaintiff’s conduct and its relationship to the plaintiff’s harm) under an unlawful conduct defense that expressly incorporates those factors than by invoking the imprecise language of in pari delicto. In other cases, what the courts mean when they invoke the phrase in pari delicto is that the plaintiff was more at fault than the defendant. Thus, in one recent legal malpractice case, the court held that a claim against an attorney for negligence was barred by in pari delicto because the plaintiff had engaged in fraudulent conduct. As the court explained, the claim was foreclosed from judicial consideration because “[t]he actual fraud of Mr. Gosman [the client] is more objectionable than the alleged negligence of Peabody [the attorney].” Cases like this illustrate two points. First, it makes little sense to talk about the relevant defense in the language of in pari delicto if the question is not whether the plaintiff was equally at equal fault, but rather more at fault. Second, if a comparison between the fault of the parties is to be made, that inquiry may be better framed in the language of comparative negligence or comparative fault, than in terms of whether a total defense precludes recovery (regardless of whether that defense is called in pari delicto, unlawful conduct, or something else). The relationship between the wrongful conduct defense and comparative principles is discussed below.

C. Unclean Hands

A number of cases have held that a legal malpractice claim may be barred by the doctrine of unclean hands. Some of these decisions have involved clients who committed perjury based on an attorney's advice. Others have arisen from very different contexts. In one case, a lender who had previously been found liable for a violation of the state Interest Act in a suit commenced against him by a borrower was precluded from litigating a claim that his violation
resulted from incorrect advice provided to him by his attorney. The court found it irrelevant that the earlier case did not involve fraud because the relevant principle was that “courts do not aid parties whose causes of action are founded on any illegal or immoral acts, including the violation of a statute, to assert rights growing out of such acts or to relieve themselves of the consequences of those acts.” This formulation of an unlawful conduct bar to legal malpractice liability is exceptionally broad and creates an unreasonable and unnecessary risk that relief will be foreclosed in a range of cases far wider than is appropriate. Throughout the law of torts, a statutory violation by the plaintiff, even if proximately causing the plaintiff's injuries, is normally not a total bar to relief, but only an obstacle to recovery to the extent provided by applicable principles of comparative negligence or comparative fault. “Immoral” conduct that is not a violation of legislative or common-law rules, is not a defense at all. And whether recovery is permitted or foreclosed is determined by reference to well-developed principles of proximate causation, not whether the rights asserted “grow out of” particular acts.

Applying the doctrine of unclean hands to legal malpractice cases is not a useful path of analysis for at least two reasons. First, unclean hands is an equitable defense that properly has no application when legal relief, such as a request for damages, is in issue. Second, the rubric of “unclean hands” obfuscates the issue of just what type of conduct gives rise to the defense or how closely that conduct must be connected to the relief being sought in order for the action to be barred. The better path is to forego the opaque language of “unclean hands” and engage in a careful analysis of the facts in light of a clearly articulated unlawful conduct defense.

D. Insider Fraud

Malpractice actions by business entities or their successors in interest have sometimes been barred by what is called the “insider fraud defense.” In these cases, the question is whether it is fair to impute the fraudulent conduct of entity constituents, such as officers or employees, to the entity itself or its successor. A complex body of law has evolved relating to these issues. A number of exceptions to the general principle of imputation have been recognized. Thus, when a constituent acts adversely to the entity, the entity will not be barred from pursuing a malpractice claim by the fraudulent conduct of the constituent. In these cases, the unlawful conduct defense fails even though fraud was committed. However, if the fraudulent conduct of the agent is imputable to the principal, the defense can be asserted, because fraud is uniformly regarded as a serious form of unlawful conduct. Some of the cases addressing the issue of whether insider fraud will be imputed to an entity or successor in interest to bar a legal malpractice claim address the issue within the rubric of the in pari delicto doctrine.

