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DECISIONS ABOUT COERCION: THE CORPORATE ATTORNEY-CLIENT PRIVILEGE WAIVER PROBLEM

*Daniel Richman**

INTRODUCTION

For almost a decade, law reviews and hearing rooms have resounded with cogent arguments that, for corporations at least, the attorney-client privilege has been chilled, eroded, attacked, or even killed by the federal government's misuse of its bargaining leverage.[1] Yet it is unclear whether this rhetoric is overstated or understated. Given that most federal criminal defendants plead guilty, and that an extraordinarily large percentage of them provide information and testimony against others in order to avoid harsh sentences (or to avoid being charged at all), one could as easily say that the Fifth and Sixth Amendments to the U.S. Constitution are on their last legs, as are the rules of evidence and other adjudicatory principles.[2]

"Death" or, more formally, "waiver" abounds in the federal system, as does "coercion"—if the term is understood in its ordinary sense. Put differently, the system's reality bears little resemblance to the regime of robust rights ostensibly promised by black-letter procedural law.[3] This disjunction can be disturbing to outsiders, but insiders have

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1. *See, e.g.*, Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003); William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621 (2006); 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 (2000) ("The sound you hear coming from the corridors of the Department of Justice is a requiem marking the death of privilege in corporate criminal investigations."); *see also Examining Approaches to Corporate Fraud Prosecutions and the Attorney-Client Privilege Under the McNulty Memorandum: Hearings Before the S. Judiciary Comm.*, 109th Cong. (2007), *available at* http://judiciary.senate.gov/hearing.cfm?id=2886 [hereinafter *McNulty Memo Hearing*].

2. *See* Richard A. Leo, *Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY 266, 286 (1996) (indicating that 78% of suspects waive their Miranda rights).

3. *See* Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998).

become inured to it. Some, like Judge Lynch, actually embrace it and remind us that deviation from our touted adversarial ideal does not necessarily make our system unreasonable or unjust.[4]

Part II of this Article sets out the dimensions of the current debate over corporate privilege waivers—Justice Department policies since 1999, challenges to those policies, and the proposed legislative response.[5] Part III teases out the legal and institutional strands of the policy debate.[6] The larger criminal procedure backdrop—waiver as the normal way of doing business—presents special challenges to those who would complain of government privilege-waiver demands and to those who would assess, and perhaps address, those complaints. That a potential criminal defendant is obliged to surrender a useful right as the price of avoiding prosecution is not, in and of itself, particularly interesting or troubling, especially where that party has adequate access to zealous and competent legal counsel—something too many criminal defendants lack. What, if anything, about this particular waiver demand is problematic? While the literature is filled with arguments by academics—who fear that the flickering of corporate privileges presages a more general threat to attorney-client protections—and by able white-collar defense counsel—concerned with the plight of their individual and corporate clients, as well as the independence and esprit of their own profession—those arguments generally rest on a number of quite contestable empirical and normative propositions. Part III discusses these arguments and the assumptions that lie behind them.

In the face of empirical or policy uncertainty, we often use doctrinal tools to truncate or advance the analysis. However, as Part IV shows, waiver is so enshrined in current doctrine that such tools are of limited use for those dissatisfied or uneasy with government practices in this area.[7] The general approach assigns broad rights to defendants and extraordinarily coercive sanctioning powers to the government, then ratifies the results of the ensuing bargaining process. White-collar lawyers appear to recognize this as well, hence their unusual prolificacy and pleas for legislative intervention.

In the face of such lobbying, the question becomes one of institutional choice—the second focus of Part IV.[8] The current scheme—

4. *Id.*; *see also* Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 COLUM. L. REV. 749 (2003).

5. *See infra* notes 10–38 and accompanying text.

6. *See infra* notes 39–93 and accompanying text.

7. *See infra* notes 94–111 and accompanying text.

8. *See infra* notes 112–144 and accompanying text.

established by the December 2006 "McNulty Memo"[9]—subjects waiver demands to a degree of oversight, both from within a district and from Washington, that may well moderate prosecutorial behavior. Any effort to go further and establish a more stringent set of controls or an outright prohibition ought not be made without thinking about the effect that the locus of decision making has on Justice Department decisions and about the dynamics of legislative oversight. Moreover, consideration of the political economy of white-collar criminal enforcement counsels legislative—and perhaps even administrative—forbearance.

II. THE CURRENT STATE OF PLAY

Some facts are not in dispute. In 1999, Deputy Attorney General Eric Holder issued a memorandum entitled "Federal Prosecution of Corporations," now known as the "Holder Memo,"[10] which counseled prosecutors to consider a number of factors when determining whether to bring charges against a corporate target. Among these factors were the "corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents, including, if necessary, the waiver of the corporate attorney-client and work-product privileges."[11]

In early 2003, Deputy Attorney General Larry Thompson issued a policy memorandum on "Principles of Federal Prosecution of Business Organizations," which, while substantively identical on this point, was mandatory in nature.[12] The "Thompson Memo" noted that any

9. Memorandum from Paul J. McNulty, U.S. Deputy Att'y Gen., to Heads of Dept. Components & U.S. Att'ys (Dec. 12, 2006), *available at* http://lawprofessors.typepad.com/whitecollarcrime_blog/files/mcnulty_memo.pdf [hereinafter McNulty Memo].

10. Memorandum from Eric H. Holder, Jr., U.S. Deputy Att'y Gen., to all Component Heads & U.S. Att'ys (June 16, 1999), *available at* http://www.abanet.org/poladv/priorities/privilegewaiver/1999jun16_privwaiv_dojholder.pdf [hereinafter Holder Memo]; *see also* Philip Urofsky, *Prosecuting Corporations: The Federal Principles and Corporate Compliance Programs*, 50 U.S. ATTORNEYS' BULL. 19 (Mar. 2002).

11. Holder Memo, *supra* note 10, at 4. In October 2001, the SEC noted that it, too, would consider a company's readiness to waive its privilege when assessing the extent of that company's cooperation with an investigation. *See* U.S. SEC. & EXCH. COMM'N, REPORT OF INVESTIGATION PURSUANT TO SECTION 21(A) OF THE SECURITIES EXCHANGE ACT OF 1934 AND COMMISSION STATEMENT ON THE RELATIONSHIP OF COOPERATION TO AGENCY ENFORCEMENT DECISIONS (Oct. 23, 2001), *available at* http://www.sec.gov/litigation/investreport/34-44969.htm; *see also* McLucas et al., *supra* note 1, at 631. The focus here, however, will be on criminal investigations and proceedings.

12. Memorandum from Larry D. Thompson, U.S. Deputy Att'y Gen., to Heads of Dept. Components & U.S. Att'ys (Jan. 20, 2003), *available at* http://www.usdoj.gov/dag/cftf/business_organizations.pdf [hereinafter Thompson Memo]; *see also* Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo In Theory and Practice*, 43 AM. CRIM. L. REV. 1095 (2006).

"waiver should ordinarily be limited to the factual internal investigation and any contemporaneous advice given to the corporation concerning the conduct at issue. Except in unusual circumstances, prosecutors should not seek a waiver with respect to communications and work product related to advice concerning the government's criminal investigation."[13]

The consequences of that policy articulation are somewhat unclear. In a late 2003 interview, then-U.S. Attorney and soon-to-be Deputy Attorney General James Comey noted that a corporation's willingness to waive its privilege was not a "litmus test" when it comes to charging decisions and that he had seen no evidence that prosecutors routinely demanded waivers. The Department simply "expect[ed] cooperating corporations to help us catch the bad guys." He explained the possibilities:[14]

> If a corporation can do that without a waiver, prosecutors should give them the opportunity to do that. If the questions are fully answered without a waiver, prosecutors should consider that to be meaningful cooperation in evaluating all factors in making the charging decision. If a corporation wishes to go farther and share work product and privileged materials in order to enhance the Government's investigation, so much the better. Whether a corporation's failure to cooperate at all, or failure to waive if necessary to answer those questions, will result in a charge, is a separate issue that can only be answered by evaluating all the factors.[15]

In 2004, the Department's point person on the issue, Mary Beth Buchanan, drew on a 2002 survey of all U.S. Attorneys' offices to report that "requests for waiver of the attorney-client privilege or work-product protection were the exception rather than the rule."[16] She added that "those who argue that waivers are required frequently do so on the basis of anecdotes without any supporting data."[17]

On October 21, 2005, the Department offered a sop to critics in the form of a memorandum by Acting Deputy Attorney General Robert D. McCallum, Jr., "the McCallum Memo."[18] The McCallum Memo

13. Thompson Memo, *supra* note 12, at 7 n.3.

14. *Interview with U.S. Attorney James B. Comey Regarding Department of Justice's Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, 51 U.S. ATTORNEYS' BULL. 1, 1–2 (Nov. 2003) [hereinafter *Comey Interview*].

15. *Id.*

16. Mary Beth Buchanan, *Effective Cooperation by Business Organizations and the Impact of Privilege Waivers*, 39 WAKE FOREST L. REV. 587, 598 (2004).

17. *Id.*

18. Memorandum from Robert D. McCallum, Acting Deputy Att'y Gen., to Heads of Dept. Components & U.S. Att'ys (Oct. 21, 2005), *available at* http://www.abanet.org/poladv/priorities/privilegewaiver/2005oct21_privwaiv_dojmccallum.pdf.

reaffirmed prior departmental policy, but added the following mandate:

> To ensure that federal prosecutors exercise appropriate prosecutorial discretion under the principles of the *Thompson Memorandum*, some United States Attorneys have established review processes for waiver requests that require federal prosecutors to obtain approval from the United States Attorney or other supervisor before seeking a waiver of the attorney-client privilege or work product protection. Consistent with this best practice, you are directed to establish a written waiver review process for your district or component. . . . Such waiver review processes may vary from district to district (or component to component), so that each United States Attorney or component head retains the prosecutorial discretion necessary, consistent with circumstances, to seek timely, complete, and accurate information from business organizations.[19]

The McCallum Memo's chief significance was thus negative, as it implicitly rejected both challenges to existing waiver practices and called for greater centralized supervision of waiver demands.

