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## Decisions about Coercion: The Corporate Attorney-Client Privilege Waiver Problem

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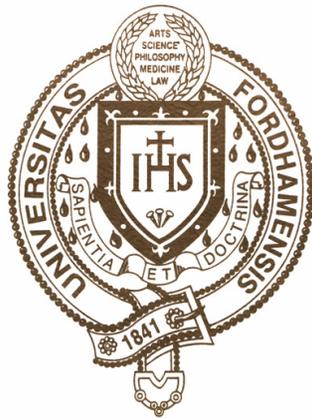
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# Fordham University School of Law



## Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem

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**Decisions about Coercion: The Corporate Attorney-Client Privilege Waiver Problem**  
**by Daniel Richman\***

(early draft – please don't quote from without permission)

DePaul Symposium piece

Abstract: This symposium essay explores the contestable empirical and normative assumptions that underlie criticisms of the Justice Department's policies with respect to the waiver of corporate attorney-client and work-product privileges. And it considers how authority with respect to prosecutorial decisionmaking in this area ought to be allocated.

\* \* \* \* \*

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, even killed by the federal government's (mis) use of its bargaining leverage.<sup>1</sup> Of course, given that most federal criminal defendants plead guilty and that an extraordinary large percentage of them provide information and testimony against others in order to avoid harsh sentences, one might equally say that the Fifth and Sixth Amendments to the U.S. Constitution are on their last legs in the federal system (and in state systems as well), as are the rules of evidence and other ostensibly sacred adjudicatory principles.<sup>2</sup>

The simple fact is that "death" or (more formally) "waiver" abounds in our system. So does "coercion" (if the term is understood in its ordinary language sense). Put differently, the

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<sup>1</sup>See, e.g. David M. Zornow & Keith D. Krakauer, 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 corp criminal investigations."); William R. McClucas, Howard M. Shapiro & Julie J. Song, The Decline of the Attorney-Client Privilege in the Corporate Setting, 96 J. Crim. L. & Crim. 621 (2006); 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); ..... [add]

<sup>2</sup>See also Richard A. Leo, Inside the Interrogation Room, 86 J Crim L & Crim. 366 (1996) (Miranda waiver rate of 78%).

reality of the system bears little resemblance to the regime of robust rights ostensibly promised by black-letter procedural law.<sup>3</sup> This disjunction can be disturbing to outsiders, but insiders are pretty much enured to it. Some, like Jerry Lynch, even embrace it, or at least remind us that mere deviation from our touted adversarial ideal does not necessarily make our system unreasonable or unjust.<sup>4</sup>

This backdrop of 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 of itself – particularly interesting or troubling, especially where that party has adequate access to zealous and competent legal counsel (something that all 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 and with the independence and esprit of their own profession, their claims generally rest of on a number of quite contestable empirical and normative propositions. These, I will discuss in Part I of this essay.

Often, in the face of empirical or policy uncertainty, we reach for doctrinal tools to truncate or advance the analysis. However, as Part II will show, waiver is so enshrined in our doctrine as to render such tools of limited use for those dissatisfied or uneasy with government practices in this area. The general (and perhaps a bit odd) approach is to assign broad rights to defendants and extraordinarily coercive sanctioning powers to the government, and to ratify 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 this lobbying, however, we ought to pause to consider the current status quo – a world in which the possibility of a waiver demand is on the table, but subject to due consideration within a U.S. Attorney’s Office (which, in the wake of the December 2006 “McNulty Memo,”<sup>5</sup> must act in consultation with the Criminal Division of Main Justice). This is not negligible oversight, but it is quite different from the absolute prohibition or stringent centralized regulation that critics seek. Consideration of a legislative or administrative alternative to the current regime thus requires an exploration of the effect that the locus of decisionmaking has on decisions in the Justice

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<sup>3</sup>See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 *Ford. L. Rev.* 2117 (1998).

<sup>4</sup>*Id.*; see also Daniel Richman, *Prosecutors and Their Agents, Agents and Their Prosecutors*, 103 *Colum. L. Rev.* 749 (2003).

<sup>5</sup>See Memorandum from Paul J. McNulty, Deputy Attorney General, to Heads of Department Components and United States Attorneys (December 12, 2006) (hereinafter “McNulty Memo”), available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf)

Department. And this exploration, I hope, offers both a case study and some practical help in figuring out how we navigate in a world with few clear doctrinal or even normative certainties.

## Part I

Some facts are not in dispute. In 1999, Deputy Attorney General Eric Holder issued a Memorandum, entitled “Federal Prosecution of Corporations” but soon called the “Holder Memo,”<sup>6</sup> that counseled prosecutors to consider a number of factors when determining whether to bring charges against a corporate target. Among these factors was 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.”<sup>7</sup> In early 2003, Deputy Attorney General Larry Thompson issued a policy memorandum on “Principles of Federal Prosecution of Business Organizations” that, while identical in substance on this point, was mandatory in nature.<sup>8</sup> This memo noted that any waiver sought “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.”<sup>9</sup>

The consequences of this policy articulation are somewhat less clear. 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 privilege was not a “litmus test” when it come to charging

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<sup>6</sup>Memorandum from Eric H. Holder, Jr., Deputy Attorney General, to all Component Heads and United States Attorneys (June 16, 1999) (hereinafter “Holder Memo”); see also Philip Urofsky, *Prosecuting Corporations: The Federal Principles and Corporate Compliance Programs*, U.S. Attys’ Bull., Mar. 2002, at 19.

<sup>7</sup>Holder Memo, *supra* note \_\_, at \_\_. In October 2001, the SEC noted that it too would consider a company’s readiness to waive its privilege when assess the extent of its cooperation with an investigation. See 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, Exchange Release 34-44969, available at <http://www.sec.gov/litigation/investreport/34-44969.htm>; see also Lucas, Shapiro & Song, *supra* note \_\_, at 631. The focus here, however, will be on criminal investigations and proceedings.

<sup>8</sup>Memorandum from Larry D. Thompson, Deputy Attorney General, to Heads of Department Components and United States Attorneys (Jan. 20, 2003) (hereinafter “Thompson Memo”), available at [http://www.usdoj.gov/dag/cftf/business\\_organizations.pdf](http://www.usdoj.gov/dag/cftf/business_organizations.pdf); 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).

<sup>9</sup>Thompson Memo, *supra* note ))), at 7 n.3.

decisions and that he had not seen evidence that waivers were routinely demanded. The Department simply “expect[ed] cooperating corporations to help us catch the bad guys.” He explained:

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.<sup>10</sup>

In 2004, the Department’s point person on the issue, Mary Beth Buchanan, drew on a 2002 survey of all U.S. Attorney’s Office to report that “requests for waiver of the attorney-client privilege or work product protection were the exception rather than the rule.” She added that “those who argue that waivers are required frequently do so on the basis of anecdotes without any supporting data.”<sup>11</sup>

In 2005, the Department offered a sop to critics in the form of the Memorandum by Acting Deputy Attorney General Robert D. McCallum, Jr., dated October 21, 2005 (“the McCallum Memo”). While reaffirming prior departmental policy, it added:

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.<sup>12</sup>

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<sup>10</sup>Interview with U.S. Attorney James B. Comey Regarding Dep’t of Justice’s Policy on Requesting Corporations under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection, U.S. Attys’ Bulletin, November 2003, at 1, 2.

<sup>11</sup>Mary Beth Buchanan, Effective Cooperation by Business Organizations and the Impact of Privilege Waivers, 39 Wake Forest L. Rev. 587, 598 (2004).

<sup>12</sup>Memorandum to Heads of Department Components and United States Attorneys, dated October 21, 2005, from Robert D. McCallum, Jr., available at

This memo's chief significance was thus negative, as it implicitly rejected both challenges to existing waiver practices and calls 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 notes, “were not conducted with even minimal rigor.”<sup>13</sup> 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<sup>14</sup> 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.”<sup>15</sup> Although the survey inquired about all enforcement agencies, respondents made clear that U.S. Attorneys' Offices were the primary demanders of waivers.<sup>16</sup> Of the respondents who had actually been investigated, “55% of outside counsel responded that waiver of the attorney-client privilege [had been] requested by enforcement officials either directly or indirectly,” and 27% of in-house counsel “confirmed this to be true.”<sup>17</sup>

What privileged or protected materials were prosecutors seeking? Back in November 2003, U.S. Attorney Comey asserted that “prosecutors 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...”<sup>18</sup> The 2006 Corporate Counsel survey largely corroborated that, but did find, for those respondents reporting the nature of materials demanded, that 15% of the requests experienced by in-house counsel and 20% of those experience by outside counsel had involved materials relating to the

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[http://www.usdoj.gov/usao/eousa/foia\\_reading\\_room/usam/title9/crm00163.htm](http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00163.htm).