E. Lack of Proximate Causation

It is possible to speak of the plaintiff’s unlawful conduct not as an affirmative defense to be pleaded and proved by the defendant, but as an obstacle to the plaintiff’s proof of a prima facie case of liability. For example, Shahbaz v. Horwitz held that a client who was found guilty of fraud in a civil suit could not successfully maintain a negligence action against the law
firm that had assisted him in the fraudulent transaction, because the proximate causation element of a malpractice claim includes “determining cause in fact and considering various policy factors that may preclude imposition of liability.”201 The court reasoned that just as “an intentional tortfeasor cannot obtain contribution from a negligent joint tortfeasor”202 and “a party [cannot] obtain indemnity or insurance for intentional wrongdoing,”203 so too “[p]ublic policy forbids intentional tortfeasors . . . from shifting their liability for intentional wrongdoing to their negligent attorneys.”204 Although the court acknowledged that “[o]ther states have barred intentional wrongdoers from bringing malpractice actions against negligent attorneys under the doctrine, in pari delicto,”205 it found that the defendants’ “contentions reduce[d] to an attack on proximate causation.”206

In framing the issue in causation terms, the Shahbaz court followed essentially the same path that states have taken in holding that plaintiffs must prove exoneration or innocence when alleging negligence in the context of criminal representation. It viewed the critical issue as one of causation and adopted a rule that effectively insulates an entire class of attorneys from liability for malpractice, namely those attorneys who represent persons ultimately found liable for fraud.207 As with the exoneration or innocence requirements that apply in suits against criminal defense attorneys, it is possible to ask whether this line of analysis in cases involving client fraud results in doctrinal overkill.

IV. Comparative Principles and Future Development of the Unlawful Conduct Defense

As Parts II and III demonstrate, commission of unlawful conduct closes the courthouse doors to plaintiffs in a broad range of cases involving tort claims in general and legal malpractice claims in particular. Thus, today the law is considerably different than when the first and second Restatements208 rejected an outlaw doctrine and announced that the mere commission of a crime or tort did not bar one from recovery for interference with legally protected interests. Yet perhaps the difference is less significant than might first appear.

The recent emergence of an unlawful conduct defense in American tort law is, in a sense, a restoration of the balance struck, on other grounds, during much of the twentieth century regarding the availability of compensation for negligence.209 Even as the first210 and second211 Restatements rejected an outlaw doctrine, they held that a plaintiff’s unlawfully tortious or criminal conduct could give rise to the defense of contributory negligence.212 Until roughly the early 1970s, contributory negligence was a total defense to a negligence claim in most jurisdictions.213 Thus, recognition of an unlawful conduct defense today in negligence cases dictates the same result that was often reached under the contributory negligence doctrine in the age of pre-comparative principles. In either case, a plaintiff suing in negligence to recover for injuries to which the plaintiff’s own serious unlawful conduct contributed is barred from receiving compensation.214

Nevertheless, the widespread endorsement of comparative negligence and comparative
fault in 46 states\textsuperscript{215} cannot be ignored. The substitution of proportionality principles\textsuperscript{216} for the earlier all-or-nothing rule of contributory negligence ranks as the most important development of the field of tort law in the last hundred years.\textsuperscript{217} Today, in a wide range of situations, the law favors the view that liability should not only be based on fault, but limited in proportion to fault.\textsuperscript{218} In that respect, the emergence of an unlawful conduct defense that is a total bar to recovery is out of step with the strongest trend in modern American tort law because it ignores fault on the part of the defendant and focuses wholly on the fault of the plaintiff. Such an approach to issues of lawyer liability is infirm because the law should embrace rules that create an incentive for both the defendant (the lawyer) and the plaintiff (the client or third person) to exercise care to avoid losses that could be minimized through lawful and otherwise appropriate conduct.\textsuperscript{219} Courts should be reluctant to expansively create doctrines—such as some versions of the modern unlawful conduct defense—which abrogate state comparative law schemes.\textsuperscript{220}

There is legitimate concern—at least within the legal profession—about the tendency in contemporary American society for clients to seek to hold their lawyers responsible for whatever losses that flow from the clients' endeavors.\textsuperscript{221} The legal rules that govern such actions—including the law of negligence and fiduciary duty principles—sometimes make it too easy for plaintiffs to state a cause of action and raise triable issues of fact that will be decided by a jury. The most disturbing claims may be those brought by clients who themselves, either personally or through their representatives, have engaged in serious criminal conduct. Allowing such claims to give rise to malpractice liability inevitably raises the cost of legal services for other, law-abiding clients, since those losses are typically spread by lawyer-defendants, through malpractice insurance or otherwise, as a cost of doing business. One way to guard against these claims and related costs is by asserting that recovery is barred by the plaintiff's own unlawful conduct.