Meanwhile, those on the other side of the already heated debate tried to go beyond anecdote—albeit in surveys that, as Julie O'Sullivan noted, "were not conducted with even minimal rigor."[20] A survey by the Association of Corporate Counsel of its members and—through other organizations in the Coalition to Preserve the Attorney-Client Privilege—of white-collar practitioners[21] found widespread belief among respondents that "a 'culture of waiver' has evolved in which governmental agencies believe it is reasonable and appropriate for them to expect a company under investigation to broadly waive attorney-client privilege or work product protections."[22] Although the survey inquired about all law enforcement agencies, respondents made clear that U.S. Attorneys' offices were the most frequent offenders.[23] Of the respondents who had been investigated, "55% of outside counsel responded that waiver of the attorney-client privilege

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19. *Id.*

20. Julie O'Sullivan, *Does the DOJ's Compelled-Voluntary Privilege Waiver Policy Undermine Corporate Client's Willingness to Communicate with Counsel and Counsel's Ability to Ensure Corporate Legal Compliance? A Preliminary "No,"* (forthcoming) (manuscript at 11, on file with author).

21. ASS'N OF CORP. COUNSEL ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT, 2–3 n.7 (2006), *available at* http://www.acc.com/resource/v6877 [hereinafter ACC SURVEY]. The survey received 676 responses from in-house counsel and 538 from outside counsel. *Id.*

22. *Id.* at 3; *accord In re* Qwest Comm'cns Int'l, Inc., 450 F.3d 1179, 1199–1201 (10th Cir. 2006) (noting amicus ACC's efforts to draw the court's attention to the "culture of waiver").

23. ACC SURVEY, *supra* note 21, at 6.

[had been] requested by enforcement officials either directly or indirectly, [and 27%] of in-house counsel confirmed this to be true."[24]

What privileged or protected materials did prosecutors seek? In November 2003, U.S. Attorney Comey described their waiver requests:

> [P]rosecutors are not generally seeking legal advice or opinion work product; they are just seeking the facts, including factual attorney work product. Of course, disclosure of interview notes or the facts contained in the notes reflects the questions asked by the attorney, which may result from prior research, as well as the attorney's focus during the interview. The disclosure, however, involves a minimal intrusion on the privilege.[25]

The 2006 Corporate Counsel Survey largely corroborated this, but also found that, for those respondents reporting the nature of materials demanded, 15% of the requests to in-house counsel and 20% of the requests to outside counsel had involved materials relating to the advice of counsel.[26]

The immediate audience for the Corporate Counsel Survey was the U.S. Sentencing Commission, and the response from the Commission must have been gratifying. In May 2006, the Commission amended the Sentencing Guidelines to eliminate language that was "misinterpreted to encourage waivers."[27] Given that the Guidelines speak only to sentencing and not to the demands that the government makes as a condition for allowing a company to avoid criminal liability, the significance of this advocacy victory has been limited, as it will continue to be unless the Commission's decision influences Congress or the Justice Department.

More balm for critics came early in December 2006 when Senator Arlen Specter, in his last months of chairing the Judiciary Committee, introduced legislation that would bar the government from demanding the waiver of an organizational attorney-client privilege and from considering an entity's assertion of that privilege when deciding

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24. *Id.* at 4.

25. *Comey Interview*, *supra* note 14, at 1.

26. ACC SURVEY, *supra* note 21, at 9. The Survey report regrettably lumped together situations in which defendants asserted an "advice-of-counsel" defense and those where they did not, as well as cases in which defendants sought advice related "to the investigation itself (rather than the underlying conduct being investigated)." *Id.*

27. U.S. SENTENCING COMM'N, AMENDMENTS TO THE SENTENCING GUIDELINES 45 (May 18, 2006), *available at* http://www.ussc.gov/2006guid/FinalUserFrdly.pdf (eliminating the last sentence of Application Note 12 to § 8C2.5, which stated that "[w]aiver of attorney-client privilege and of work product protections is not a prerequisite to a reduction in culpability score . . . unless such waiver is necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization"). The amendment took effect on Nov. 1, 2006, in the absence of congressional modification.

whether to pursue criminal charges or civil sanctions.[28] On December 12, 2006, Deputy Attorney General Paul McNulty, during a speech to the New York-based business and defense lawyer group, the Lawyers for Civil Justice, announced a revision of the Thompson Memo.[29] While not addressing the common scenario—in which a corporation "volunteers" to waive its privilege—the McNulty Memo somewhat tightened the internal regulations on prosecutors who explicitly ask for the most frequently sought privileged materials: documents, interview memoranda, and "reports containing investigative facts documented by counsel."[30]

Before asking a corporation to waive its privilege on these "Category I" materials, a line prosecutor must obtain written authorization from the U.S. Attorney, who must in turn consult with the head of the Criminal Division in Washington.[31] Prior to seeking waiver of privilege as to "Category II" materials—those which reveal "legal advice given to the corporation before, during, and after the underlying misconduct"—prosecutors must obtain the Deputy Attorney General's written permission.[32] The McNulty Memo makes exceptions when the material sought relates to the underlying misconduct and the corporation or one of its employees is relying on an advice-of-counsel defense or when the advice falls within the crime/fraud exception to the privilege. Prosecutors may consider a corporation's response to a Category I request when deciding whether a firm has cooperated, but they cannot consider a firm's refusal to waive the privilege on Category II materials.

Although its promulgator billed it as such, it is far from clear that the McNulty Memo constitutes a significant departure from existing practice. It does, however, signal a tactical retreat by the Department and perhaps the beginning of a new quietism toward corporate crime. Some influential interests would applaud the latter. Just nine days before the Memo's release, the Committee on Capital Markets Regu-

28. 152 CONG. REC. S11438-39 (daily ed. Dec. 7, 2006) (statement of Sen. Specter). The bill was reintroduced as the Attorney-Client Protection Act of 2007, S. 186, 110th Cong. (2007). For a critique of Senator Specter's bill, see *McNulty Memo Hearing*, *supra* note 1, Written Testimony of Daniel Richman, *available at* http://judiciary.senate.gov/testimony.cfm?id=2886&wit_id=6656.

29. Lawyers for Civil Justice, http://www.lfcj.com/process.cfm?PageID=2 (last visited Sept. 24, 2007). According to its website, Lawyers for Civil Justice "plays a unique role in the civil justice reform movement by coalescing the resources of the defense trial lawyers with the support of a significant segment of the business community." *Id.*

30. McNulty Memo, *supra* note 9.

31. *Id.*

32. *Id.*

lation, formed with the support of the Secretary of the Treasury,[33] released its "interim" report, which recommended that the Justice Department "revise its . . . guidelines so that firms are only prosecuted in exceptional circumstances of pervasive culpability throughout all offices and ranks."[34] The Committee also recommended that the Department "revise its prosecutorial guidelines to *prohibit* federal prosecutors from seeking waivers of the attorney-client privilege."[35] Others, too, have argued that the pendulum has swung too far in the direction of enforcement as a result of overreaction to Enron and other corporate scandals.[36]

At a September 2007 hearing on Senator Specter's bill, a Justice Department representative reported that, "[s]ince December 2006, the Criminal Division has received ten requests for factual information under Category I of the *McNulty Memorandum*, only five of which involved a request for privileged documents actually covered by the *Memorandum*. Four of those five requests were approved."[37] Moreover, the Deputy Attorney General's office had "not processed any requests for attorney-client communications under Category II of the *Memorandum*."[38]

III. THE POLICY DEBATE AND ITS UNDERLYING ASSUMPTIONS

What exactly is at stake here, beyond the obvious point that the government is using its considerable leverage to extract waivers of valuable rights from corporate entities, which recognize that the mere decision to charge can put them out of business? The available data are rather thin. Although the Coalition to Preserve the Attorney-Client Privilege purportedly sought to document the extent to which a "culture of waiver" prevails among government enforcers, its survey results give only a sketch of the alleged problem. Respondents in the study offered some telling quotes, but were not necessarily representative of practitioners in the area or even of the entire membership of

33. *See* Jenny Anderson, *Sharply Divided Reactions to Report on U.S. Markets*, N.Y. TIMES, Dec. 1, 2006, at C8.

34. INTERIM REPORT OF THE COMMITTEE ON CAPITAL MARKETS REGULATION 85 (Nov. 30, 2006), *available at* http://www.capmktsreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf.

35. *Id.* at 86 (emphasis in original). The report, like the McNulty Memo, also addressed the degree to which a prosecutor's charging calculus can include a corporation's advancement of legal fees to its employees. *See* United States v. Stein (*KPMG Case*), 440 F. Supp. 2d 315 (S.D.N.Y. 2006), appeal pending. This Article does not address that issue.

36. *See* Carrie Johnson, *SEC Shift May Lead to Lower Penalty: Policy Addresses Firms' Culpability*, WASH. POST, Apr. 13, 2007, at D1.

37. *McNulty Memo Hearing*, *supra* note 1, Statement of Karin Immergut, U.S. Att'y., D. Ore., *available at* http://judiciary.senate.gov/print_testimony.cfm?id=2886&wit_id=6653.

38. *Id.*

the organizations involved.[39] Moreover, without raw data, it is difficult to discern the degree to which those responses reflected general perceptions rather than personal experiences. As noted above, it is unclear to what extent prosecutors have sought access to materials relating to counsel's advice in situations other than those in which a target has asserted an advice-of-counsel defense.

For its part, the Justice Department has only just started to provide a more complete picture of how its representatives have conducted themselves. To be fair, collecting data of this sort has always been a challenge for the Department, particularly when information requests are not accompanied by a regime of strict, centralized control.[40] Even if Main Justice received complete and detailed field reports about negotiations with corporate counsel, issues would remain regarding signals received by counsel, but not intentionally or explicitly sent by prosecutors.[41] Prosecutors can make clear demands, but they can also make casual suggestions or choose to say nothing, thereby profiting from defense counsel misperceptions of government expectations. Efforts have indeed been made to collect data in the wake of the McNulty Memo, but considerable uncertainty remains.[42]

Pending the kind of data that the McNulty Memo may produce, assume that privilege waiver is regularly on the table when a corporation seeks to avoid prosecution by demonstrating "cooperation." Assume further that the waivers sought or obtained encompass all factual materials gathered by inside or outside counsel as part of their internal investigation into matters of government concern. This would include written reports prepared by counsel (though reports are often oral) and the underlying interview notes and memos, which, like the reports themselves, would otherwise be protected against disclosure by a combination of attorney-client and work-product privileges.

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39. ACC SURVEY, *supra* note 21, at 2–3 n.7 ("We believe the survey's response rate can be considered robust; but since we are not an independent surveying company or statisticians, we can make no proffer that the sampling is statistically significant or representative of the entire profession.").