<sup>13</sup>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,” at 11 (draft).

<sup>14</sup>The survey received 676 responses from in-house counsel and 538 from outside counsel. The Decline of the Attorney-Client Privilege in the Corporate Context at 2-3 n.7 (hereinafter “Survey”), available at <http://www.acca.com/Surveys/attyclient2.pdf>.

<sup>15</sup>Id. at 3; see also *In re Qwest*, 450 F.3d 1179, \_\_\_ (10<sup>th</sup> Cir. 2006) (noting efforts of amicus Ass'n of Corporate Counsel to draw court's attention to “culture of waiver”).

<sup>16</sup>Survey at 6.

<sup>17</sup>Survey at 4.

<sup>18</sup>Comey Interview at 1.

advice of counsel. (The survey report regrettably lumped together situations in which an “advice of counsel” defense was being asserted and those in which it was not – as well as cases in which advice sought related “to the investigation itself (rather than the underlying conduct being investigated).”)<sup>19</sup>

The immediate audience for the Corporate Counsel survey was the U.S. Sentencing Commission, and the response from the Commission must have been gratifying. Thereafter, in May 2006, the Commission amended the Sentencing Guidelines to eliminate language that had been “misinterpreted to encourage waivers.”<sup>20</sup> Given that the Guidelines speak only to sentencing, however, and not to the demands that the government makes as a condition for letting an company avoid criminal liability altogether, the significance of this advocacy victory has so far 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 Specter, in the last months of chairing the Judiciary Committee, introduced legislation that among other things, would bar the government from demanding the waiver of an organizational attorney-client privilege, and would bar it from considering an entity’s assertion of that privilege when deciding whether to pursue criminal (or civil) charges.<sup>21</sup> Then, on December 12, Deputy Attorney General, during a speech to the “Lawyers for Civil Justice” (a business and defense lawyer group)<sup>22</sup> in New York, announced a revision of the Thompson Memo. While not addressing the common scenario in which a corporation, for its own reasons, “volunteers” to waive its privilege as to certain materials (save for requiring that a record be maintained of such a waiver), the McNulty Memo somewhat tightens the internal regulations on prosecutors who explicitly ask for the most frequently sought privileged materials – documents, interview memoranda, and “reports

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<sup>19</sup>Survey at 9.

<sup>20</sup>U.S. Sentencing Commission, Amendments to the Sentencing Guidelines, May 18, 2006, at 45, available at <http://www.ussc.gov/2006guid/FinalUserFrdly.pdf> (eliminating last sentence of Application Note 12 to § 8C2.5, which stated: “Waiver 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. [check]

<sup>21</sup>152 Cong. Rec. S11438-39 (daily edition) (statement of Sen. Specter) (“Attorney-Client Privilege Protection Act of 2006”). [KEEP THIS CURRENT for 110<sup>TH</sup> CONG]

<sup>22</sup>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.” See <http://www.lfcj.com/process.cfm?PageID=2>.

containing investigative facts documented by counsel.” Before requesting that a corporation 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. Before seeking waiver of privilege as to “Category II material – materials revealing “legal advice given to the corporation before, during, and after the underlying misconduct” – however, prosecutors must obtain the written permission of the Deputy Attorney General himself, unless 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 the advice falls within the crime/fraud exception to the privilege. Prosecutors may consider a corporation’s response to a request for Category I material when deciding whether a firm has cooperated. They cannot consider a firm’s refusal to waive as to Category II material.

Although its promulgator has billed it as such, it is far from clear that the McNulty Memo constitutes much of a departure from existing practice. But it does signal a tactical retreat by the Department, and perhaps even the beginning of a new quietism toward corporate crime. Certainly some influential interests would applaud the latter. Just nine days before the Memo’s release, the Committee on Capital Markets Regulation – formed with the support of the Secretary of the Treasury<sup>23</sup> – released its “interim” report, which, among other things, 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,”<sup>24</sup> and that the Department also “revise its prosecutorial guidelines to *prohibit* federal prosecutors from seeking waivers of the attorney-client privilege.”<sup>25</sup> Others too have argued that the pendulum has swung too far in the direction of enforcement as a result of overaction to Enron et al.

## Part B

What exactly is at stake here, beyond the obvious point that the government is using its considerable bargaining leverage to extract waiver of a valuable legal right from corporate entities, which recognize that the decision to charge – regardless of outcome and sentence – can put a company out of business or close to it? What are the consequences of the government’s practices in this area? Before turning to the (inadequate) doctrinal tools available to assess a

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<sup>23</sup>See Jenny Anderson, *Sharply Divided Reactions to Report on U.S. Markets*, N.Y. Times, Dec. 1, 2006, at C8.

<sup>24</sup>Interim Report of the Committee on Capital Markets Regulation (Dec. 5, 2006), at 85, available at [http://www.capmksreg.org/pdfs/11.30Committee\\_Interim\\_ReportREV2.pdf](http://www.capmksreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf)

<sup>25</sup>Id. at 86. 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 KPMG case. I do not address this issue here, although much of my discussion is relevant to it.

regime of effectively coerced waiver, let us consider the broader policy issues.

These critical questions are rather difficult to answer given the available data. Although the “Coalition to Preserve the Attorney-Client Privilege” purports to have made a concerted effort to go beyond anecdote and document the extent to which a “culture of waiver” indeed prevails among government enforcers, its survey results still give only a sketchy picture of the alleged problem. Respondents offered some telling quotations, but they were not necessarily representative of all practitioners in the area or even of all members of the organizations involved.<sup>26</sup> Moreover, without raw data, it is hard to discern the degree to which responses reflected general perceptions, as opposed to personal experience. There is also, as noted above, no clarity about the extent to which prosecutors have sought access to materials relating to advice of counsel in situations *other than* those in which an advice of counsel defense has been asserted.

For its part, the Justice Department has – so far at least – assiduously avoided providing a more rigorous picture of how its minions have conducted themselves on this issue. To be fair, collecting data of this sort, particularly when a request for information is not accompanied by a regime of strict centralized control, has always been a challenge for the Department.<sup>27</sup> And even if Main Justice, by some miracle, received complete and details reports from the field about negotiations with corporate counsel, there would remain issues about signals received by counsel but not intentionally or explicitly sent by prosecutors.<sup>28</sup> Prosecutors can make clear demands. But they can also make casual suggestions. Or say nothing, but profit from defense counsel perceptions of government expectations, and leave them uncorrected.<sup>29</sup> That said, given how

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<sup>26</sup>The survey report notes: “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.” Survey at 3 n.7.

<sup>27</sup>The strenuous effort that the Justice Department has made in capital cases provide a remarkable (although understandable) contrast to its efforts in non-capital cases. See Daniel Richman, Institutional Coordination and Sentencing Reform, 84 Texas L. Rev. 2055, 2068 (2006); John Gleenson, 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); Stephen P. Klein, Richard A. Berk & Laura J. Hickman, Race and the Decision to Seek the Death Penalty in Federal Cases (2006) (RAND report), available at [http://rand.org/pubs/technical\\_reports/2006/RAND\\_TR389.pdf](http://rand.org/pubs/technical_reports/2006/RAND_TR389.pdf)

<sup>28</sup>See Wray & Hur, *supra* note \_\_, at 1177 (“Mutual misunderstandings between [pros & defense attys] can help explain the chasm between the Justice Dept’s accounts of the rarity of waiver requests and the defense bar’s vehement insistence that they occur routinely.”).