In deciding whether and to what extent an unlawful conduct defense should foreclose otherwise viable theories of compensation, courts must balance a number of important considerations. The path chosen by the courts must encourage lawful conduct and personal responsibility;\textsuperscript{222} prevent persons from profiting from wrongful conduct;\textsuperscript{223} create appropriate incentives for the exercise of care by professionals;\textsuperscript{224} protect clients and others from attorney wrongdoing;\textsuperscript{225} and embrace rules that are sufficiently clear and administratively convenient that they can be applied fairly and can encourage the resolution of claims, either in the courts or via settlement negotiations or other alternative dispute resolution mechanisms.\textsuperscript{226}

The most desirable course is one that steers clear of extremes. Unlawful conduct by malpractice plaintiffs should not be overlooked, nor should it be too ready disqualifying from judicial recourse. The courthouse doors should be closed only if the plaintiff's unlawful conduct is so serious, so well established, and so closely connected to the injuries for which the plaintiff seeks compensation that the petition for relief should wholly be rejected because sound public policy demands it. Mindful of these considerations, future development of the unlawful conduct defense should be guided by the following principles:

First, legislation creating an unlawful conduct defense should be treated as inapplicable
to legal malpractice lawsuits unless the legislation manifests a clear intent, by its text or legislative history, that the law is intended to govern issues of lawyer liability. This approach will ensure that statutes drafted for other purposes—typically to govern relationships neither consensual nor fiduciary in nature—do not undermine the fiduciary principles and related public policies that play an important role in most legal malpractice actions.

Second, in addressing whether a plaintiff’s unlawful conduct bars recovery in a legal malpractice action, courts should refrain from using nebulous or ill-structured concepts, such as the *in pari delicto* rule or unclean hands doctrine, and should instead employ a carefully articulated unlawful conduct defense, which clearly specifies its elements and places the burden of proof on the defendant. This will avoid misunderstandings as to what must be proved and who must prove it. Placing the burden on the defendant will also avoid premature foreclosure of redress in the courts by making clear that there is no presumption that judicial consideration of malpractice claims is barred.

Third, only the most serious forms of unlawful conduct, knowingly committed by the plaintiff, should suffice as the predicate for an unlawful conduct defense in a legal malpractice action. The plaintiff’s commission of fraud, perjury, or another grievous felony would readily fall within this category. Many other forms of bad conduct, even if violative of a statute or in some sense immoral, will fall short of this demanding standard. This is appropriate, for the law should be reluctant to label one an outlaw unfit to seek redress in the courts. Of course, the plaintiff’s knowing commission of serious unlawful conduct must be convincingly proven, either by prior adjudication in a criminal or civil proceeding, or in the legal malpractice action itself. In the latter case, a preponderance of the evidence standard of proof would seem to be appropriate because many affirmative defenses, including ones based on the plaintiff’s conduct, such as comparative negligence or comparative fault, are adjudicated on that basis.

Fourth, the plaintiff’s knowing commission of serious unlawful conduct should be a total defense to liability only if that conduct is both a factual and proximate cause of the plaintiff’s injury, judged according to ordinary tort principles. To satisfy the demands of factual causation, the plaintiff’s conduct must have been such a substantial factor that it made an indispensable contribution to the production of the harm (*i.e.*, was a but-for cause) or was independently sufficient to cause that harm regardless of whether the lawyer acted improperly (*i.e.*, must fall within the well-recognized multiple-causation exception to the but-for rule). Further, to meet the requirements of proximate causation, the harm for which the plaintiff seeks recovery must have been a foreseeable result or a direct consequence of the plaintiff’s unlawful conduct.

Finally, in cases not meeting the demanding requirements of the unlawful conduct defense, outlined above—(1) serious unlawful conduct, (2) knowingly committed, that is a (3) factual and (4) proximate cause of the plaintiff’s harm—conduct of the plaintiff that is otherwise immoral or illegal should be treated as a defense only to the extent that it constitutes a form of contributory or comparative negligence or assumption of the risk. The effect of such a finding would then be determined by the rules of the jurisdiction governing contributory negligence, comparative negligence, or comparative fault.
The legal system is ill-served by the recent rush to broadly impose innocence or exoneration requirements on plaintiffs alleging malpractice in criminal representation and by the continued judicial application of hazy and poorly structured concepts, such as the *in pari delicto* and unclean hands doctrines, in actions against attorneys. It is appropriate and necessary for courts to embrace a clearly articulated unlawful conduct defense in legal malpractice cases under terms that foreclose judicial redress only in a narrow range of cases where the plaintiff’s unlawful conduct is serious, knowingly committed, and closely tied by principles of factual and proximate

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1 See Barker v. Kallash, 468 N.E.2d 39 (N.Y. 1984) (Jasen, J., concurring) (stating that the "so-called 'outlaw' doctrine of tort law—i.e., depriving a violator of the law of any rights against a tort-feasor—has long since been discarded by most, if not all, American jurisdictions").