40. The strenuous effort that the Justice Department has made in capital cases provides a remarkable, though understandable, contrast to its efforts in noncapital cases. *See* John Gleeson, *Supervising Federal Capital Punishment: Why the Attorney General Should Defer When U.S. Attorneys Recommend Against the Death Penalty*, 89 VA. L. REV. 1697 (2003); Daniel Richman, *Institutional Coordination and Sentencing Reform*, 84 TEX. L. REV. 2055, 2068 (2006); *see also* Stephen P. Klein et al., *Race and the Decision to Seek the Death Penalty in Federal Cases* (2006), *available at* http://rand.org/pubs/technical_reports/2006/RAND_TR389.pdf.

41. *See* Wray & Hur, *supra* note 12, at 1177 ("Mutual misunderstandings between [prosecution and defense attorneys] can help explain the chasm between the Justice Department's accounts of the rarity of waiver requests and the defense bar's vehement insistence that they occur routinely.").

42. *See McNulty Memo Hearing*, *supra* note 1, Statement of Karin Immergut.

A solid case can be made for a regime of broad disclosure by corporations—coerced, prodded, encouraged, or simply appreciated by the government. Although corporations have no Fifth Amendment privilege against self-incrimination,[43] the collective knowledge of these artificial "persons" often cannot be tapped without the participation of corporate counsel. The government subjects natural persons to intensive debriefings as a condition of cooperation to ensure that they fully disclose what they know about matters under investigation. The only way a corporation can render an analogous degree of cooperation is through the disclosure of all factual materials in its control, including, in particular, information gathered by its lawyers. As is always the case when the government uses the explicit or implicit threat of prosecution to obtain information, the subject of the pressure would prefer it otherwise. But, given the alternatives—possible prosecution or perhaps a sustained grand jury investigation—this coercion seems little different from the sort generally tolerated in the criminal justice system.[44]

Why, then, should the government's coercive efforts to obtain these materials cause such concern? These efforts put firms at a disadvantage, but what are the social costs? There are forceful arguments against such practices that will only be sketched out here, with the goal merely to expose their underlying empirical or normative assumptions. First, Section A looks at the plight of firms, then of the officers and employees within them. Finally, Section B turns to broader systemic concerns.

A. The Plight of Firms

The first category of criticism looks to the plight of corporations in a world in which their internal investigations or inquiries may end up

43. *See* Braswell v. United States, 487 U.S. 99, 105 (1988); Hale v. Henkel, 201 U.S. 43 (1906); O'Sullivan, *supra* note 20, at 22 ("[B]ecause it lacks a Fifth Amendment privilege, a corporation can protect the results of its investigation—at least until it chooses how it will act on the report—only by using lawyers who can shield their work under the attorney-client privilege and work product doctrine.").

44. *See, e.g.*, Bordenkircher v. Hayes, 434 U.S. 357, 365 (1978) (holding that the prosecutor's offer to accept a guilty plea to a lesser charge, as opposed to a charge carrying a life sentence, simply presented the defendant with the unpleasant alternatives of forgoing trial or facing charges on which he was plainly subject to prosecution); Chaffin v. Stynchcombe, 412 U.S. 17, 31 (1973) ("Although every [plea bargain] has a discouraging effect on the defendant's assertion of his trial rights, the imposition of these difficult choices [is] an inevitable attribute of any legitimate system which tolerates and encourages the negotiation of pleas."); Brady v. United States, 397 U.S. 742, 751 (1970) (declining to find that guilty pleas are invalid "whenever motivated by the defendant's desire to accept the certainty or probability of a lesser penalty rather than face a wider range of possibilities extending from acquittal to conviction and a higher penalty authorized by law for the crime charged"); United States v. Cruz, 156 F.3d 366, 374 (2d Cir. 1998).

being transparent to the government. Should this prospect lead firms to engage in fewer internal investigations, the social cost of a waiver regime would be grave indeed. However, this seems unlikely.[45] Corporate managers already have considerable legal and economic incentives "to strive for legal compliance irrespective of the prospect of privilege waiver."[46] The costs of failing to inquire into questionable conduct can be great, and the government may not even take an interest in the matter. Moreover, should existing incentives be insufficient in this regard, policymakers could increase them, particularly on the civil or criminal sanctioning side.[47]

Perhaps firms will continue to request internal inquiries, but their lawyers would be less zealous and effective in conducting them. Yet, as Professor O'Sullivan keenly observed, defense counsel's argument that "their duty of effective representation requires them to compromise the investigation" sounds very much "like an argument that a lawyer's ethical duty to the entity requires—in light of the possibility of prospective privilege waiver requests—that lawyers commit malpractice while investigating."[48] O'Sullivan is aptly skeptical of this argument.

A more subtle chilling-effect argument considers counsel's own interests. Even assuming that a clear distinction can be drawn between factual material and legal advice, and that only the former will be routinely disclosed to the government, counsel may still be reluctant to create materials that will be subject to prosecutorial scrutiny—scrutiny that might extend to the lawyers themselves.[49] At worst, the lawyers risk obstruction charges. At best, they are rendered potential

45. *But see* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007). Griffin suggests that, as a result of government waiver demands, "some corporations [already] have limited internal investigations to pare down the amount of potential misconduct and proprietary information that must be revealed to the government." *Id.* at 345–46. The Business Week article that she cites for support, however, offers little clear evidence. *See* Lorraine Woellert, *Justice Softens Investigation Guidelines*, BUSINESSWEEK.COM, Dec. 13, 2006, http://www.businessweek.com/bwdaily/dnflash/content/dec2006/db20061213_615165.htm. In all fairness, clear empirical data would be difficult to find.

46. Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 903 (2006); *accord Comey Interview*, *supra* note 14, at 2 ("We have seen no evidence at all that corporations refrain from conducting internal investigations because, in order to obtain leniency for cooperating, they might be asked to waive a privilege.").

47. *See* Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

48. O'Sullivan, *supra* note 20, at 48.

49. *See* Upjohn Co. v. United States, 449 U.S. 383 (1981) (discussing why it is unwise to deter lawyers from keeping written records).

government witnesses.[50] Yet the power of this argument is debatable. After all, prosecutors regularly become potential witnesses. Although prosecutors generally do not have to worry about obstruction charges, it is unclear that corporate defense counsel really need worry either—particularly if they avoid doing interviews on their own.

Ironically, another argument is, in part, driven by the assumption that potential civil sanctions are already too great—at least those imposed at the behest of private plaintiffs. Corporations will continue to conduct internal investigations, and they will comply with prosecutorial waiver demands. Unfortunately, these corporations will face disclosure of sensitive materials not only to the government, but also to private plaintiffs. Outside of the Eighth Circuit, and in the absence of congressional action, there is no clear doctrine of "selective waiver" of the sort that would allow a corporation to assert its privileges against other plaintiffs after disclosing otherwise privileged materials to the government.[51] At first blush, this scenario does not appear troubling. After all, why be concerned if litigation costs to deserving plaintiffs are reduced? Private plaintiffs are often permitted to piggyback off criminal convictions with offensive collateral estoppel.[52] Why not let them similarly take advantage of the government's entire investigative haul? Indeed, one could argue that "private litigants have no less of an interest [than the government] and may be better suited to achieving the goals of deterrence and punishment of corporations."[53]

On the other hand, the introduction of private litigants into the mix may be more problematic, because not all plaintiffs are equally "deserving."[54] The internal investigation that either clears the firm or provides evidence of misconduct so equivocal as to be unworthy of prosecutorial pursuit might still provide grist for one or more civil suits that, though not meritorious, still need to be settled or litigated.[55] Effectively subsidizing these suits through a privilege waiver regime could lead to overdeterrence. Alternatively, a firm otherwise ready to

50. Thanks to Julie O'Sullivan for this point.

51. *In re* Qwest Commc'ns Int'l, Inc., 450 F.3d 1179, 1181 (10th Cir. 2006).

52. *See* John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 MD. L. REV. 215, 221–22 (1983).

53. Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?*, 30 SEATTLE U. L. REV. 155, 189–90 (2006).

54. Indeed, the ability of shareholders to diversify, among other things, raises questions about all securities class actions. *See* John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1547 (2006).

55. *See* Coffee Jr., *supra* note 52; *see also* Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW & CONTEMP. PROBS. 167 (1997).

fully cooperate with any government investigation might think twice about cooperating when such subsidization is the consequence.[56]

There is also the risk that a waiver regime would result in less productive investigations, because officers and employees worry about providing statements that will thereafter be turned over to the government. This risk might be quite limited, however, because officers and employees would have these concerns even without prosecutorial waiver demands.[57] The privilege belongs to the corporation, and the corporate calculus could easily dictate giving the government information that exposes its officers and employees to criminal liability, even in the absence of a government demanded waiver.[58] The possibility that a corporation will "push liability downward" onto individual officers or employees is a standard problem in white-collar enforcement.[59] Perhaps there are officers or employees who would be forthcoming under a robust privilege regime, notwithstanding the corporation's control over the privilege, because they trust the firm to consider their personal interests and do not think it would lightly turn them in—perhaps because they have real power within the firm. One would expect these individuals to be less open with internal investigators under a waiver regime that increases the likelihood of government access to their statements. However, the size of this class is unclear.

One can step back from concerns relating to employee trust of internal investigators to concerns about employee trust more gener-

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56. *See* George J. Terwilliger III & Darryl S. Lew, *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations*, 7 ENGAGE: J. FEDERALIST SOC'Y'S PRACTICE GROUPS 25, 30 (Mar. 2006) ("The uncertainty regarding principles of limited waiver also can dampen corporations' enthusiasm for cooperating with government investigations.").

57. *See* William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 FORDHAM L. REV. 1453, 1468 (2006) ("Given [the] long-standing limits on the privilege, it has always been irrational for a manager to make disclosures to the corporation's counsel that she would not have been willing to make in the absence of any confidentiality safeguards.").

58. *See* Brown, Jr., *supra* note 46, at 904 ("Corporate constituents . . . could legitimately distrust the security provided to them by the corporate privilege, given that it belongs to the corporation rather than to them individually."); *see also* Buchanan, *supra* note 16, at 599–600; John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 509 (1982) (noting that, when "the information-holder has a personal, as well as corporate, legal interest in the information he possesses, the possibility that the corporation might waive the attorney-client privilege, thereby rendering the information discoverable, would create a powerful incentive either to refuse to communicate with the attorney or to prevaricate").