<sup>29</sup>Analogy might be made to Hobbs Act cases in which extortion “under color of official right” can be found where a public official takes money from a private citizen with knowledge of

well reticence has served its legislative purposes (until now), one can wonder about the Department's commitment to obtain data in this area.<sup>30</sup>

At this juncture – pending the kind of data that the McNulty Memo may produce -- let us assume, at least for purposes of argument, corporate counsel's claims that privilege waiver is regularly on the table when a corporation seeks to avoid prosecution by demonstrating "cooperation." And, in the absence of precise data about the contours of the data sought or obtained by prosecutors, let us also assume that the waives sought and/or obtained encompass all factual materials gathered by inside or outside counsel as part of their internal investigation into the matters of concern to the government. This would include written internal reports prepared by counsel, as well as the underlying interview notes and memos that, like the reports themselves, would otherwise be protected against disclosure by some combination of the attorney-client and work product privileges.<sup>31</sup>

A good 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,<sup>32</sup> the collective knowledge of these artificial "persons" often cannot be tapped without the participation of corporate counsel. Natural persons are subjected to intensive government debriefings as a condition of cooperation, to ensure that they fully disclose what they know about the matters being investigated, and many other matters as well. The only way a corporation can render an analogous degree of cooperation is through the disclosure of all factual materials in its control, including (indeed, especially) those gathered by its lawyers. As is always the case when the government uses the explicit or implicit

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that person's expectation that the official will do something in return. See *Evans v. United States*, 504 U.S. 255, 274 (1992); *United States v. Giles*, 246 F.3d 966, 972 (7<sup>th</sup> Cir. 2001).

<sup>30</sup>In his testimony before the Sentencing Commission, Deputy Attorney General McCallum noted that the Department had been requesting information-gathering assistance from the ABA subcommittee looking at privilege waiver See U.S. Sentencing Comm'n, Public Hearing, Mar. 15, 2006, at 47, available at [http://www.usc.gov/hearings/03\\_15\\_06/0315USSC.pdf](http://www.usc.gov/hearings/03_15_06/0315USSC.pdf). In addition, DOJ and the SEC have stated that they will be providing empirical data on the subject during the comment period for proposed FRE 502. (Per Dan Capra)

<sup>31</sup>Possible note re *Milberg Weiss* as a special case. There, waiver re prior dealings with named representatives appears to have been sought.

<sup>32</sup>See *Braswell v. United States*, 487 U.S. 99, 105 (1988); *Hale v. Henkel*, 201 U.S. 43 (1906); see Julie O'Sullivan, draft 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.").

threat of prosecution to obtain information, the subject of the pressure would prefer it otherwise. But given the alternatives – possible prosecution, or just a sustained grand jury investigation – the coercion involved seems little different from the sort generally tolerated in the criminal justice system.<sup>33</sup>

Why then ought we be especially concerned about the government’s coercive efforts to obtain these materials? Obviously, these efforts put firms at a disadvantage. But what are the social costs? Those arguing against such practices have made forceful arguments that will only be sketched out here. The goal is less to support or oppose them than to consider their underlying empirical or normative assumptions.

### *Plight of firms*

The first category of criticism focuses on the plight of corporations in a world in which their internal investigations or inquiries may end up 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. The likelihood of this happening, however, seems somewhat slim.<sup>34</sup> Corporate managers already have considerable legal and economic incentives to “strive

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<sup>33</sup>See, e.g., *Bordenkircher v. Hayes*, 434 U.S. 357, 365 (1978) (prosecutor's offer to accept a guilty plea to a lesser charge "no more than openly 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) ("We decline to hold, however, that a guilty plea is compelled and invalid under the Fifth Amendment 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).

<sup>34</sup>Lisa Griffin suggests that, already, as a result of government waiver demands, “some corporations have limited internal investigations to pare down the amount of potential misconduct and proprietary information that must be revealed to the government.” Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. Rev. 101, 132 (2007) (SSRN pageproofs). The *Business Week* article that she cites for support, *id.* at 132 n.175, however, offers little clear evidence of this; to be fair, however, clear empirical of the point would be hard to find.

for legal compliance irrespective of the prospect of privilege waiver.”<sup>35</sup> 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 not be sufficient in this regard, they could be increased, particularly on the civil or criminal sanctioning side.<sup>36</sup>

Maybe firms will keep asking for internal inquiries, but the lawyers will be less zealous and effective in conducting them. Yet as Julie O’Sullivan cuttingly notes, 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.”<sup>37</sup> O’Sullivan is aptly skeptical of this argument.

A subtler chilling effect argument considers counsel’s own interests. Even if one makes the (rather heroic) assumption that a clean 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 and make *them* subjects of such scrutiny.<sup>38</sup> At worst, there is a risk of obstruction charges. At best, the lawyer is a potential government witness.<sup>39</sup> The power of this argument is up for question, however. After all, prosecutors are regularly in the position of being potential witnesses too. Although prosecutors generally don’t have to worry about obstruction charges, it’s not clear that corporate defense counsel really worry either.

Ironically, another argument is in part driven by the assumption that potential civil sanctions, at least those imposed at the behest of private plaintiffs, are already too great. Corporations will indeed continue to conduct internal investigations, and they will comply with prosecutorial waiver demands, the argument goes. But then they will unfortunately face disclosure of these sensitive materials not just to the government but to private plaintiffs.

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<sup>35</sup>Lonnie T. Brown, Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox, 34 Hofstra L. Rev. 897, 903 (2006); see also Comey, *supra* note \_\_\_, at 3 (“We have seen no evidence at all that corporations will refrain from conducting internal investigations because, in order to obtain leniency for cooperating, they might be asked to waive a privilege.”).

<sup>36</sup>See Gary S. Becker, Crime and Punishment: An Economic Approach, 76 J. Po. Econ. 169 (1968).

<sup>37</sup>O’Sullivan, *supra* note \_\_\_, draft at 48.

<sup>38</sup>See Upjohn, 449 U.S. at 398 (discussing why we don’t want to deter lawyers from writing stuff down).

<sup>39</sup>Thanks to Julie O’Sullivan for this point.

Outside the Eighth Circuit (and in the absence of congressional action<sup>40</sup>), there is no clear doctrine of “selective waiver,” of the sort that would allow a corporation to assert its privileges against other plaintiffs after it has disclosed otherwise privileged materials to the government.<sup>41</sup> At first blush, this scenario does not seem that troubling. After all, why should we be concerned if the litigation costs to deserving plaintiffs are reduced? We often permit private plaintiffs to piggyback off criminal convictions with offensive collateral estoppel.<sup>42</sup> Why not let them similarly take advantage of the government’s entire investigative haul? Indeed, one can 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.”<sup>43</sup>

At second blush, the introduction of private litigants into the mix may be more problematic since all plaintiffs are not “deserving.”<sup>44</sup> The internal investigation that either clears the firm so far as the government is concerned 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 bought off or litigated.<sup>45</sup> Effectively subsidizing these suits through a privilege waiver regime could lead to overdeterrence, which *is* of societal concern. Alternatively, a firm otherwise ready to fully cooperate with any government investigation might think twice about cooperating when the consequence is such subsidization.<sup>46</sup>

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<sup>40</sup>See *infra* ---

<sup>41</sup>See *In re Qwest*, 450 F.3d 1179, \_\_\_ (10<sup>th</sup> Cir. 2006) (collecting cases); more

<sup>42</sup>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, 222 (1983); [note that collateral estoppel is often not available]

<sup>43</sup>Colin P. Marks, *Corporate Investigations, Attorney-Client Privilege, and Selective Waiver: Is a Half-Privilege Worth Having at All?* 30 *Seattle Univ. L. Rev.* 155, 189-90 (2006).

<sup>44</sup>Indeed, the ability of shareholders to diversify, among other things, raises questions about the whole project of 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 (2006).

<sup>45</sup>See Coffey, *Rescuing*, *supra* \_\_\_; Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 *Law & Contemp. Probs.* 167 (1997).

<sup>46</sup>See George J. Terwilliger III & Darryl S. Lew, *Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations*, 7 *Engage (Journal of Fed. 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 investigation.”).

Then there is the risk that a waiver regime would result, not in any reluctance of corporations to conduct internal investigations, but 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, since officers and employees would have (or at least ought to have) these concerns even without prosecutorial waiver demands.<sup>47</sup> 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 waiver demand by the government.<sup>48</sup> The possibility that a corporation will “push liability downward” onto individual officers or employees is a standard problem in white collar enforcement.<sup>49</sup> 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 would be less open with internal investigators under a waiver regime that made government access to their statements far more likely. But the size of this class is far from clear.