2 Restatement (Second) of Torts § 889 (1979). Nevertheless, there is evidence that early American law did recognize some form of unlawful conduct defense. In *Barker v. Kallash*, 468 N.E.2d 39 (N.Y. 1984), Judge Matthew Jasen wrote:

[T]hese same principles of public policy were once elegantly expressed in another context by Justice Brandeis: “The door of a court is not barred because the plaintiff has committed a crime. The confirmed criminal is as much entitled to redress as his most virtuous fellow citizen; no record of crime, however long, makes one an outlaw. The court's aid is denied only when he who seeks it has violated the law in connection with the very transaction as to which he seeks legal redress. Then aid is denied despite the defendant's wrong. It is denied in order to maintain respect for law; in order to promote confidence in the administration of justice; in order to preserve the judicial process from contamination." . . . . 468 N.E.2d 45 (Jasen, J., concurring) (quoting Olmstead v. United States, 277 U.S. 438 (1928) (Brandeis, J., dissenting)).

3 See Restatement (Second) of Torts §889 Cmts. a and b (1979) (discussing intentional harm, recklessness, negligence, and liability for abnormally dangerous activities). The Restatement even rejected an outlaw doctrine between co-conspirators. *Id.* at §889 Cmt. c (indicating that “[a]lthough one is engaged in a criminal activity with another person, he is nevertheless entitled to recover for harm intentionally inflicted by his fellow conspirator, and this is true even though the harm arises out of and because of the crime that is being committed”).

4 *Id.* at §889 Cmt. b (stating that “[c]riminal conduct that by virtue of statutory interpretation or otherwise constitutes negligence or recklessness, is a defense to an action for harm caused by corresponding negligence or recklessness of another”).

5 *Id.* §889 Cmt. a.

6 Restatement (Second) of Torts §889 Reporter's Note (1979) (collecting citations).

7 In one famous case, *Katko v. Briney*, 183 N.W.2d 657, 662 (Iowa 1971), a trespasser
injured by a concealed spring gun on the defendant's property was allowed to recover compensation for harm intentionally inflicted via that mechanism. The court held that the plaintiff's deliberate violation of the law did not change the rule that deadly force cannot be used merely to protect property. *Katko* was controversial, but the decision was not unique in the principles it applied. *Katko* outraged many persons not merely because a lawbreaker was permitted to recover, but because the defendants had to sell a large part of their farm to pay the judgment. See Robert F. Bloomquist, *Re-Enchanting Torts*, 56 S.C.L. Rev. 481, 501 n.149 (2005).

8 See Carroll v. Staten Island R. Co., 13 Sickels 126, 1874 WL 11265, *6 (N.Y.) (stating that “[t]he negligence of the defendant was as wrongful on Sunday as on any other day, and . . . [the] plaintiff’s unlawful act did not in any sense contribute to the explosion”).

9 See Armstead v. Lounsberry, 151 N.W. 542, 544 (Minn. 1915) (stating that “[t]he right of a person to maintain an action for a wrong committed upon him is not taken away because he was at the time of the injury disobeying a statute law which in no way contributed to his injury”).

10 See The Law Commission, Consultation Paper No. 160: The Illegality Defence in Torts 77 (2002) (discussing the UK and stating “the law does not allow even a criminal who has committed a serious offence to be deprived of all his or her rights under either the civil or criminal law. This would amount to outlawry, and this has quite clearly, and in our view rightly, been rejected by the courts.”), cited in Ronen Perry, *The Role of Retributive Justice in the Common Law of Torts: A Descriptive Theory*, 73 Tenn. L. Rev. 177, 211 n.203 (2006).