59. William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1343, 1348 (1999).

ally.[60] The mutual distrust that government cooperation incentives breed among co-conspirators is often celebrated.[61] That is the beauty of the Prisoner's Dilemma, at least from a societal perspective—prisoners as a class are likely less keen on the phenomenon. Within corporations, however, trust is something society generally wants to foster.[62] When corporations "own" the information they obtain in the course of internal probes, they can fairly be expected to consider the costs of "betraying" the loyalty of the employee who is forthright with internal investigators. In a waiver regime, firms lose the ability to make and act on such calculations, as effective "ownership" of the investigative haul is transferred to the government. The resulting costs in internal cohesiveness may thus be greater than those flowing simply from corporate control of the privilege.

There is, however, a rejoinder to the trust argument: the extent to which trust drives corporate productivity is far from clear.[63] Moreover, given that waivers only occur after law enforcers become interested in a matter, the extent to which a waiver regime threatens any such trust is also unclear. After all, many firms will conduct internal investigations in matters that never appear on any prosecutorial radar. Even were a waiver regime to erode such trust, the social cost of that erosion might be counterbalanced by the social gains from cheaper and more effective law enforcement.

Corporations might even share the benefits of more efficient law enforcement. Although a savvy federal enforcer will not stay within the four corners of internal investigation reports or interview memos, these legal products can significantly speed the process of getting to the bottom of the matter at hand. The enforcer who reaches the bottom, or thinks she has, will often be satisfied and move on to other

60. *See* Zornow & Krakauer, *supra* note 1, at 156 (noting that a waiver demand "has the effect of chilling the inquiry from the outset and often has an adverse impact on the relationships among senior management and lower-level employees").

61. *See* Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670 (1992); Daniel C. Richman, *Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels*, 8 FED. SENT'G REP. 292 (1996); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69 (1995).

62. *See* Margaret M. Blair & Lynn A. Stout, *Trust, Trustworthiness, and the Behavioral Foundations of Corporate Law*, 149 U. PA. L. REV. 1735, 1757–59 (2001); Griffin, *supra* note 45, at 335 (noting that waiver demands undercut loyalty within firms).

63. *See* CHARLES HECKSCHER, WHITE-COLLAR BLUES: MANAGEMENT LOYALTIES IN AN AGE OF CORPORATE RESTRUCTURING (1995); PAUL OSTERMAN, SECURING PROSPERITY: THE AMERICAN LABOR MARKET: HOW IT HAS CHANGED AND WHAT TO DO ABOUT IT (1999); BROKEN LADDERS: MANAGERIAL CAREERS IN THE NEW ECONOMY (Paul Osterman ed., 1996).

cases. The sooner the government searchlight is extinguished, the better for the firm.[64]

This shared benefits argument might strike a corporate defender as rather paternalistic. Sure, handing internal investigative materials over to the government on a silver platter might serve shareholder interests. Even without a prosecutorial regime that explicitly encouraged waiver, a firm seeking to signal that it has nothing to hide would be tempted to pursue an "open file" policy with the government. Yet this hardly means that disclosure is invariably in shareholders' interests. Corporate counsel ought to be left to figure this out for herself, especially in light of the civil plaintiffs who might be waiting in the wings.

But there is a counterclaim to the cry of paternalism: perhaps management is not the greatest judge of shareholders' best interests in these matters.[65] Management might be prone to overvalue the importance of trust within the firm. Managers themselves might have some actual or perceived culpability in the corporate conduct being investigated. Alternatively, having altogether different skeletons in their own closets, managers might confuse their personal interest in the non-disclosure of internal corporate matters with shareholders' interests. The extent to which managers' interests are aligned with shareholders' interests on this score will vary considerably with the type of misconduct under scrutiny, with a long continuum running from cases of isolated self-dealing by an individual employee to cases of sustained bid-rigging (or violation of the Foreign Corrupt Practices Act) that primarily benefits the firm. Even if one assumes as a general matter that, regardless of endemic agency problems,[66] corporate managers are better situated than the government to advance shareholder interests, one might still wonder if this assumption holds true where the government has found reason to criminally investigate corporate conduct.

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64. *See* Buchanan, *supra* note 16, at 605. "The corporation may be able to identify quickly and efficiently the appropriate individuals with knowledge of the events and the relevant documents and other evidence. This is what makes the investigation of corporate crimes unique and why the corporation may be in a position to benefit itself by cooperating . . . ." *Id.*; *see also* Fordham U. Sch. of Law, *Advisory Committee on Evidence Rules: Hearing on Proposal 502*, at 59, (Apr. 24, 2006) (statement of Peter Pope, Deputy Att'y Gen., N.Y.) (noting the interest of corporations to quickly dispose of matters).

65. *See* William H. Simon, *Whom (or What) Does the Organization's Lawyer Represent?: An Anatomy of Intraclient Conflict*, 91 CAL. L. REV. 57 (2003).

66. *See* OLIVER E. WILLIAMSON, MARKETS AND HIERARCHIES: ANALYSIS AND ANTITRUST IMPLICATIONS: A STUDY IN THE ECONOMICS OF INTERNAL ORGANIZATION (1975); Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

The challenge to the suitability of managers as guardians of the corporate privilege, at least where government investigations are concerned, may prove too much. If law enforcers are indeed better placed than managers to determine when the privilege ought to be waived, why have the privilege to begin with? This is a fair question, one to which this Article will return. But, for now, the challenge should be seen as supporting, at a minimum, a "coerced" waiver regime.

B. Plight of Officers and Employees

A second category of arguments against a coerced waiver regime evinces solicitude less for corporate entities than for their individual officers and employees. That these arguments are made by corporations or those that represent them is interesting, but hardly dispositive, because, as previously noted, firms have their own interest in assuring fairness to their officers and employees.

Internal investigations can put an executive or employee into a difficult position, to put it mildly. Should she refuse to speak, she may well lose her job.[67] She also faces the risk that, should she speak, her statements will be turned over to the government and expose her to civil or criminal liability. As noted, this risk would be present even if the government eschewed privilege waiver demands, because waiver may serve the firm's own interests, and because the waiver decision is the firm's to make.[68] Should she lie, she might find herself charged with obstruction of justice.[69]

If an executive or employee expects that statements to corporate counsel are protected by an attorney-client privilege that she controls, she will likely be corrected by counsel, who ought to give her "*Upjohn* warnings."[70] Should counsel fail to give these warnings and should the employee reasonably conclude that counsel represents *her* and not the firm, a court might find that an attorney-client relationship exists and she does control the privilege.[71] Thus, companies that wish to maintain control over such statements have some incentive to clarify counsel's role, and there is some reason to believe that *Upjohn* warn-

67. McLucas et al., *supra* note 1, at 636–37 n.62; *see also* Griffin, *supra* note 45; *Comey Interview*, *supra* note 14, at 2 (noting that a corporation has the ability to require an employee to cooperate with its counsel on pain of dismissal).

68. *See supra* notes 57–59 and accompanying text.

69. *See* McLucas et al., *supra* note 1, at 637 n.63 (discussing *Computer Associates* charges in Federal District Court in the Eastern District of New York); O'Sullivan, *supra* note 20, at 60.

70. *See* Brown, *supra* note 46, at 939; O'Sullivan, *supra* note 20, at 57.

71. *See In re* Grand Jury Subpoena: Under Seal, 415 F.3d 333, 340 (4th Cir. 2005); *see also* O'Sullivan, *supra* note 20, at 59–60.

ings have become standard procedure.[72] If employers infrequently or inadequately give such warnings and courts cannot be counted on to give relief to the misled employee—say, by giving her control over the privilege and protection against the derivative use of statements obtained in violation of the privilege[73]—any regime that envisions corporate waivers, whether purely strategic or coerced, is indeed problematic. The most obvious solution, however, is to ensure that corporations bolster their *Upjohn* warning practices.

C. *Broader Systemic Concerns*

Other arguments against a coerced waiver regime go beyond concern for corporations and their employees per se and look to broader systemic damage that may result from such a regime. First, some see the corporate privilege as a miner's canary.[74] If the government is permitted to eviscerate the attorney-client privilege of corporations, it may next turn to other kinds of defendants.[75] Such slippery-slope arguments are easily made and hard to answer.[76] However, some government actions, like the prosecution of Lynne Stewart, seem quite unconnected to the coerced waiver trend, and there is little reason to expect that privilege waiver will be a non-negotiable part of cooperation for noncooperative clients.[77]

Why does the government refrain from demanding that *individuals* waive their attorney-client privilege as a down payment on the cooperation that defendants so fervently seek to render?[78] After all, the

72. *See* Paul Rothstein, *The Story of* Upjohn Co. v. United States*: One Man's Journey to Extend Lawyer-Client Confidentiality, and the Social Forces That Affected It*, *in* EVIDENCE STORIES 151, 176 (Richard Lempert ed., 2006) (noting that, "[i]n view of the frequency of waiver today," employees ordinarily know about "the waiver incentives operating on the company").

73. *See In re* Grand Jury Subpoenas 04–124–03 and 04–124–05, 454 F.3d 511 (6th Cir. 2006); United States v. Schwimmer, 924 F.2d 443, 446 (2d Cir. 1991) (noting that the *Kastigar* standard applies where attorney-client privilege is breached).

74. *See* LANI GUINIER & GERALD TORRES, THE MINER'S CANARY: ENLISTING RACE, RESISTING POWER, TRANSFORMING DEMOCRACY 11 (2003) (recounting how miners used to bring along canaries, because the bird's "more fragile respiratory system would cause it to collapse from noxious gases long before humans were affected").

75. *See* Cole, *supra* note 1; *see also* Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 674 (2005) (asserting that the Justice Department's positions in corporate prosecutions are "symptomatic" of the Department's "broader push against lawyers").

76. *See* Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 HARV. L. REV. 1026 (2003).

77. The cooperation agreement of Michael J. Kopper and the Enron Task Force did contain such a waiver provision. *See* JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 1302 (2d ed. 2003). This, however, appears to be the exception that proves the rule.

78. In 2006, the national rate for sentences "below guidelines range" because of defendants' substantial assistance was 14.4%, with districts ranging from 0.9% to 40.0%. U.S. SENTENCING

government demands that defendants seeking a cooperation agreement waive the protections of the rules that ordinarily bar the use of statements made in the course of plea negotiations.[79] Why not use the enormous bargaining leverage that enures from substantial control over cooperators' sentencing discounts[80] to obtain information from a prospective cooperator's lawyer that might help a prosecutor assess the defendant's credibility? One reason this practice has not developed may be that the perceived benefits are small and the risks are great. The government presumes that it will get the client's complete account during the proffer sessions that precede entry into a cooperation agreement or during the debriefing sessions that follow.[81] Additionally, the *Brady* issues that would arise from treating counsel as a supplemental source of information could create more headaches than the effort is worth. If the government has unfettered access to defense counsel files, all "material" information in them might be subject to disclosure in future trials of other defendants.[82] In short, the government's protection of the space between attorney and cooperator often benefits prosecutors as much as it benefits cooperators.