One can step back from concerns relating to employee trust of internal investigators to concerns about employee trust more generally.<sup>50</sup> When it comes to conspiracies, we often celebrate the mutual distrust that government cooperation incentives breed among co-

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<sup>47</sup>See William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *Ford. L. Rev.* 1454, 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.”).

<sup>48</sup>See Lonnie Brown, *supra* note \_\_ 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.”); Buchanan, *supra* note \_\_, 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) (“[I]n those cases where 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.”).

<sup>49</sup>See William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 *Vand. L. Rev.* 1343, \_\_ (1999).

<sup>50</sup>See Zornow & Krakauer, *supra* note \_\_, at 157 (waiver demand has “effect of chilling the inquiry from the outset and often has an adverse impact on the relationships among senior management and lower-level employees.”).

conspirators.<sup>51</sup> 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 we generally want to foster.<sup>52</sup> When corporations really “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 (when it so chooses). The resulting costs in internal cohesiveness may thus be greater than those that flow simply from corporate control over the privilege.

This is, of course, a rejoinder to this trust argument: The extent to which trust drives corporate productivity is far from clear.<sup>53</sup> Given that waivers only occur after law enforcers become interested in a matter, the extent to which any such trust is threatened by a waiver regime is also unclear. After all, many internal investigations will be conducted in matters that never appear on any prosecutorial radar. And even were trust eroded by such a regime, the social cost of that erosion might well be counterbalanced by the social gains from cheaper and more effective law enforcement.

Corporations themselves might even share the benefits of this law enforcement efficiency. A savvy federal enforcer will not stay within the four-corners of a internal investigation report – even one done by the most respected outside counsel – but the report can significantly speed the process of getting to the bottom of the matter at hand. The enforcer who reaches the bottom (or thinks he has) will often be satisfied and move on to other cases. And the sooner the government searchlight is turned off, the better for the firm.<sup>54</sup>

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<sup>51</sup>See Darryl Brown, Executive Branch Regulation, *supra* note \_\_, at \_\_; Richman, Cooperating Clients, 56 Ohio St. L. J. 69 (1995); Daniel C. Richman, Cooperating Defendants: The Costs and Benefits of Purchasing Information from Scoundrels, 8 Fed. Sent. Rptr. 292 (1996); Pamela S. Karlan, Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel, 105 Harv. L. Rev. 670, \_\_ (1992).

<sup>52</sup>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 \_\_, at 123 (noting how waiver demands undercut loyalty within firm).

<sup>53</sup>Perhaps cite worker mobility literature, e.g. Paul Osterman, *Securing Prosperity* (1999); Paul Osterman, ed., *Broken Ladders: Managerial Work in Transition* (1996); Charles Heckscher, *White Collar Blues: Management Loyalties in an Age of Corporate Restructuring* (1995).

<sup>54</sup>See Buchanan, *supra* note \_\_, 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 with the

This shared benefits argument might strike a corporate defender as rather paternalistic, however. Sure, a shareholder interests might be served by handing internal investigative materials over to the government on a silver platter. And, yes, even without a prosecutorial regime that explicitly encouraged waiver, the firm seeking to signal that it had nothing to hide would be tempted to pursue an “open file” policy with the government even where the firm’s interests in the particular matter would best be served by non-disclosure.<sup>55</sup> But that hardly means that disclosure is invariably in shareholder 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 best judge of shareholders’ best interests in these matters.<sup>56</sup> It 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. Or having altogether different skeletons in their own closets, they might be all too ready to confuse their personal interest in the non-disclosure of internal corporate matters with shareholder interests. The extent to which managers’ interests are aligned with shareholder interests on this score will vary considerably with the type of misconduct being pursued (or that might be disclosed), with a long continuum running between cases of isolated self-dealing by an individual employee and sustained bid-rigging (or violations 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<sup>57</sup> – corporate managers are better situated than the government to advance shareholder interests, one can still wonder whether this assumption holds true where the government has found reason to criminally investigate corporate conduct.

Of course, 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

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government.”); see also Advisory Committee on Evidence Rules: Hearing on Proposal 502, April 24, 2006, Fordham University School of Law, at 59 (testimony of Peter Pope, Deputy Attorney General, New York State) (noting interest of corporations in getting quick disposition of matter).

<sup>55</sup>Discuss pooling equilibrium & fifth am game theory literature. Ostensible “cooperation” with interrogators as way to appear innocent. [but note that repeat player and coordination possibilities available to defense counsel might favor development of convention against waiving privilege. Create pooling equilibrium favoring silence.

<sup>56</sup>See William H. Simon, Whom (or What) Does the Organization’s Lawyer Represent? An Anatomy of Intraclient Conflict, 91 Cal. L. Rev. 57 (2003).

<sup>57</sup>See Michael C. Jensen & William H., Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure, 3 J. Fin. Econ.305 (1976); Oliver E. Williamson, Markets and Hierarchies: Analysis and Antitrust Implications (1975).

waived, why have the privilege to begin with? This is a fair question, one that we will return to later. But for now, the challenge should be seen as supporting, at the minimum, a “coerced” waiver regime.

### *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, since (as already noted) firms do have their own interest in assuring fairness to their officers and employees – albeit an interest that is sometimes outweighed.

Internal investigations can put an executive or employee into a difficult position (to put it mildly). Should she refuse to speak with interviewers, she may well lose her job.<sup>58</sup> She also faces the risk that, should she speak, her statements will be turned over to the government, thus exposing her to civil or criminal liability. As noted, this risk would be present even were the government to eschew demands for privilege waiver, since waiver could serve the firm’s own interests and is the firm’s to make.<sup>59</sup> Should she lie, she might even find herself charged with obstruction of justice.<sup>60</sup>

If our executive or employee expects that her 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.”<sup>61</sup> Should counsel fail to give these warnings and should she reasonably conclude that counsel represents *her* and not the firm, a court might conclude (although it will be an uphill battle) that an attorney-client relationship exists and she does control the privilege.<sup>62</sup> So the company that wants to maintain control over her statements has some incentive to make counsel’s role clear, and there some reason to believe that *Upjohn*

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<sup>58</sup>See McLucas, Shapiro & Song, *supra* note \_\_, at 636 & n.62 (citing sources); Griffin, *supra* note \_\_, at \_\_; Comey *supra* note \_\_, at 2 (noting that a corporation has the ability to require an employee to cooperate with its counsel on pain of dismissal).

<sup>59</sup>See *supra* re corp control of privilege.

<sup>60</sup>See McLucas, Shapiro & Song, *supra* note \_\_, at 637 (discussing Computer Associates charges in E.D.N.Y.); O’Sullivan draft at 60.

<sup>61</sup>See Lonnie Brown, *supra* note \_\_, at 939; O’Sullivan draft at 57.

<sup>62</sup>See *In Re Grand Jury Subpoena*, 415 F.3d 333, 340 (4<sup>th</sup> Cir. 2005)(AOL case); see also O’Sullivan draft at 59-60.

warnings have become standard procedure.<sup>63</sup>

If such warnings are not being given or are inadequately given, and courts cannot be counted on to give relief to the misled employee – by giving her control over the privilege and protection against the derivative use of statements obtained in violation of the privilege<sup>64</sup> – any regime that envisions corporate waivers, whether purely strategic or coerced, is indeed problematic. But the most obvious cure for that problem is to do more to bolster *Upjohn* warning practices.

### *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 damages that may result from such a regime. First, there is the argument that sees the corporate privilege as a miner’s canary. If the government is permitted to eviscerate the attorney-client privilege of corporations, it may next turn to other kinds of clients.<sup>65</sup> Such slippery slope arguments are easily made and hard to answer.<sup>66</sup> But dots 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 non-cooperate clients.<sup>67</sup>

Why *doesn't* the government demand that *individuals* waive their attorney-client privilege

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<sup>63</sup>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 “necessarily know about” the “waiver incentives operating on the company”).

<sup>64</sup>See *In re Grand Jury Subpoenas 04-124-03 and 04-124-05*, \_\_\_ F.3d \_\_\_ (6<sup>th</sup> Cir. July 13, 2006); *United States v. Schwimmer*, 924 F.2d 443,446 (2d Cir. 1991) (*Kastigar* standard applies where attorney-client privilege is breached).

<sup>65</sup>Lance Cole, *supra* note \_\_\_ (drawing connection to Lynne Stewart case); see also Peter J. Henning, *Targeting Legal Advice*, 54 *Am. U. L. Rev.* 669, \_\_\_ (2005) (asserting that Justice Department’s positions in corporate prosecutions is “symptomatic” of Department’s “broader push against lawyers”).