11 See Restatement (First) of Torts § 889 (1939).

12 Fowler V. Harper and Fleming James, Jr., *The Law of Torts* § 17.6, 995-97 (1956) (adding that the outlaw doctrine “could be justified at all only as a stringent means of imposing additional sanctions to enforce a very important provision of the criminal law, and [that] it is questionable indeed whether it is wise for the court to assume the responsibility of imposing such a sanction when the legislature has not seen fit to do so”); *id.* at 1005 (referring to the “outlaw theory”). See also Fleming James, Jr., *Contributory Negligence*, 62 Yale L.J. 691, 700 (1953) (describing the “outlaw theory” as “largely discredited” and “indeed a fairly accurate reflection of some such notion as an insistence on clean hands” which “shows its unacceptable harshness”).


16 Cf. Johnson & Gunn, *supra* note 14, at 5 (discussing repeated efforts to re-form the law of torts in recent decades). See also Vincent R. Johnson, *Tort Law in America at the Beginning of the 21st Century*, 1 Renmin U. L. Rev. (China) 237, 245 (2000) (hereinafter “Tort Law in America”) (discussing efforts aimed at “turning back the clock” to “a time when American tort plaintiffs were often denied compensation for injuries and when tort law did little to create incentives for safety”).

See Part II. But see Goldfuss v. Davidson, 679 N.E.2d 1099, 1104 (Ohio 1997) (per Moyer, C.J., with two Judges concurring, and three Judges concurring in judgment only) (holding, in an action based on the allegedly negligent shooting of a trespasser, that public policy does not preclude recovery for injuries sustained during the commission of a felony).

Barker v. Kallash, 468 N.E.2d 39, 41 (N.Y. 1984) (holding that a fifteen-year-old boy who was injured while constructing a “pipe bomb” was precluded from recovering from the nine-year-old boy who supplied the gunpowder). But see Flanagan v. Baker, 621 N.E.2d 1190, 1192-93 (Mass. App. Ct. 1993) (holding, on facts “almost identical” to those in Barker, that even if the Massachusetts comparative negligence statute allowed negligence actions by certain lawbreakers to be barred for public policy reasons, the plaintiff child's action was not barred on that basis).

See Part III-A. Of course, unlawful conduct can also create an obstacle to recovery in contract. A malpractice claim is often met with a counterclaim for unpaid fees that the plaintiff owes the defendant law firm. In one such case, the California Supreme Court held that a New York law firm's unauthorized practice of law in California barred enforcement of its fee agreement with respect to legal services performed in California. See Birbower, Montalbano, Condon & Frank, P.C. v. Superior Ct. of Santa Clara County, 949 P.2d 1 (Cal. 1998). So too, in some states, a contract procured by improper client solicitation is unenforceable. See Charles W. Wolfram, Modern Legal Ethics 787 (1986); see also Tex. Disciplinary R. Prof'l Conduct R. 7.03(d) (2007) (providing that a "lawyer shall not enter into an agreement for, charge for, or collect a fee for professional employment obtained in violation" of the Texas anti-solicitation rules).

See Part III-B.

See Part III-C.

See Part III-E.

See FDIC v. Ernst & Young, 967 F.2d 166, 171-172 (5th Cir. 1992) (allowing an insider fraud defense); Breeden v. Kirkpatrick & Lockhart, LLP, 268 B.R. 704, 709 (S.D.N.Y. 2001) (holding that a trustee could not “sue third-party professionals [attorneys and accountants] for allegedly aiding and abetting corrupt management in a scheme to defraud the debtor corporation”).

See Part III-D.

See generally David B. Newdorf, Inside Fraud, Outside Negligence and the Savings and Loan Crisis: When Does Management Wrongdoing Excuse Professional Malpractice, 26 Loy. L.A. L. Rev. 1165 (1993); see also Part III-C.