Another reason for the government's forbearance might simply be the respect that prosecutors—who, after all, have much in common with, and will probably soon be, defense lawyers—have for the privilege.[83] At any rate, waivers are not demanded as part of an individual's cooperation, and there is no reason to expect that a prosecutorial practice peculiar to the corporate context—where corporate counsel is the repository of information and evidence that cannot easily be duplicated by prosecutors—will be extended outside of it.

COMMISSION, 2006 ANNUAL REPORT 37 (2007), http://www.ussc.gov/ANNRPT/2006/chap5_06.pdf. This does not include defendants who sought to cooperate but did not receive 5K.1 treatment, or safety valve defendants. The defendants receiving 5K.1 treatment obtained a 47.8% median decrease in the otherwise applicable guideline minimum sentence. *Id.* at 48.

79. *See* Benjamin A. Naftalis, *"Queen for a Day" Agreements and the Proper Scope of Permissible Waiver of the Federal Plea-Statement Rules*, 37 COLUM. J. L. & SOC. PROBS. 1 (2003).

80. Prosecutors' control over 5K.1 may have been lessened by *United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006), which allowed a sentencing judge to consider a defendant's cooperation even in the absence of a 5K.1 motion by the government.

81. *But see* Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 FORDHAM L. REV. 917 (1999) (suggesting that prosecutors are not very good at assessing cooperator credibility).

82. *See* United States v. Risha, 445 F.3d 298, 303–06 (3d Cir. 2006) (discussing whether constructive knowledge of materials in state files could be imputed to the federal prosecution because of close involvement between the federal prosecution and state agents).

83. *See* Richman, *supra* note 4, at 787–88 (noting that "a great many" prosecutors see their "job as a way station, a means of acquiring human capital . . . that will facilitate their representation of private clients thereafter").

Indeed, the burdens that waiver demands place on corporate counsel grow out of the special relationship between corporate counsel and corporate "knowledge." When an individual seeks to cooperate with the government, the government expects her to tell all she knows about the investigated transactions and many peripheral matters, such as unrelated personal misconduct, with grave consequences often attending her failure to be completely forthcoming. If one expects analogous disclosure from artificial entities like corporations, to whom will one turn if not the lawyers, who may well be the only corporate agents charged with gathering all the information within the entity's collective knowledge?

Yet, even if a coerced waiver regime is confined to corporate clients, the threat it poses to the adversary system should not be discounted—not through the erosion of the privilege itself, but through the change it may bring to white-collar defense practice. While some defense lawyers confine their practice to individual clients, corporate clients loom large as actual or potential sources of business in this segment of the profession. Should corporate counsel actually start thinking of themselves "as an arm of law enforcement,"[84] from whence will come the adversarial mindset that we rely on to ensure that the government does not overreach? Even in a world with increasingly fewer trials, our readiness to rely on administrative and professional prosecutorial controls has its limits. We want defense counsel to be able to pose a credible threat of trial in appropriate cases.[85]

The last argument is particularly strong if we assume that white-collar practice before waiver demands became common represented some optimal level of adversarial zeal. That is contestable, of course. Perhaps the government was unduly hampered by the information control tactics that Kenneth Mann depicted so well in his study of white-collar lawyers.[86] Given that large-scale corporate crime cases have been a regular part of the prosecutorial diet for only three decades at most,[87] figuring out a baseline for balance-of-power calculations is difficult indeed. Moreover, the selection of such a baseline

84. Zornow & Krakaur, *supra* note 1, at 147; *see also* Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputization of Corporate America*, 45 S. TEX. L. REV. 111 (2003).

85. *See* Lynch, *supra* note 3, at 2144 (noting that "the regular if proportionately infrequent resort to the adversarial trial procedure" helps "keep at least a loose rein on executive power").

86. *See* KENNETH MANN, DEFENDING WHITE COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK (1985).

87. *See* Tony G. Poveda, *White-Collar Crime and the Justice Department: The Institutionalization of a Concept*, 17 CRIM. L. & SOC. CHANGE 235 (1992).

will inevitably be influenced by one's normative views on prosecutorial priorities. One might find it perfectly acceptable to raise the costs of white-collar prosecutions, because too many white-collar cases overreach and chill viable commercial conduct,[88] or because the federal government has misallocated resources (perhaps toward violent crime or drug enforcement or, if one looks to the budget as a whole, farm subsidies).

Insightful critics of a waiver regime have made another argument:

> [A waiver regime] leverages governmental resources and takes away the historical checks and balances that existed in the process when the government investigated and company counsel defended in such an investigation. When private attorneys can effectively be commissioned into government service through a process that will unearth every relevant scrap of relevant information at the company's cost, governmental budget constraints matter much less. There is no incentive to hold back on some investigations that would otherwise be unproductive, and the government has nearly unlimited opportunity—with a low threshold for cost effectiveness—to find misconduct at a public corporation. Because the publicity and risks of a civil or criminal trial can be so devastating to public corporations, and especially to highly regulated corporations—both in economic and reputational terms—they are often compelled to settle, even if it means taking positions contrary to their officers and employees.[89]

One can accept most of this analysis and still come out exactly the other way if one believes that corporate criminal enforcement is so far from the margin that a systematic reduction of the costs of prosecution should be celebrated, not feared. Even as corporate criminal enforcement continues to attract public attention, the recentering of the federal enforcement bureaucracy since 9/11 has put enormous strains on resource commitments outside the area of terrorism. Whether corporate enforcement has been unaffected remains unclear.[90] Given

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88. *See, e.g.*, Stuart P. Green, *Why It's a Crime to Tear the Tag Off a Mattress: Overcriminalization and the Moral Content of Regulatory Offenses*, 46 EMORY L.J. 1533 (1997); *see also* Henning, *supra* note 75; Erik Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703 (2005); Stephen F. Smith, *Proportionality and Federalization*, 91 VA. L. REV. 879 (2005).

89. McLucas et al., *supra* note 1, at 639.

90. *Compare* Daphne Eviatar, *What's Behind the Drop in Corporate Fraud Indictments?*, AM. LAWYER, Nov. 1, 2007 (reporting "the precipitous decline in the number of major corporate fraud indictments in the two years since the re-election of President Bush"), *and* Jason McLure, *Has the Wave of White-Collar Prosecutions Crested?*, LEGAL TIMES, July 18, 2006 ("[B]y some measures the crackdown on corporate criminals has stalled."), *and* Kelly Thornton & Onell R. Soto, *Job Performance Said to Be Behind White House Firing*, S.D. UNION-TRIB., Jan. 12, 2007 (suggesting that the San Diego U.S. Attorney was asked to resign because of her focus on white-collar and public corruption cases at the expense of immigration and gun cases), *and* Paul Shukovsky & Daniel Lathrop, *FBI Faces Deep Cuts in Programs to Fight Crime*, SEATTLE POST-INTELLIGENCER, Sept. 28, 2007, at A1 (retired "top FBI official" observing that proposed 2008

that even a waiver regime will not bring the marginal cost of investigating and prosecuting a case down to zero—or anywhere close to it[91]—it is entirely possible that "commissioning" corporate counsel as deputies in the government's corporate crime program will be socially beneficial.[92]

Yet one needs to be careful in assessing the overall "social benefit" in this area, even if one believes that there ought to be more corporate crime prosecutions and that a waiver regime will further that goal. To the extent that the regime skews enforcement activity and dispositions, one might have additional concerns. One commentator suggested, for instance, that "publicly traded companies are especially susceptible to government demands for waiver in a way that private companies are not," because "[a] private company simply does not face the punishment that publicity and controversy can inflict at the first sign of market concern."[93] If this is true, we would have to consider the extent to which an enforcement skew toward publicly traded companies is justified by the peculiar agency problems endemic to broad-based ownership.

If the reader has a firm understanding of the social utility of a waiver regime or the lack thereof by this point, it is probably because she had some deeply held empirical and normative beliefs when she started. This Article's goal has been not to persuade, but rather to explore how positions on waiver have turned more on contestable assumptions than on reasoning. One therefore yearns for the comfort of

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budget cuts "will completely wipe out the FBI's white-collar program"), *with* U.S. DEP'T JUSTICE, OFFICE OF THE INSPECTOR GEN., AUDIT DIV., THE EXTERNAL EFFECTS OF THE FEDERAL BUREAU OF INVESTIGATION'S REPRIORITIZATION EFFORTS, AUDIT REPORT 05-37, at 53 (Sept. 2005). "The FBI has, in recent years, designated corporate fraud as its top national priority for financial crimes." *Id.* Additionally, "[c]ase management data from the [U.S. attorneys' offices] also demonstrated the FBI's increased emphasis on corporate fraud matters, showing that the FBI had referred more matters to [those offices] during [fiscal year] 2004 than it had during [fiscal year] 2000." *Id.*

91. *See* Henning, *supra* note 75, at 696 (noting that "it is unlikely that the government will accept the conclusions of an internal investigation uncritically or forego its own investigation simply because the corporation's lawyers have already conducted one").

92. *See* Wray & Hur, *supra* note 12.

> It makes complete sense for regulators and law enforcement officials to create incentives for companies to cooperate with government investigations. Government resources are finite; because it benefits investigators enormously when a company's often formidable resources work with the government instead of against it, prosecutors and regulators will continue to press companies to cooperate. To do otherwise would be both inefficient and ineffective. And the increasing number of investigations that proceed at a dramatically quicker pace—the government's success in what it has dubbed "real-time enforcement"—stems directly from the increase in corporate cooperation.

Id. at 1170–71.

93. McLucas et al., *supra* note 1, at 640.

settled legal principles. But, unless one has no qualms at all about waiver demands, doctrinal analysis is largely unhelpful. Indeed, its indeterminancy offers a case study in the clash and interrelationship of substantive and procedural law.