<sup>66</sup>See Eugene Volokh, *The Mechanisms of the Slippery Slope*, 116 *Harv. L. Rev.* 1026 (2003).

<sup>67</sup>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 appears to be the exception that proves the rule however.

as a down payment on the cooperation that defendants so fervently endeavor to render?<sup>68</sup> After all, the government does demand 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.<sup>69</sup> Why not use the enormous bargaining leverage that substantial control over the sentencing discounts reserved for cooperators<sup>70</sup> to obtain information from a prospective cooperator's lawyer that might help a prosecutor assess the client's credibility? One reason this practice has not developed may be because the perceived benefits are small and the risk great. The government presumes 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.<sup>71</sup> And 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 well be subject to disclosure at latter trials of others.<sup>72</sup> In short, protection of the space between attorney and cooperator can often benefit the government as much as it benefits the cooperator. Another reason 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.<sup>73</sup> At any rate, the fact is that

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<sup>68</sup>Post *Booker*, the national rate for sentences "below guidelines range" because of defendants' substantial assistance was 14.7%, with districts ranging from 2.5% to 39.3%. U.S. Sentencing Comm'n, 2005 Annual Report 47 (2006?). And this doesn't include defendants who have sought to cooperate but have not received 5K1 treatment, or safety valve defendants. The defendants receiving 5K1 treatment obtained a 50% median decrease in the otherwise applicable guideline minimum sentence. *Id.* at 48.

<sup>69</sup>See Mezzonato, 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); Fed Bar Council Report, & more

<sup>70</sup>Prosecutors' control over 5K.1 may have been lessened by *US v. Fernandez*, (2d Cir. 2006).

<sup>71</sup>But see Ellen Yaroshefsky, *Cooperation with Federal Prosecutors: Experiences of Truth Telling and Embellishment*, 68 Ford. L. Rev. 917 (1999) (discussing how prosecutors aren't very good at assessing cooperator credibility).

<sup>72</sup>*United States v. Risha*, 445 F.3d 298 (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).

<sup>73</sup>See Richman, *Prosecutors and Their Agents*, *supra* note \_\_, 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")

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.

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, he is expected to tell all he knows about the matters being investigated and many peripheral matters (like unrelated personal misconduct), with grave consequences often attending his 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?

And yet, even if a coerced waiver regime is confined to corporate clients, we ought not discount the threat it poses to the adversary system, 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 really start thinking of themselves as “as arm of law enforcement,”<sup>74</sup> from whence will come the adversarial mind-set that we rely on to ensure that the government does not overreach? Even in a world with vanishingly few trials, our readiness to rely on administrative and professional controls on prosecutors has its limits. We do want defense counsel to be able to pose a credible threat of trial in appropriate cases.<sup>75</sup>

Of course, for the last argument to have any bite on current policy matters, we have to assume that the status quo in white collar practice before the waiver demands became common represents some optimal level of adversarial zeal. And that's contestable. Perhaps the government was being outgunned by the experts in information control that Kenneth Mann depicted so well in his study of white collar lawyers.<sup>76</sup> To the extent this was true and added to the expense of white collar prosecutions for the government, one could still find the cost appropriate and the consequent level of such prosecutions either appropriate (because, say, all too

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<sup>74</sup>Zornow & Krakaur, *supra* note \_\_, at 147; see Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputization of Corporate America*, 45 S. Tex. L. Rev. 111 (2003).

<sup>75</sup>See Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 Ford. L. Rev. 2117, 2144 (1998) (noting how “the regular if proportionately infrequent resort to the adversarial trial procedure” helps “keep at least a loose rein on executive power”).

<sup>76</sup>Kenneth Mann, *Defending White Collar Crime: A Portrait of Attorneys at Work* (1985).

many white collar cases overreach and chill viable commercial conduct<sup>77</sup>) or the result of a misallocation of enforcement resources by the federal government (toward, say, violent crime or drug enforcement, or, if one looks to the budget as a whole, farm subsidies). Or, alternatively, one could celebrate a coerced waiver regime as a welcome way to even up the balance in the war for control over information relating to corporate liability.<sup>78</sup>

Insightful critics of a waiver regime have argued that it

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.<sup>79</sup>

One can accept most of this analysis, but come out exactly the other way if one believes that corporate criminal enforcement is so far away from the margin that a systematic reduction of the costs of prosecution is to be celebrated, not feared. Even as corporate criminal enforcement continues to attract public attention, the re-centering of the federal enforcement bureaucracy since September 11 has put enormous strains on resource commitments outside the terrorism area. And whether corporate crime has remained unaffected is far from clear.<sup>80</sup> Given that even

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<sup>77</sup>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); Peter Henning, *supra* note \_\_; Erik Luna, *The Overcriminalization Phenomenon*, 54 *Am. Univ. L. Rev.* 703 (2005); Stephen F. Smith, *Proportionality and Federalism*, 91 *Va. L. Rev.* 879 (2005).

<sup>78</sup>See Alexandra Natapoff, *Underenforcement*, 75 *Fordham L. Rev.* 1715, \_\_ (2006).

<sup>79</sup>McLucas, Shapiro & Song, *supra* note \_\_, at 639.

<sup>80</sup>Compare Jason McLure, *Has the Wave of White-Collar Prosecutions Crested?* *Legal Times*, July 18, 2006 (“by some measures the crackdown on corporate criminals has stalled”); Kelly Thornton & Onell R. Soto, *San Diego Union-Tribune*, Jan. 12, 2007 (suggesting that 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); [add more as Senate inquiry

a waiver regime will not bring the marginal cost of investigating and prosecuting a case down to zero or anywhere close to it,<sup>81</sup> it is thus entirely possible that the “commissioning” of corporate counsel as deputies in the government’s corporate crime program will be socially beneficial.<sup>82</sup>

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 the regime skews enforcement activity and dispositions, we might have additional concerns. It has been 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.”<sup>83</sup> 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.<sup>84</sup> And so on.

If the reader has a firm belief in the social utility of a waiver regime or the lack thereof by

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develops]; 2006 TRAC report; with U.S. Dep’t Justice, Office of the Inspector General, Audit Division, *The External Effects of the Federal Bureau of Investigation’s Reprioritization Efforts*, Audit Report 5-37, at 53 (September 2005) (noting that the “FBI designated corporate fraud as its top national priority for financial crimes and has increased the number of agents handling these matters between [fiscal years] 2000 and 2004. Case 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 [2000.]”).

<sup>81</sup>See Henning, *supra* note \_\_, at 696 (“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”).

<sup>82</sup>See Wray & Hur, *supra* note \_\_, at 1171 (“It makes complete sense for regulators and law enf 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.”)

<sup>83</sup>McLucas, Shapiro & Song, *supra* note \_\_, at 640.

<sup>84</sup>Perhaps discuss a/c rules re partnerships. See *United States v. Campbell*, 73 F.3d 44 (5<sup>th</sup> Cir. 1996); *Hopper v. Frank*, 16 F.3d 92 (5<sup>th</sup> Cir. 1994).

this point, it is probably because she had some deeply held empirical and normative beliefs when she started. The point has been not to persuade but to explore why positions on the issue have turned more on contestable assumptions than on reasoning. One therefore yearns for the comfort of settled legal principles. But unless one has no qualms at all about waiver demands, not only is doctrinal analysis largely unhelpful, but its indeterminacy offers a case-study in the clash and interrelationship of substantive and procedural law.

## II. Doctrinal and Institutional Resolutions

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.<sup>85</sup> Yet one gets little legal traction by noting the entrenched status of a right or privilege in the criminal process. Even as we recognize that there have to be some limits on what rights can be waived,<sup>86</sup> the general rule is to presume waivability.<sup>87</sup> And although many have called for some calibration of the bargaining pressure that the government uses to extract such waivers, the general rule is to eschew labeling as improperly “coercive” any waiver that the government extracts through the threat to bring charges that it is “entitled” to bring under substantive law.<sup>88</sup>

Sure, it is pretty 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”

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<sup>85</sup>See McLucas, Shapiro & Song, *supra* note \_\_\_, at 629; see Public comments on 502 & ABA Task Force Report.