See Shahbaz v. Horwitz, 2008 WL 808034, *9-*10 (Cal. Ct. App. 2008) (holding that a client who fraudulently induced a third party to enter into an agreement could not establish proximate causation in a legal malpractice claim against a law firm that assisted the transaction because, as a matter of public policy, the client was precluded from shifting responsibility for his intentional wrongdoing to his attorneys, even if the attorneys drafted the agreement negligently); Mettes v. Quinn, 411 N.E.2d 549, 551 (Ill. Ct. App. 1980) (holding, in a suit where an attorney's allegedly negligent advice caused the plaintiff's fraud to be discovered, that no relief was available because the courts “will not aid a fraudfeasor”). See also In re Gosman, 382 B.R. 826, 838 (S.D. Fla. 2007) (stating that a legal malpractice action was barred under the doctrine of in pari delicto where a client engaged in fraud, but the attorney was merely negligent); Heyman v. Gable, Gotwals, Mock, Schwabe, Kihle, Gaberino, 994 P.2d 92, 94 (Okla. Civ. App.1999) (holding that where a final judgement established that a law firm's clients had committed fraud against their partners, no legal malpractice action could be maintained based on the firm's allegedly negligent
drafting of an agreement between the clients and their partners or the firm's representation of the clients at trial; “[i]t would be contrary to public policy to allow the Clients here to benefit from their own confirmed fraud and recover a monetary judgment from the Firm to indemnify them for their fraud”;

28 Maxwell, 1993 W.L. 512907, *3 (S.D.N.Y.). Maxwell was found guilty of perpetrating fraud on investors in a civil action filed in federal court by the Commodity Futures Trading Commission. Id. at *1-*2. Maxwell pled guilty in New Jersey state court to one count of selling an unregistered security. Id. at *2.


31 See Heyman v. Gable, Gotwals, Mock, Schwabe, Kihle, Gaberino, 994 P.2d 92, 95 (Okla. Civ. App.1999) (Stubblefield, J., concurring in result) (noting, in a suit raising the question of whether clients' fraud against third persons barred a malpractice action against the clients' attorneys, that “there is little discoverable authority purporting to determine such cases on the basis of public policy”).

32 See, e.g., Douglas v. Delp, 987 S.W.2d 879, 882 (Tex. 1999) (holding that once a party with a legal malpractice claim declares bankruptcy, the trustee of the bankruptcy estate is the only party with standing to pursue the claim); see also News in Brief, N.Y.L.J., Feb. 17, 2006, at 1 (reporting that Paul, Weiss, Rifkind, Wharton & Garrison “agreed to pay part of a $180 million settlement of claims arising from the 1998 bankruptcy of Boston Chicken Inc.” in a suit by the company's court-appointed bankruptcy trustee).

33 See also In re Gosman, 382 B.R. 826, 838 (S.D. Fla. 2007) (barring a legal malpractice suit by a trustee in bankruptcy based on the debtor's fraud).


corporate scandals).

36 See Amanda Bronstad, *Firms Fend Off More Malpractice Actions*, Nat'l L.J. Online, Mar. 21, 2008 (reporting that "an increasing number of [malpractice] suits are being filed by the trustees overseeing the bankruptcy of a law firm's client").

37 See, e.g., Restatement (Third) of the Law Governing Lawyers § 53 (2000) (providing that whether a lawyer's breach of a duty of care or breach of a fiduciary duty was a legal cause of injury is “determined under generally applicable principles of causation and damages”).

38 See King, *supra* note 30, at 1014-18 (tracing the history of denying legal protection to outlaws as far back as the twelfth century).

39 See Quackenbush v. Superior Court (Congress of California Seniors) 70 Cal. Rptr. 2d 271, 273-74 (Cal. App. [Dist. 1] 1997) (indicating that “[o]n November 5, 1996, the voters approved Proposition 213, the Personal Responsibility Act of 1996, adding sections 3333.3 and 3333.4 to the Civil Code, applicable to trials commencing after January 1, 1997,” and holding those provisions to be constitutional). Section 3333.4 is discussed below in note 69.


41 Ohio St. Rev. Code § 2307.60(B)(2) (Westlaw 2008).

42 Alaska Stat. § 09.65.210 (Westlaw 2008). Section 09.65.210 provides:

A person who suffers personal injury or death or the person's personal representative . . . may not recover damages for the personal injury or death if the injury or death occurred while the person was

(1) engaged in the commission of a felony, the person has been convicted of the felony, including conviction based on a guilty plea or plea of *nolo contendere*, and the party defending against the claim proves by clear and convincing evidence that the felony substantially contributed to the personal injury or death;

(2) engaged in conduct that would constitute the commission of an unclassified felony, a class A felony, or a class B felony for which the person was not convicted and the party defending against the claim proves by clear and convincing evidence

(A) the felonious conduct; and

(B) that the felonious conduct substantially contributed to the personal injury or death;

. . .