IV. DOCTRINAL AND INSTITUTIONAL RESOLUTIONS

A. *The Limits of Legal Doctrine*

Critics of the waiver regime often point to the firmly rooted nature and general social utility of the attorney-client privilege for both individuals and organizations.[94] Yet one gets little legal traction by noting the entrenched status of a right or privilege in the criminal process. Although there must be some limits on what rights can be waived,[95] the general rule is to presume waivability.[96] Moreover, although many have called for some calibration of the bargaining pressure that the government uses to extract such waivers, the general rule is to deem "uncoerced" any waiver the government extracts by threatening charges that it is "entitled" to bring under substantive law.[97]

Sure, it is curious that, in an area of ostensibly clear public interest—the criminal process—we have opted for what is essentially a private law regime of free bargaining—one that allots procedural rights to citizens and organizations, grants substantive penal law "entitlements" to the government,[98] and accepts the arrangements that emerge. But this is the state of current legal doctrine. Those seeking

94. *See* McLucas et al., *supra* note 1, at 629; *McNulty Memo Hearing*, *supra* note 1, Written Testimony of Dick Thornburgh, *available at* http://judiciary.senate.gov/print_testimony.cfm?id=2886&wit_id=6654.

95. *See* United States v. Mezzanatto, 513 U.S. 196, 204 (1995) ("There may be some evidentiary provisions that are so fundamental to the reliability of the factfinding process that they may never be waived without irreparably 'discredit[ing] the federal courts.'" (quoting 21 CHARLES ALAN WRIGHT & KENNETH W. GRAHAM, FEDERAL PRACTICE AND PROCEDURE § 5039, at 207–08 (1977))); *see also* Wheat v. United States, 486 U.S. 153 (1988) (upholding refusal of trial judge to accept defendant's waiver of his right to conflict-free representation).

96. *Mezzanatto*, 513 U.S. at 204; United States v. Fariduddin, 469 F.3d 1111, 1112 (7th Cir. 2006) ("Like almost all rights in the criminal process, the entitlement to a schedule of payments may be waived." (citation omitted)).

97. *See Mezzanatto*, 513 U.S. at 208; Bordenkircher v. Hayes, 434 U.S. 357 (1978); United States v. Brady, 397 U.S. 742 (1970) (noting that leverage came from the threat of the death penalty, which was held unconstitutional in a subsequent case); William J. Stuntz, Bordenkircher v. Hayes: *Plea Bargaining and the Decline of the Rule of Law*, *in* CRIMINAL PROCEDURE STORIES 351 (Carol Steiker ed., 2006); Stephanos Bibas, *Plea Bargaining Outside the Shadow of Trial*, 117 HARV. L. REV. 2463 (2004).

98. "Entitlement" terms are rarely used in reference to the government's control over charging and perhaps sentencing. *But see* Apprendi v. New Jersey, 530 U.S. 466, 501 (2000) (Thomas, J., concurring) (discussing the "punishment to which the prosecution is by law entitled for a given set of facts").

rhetorical leverage from existing procedural law therefore must confront the breadth and prosecutorial authority afforded by existing substantive criminal law, which effectively allows a corporation to be held criminally liable for any act committed by an employee in the course of his employment that was intended to benefit the corporation.[99]

Professor Stuntz has insightfully highlighted the interrelationship of substantive and procedural criminal law.[100] Legislative breadth inevitably weakens procedural protections, often intentionally. Robustly defined constitutional and subconstitutional protections can end up being just chits in the bargaining process, to which defendants must resort to avoid extraordinarily harsh punishment. Yet recognition of the interrelationship between substantive and procedural law does not necessarily come with a normative cash-out, particularly where neither side of the legal divide is constitutionally based or even the product of considered legislative action. This is precisely the case for both corporate criminal liability and the corporate attorney-client privilege under federal law, which both owe their existence and contours far more to judicial fiat than legislative choice.

Corporate criminal liability is mostly a matter of federal common law: in the absence of any express provision for entity liability, courts have read it into criminal statutes and based it on *respondeat superior*. Criticism of the consequent breadth of corporate criminal liability, and of Congress's acquiescence to it, has been cogent and sustained.[101] The best justification for substantive *respondeat superior* criminal liability may be procedural: corporate criminal liability is essentially an information-forcing penalty default that ensures that a corporation will fully cooperate with prosecutors in the investigation of individual

99. *See* N.Y. Cent. & Hudson River R.R. v. United States, 212 U.S. 481, 495 (1909); United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972); *see also* John C. Coffee, Jr., *"No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 668 (2006) ("[G]iven the way that courts have applied these principles, it is difficult to find a case in which a corporation *cannot* be tagged for the activities of its agents.").

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

101. *See, e.g.*, Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Criminal Liability*, 75 MINN. L. REV. 1095 (1991); Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. 853, 876–79 (2007); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); *Developments in the Law—Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 HARV. L. REV. 1227 (1979); O'Sullivan, *supra* note 99.

criminal misconduct.[102] Such cooperation is practically necessary, given the degree to which the corporation controls, or can obtain, relevant information about misconduct. Imposing a duty on the corporation to provide this assistance will help clarify the firm's own involvement in the activity at issue. To be sure, some may find this procedural answer an inadequate justification for broad corporate criminal liability. Indeed, this is a rather extreme case of criminal law being used—perhaps misused—as a jurisdiction grant. The point is simply that the normative status of trade-offs between the government's power to charge and corporate control of investigative information is up for grabs.[103]

Although there is no clear doctrinal bar to effectively deputizing corporate counsel as prosecutorial information gatherers, one aspect of the process may well have doctrinal consequences that courts are now exploring. Relying on *Garrity v. New Jersey*,[104] some white-collar defense counsel have argued that, where U.S. Attorneys "insist[] that [a] company use its disciplinary authority to encourage cooperation, an employee subsequently might seek to preclude the use of his statements against him on that ground that such statements were the product of governmental coercion and thus were obtained in violation of his Fifth Amendment rights."[105] Indeed, two defendants in the KPMG case convinced Judge Kaplan to suppress their statements to prosecutors on the theory that the government had "quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights."[106] Whether Judge Kaplan's rationale would extend to statements ob-

102. *See* Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 TEX. L. REV. 1383 (2002); *see also* Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87 (1989).

103. *See* Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001); Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473 (2006).

104. Garrity v. State of New Jersey, 385 U.S. 493 (1967); *see* McKune v. Lile, 536 U.S. 24, 40 (2002) (Kennedy, J.) (plurality opinion) (characterizing *Garrity* as a case that "involved free citizens given the choice between invoking the Fifth Amendment privilege and sustaining their economic livelihood").

105. Richard Ben-Veniste & Lee H. Rubin, *DOJ Reaffirms and Expands Aggressive Corporation Cooperation Guidelines*, 18 LEGAL BACKGROUNDER 11 (Apr. 4, 2005); *accord* Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1233–34 (2006) (noting that "employees who are given the choice of either speaking with corporate investigators or losing their jobs, often without being provided with their own counsel to discuss that choice and under threat of having their statements to the company's lawyers disclosed to the government," are in the position of the defendant in *Garrity*). For a sustained discussion of the *Garrity* argument, see Griffin, *supra* note 45.

106. United States v. Stein, 440 F. Supp. 2d 315 (S.D.N.Y. 2006) (appeal pending).

tained by corporate counsel for the purposes of an internal investigation that would later be disclosed to the government is open to question. After all, Kaplan had to distinguish his case from *United States v. Solomon*, where the Second Circuit refused to treat a broker's interrogation during a New York Stock Exchange disciplinary hearing as the equivalent of government interrogation.[107] That an internal investigation is conducted in the shadow of a government agency's regulatory capability is not enough to transform it into state action, particularly where corporate agents initiated the questioning of employees for corporate purposes.[108]

As is so often the case in unsettled common law territory, the issue is one of dueling analogies. On one hand, the government is harnessing private power for a public purpose to the detriment of someone with comparatively less private power. On the other, the government is simply requiring that the corporation demand and deliver information that the corporation "owns"[109] and that it use all the means legally available to do so.[110] As Professor Buell noted, "Judge Kaplan's theory . . . requires a means of determining (1) the degree of state involvement that renders the employer's conduct state action, and (2) the degree of employer action that renders that action compulsion. These are hard lines to draw and to control once drawn."[111]

B. Institutional Choices

Opponents of the waiver regime see the absence of constitutional and common law guidance on this sensitive issue as cause for legislative intervention. Legislative assistance may be on the way in the form of Senator Specter's bill, which, among other things, would bar the government from demanding the waiver of an organizational attorney-client privilege and bar it from considering an entity's assertion

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107. *Id.* at 328 (distinguishing United States v. Solomon, 509 F.2d 863, 869 (2d Cir. 1975)). *But see* Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613, 1641 (2007) (noting that *Garrity* "has not been extended even to statements extracted by private employers, licensors, and the like whose activities are routinely intertwined with state action, including the investigation and sanctioning of violations of the law").

108. *See* United States v. Garlock, 19 F.3d 441, 444 (8th Cir. 1994) (holding that a private employer who investigated employee misconduct and reported the results did not automatically become a state actor).

109. *See In re* Grand Jury Subpoena, 274 F.3d 563 (1st Cir. 2001); United States v. Int'l Bhd. of Teamsters, 119 F.3d 210, 215 (2d Cir. 1997); United States v. Stein (*KPMG Case*), 440 F. Supp. 2d 315 (S.D.N.Y. 2006).

110. *See* Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and "Good Corporate Citizenship,"* 76 ST. JOHN'S L. REV. 979, 1008 (2002) (noting that "[c]orporations don't cooperate; people do").

111. Buell, *supra* note 107, at 1641.

of that privilege when deciding whether to pursue criminal charges or civil sanctions.[112] There are certain technical aspects of this legislation that need to be ironed out, but there is, to put it mildly, something to be said for democratically elected bodies taking the laboring oar in resolving hard public policy questions.[113]

Given how frequently and cogently Congress is faulted for abdicating its responsibilities on federal criminal issues,[114] it may seem odd to argue that Congress should stay its legislative hand on this particular one. But, in a world in which Congress has generally stood back while procedural rights are waived by those seeking to avoid or mitigate extremely harsh criminal sanctions, the question becomes whether the case for legislative involvement is any stronger here than elsewhere[115] The case seems a lot weaker. If there were any place to fairly expect a satisfactory equilibrium through informal or formal internal checks on prosecutorial discretion and formal or informal interaction between prosecutors and repeat player institutions, it would be here. One need not be a wholehearted adherent of public choice theory to worry that legislative line drawing will not be in the public interest where substantial corporate interests are involved on the defense side and no lobby but the Justice Department on the other.[116]

Moreover, if Congress is interested in tinkering with or radically reshaping the corporate criminal enforcement environment, it should not operate in a piecemeal fashion. Indeed, the attorney-client waiver "problem" ought to appear at the bottom of a long list of interrelated issues, including the scope of corporate liability, the scope of corporate privileges, and the funding of white-collar enforcement units.