<sup>86</sup>See *United States v. Mezzanatto*, 513 U.S. 196, \_\_\_ (1995) (“There may be some evidentiary provisions that are so fundamental to reliability of the factfinding process that they may never be waived without irreparably ‘discredit[ing] the federal courts’”) (quoting 21 C. Wright & K. Graham, *Federal Practice and Procedure* § 5039, at 207-208 (1977)); see also *Wheat v. United States*, 486 U.S. 153, 192 (1988) (court may decline defendant’s waiver of his right to conflict-free representation).

<sup>87</sup>See *United States v. Mezzanatto*, 513 U.S. at \_\_\_; *United States v. Fariduddin*, 469 F.3d 1111, 1112 (7<sup>th</sup> Cir. 2006) (“Like almost all rights in the criminal process [citing *Mezzanatto*], the entitlement to a schedule of payments may be waived.”).

<sup>88</sup>See *United States v. Mezzanatto*, 513 U.S. 196 (1995); *United States v. Brady*, 397 U.S. 742 (1970) (where leverage came from threat of death penalty later held – in another case – to be unconstitutional); *Bordenkircher v. Hayes*; 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).

to the government,<sup>89</sup> and accepts the arrangements that emerge. But that is pretty much the state of current legal doctrine. And those who seek rhetorical leverage from existing procedural law 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 such person's employment that is intended to benefit the corporation.<sup>90</sup>

Bill Stuntz has insightfully highlighted the interrelationship of substantive and procedural criminal law.<sup>91</sup> Legislative breadth inevitably weakens procedural protections, and is often intended to do so. Robustly defined constitutional and subconstitutional protections can end up being just chits in the bargaining process that defendants must resort to in order 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. And 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 to legislative choice.

As Julie O'Sullivan has noted, 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 allowed it to be based on *respondeat superior*.<sup>92</sup> Criticism of the consequent breadth of corporate criminal liability – and of Congress's acquiescence in it – has

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<sup>89</sup>We rarely talk in “entitlement” terms about the government’s power to bring (and prevail on) a particular criminal charge. But see *Apprendi v. New Jersey*, 530 U.S. 466, \_\_\_\_ (2000) (Thomas, J. concurring) (discussing “punishment to which the prosecution is by law entitled for a given set of facts”).

<sup>90</sup>See *New York Cent. & Hudson R.R. v. U.S.* 212 U.S. 481, 495 (1909); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9<sup>th</sup> Cir. 1972); see also Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 *J. Crim. L. & Crim.* 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.”); 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).

<sup>91</sup>See William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 *Yale. L.J.* 1 (1997).

<sup>92</sup>See Julie R. O’Sullivan, *Federal White Collar Crime: Cases and Materials* 207 (2d ed. 2003).

been sustained and cogent.<sup>93</sup> The best justification of substantive *respondeat superior* criminal liability may well be procedural: Corporate criminal liability is essentially an information-forcing penalty default that effectively ensures that a corporation will fully cooperate with prosecutors in the investigation of individual criminal misconduct.<sup>94</sup> Such cooperation is practically necessary, given the degree to which the corporation controls (or can obtain) relevant information about the misconduct. And 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 response to the substantive law question of why we have such broad corporate criminal liability. Indeed, this is a rather extreme case of criminal law being (mis?)used 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.<sup>95</sup>

Although effectively deputizing corporate counsel as prosecutorial information gatherers does not have clear doctrinal implications, one aspect of the process may well have doctrinal consequences that courts are now exploring. Relying on *Garrity v. New Jersey*,<sup>96</sup> some white collar defense counsel have argued that "if the government insists that [a] company use its disciplinary authority to encourage cooperation, an employee 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."<sup>97</sup> Indeed, two

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<sup>93</sup>See, e.g., Vic Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 Harv. L. Rev. 1477 (1996); Sam Buell; Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Criminal Liability*, 75 Minn. L. Rev. 1095 (1991); *Developments in the Law – Corporate Crime: Regulating Corporate Behavior Through Criminal Sanctions*, 92 Harv. L. Rev. 1227 (1979); O'Sullivan, *supra* note \_\_ (casebook), at 187-233; Brandon L. Garrett, *Structural Reform Prosecution*, \_\_ Va. L. Rev. \_\_, \_\_ (2007)

<sup>94</sup>See Darryl K. Brown, *Third-Party Interests in Criminal Law*, 80 Tex. L. Rev. 1383 (2002).

<sup>95</sup>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).

<sup>96</sup>385 U.S. 493 (1967); see *McKune v. Lile*, 536 U.S. 24, 40 (2002) (Kennedy, J.) (plurality opinion) (characterizing *Garrity* as case that "involved free citizens given the choice between invoking the Fifth Amendment privilege and sustaining their economic livelihood").

<sup>97</sup>Richard Ben-Veniste & Lee H. Rubin, *DOJ Reaffirms and Expands Aggressive Corporation Cooperation Guidelines*, Legal Backgrounder, Wash. Legal Foundation, vol 18, no. 11; see 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,

defendants in the KPMG case were able to get 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.”<sup>98</sup> Whether Judge Kaplan’s rationale would extend to statements obtained 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.<sup>99</sup> 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 the questioning of employees has been initiated for corporate purposes by corporate agents.<sup>100</sup> As so often is the case in unsettled common law territory, the issue is one of dueling analogies. On one hand, the government is clearly 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 corporate entity demand and deliver information that the corporation “owns,”<sup>101</sup> and that it use all the means legally available to it to do so.<sup>102</sup> As Sam Buell has noted: “To pursue [Judge

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1233-34 (2006) (“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 exploration of the *Garrity* argument, see Griffin, *supra* note \_\_\_\_.

<sup>98</sup>United States v. Stein 440 F. Supp.2d 315 (S.D.N.Y. 2006).

<sup>99</sup>Id. at \_\_\_\_ (distinguishing *United States v. Solomon*, 509 F.2d 863, 869 (2d Cir. 1975) (Friendly, J.)). But see Buell, *supra* note \_\_\_, 59 Stan. L. Rev. at 127 (“Most courts have concluded that *Garrity* cannot apply to statement compelled by private employers and other private entities, even when those entities routinely share the fruits of such compulsion with state enforcers.”) (citing *D.L. Cromwell Invs. Inc. V. NASD Regulation, Inc.*, 279 F.3d 155 (2d Cir. 2002)).

<sup>100</sup>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).

<sup>101</sup>See *In re Grand Jury Subpoena*, 274 F.3d 563, \_\_\_\_ (1<sup>st</sup> Cir. 2001); *United States v. Int’l Bhd. of Teamsters*, 119 F.3d 210 \_\_\_\_ (2d Cir. 1997); *United States v. Stein* (KPMG Case), 440 F. Supp.2d 315 (S.D.N.Y. 2006).

<sup>102</sup>See Michael A. Simons, *Vicarious Snitching: Crime, Cooperation, and “Good Corporate Citizenship,”* 76 St. John’s L. Rev. 979, 1008 (2002) (“Corporations don’t cooperate; people do.”)

Kaplan's] theory, we would need to develop means of determining (1) the degree of state involvement that render's the employer's conduct state action, and (2) the degree of employer action that renders that action compulsion. These are exceedingly hard lines to draw."<sup>103</sup>

The absence of constitutional and common law guidance on this sensitive issue seems, at least to opponents of the waiver regime, to be cause for legislative intervention. And legislative assistance may be on the way, courtesy of a bill by Senator Specter that, among other things, would bar the government from demanding the waiver of an organizational attorney-client privilege, and would bar it from considering an entity's assertion of that privilege when deciding whether to pursue criminal (or civil) charges.<sup>104</sup> 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.

Given how frequently and cogently Congress is faulted for abdicating its responsibilities on federal criminal issues generally,<sup>105</sup> it may seem a bit odd to argue that Congress should stay its legislative hand on this particular one. But I do. 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 stronger here than elsewhere – e.g. the debate about the extent to which the government can demand individual defendant waivers as a precondition for cooperation discussions<sup>106</sup> -- or weaker.

To me it seems a lot weaker. If there were any place where we might 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. And one need not be a whole-hearted adherent of public choice theory to worry that legislative line-drawing will not be in the public interest where substantial corporate interests are

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<sup>103</sup>Samuel W. Buell, *Is Criminal Procedure Different Within Legal Entities*, 59 *Stan. L. Rev.* 101, 128 (2007) (forthcoming) (draft).