(4) operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance in violation of AS 28.35.030, was convicted, including conviction based on a guilty plea or plea of *nolo contendere*, and the party defending against the claim proves by clear and convincing evidence that the conduct substantially contributed to the personal injury or death; or

(5) engaged in conduct that would constitute a violation of AS 28.35.030 for which the person was not convicted if the party defending against the claim proves by clear and convincing evidence

(A) the violation of AS 28.35.030; and

(B) that the conduct substantially contributed to the personal injury or death.
43 Similar statements have been made by courts discussing common law versions of the unlawful conduct defense. See, e.g., Rimert v. Mortell, 680 N.E.2d 867, 873 (Ind. App. 1997) (stating that the “prohibition against actions based in whole or in part upon one's own criminal conduct is grounded upon the sound public policy that convicted criminals should not be permitted to impose or shift liability for the consequences of their own antisocial conduct”). See also Barker v. Kallash, 468 N.E.2d 39, 43 (N.Y. 1984) (stating that the defense “rests . . . upon the public policy consideration that the courts should not lend assistance to one who seeks compensation under the law for injuries resulting from his own acts when they involve a substantial violation of the law”).

44 See the text accompanying note 40.


47 Id. at *4 (concluding that “nothing in the language of the initiative or the ballot materials reflects an intention on the part of the electorate to limit the term ’law-abiding citizens' to the victims of the plaintiff’s crime”).

48 See Restatement (Second) of Torts § 889 (1979).

49 See supra the text accompanying note 2.


52 Alaska Stat. § 09.65.210 (a) & (b) (Westlaw 2008) (providing that an action for damages is barred by conviction of any felony or by clear and convincing evidence of a class A or class B felony of which the plaintiff was not convicted).

53 Alaska Stat. § 09.65.210 (Westlaw 2008). In Alaska, operating a vehicle, aircraft, or watercraft while under the influence of intoxicating liquor or any controlled substance is usually a class A misdemeanor. See Alaska Stat. § 28.35.030 (b) & (n) (Westlaw 2008).


56 See John Hoffman, Note, Implied Consent with a Twist:
Adding Blood to New Jersey’s Implied Consent Law and Criminalizing Refusal Where Drinking and Driving Results in Death or Serious Injury, 35 Rutgers L.J. 345, 349 (2003) (reporting that most states have lowered their legal limit for intoxication to .08% blood alcohol content).

57 Cf. Rummel v. Estelle, 445 U.S. 263, 288 (1980) (Powell, J., dissenting) (discussing history of the proportionality principle in Anglo-American criminal law and noting that “The Magna Carta of 1215 insured that “[a] free man shall not be [fined] for a trivial offence, except in accordance with the degree of the offence; and for a serious offence he shall be [fined] according to its gravity.”).

58 See supra the text accompanying note 40.


61 See supra the text accompanying note 40.


63 Ohio St. Rev. Code § 2307.60 (Westlaw 2008).


65 Id.


67 See Restatement (Second) of Torts § 552 (1977) (sets forth the classic formulation of the tort).


69 For example, one California statute addressing auto accidents bars recovery of damages to compensate for noneconomic losses such as pain and suffering or other nonpecuniary damages if the plaintiff was operating a vehicle under the influence of drugs or alcohol or owned or operated the vehicle without proper insurance or proof of financial responsibility. See Cal. Civ. Code § 3333.4 (Westlaw 2008).


72 See, e.g., Cleveland v. Rotman, 297 F.3d 569, 574 (7th Cir. 2002) (rejecting a widow's claim that bad tax advice had caused her husband to commit suicide); McPeake v. William T. Cannon, Esq., P.C., 553 A.2d 439 (Pa. Super. Ct. 1989) (rejecting a claim arising from
the death of a client who committed suicide after being found guilty); McLaughlin v. Sullivan, 461 A.2d 123, 127 (N.H. 1983) (holding that the connection between an attorney's alleged negligence and a client's suicide was too attenuated to impose legal liability on the attorney).