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112. Attorney-Client Privilege Protection Act of 2007, S.186, 110th Cong. (2007).

113. The bill would, among other things, allow every indicted corporation to impose costs on the government by claiming, with or without foundation, that the decision to prosecute was motivated by impermissible considerations. *See McNulty Memo Hearing*, *supra* note 1, Written Testimony of Daniel Richman, *available at* http://judiciary.senate.gov/testimony.cfm?id=2886&wit_id=6656.

114. *See* Dan M. Kahan, *Is* Chevron *Relevant to Federal Criminal Law?*, 110 HARV. L. REV. 469 (1996); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757 (1999); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505 (2001).

115. Congress has, for example, shown little interest in resolving the debate over the extent to which prosecutors can require, as a precondition for cooperation discussions, that individual defendants give up their right to bar the government from introducing their proffer statements at trial. *See* United States v. Barrow, 400 F.3d 109 (2d Cir. 2005); United States v. Stein, 2005 U.S. Dist. LEXIS 11141 (E.D. Pa. June 8, 2005); United States v. Krilich, 163 F. Supp. 2d 943, 947 (N.D. Ill. 2001); Naftalis, *supra* note 79.

116. This statement betrays the author's biases with respect to the McDade Amendment, now codified at 28 U.S.C. § 530B. *See* Craig S. Lerner, *Legislators as the "American Criminal Class": Why Congress (Sometimes) Protects the Rights of Defendants*, 2004 U. ILL. L. REV. 599, 650–56.

Moreover, before addressing this list, it would be helpful if Congress had a better sense of the current enforcement level than that provided by hearings at which Administration officials boast of corporate scalpings and corporate defenders tell of the dreaded chill.

There is one caveat. There are good arguments for legislative intervention to ensure that the entity forced to waive is not unfairly disadvantaged vis-à-vis private plaintiffs.[117] Currently, only the Eighth Circuit has held that a company's disclosure of privileged materials in response to government investigative demands will not result in its complete waiver of privilege as to all other parties under federal law.[118] Acting at Congress's request, the Evidence Rules Committee of the Judicial Conference recently considered a new evidence rule that would allow selective waiver, freeing corporations to fully cooperate with the government, while maintaining the ability to assert the privilege against private plaintiffs.[119] Such plaintiffs would still receive the benefit of offensive collateral estoppel should the government bring and prevail on criminal charges and the far earlier benefit of the signal of merit that news of a pending criminal investigation provides. But they would be deprived of the privileged parts of the government's investigative haul, particularly in those cases in which the government investigates but never brings charges.

Reasonable minds may, and have, differed on this point. But the calculus of a company considering whether to placate the government with a waiver or risk prosecution is vastly complicated where the consequence of waiver, even in the absence of criminal wrongdoing, is exposure to private litigation. Whether out of concern that fears of this perhaps unwarranted exposure may chill cooperation with the government or out of a sense of "simple fairness" that recognizes the unique degree of coercion involved in the waiver decision and the spe-

117. For arguments favoring limited waiver and legislation, see Terwilliger & Lew, *supra* note 56.

118. *Compare* Diversified Indus., Inc., v. Meredith, 572 F.2d 596 (8th Cir. 1977), *with In re* Qwest Commc'ns Int'l, Inc., 450 F.3d 1179 (10th Cir. 2006).

119. Proposed FED. R. EVID. 502(c) reads as follows:

> In a federal or state proceeding, a disclosure of a communication or information covered by the attorney-client or work product protection—when made to a federal public office or agency in the exercise of its regulatory, investigative, or enforcement authority—does not operate as a waiver of the privilege or protection in favor of non-governmental persons or entities.

Letter from Jerry E. Smith, Chair Advisory Committee on Evidence Rules to David F. Levi, Chair Standing Committee on Rules of Practice and Procedure (May 15, 2006), http://www.uscourts.gov/rules/Reports/EV05-2006.pdf.

cial institutional features of public agencies,[120] Congress might well strike a more appropriate balance than the one that courts have struck following common law principles that far predate modern enforcement practices.[121]

Given these concerns, one might expect groups like the Association of Corporate Counsel to support the proposed Federal Rule. The Association has opposed it, however, and it appears that their opposition will be successful.[122] Their rationale seems to be that any attempt to resolve the selective waiver problem might make government waiver demands or expectations palatable, possibly more frequent, and certainly more defensible in Congress. Senator Specter's legislative proposal and the Justice Department's recent efforts to limit prosecutors in this area suggest that the strategy is paying off.

This brinksmanship on the part of the Association of Corporate Counsel highlights a more general theme of corporate prosecutions. With certain notable exceptions, they often involve a sophisticated game of "chicken."[123] Notwithstanding the breadth of the law on corporate criminal liability, the government rarely has much interest in actually bringing charges against an entity based on the criminal conduct of its agents. Substantial—albeit unequal—stigma can be imposed on the entity through civil sanctions, as well as fines, penalties, and forfeitures. Particularly where the collateral consequences of a corporate conviction are contractual debarment or worse, civil proceedings will avoid or limit the harm to innocent or relatively innocent third parties.[124]

Sending someone to prison is not the sine qua non of criminal prosecutions, but it is the gold standard, and prosecutors would far prefer going after individuals to seeking a corporate conviction. Threatening to prosecute the entity itself is a means to that end, for, without this

120. *See* Fordham U. Sch. of Law, *Advisory Committee on Evidence Rules: Hearing on Proposal 502, Testimony of N.Y. Deputy Att'y Gen. Peter B. Pope*, at 57–65 (Apr. 24, 2006), *available at* http://www.uscourts.gov/rules/EV_Hearing_April_2006.pdf.

121. *See* Daniel J. Capra, *Getting Control of Waiver of Privilege in the Federal Courts: A Proposal for a Federal Rule of Evidence 502*, at 37 (Berkeley Electronic Press, Paper No. 1485, 2006), *available at* http://law.bepress.com/cgi/viewcontent.cgi?article=6665&context=expresso.

122. *See* Letter of Susan Hackett, Senior Vice President & Gen. Counsel, Ass'n of Corp. Counsel, to Judge David F. Levi (Jan. 9, 2006), *available at* http://www.acc.com/public/policy/attyclient/accfre502comments.pdf. On September 26, 2007, the Judicial Conference's Committee on Rules of Practice and Procedure notified Congress that it would not propose a selective waiver provision. *See* Letter of Lee H. Rosenthal, Chair of Comm. on Rules of Practice and Procedure, to Senators Patrick J. Leahy & Arlen Specter, *available at* http://www.uscourts.gov/rules/Hill_Letter_re_EV_502.pdf.

123. *See* DOUGLAS G. BAIRD ET AL., GAME THEORY AND THE LAW 303–04 (1994).

124. *See* Brown, *supra* note 102.

threat, the entity would be far more tempted to protect the individuals and indeed may still do so if the individuals have sufficient sway within the organization. But an actual prosecution will generally be a sign that something has gone wrong—perhaps real or perceived recalcitrance by the corporation that the government takes as both a failure to cooperate and a sign of a "culture" of wrongdoing within the organization.[125]

For their part, corporate employees will find themselves in the usual Prisoner's Dilemma with each other and the corporate entity, each with an incentive to gain the benefits of cooperation with the government at the expense of the others. But, vis-à-vis the government, they are also playing a game of chicken, essentially hoping that the government, out of concern for third-party interests, such as those of shareholders and customers, will swerve away from prosecuting or credibly threatening to prosecute the entity. If anyone has to take a plea, however, better the organization than the individual—at least from the individual's perspective.

These bargaining dynamics are mirrored in policy discussions about privilege waivers and, for that matter, corporate deferred prosecutions.[126] These measures let prosecutors obtain the fruits of threatened criminal charges, while making it less likely that the government will have to actually pull the trigger on firms and inflict significant injury to third parties. Those who would eliminate such half measures of demonstrably credible cooperation presumably would like the government to confront just this dilemma. Assuming that the consequent prosecutorial investigative disadvantages were not cured by a massive increase in enforcement resources—a fair assumption—the consequence, for good or ill, would be fewer corporate prosecutions and less pressure on firms to assist in the prosecution of their employees.

It is against this extraordinary backdrop—substantive law that permits entities to be easily prosecuted where no one really wants them prosecuted—that the debate about corporate waivers takes place. But it is not only on the substantive law side that there may be a large gap between black-letter law and societal interests. Just as there are good

125. *See* Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 476 (2006) ("[I]n the shadow of a strikingly broad de jure rule of liability that is nearly indistinguishable from its civil counterparts, the criminal system's actors gradually have developed a practice of imposing enterprise liability that looks much narrower and is tied to a form of heightened criminal responsibility.").

126. *See* Garrett, *supra* note 101; *see also* Daniel Richman, *Institutional Competence and Organization Prosecutions*, 93 VA. L. REV. IN BRIEF 101 (2007), http://www.virginialawreview.org/inbrief/2007/06/18/richman.pdf.

arguments that corporate criminal liability is far too expansive, so too are there good arguments that corporate attorney-client privilege doctrine sweeps far too broadly.[127]

These substantive and procedural doctrines have much in common. Both are judicial constructs, established with minimal consideration of social costs and rooted less in logic than in contestable analogies: on the liability side, between civil and criminal liability; on the privilege side, between individual and organizational needs.[128] Two wrongs do not necessarily make a right.[129] Nor can one make a good a priori case that the clash between two contestable doctrines will produce a socially beneficial result. Particularly in a criminal justice system so bedeviled by resource imbalances and transaction costs, one generally has no reason to expect that the assignment of expansive defaults to each side will lead to bargaining that produces some normatively acceptable result. But the institutional frameworks here—to which we will now turn—allow a powerful case to be made for organic development and legislative abstention, with the government drawing on its substantive law power to extract procedural benefits from organizational entities.