<sup>104</sup>152 Cong. Rec. S11438-39 (daily edition) (statement of Sen. Specter) ("Attorney-Client Privilege Protection Act of 2006"). [KEEP THIS CURRENT for 110<sup>TH</sup> CONG]

<sup>105</sup>See Dan Kahan, *Is Chevron Relevant to Federal Criminal Law*, 110 *Harv. L. Rev.* 469 (1996); Daniel Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 *UCLA L. Rev.* 757 (1999); William J. Stuntz, *Pathological Politics*

<sup>106</sup>See *United States v. Barrow*, 400 F.3d 109 (2d Cir. 2005); *United States v. Stein*, 2005 U.S. LEXIS 1141 (E.D. Pa. 2005); *United States v. Krilich*, 163 F. Supp.2d 943, 947 (N.D. Ill. 2001); 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).

involved on the defense side, and no lobby but the Justice Department on the other.<sup>107</sup>

Moreover, if Congress wants to take its legislative responsibilities seriously and is interested in tinkering with (or radically reshaping) the corporate criminal enforcement environment, it ought not be working in a piecemeal fashion. Indeed, the attorney-client waiver “problem” ought to be toward 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. And before taking up 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 scalps and corporate defenders tell of the dreaded chill.

One caveat here. There *are* good arguments for legislative intervention to ensure that the entity forced to waive is not put at an unfair disadvantage vis a vis private plaintiffs.<sup>108</sup> Right now, the Eighth Circuit is the only area in the country where 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).<sup>109</sup> Acting at Congress’s request, the Evidence Rules Committee of the Judicial Conference has been considering a new evidence rule that would allow selective waiver – freeing corporations to render the government full cooperation while maintaining the ability to assert the privilege against private plaintiffs.<sup>110</sup> Such plaintiffs, of course, would still get 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 are deprived of the privileged parts of the government’s investigative haul, particularly in those cases in which the government investigates but never brings charges.

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<sup>107</sup> Yes, I betray my biases with respect to the McDade Amendment, now codified at 28 USC 530B, when I say this. See Craig S. Lerner, Legislators as the “American Criminal Class”: Why Congress (Sometimes) Protects the Rights of Defendants, 2004 U. Ill. L. Rev. 599, 650-656.

<sup>108</sup>For arguments favoring limited waiver & legislation, see George J. Terwilliger III & Darryl S. Lew, Privilege in Peril: Corporate Cooperation in the New Era of Government Investigations, 7 Engage (Journal of Fed. Soc’y’s Practice Groups) 25 (Mar 2006).

<sup>109</sup>Compare *Diversified Industries v. Meredith*, 572 F.2d 596 (8<sup>th</sup> Cir. 1977) with *In re Qwest Communications*, 450 F.3d 1179, \_\_\_ (10<sup>th</sup> Cir. 2006) (collecting cases).

<sup>110</sup>Proposed Fed. R. Evid. 502 ( c) (“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.”), transmission letter from Advisory Committee (May 16, 2006), <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>

Reasonable minds can (and have) differed on the point. But, as already noted,<sup>111</sup> 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 where no criminal wrongdoing is found, is exposure to private litigation. And 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 special institutional features of public agencies,<sup>112</sup> Congress might well strike a more appropriate balance than the one that has been struck by courts following common law principles that far pre-date modern enforcement practices.<sup>113</sup>

Given these concerns, one might expect groups like the ABA Presidential Task Force on Attorney Client Privilege and \_\_\_ [others] to support the proposed Federal Rule. They haven’t though, and it looks like they will be successful in their opposition.<sup>114</sup> 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, as well as the recent Justice Department’s recent efforts to limit prosecutors in this area suggest that the strategy of these business groups is paying off.<sup>115</sup>

This brinkmanship on the part of the ABA Task Force highlights a more general theme of corporate prosecutions. With certain notable exceptions, they often involve a sophisticated game of “chicken.”<sup>116</sup> Notwithstanding breadth of the law on corporate criminal liability, the government rarely has much interest in actually bringing charges against an entity based on the

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<sup>111</sup>See supra \_\_\_

<sup>112</sup>See Testimony of N.Y. Deputy Attorney General Peter B. Pope, Advisory Committee on Evidence Rules: Hearing on Proposal 502, Apr. 24, 2006, at 57-65, available at [http://www.uscourts.gov/rules/EV\\_Hearing\\_April\\_2006.pdf](http://www.uscourts.gov/rules/EV_Hearing_April_2006.pdf)

<sup>113</sup>See Kenneth S. Broun & Daniel J. Capra, Getting Control of Waiver of Privilege in the Federal Courts – A Proposal for a Federal Rule of Evidence 502, draft at 37 (2006), available at <http://law.bepress.com/cgi/viewcontent.cgi?article=6665&context=expresso>  
Note Bank Regulatory Act of 2006, which provides for selective waiver for disclosures to bank regulators.

<sup>114</sup>Cites re David Brodsky testimony at Fordham. See also Colin Marks point re “band aid” ADD CITES IF/WHEN RULE DIES

<sup>115</sup>Check re first version of Specter bill (selective waiver provision??)

<sup>116</sup>See Douglas G. Baird, Robert H. Gertner & Randal C. Picker, Game Theory and the Law 303-04 (1994); more

criminal conduct of its agents. Substantial (although not equal) stigma can be imposed on the entity through civil sanctions, as can fines, penalties and forfeitures. And, particularly in those situations in which 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.<sup>117</sup> 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 means to that end, for without this 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 – e.g. perceived recalcitrance by the corporation that the government takes as both a failure to cooperate and maybe of a “culture” of wrongdoing within the organization.<sup>118</sup> Yes, there is an aspect of holding the village hostage to this. But this is frequently a village that, in addition to protecting the wrongdoer has also profited from the wrongdoing and perhaps harbored a culture that fostered it.<sup>119</sup>

For their part, corporate employees will find themselves in the usual prisoner’s dilemma game with each other and the corporate entity, with each having an incentive to gain the benefits of cooperation with the government at the expense of the others.<sup>120</sup> But vis a vis the government, they are also playing a game of chicken, essentially hoping that the government, out of concern for third party interests – shareholders, customers, etc. – will swerve away from prosecuting or credibly threatening to prosecute the entity. The individuals would be happy to hide behind the village, pleading the innocence of its members, fully aware that the government would prefer not to shoot (particularly in those cases where entity indictment might well mean death). But if anyone has to take a plea, better the organization than the individual (at least from the perspective of the individuals).

These bargaining dynamics are mirrored in policy discussions about privilege waivers (and, for that matter, corporate deferred prosecutions<sup>121</sup>). These measures allow the government

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<sup>117</sup>See Darryl Brown piece re Third Party interest

<sup>118</sup>See American Lawyer articles on Andersen & Milberg, Weiss

<sup>119</sup>See Samuel W. Buell, The Blaming Function of Entity Criminal Liability, 81 Ind. L. J. 473, 476 (2006) (“in 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.”).

<sup>120</sup>See Richman, Cooperating Clients, Ohio St. L. J. at \_\_.

<sup>121</sup>See Garrett, supra note \_\_.

to obtain the fruits of threatened criminal charges while making it less likely that it will have to actually pull the trigger on firms and inflict significant injury to third parties. Those that would eliminate such half-way measures of demonstrably credible cooperation presumably would like the government to confront just this dilemma. Assuming that the consequent prosecutorial investigative disadvantage were not cured by a massive increase in enforcement resources (quite 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 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 extremely good arguments that corporate criminal liability is far too expansive, so too are there very good arguments that corporate attorney-client privilege doctrine sweeps far too broadly.<sup>122</sup> (I will leave it to Julie O’Sullivan to address those arguments in a piece that she’s preparing for this symposium.)<sup>123</sup>

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.<sup>124</sup>

Two wrongs won’t necessarily make a right.<sup>125</sup> Nor can one make a good a priori case that the clash of two contestable doctrines will produce a socially beneficial result. Particularly in the 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 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.

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<sup>122</sup>See See Lonnie Brown at 924 & ff; David Luban, *Lawyers and Justice* 217-33 (1988); Rothstein on Upjohn in *Evidence Stories*; Daniel R. Fischel, *Lawyers and Confidentiality*, 65 *U. Chi. L. Rev.* 1 (1998).