In McPeake, an attorney was allegedly negligent in representing a criminal defense client on charges of burglary, rape, indecent assault, and corrupting the morals of a minor. When a guilty verdict was returned at the trial, the client jumped from the fifth floor of the courthouse. The court refused to hold the attorney liable for the death for policy reasons, including the fact that imposing a risk of liability on these types of facts would discourage attorneys from representing “a sizeable number of depressed or unstable criminal defendants,” and would therefore defeat the important goal of making legal counsel available to those who need it. 553 A.2d at 443. Presumably the same result could have been reached under a statutory or common law unlawful conduct defense because the client's proven felonious conduct was directly related to his death.

73 See Kommavongsa v. Haskell, 67 P.3d 1068, 1078 (Wash. 2003) (en banc) (holding that a motorist's legal malpractice claim against a law firm that represented him in a personal injury action was not assignable).

74 See Sample v. Freeman, 873 S.W.2d 470, 476 (Tex. App.—Beaumont 1994) (holding that a legal malpractice action is a suit for personal injury and therefore prejudgment interest is available).


76 Ohio St. Rev. Code § 2307.60(B)(2) (Westlaw 2008).


79 See generally Legal Malpractice Law, supra note 66, at 94-95. The text states:

In the proximate-causation context, courts frame the issue in a variety of ways. Some courts say that it is unfair to hold the defendant responsible and find that there is no proximate causation if the harm was unforeseeable. Others ask whether the result was “within the risk” created by the defendant, that is, whether the harm that occurred was one of the dangers that made the defendant's conduct negligent. . . . If not, the defendant's conduct will not be found to be a proximate cause, and liability will not be assessed. Other courts ask whether the plaintiff's harm flowed from the defendant's negligence in a natural, continuous and unbroken sequence, . . . or whether the result was “normal” (not in the sense of being “usual,” but in the sense of not being “bizarre”). If so, it may be fair to impose liability, and the defendant's conduct may be found to be a proximate cause of the plaintiff's injury. Many courts employ more than one of these modes of talking about proximate causation, selecting on a given occasion the language that seems most appropriate and
useful.


80 Cf. Estate of Re v. Kornstein Veisz & Wexler, 958 F. Supp. 907, 924-29 (S.D.N.Y. 1997) (holding that a breach of fiduciary duty claim that was subject to a “substantial factor” standard for proving causation was more readily actionable against a law firm than a malpractice claim that was subject to the usual principles of proximate causation).

81 See generally Part II-B.


In the Reno case a woman who submitted to an illegal abortion could not recover for alleged negligence on the part of the physician performing the operation . . . .

[However, the] rule denying compensation to the serious offender would not apply in every instance where the plaintiff's injury occurs while he is engaged in illegal activity . . . . Thus if the plaintiff in the example cited above had been injured in an automobile accident as a result of another's negligence, she would not be denied access to the courts merely because she was on the way to have the illegal operation performed.

84 See Alami v. Volkswagen of America, Inc., 97 N.Y.2d 281, 287 (N.Y. 2002) (holding that the New York common-law unlawful conduct defense “does not extend beyond claims where the parties to the suit were involved in the underlying criminal conduct, or where the criminal plaintiff seeks to impose a duty arising out of an illegal act,” and therefore a defective design claim against a car manufacturer was not barred by the intoxicated condition of the motorist who died in the crash of a vehicle).


86 See Horwich v. Superior Court, 87 Cal. Rptr. 2d 222, 288 (Cal. 1999) (noting that conviction of the decedent is “an unlikely event if the felon or drunk driver dies in the incident”).


88 See id.

89 See Part II-B.


91 468 N.E.2d at 43.

92 468 N.E.2d at 42.

93 A number of the cases holding that a claim was barred by a statutory unlawful conduct defense have involved the use of force by police officers. See Sun v. State, 830 P.2d 772, 777-78 (Alaska 1992) (holding that an excessive force claim was barred because the plaintiff’s criminal conduct "substantially contributed to the injury"
Allensworth v. City of Los Angeles, 2002 WL 321887, *6 (Cal. App. [Dist. 2] 2002.) (holding that defendant's claims were precluded by defendant's criminal conviction); Maxie v. Preijers, 201 F.3d 444 (Table), 1999 WL 1020954, *2 (9th Cir.) (affirming dismissal of a negligence claim).

94 See generally Part III-A.
95 See supra the text accompanying note 40.
96 See Wiley v. County of San Diego, 79 Cal. Rptr. 2d 672, 676 (Cal. 1998).
98 See id. at *7.
99 See id. at *7 n.13.