Once we consider that this is not an exercise in legislative line drawing but a pragmatic matter of institutional choice, we will need to think harder about the institutions involved, particularly on the government side. Corporations will frequently find it in their own interest to proffer privileged materials to prosecutors, even in the absence of explicit requests, so as to signal the extent of their cooperation and perhaps shorten the length and depth of the government's investigation. This will be true regardless of the government's waiver policy. These decisions, however, are presumably made in the face of the government's policy framework. If not, one is left mystified by the intensity of corporate lobbying against the Thompson Memo. What considerations should go into setting this framework? How does one choose between the Thompson Memo approach—which gives a high degree of discretion to U.S. Attorneys' offices—the McNulty Memo—

127. *See* DAVID LUBAN, LAWYERS AND JUSTICE: AN ETHICAL STUDY 217–33 (1988); Brown, Jr., *supra* note 46, at 924; Daniel R. Fischel, *Lawyers and Confidentiality*, 65 U. CHI. L. REV. 1 (1998); Rothstein, *supra* note 72. Julie O'Sullivan addresses those arguments in a piece for this Symposium. *See* O'Sullivan, *supra* note 20.

128. *See* CHARLES W. WOLFRAM, MODERN LEGAL ETHICS § 6.5.3 (1986); Brown, *supra* note 46; Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 NOTRE DAME L. REV. 157 (1993).

129. I have frequently made this point to my kids, usually when they are sitting together in the car on long trips.

which purports to, and may well, rein in those offices—and other possible administrative arrangements?

To the extent that one seeks careful calibration of government pressure, there are good arguments for leaving decisions about such calibration in the hands of line prosecutors and their enforcement agency partners[130]—the personnel best placed to assess the extent to which a corporation has been forthcoming and the need for additional internal information. Some degree of supervisory regulation seems necessary, however, because it is unrealistic to expect a line assistant to resist the chance to look at the other side's cards and perhaps even have her investigation done for her, often by a more experienced former assistant representing the corporation. The question thus becomes how many levels should be involved in the ex ante approval process?

There are degrees of supervision within districts, but putting these wrinkles aside, the issue becomes whether control should rest in the district or be shared with Washington. Delegation of decision-making power to the districts has costs. The risk that policies will differ across districts is inherent in such a system, although the extent of district independence varies from district to district and from administration to administration.[131] Expertise will vary across districts too, and Main Justice can help ensure that waiver demands are not overused substitutes for prosecutorial diligence and professionalism.

Yet centralized decision making has downsides too. As Dan Kahan suggested, the political leadership at the Justice Department is far more apt than U.S. Attorneys to "internalize" the costs of prosecutorial decision making.[132] U.S. Attorneys trying to advance their local political careers, or Assistants trying to cut their professional teeth on conspicuous white-collar targets,[133] might give too little thought to the economic value their cases can burn up. On the other hand, Main Justice may give too much, because the able defense lawyers and lobbyists who will decry "prosecutorial overreaching" will not always have counterparts clearly setting out the economic gains

130. *See* Richman, *supra* note 4.

131. *See* Joseph F. Savage, Jr. & David S. Schumacher, *Attorney-Client Privilege on the Rebound?*, 20 WHITE-COLLAR CRIME 1 (June 2006) (criticizing a policy that gives "each U.S. Attorney's Office . . . discretion to draft its own procedures, leaving defense counsel subject to the whims of the jurisdiction in which they are practicing, unfettered by uniform, national limits"); *see also* Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1 (2006).

132. Kahan, *supra* note 114, at 497.

133. *See* Richard T. Boylan & Cheryl X. Long, *Salaries, Plea Rates, and the Career Objectives of Federal Prosecutors*, 48 J.L. & ECON. 627 (2005); Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM. L. & ECON. REV. 259 (2000).

that can flow from aggressive enforcement.[134] With current priorities in the areas of counterterrorism and immigration and the odd dynamic that has made violent-crime enforcement a non-negotiable part of the federal enforcement agenda,[135] Main Justice's institutional commitment to white-collar cases may be at a low, or lower, ebb.[136]

The point about institutional commitment may seem odd to those struck by the post-Enron rhetoric of the "war on corporate crime."[137] Indeed, the Justice Department's Corporate Fraud Task Force regularly touts the number of firms and executives charged and convicted through its efforts.[138] Recent reports and news stories about the deployment of federal resources and the view of high-level Justice Department decision making allowed by the recent flap over the fired U.S. Attorneys paints a different picture, however—one in which resource-strapped districts face constant pressure from Washington to boost their statistics with respect to firearms and immigration cases and have little incentive to pursue the resource-intensive and comparatively slow work of white-collar criminal enforcement. The budget pressure on U.S. Attorneys' offices is one of the undercovered stories of recent years, one that the department leadership, at the time of this writing, apparently prefers remains so.[139]

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134. The exception is the mass hysteria that immediately follows savings & loan or Enron-type scandals.

135. *See* Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, *in* 34 CRIME & JUSTICE: A REVIEW OF RESEARCH 377, 416 (Michael Tonry ed., 2006) (noting the federal government's continuing efforts in the arena of violent crime following the terrorist attacks of 9/11.

136. *See* Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts (Part I)*, 7 U.C. DAVIS BUS. L.J. 55 (2006) (noting that the "political dynamic for white collar criminal enforcement is much more fickle [than that for street crime]" and discussing how the "operational features of white collar crime also blunt enforcement").

137. *See* Griffin, *supra* note 45, at 313; John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 348 (2004).

138. *See* CORPORATE FRAUD TASK FORCE, SECOND YEAR REPORT TO THE PRESIDENT (July 20, 2004), http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf; *see also* Daniel C. Richman & William J. Stuntz, *Al Capone's Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 613–14 (2005) (discussing the challenge of formulating adequate performance measures for federal white-collar enforcement).

139. I completed the final edits on this Article in early November 2007. Also note that, when the soon-to-be fired U.S. Attorney for Western Washington, John McKay, announced that his office was "stressed to the limit" and "down" six prosecutors (in an office of fifty-eight), the ensuing newspaper story by Paul Shukovsky and Daniel Lathrop, see *supra* note 90, immediately sparked angry emails among top staffers in the Office of the Deputy Attorney General. *See* Email from Michael Elston to Monica Goodling & Paul McNulty (Sept. 22, 2006), and Email from Brian Roehkrasse to Michael Elston et al. (Sept. 26, 2006), *available at* http://judiciary.house.gov/Media/PDFS/DOJDocsPt3-070320.pdf; *see also* Anthony M. Destefano, *Case of Shrinking Prosecutions*, NEWSDAY, Apr. 3, 2007 (noting that the Eastern District of New York U.S. Attorney's office has twenty-five vacancies).

One need not make any assumptions about the relative commitments to corporate crime enforcement of Washington and the districts to expect that any involvement of Washington in waiver decisions will be in a restrictive direction. This effect is inherent in the involvement of an entity that only sees cases in which a U.S. Attorney's office wants to seek waiver—unless the districts respond to increased oversight by exercising less discretion.[140] The effect is magnified by the bureaucratic imperative that tends to make monitoring agencies justify their existence.

It remains to be seen whether the "consultation" that the McNulty Memo requires of U.S. Attorneys' offices will be a mere formality—in which case, the fanfare with which the Memo was unveiled was simply a transparent ploy to pacify critics—or a means by which the Criminal Division makes its influence felt on a regular basis. Perhaps it will lead to an exercise in "new governance," with Washington presiding over experimentation in the districts and promoting the adoption of "best practices."[141] However, the substantial risk that the new policy will chill prosecutors' abilities to gain the help of corporations in identifying individual wrongdoers, at a time when the Department's commitment to white-collar enforcement is under significant strain, should not be ignored.

Moreover, we should not forget that, for all the disputes about the world created by the Thompson Memo, the Memo itself is a success story in federal criminal law, where clarity in the principles that guide prosecutors' charging discretion has always been elusive. To be sure, as Judge Lynch suggested,[142] it is inevitable that among repeat players a common law of prosecution will emerge. But the guidance provided by Justice Department promulgations in the corporate area has been exceptional and praiseworthy. Supporters of horizontal equity might

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140. *See* C.F. Larry Heimann, *Understanding the* Challenger *Disaster: Organizational Structure and the Design of Reliable Systems*, 87 AM. POL. SCI. REV. 421, 427 (1993).

141. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimentalist Governance in the European Union*, *in* EUROPEAN GOVERNANCE PAPERS (2007), http://www.connex-network.org/eurogov/pdf/egp-connex-C-07-02.pdf. Professor Simon made several recommendations:

> Some of the same mechanisms of transparency and accountability that the new regulatory regimes impose on businesses are readily adaptable to the conduct of agencies and prosecutors themselves. Prosecutors should articulate standards for the exercise of discretion, measure their own performance under the standards, provide transparent procedures for revising the standards in the light of experience, and provide remedies for targets that believe they have been harmed by violations of the standards.

Simon, *supra* note 57, at 1469–70.

142. Lynch, *supra* note 3.

dislike the idea that corporations receive more guidance than regular defendants, but corporations are different. This is a class of defendant that the government generally does not want to, and generally should not, prosecute. It would be ironic if the decision to promulgate and publicize guidance to line prosecutions made one sensitive enforcement area particularly amenable to wholesale—not retail—political interference[143] and thus gave prosecutors one more reason to love the "just do the right thing" ethos[144] that dominates most of the Principles of Federal Prosecution.

V. CONCLUSION

Although we will soon see changes in the Justice Department's leadership, there is no reason to expect—under *any* Administration—that the interests of corporate managers in policing their own houses will not be given due deference by the Department. At the same time, there is good reason to be concerned about a structural bias in the flow of information to Congress and other policymakers. At some distant point—perhaps after some future scandal—groups representing shareholders, workers, and other dispersed beneficiaries of white-collar criminal enforcement might come forward to join the Department in opposing efforts to give extraordinary waiver protection to corporate privileges. Coalitions of private lawyers and corporate interests are far more easily mobilized on this issue, however. While their viewpoints are, of course, understandable, they ought not be allowed to dominate decision making.

It is true that an outsider would find the world of federal criminal law very strange. It is an odd combination of overly broad statutes and harsh punishments set against an array of rights and privileges that are generally traded for leniency or nonprosecution. It is also true that both the substantive law of corporate criminal liability and the evidentiary protections offered to corporations by the attorney-client and work-product privileges may be in need of recalibration. But, in the absence of any congressional commitment to this worthy project, the targeting for legislative action of this one part of the white-collar enforcement regime is troubling and, at least in the absence of far more information than is currently available, unnecessary.

143. *Cf.* Frank O. Bowman III, *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 STAN. L. REV. 235 (2005) (suggesting that the specificity and complexity of the Sentencing Guidelines gave Congress a vehicle for unduly interfering in the sentencing process).

144. *See* David A. Sklansky, *Starr,* Singleton, *and the Prosecutor's Role*, 26 FORDHAM URB. L.J. 509 (1999).