<sup>123</sup>See Julie O’Sullivan, *supra* note \_\_ (draft)

<sup>124</sup>See Lonnie Brown, *supra* note \_\_; Elizabeth G. Thornburg, *Sanctifying Secrecy: The Mythology of the Corporate Attorney-Client Privilege*, 69 *Notre Dame L. Rev.* 157 (1993); Charles W. Wolfram, *Modern Legal Ethics* at § 6.5.3 (1968).

<sup>125</sup>See many of my conversations with my kids, usually when they are sitting together in the car on long trips.

Once we consider this not an exercise in legislative line-drawing but a pragmatic matter of institutional choice, we'll 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 an explicit request, so as to signal the extent of their cooperation and perhaps shorten the length, and perhaps depth, of the government investigation. And this will be true regardless of the waiver policy on the government side. 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 gave a high degree of discretion to U.S. Attorney's Offices; the McNulty Memo, which purports to, and may well, rein those Offices in, and other possible administrative arrangements?

While there are no absolutes here, the natural tendency of institutional components needs to be carefully considered. To the extent one wants careful calibration of government pressure, there are good arguments for leaving decisions about such calibration in the hands of line prosecutors (and the enforcement agents with whom they work in partnership)<sup>126</sup> – 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, since one can hardly expect a line assistant to resist the chance to look at the other side's cards, and perhaps even have his investigation done for him (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 decisionmaking 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.<sup>127</sup> Expertise will vary across districts too, and Main Justice can do much to ensure that waiver demands are not overused substitutes for prosecutorial diligence and professionalism.

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<sup>126</sup>See Richman, Prosecutors and Their Agents, supra note \_\_.

<sup>127</sup>See Joseph F. Savage, Jr. & David S. Schumacher, Attorney-Client Privilege on the Rebound, *Andrews Litigation Reporter* (June 2006) (criticizing 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. Funder & Ryan D. McDonnell, Devolution of Authority: The Department of Justice's Corporate Charging Policies, 51 *St. Louis Univ. L. J.* \_\_ (Fall 2006).

Yet centralized decisionmaking has downsides too. As Dan Kahan has suggested, the political leadership at the Justice Department is far more apt than U.S. Attorneys to “internalize” the costs of prosecutorial decisionmaking.<sup>128</sup> U.S. attorneys trying to advance their local political careers, or Assistants trying to cut their professional teeth on conspicuous white collar targets<sup>129</sup> – both types might give too little thought to the economic value their cases can burn up. On the other hand, Main Justice may give too much, since the able defense lawyers and lobbyists that will decry “prosecutorial overreaching” won’t always have counterparts clearly setting out the economic gains that can flow from aggressive enforcement.<sup>130</sup> And with the current priorities in the counterterrorist and immigration areas, and the odd dynamic that has made violent-crime enforcement non-negotiable part of the federal enforcement agenda,<sup>131</sup> Main Justice’s institutional commitment to white collar cases may be at a low (or lower) ebb.<sup>132</sup>

This point about institutional commitment may seem odd to those who have been struck by the post-Enron rhetoric of the “war on corporate crime.”<sup>133</sup> And indeed, the Justice Department’s Corporate Fraud Task Force regularly touts the numbers of firms and executives charged and convicted through its efforts.<sup>134</sup> Recent reports and news stories about the

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<sup>128</sup>Dan M. Kahan, *Is Chevron Relevant to Federal Criminal Law?*, 110 Harv. L. Rev. 469, 497 (1996).

<sup>129</sup>See Cheryl X. Long & Richard T. Boylan, *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).

<sup>130</sup>Except during the panics that follow a Savings & Loan Crisis or an Enron

<sup>131</sup>See Daniel Richman, *The Past, Present, and Future of Violent Crime Federalism*, 34 Crime & Justice: A Review of Research 377, 416 (2006) (noting continuing federal efforts in violent crime area after 9/11 attacks).

<sup>132</sup>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. 2 (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”), available at <http://blj.ucdavis.edu/article/641/>

<sup>133</sup>See Griffin, *supra* note \_\_, at 103-05; John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 Cornell L. Rev. 310, 348 (2004);

<sup>134</sup>See Corporate Fraud Task Force, *Second Year Report to the President* (July 20, 2004), available at [http://www.usdoj.gov/dag/cftf/2nd\\_yr\\_fraud\\_report.pdf](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*

deployment of federal resources, and the view of high level Justice Department decisionmaking allowed by the recent flap over the fired U.S. Attorneys paints suggests a quite different picture, however: one in which resource-strapped districts face constant pressure from Washington to boost their stats with respect to firearms and immigration cases, and have all too 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 current department leadership apparently prefers remain undercovered.<sup>135</sup>

But one need not make any assumptions about the relative commitments to corporate crime enforcement of Washington vs. the districts to expect that any involvement of Washington in waiver decisions will be in a restrictive direction. That effect is inherent in the involvement of an entity that will see only those cases in which a U.S. Attorney's office wants to seek waiver (unless the districts respond to increased oversight by exercising less discretion).<sup>136</sup> And the effect is magnified by the bureaucratic imperative that tends to make monitoring agencies justify their existence.<sup>137</sup>

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Prosecution, 105 Colum. L. Rev. 583, 613-14 (2005)(discussing challenge of finding adequate performance measures for federal white collar enforcement efforts).

<sup>135</sup>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, Paul Shukovsky, “Office of U.S. Attorney ‘Stressed,’” Seattle Post-Intelligencer, Sept. 22, 2006, immediately sparked angry emails among top staffers in the Office of the Deputy Attorney General. See DAG 146-47 (Michael Elston email to Monica Goodling & Paul McNulty, Sept. 22, 2006; DAG 148-49 (Brian Roehkrasse email to Michael Elston, et al., Sept. 22, 2006) (disclosures to House Judiciary Committee, set 3 of March 20, 2007 release), 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 Eastern District of New York U.S. Attorney's Office has twenty-five vacancies).

<sup>136</sup>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).

<sup>137</sup>Yes, this point reflects the regrettable bias of a former AUSA.

For what it's worth: While facts are far from clear, one account of the negotiations that proceeded Milberg Weiss indictment notes that Criminal Division officials evinced far more flexibility on the waiver issue than their USAO counterparts. See Andrew Longstreth, Communication Breakdown: The Final Weeks Before the Milberg Weiss Indictments Led to an Impasse, Am. Lawyer, July 2006, at 18: (“In contrast to their expansive D.C. counterparts, prosecutors in L.A. refused to budge on the terms for a waiver of attorney-client and work-product privilege, effectively backing the defense team into a corner.”).

It remains to be seen whether the “consultation” that the McNulty Memo requires of U.S. Attorneys offices will be merely a formality – in which case the fanfare with which the Memo was unveiled was simply a pretty 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.”<sup>138</sup> We shall see. But we ought not ignore the substantial risk that the new policy will chill the ability of prosecutors 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.

Moreover, we ought not forget that, for all the disputes about the empirics of the world created by 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 hard to find. To be sure, as Jerry Lynch has suggested, it is inevitable that among repeat players a common law of prosecution will emerge. But the guidance that DOJ promulgations have given in the corporate area has been exceptional and praiseworthy. Yes, fans of horizontal equity might not like idea that corporations get more guidance than regular defendants. But corporations *are* different. This is a class of defendant that the government generally does not want to prosecute and generally *should* not want to 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,<sup>139</sup> and thus gave prosecutors one more

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<sup>138</sup>See Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 Harv. L. Rev. 1016 (2004); Charles F. Sabel & Jonathan Zeitlin, *Learning from Difference: The New Architecture of Experimental Governance in the European Union*, forthcoming in *European Governance Papers* (Mar. 22, 2007draft). Bill Simon has noted:

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 \_\_, Ford L Rev at 1469-70.

<sup>139</sup>Cf. Frank O. Bowman, III., *Mr. Madison Meets a Time Machine: The Political Science of Federal Sentencing Reform*, 58 Stan. L. Rev. 235, \_\_ (2005) (specificity and complexity of the Sentencing Guidelines gave Congress a vehicle for unduly interfering in the sentencing process).

reason to love the “just do the right thing” ethos<sup>140</sup> that dominates most of the Principles of Federal Prosecution.

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<sup>140</sup>See David A. Sklansky, *Starr, Singleton, and the Prosecutor’s Role*, 26 *Ford. Urb. L.J.* 509 (1999).