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COMPELLED COOPERATION AND THE NEW CORPORATE CRIMINAL PROCEDURE

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In response to the broad scope of the Enron-era frauds, the federal government has adopted novel strategies to investigate and prosecute corporate crimes. This Article examines the use of stringent cooperation requirements and deferred prosecution agreements, pursuant to which corporate internal investigations have become extensions of government enforcement efforts. At the same time, liability has shifted markedly to the employee level: Over one thousand individuals have been indicted and convicted since the July 2002 creation of the Corporate Fraud Task Force, while few corporations have been charged. The convergence of corporate cooperation doctrine with the focus on individual targets results in significant unfairness for employees who are compelled to incriminate themselves in the context of internal investigations that are directed by the government. Because of the awkward partnering of public governmental investigations with private corporate compliance efforts, that normative burden on employees may not be offset by enforcement benefits. This Article suggests that the government's application of a civil regulatory model to criminal cases creates distortions because individual liberty rather than a financial sanction is at stake, because prosecutors do not engage in negotiated governance, and because judicial oversight at the investigative stage is minimal. This Article also addresses the constitutional implications of outsourcing corporate criminal investigations and argues that employees interviewed by internal investigators pursuant to the terms of a pending deferred prosecution agreement should enjoy immunity analogous to the Garrity shield that protects public employees. Several strands of Fifth Amendment theory are consistent with the argument that economic pressure, such as the threat of job loss, can rise to the level of constitutionally significant coercion. When that pressure is brought to bear pursuant to a

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deferred prosecution agreement, it is delegated coercion, but may be attributed to the government as state action.

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INTRODUCTION

In response to the broad scope of the Enron-era frauds, the federal government has adopted novel strategies to manage the complexity of corporate criminal investigations. Chief among these innovations are the cooperation requirements set forth in the Department of Justice’s (DOJ) Thompson Memorandum (along with its successor, the McNulty Memorandum) and the increased use of deferred prosecution agreements (DPAs) between prosecutors and corporations. Under its current practices, the federal government has deferred or declined to bring charges against firms themselves and has shifted liability to the employee level, indicting and convicting over one thousand individuals since the July 2002 creation of the Corporate Fraud Task Force. This Article explores a gap in the constitutional

protections afforded those individual defendants. Prosecutors' dependence on compelled cooperation is expedient but has unexamined consequences: a bypass around corporate employees' Fifth Amendment privilege against self-incrimination and the potential to degrade self-regulation. These costs arise, in part, from the merger of public governmental investigations and private corporate compliance efforts.

Part I details the policies and practices of the "war on corporate crime," with a particular focus on the factors set forth in the Thompson and McNulty Memoranda and the terms of current DPAs. Part II discusses how the convergence of cooperation doctrine with the shift to individual targets results in significant unfairness for the individual employees compelled to incriminate themselves in the context of internal investigations directed by the government. That normative burden may not be offset by enforcement benefits. Although effective corporate crime prevention often requires the cooperation of insiders, the means used to obtain that cooperation may actually increase the difficulty of detecting fraud by discouraging oversight and minimizing recordkeeping. Part III argues that the government's pursuit of DPAs and application of a civil regulatory model to criminal enforcement creates distortions because individual liberty rather than a financial sanction is at stake, because prosecutors do not engage in negotiated governance, and because judicial oversight at the investigative stage is minimal.

Part IV addresses the constitutional implications of outsourcing corporate criminal investigations. Employees interviewed by internal investigators pursuant to the terms of a pending DPA should enjoy immunity analogous to the *Garrity* shield that protects public employees. Several strands of Fifth Amendment theory are consistent with the argument that economic pressure, such as the threat of job loss, can rise to the level of constitutionally significant coercion. When a DPA is pending, that pressure, even though delegated to corporations to apply, may be attributed to the government as state action. As a practical matter, extending immunity may also enhance compliance investigations by privileging truthful information and the interests of good-faith employees.

I

THE NEW CORPORATE CRIMINAL PROCEDURE

This Part outlines the development of the government's¹ current campaign against corporate crime and the structural and strategic

¹ References to "the government" throughout this Article generally concern federal prosecutors. My focus here is on Department of Justice (DOJ) policies and practices and

innovations adopted to prosecute it. The Corporate Fraud Task Force was created by executive order in July 2002,² in response to political pressure to take action against corporate scandals—such as Enron’s December 2001 bankruptcy and WorldCom’s \$3.8 billion accounting restatement in June 2002³—and to mitigate the effect of such scandals on investor confidence in a market already stressed by the events of September 11, 2001. The Task Force’s initial stated mission was to “strengthen the efforts of the Department of Justice and Federal, State, and local agencies to investigate and prosecute significant financial crimes, recover the proceeds of such crimes, and ensure just and effective punishment of those who perpetrate financial crimes.”⁴ The rhetoric soon escalated, however, to a declaration of “war” on corporate crime,⁵ an early sign that the Task Force’s adversarial orientation would not harmonize with the cooperative nature of civil regulatory partnerships.

A. *The Culture of the War on Corporate Crime*

Cycles of scandal and reform have been the norm in corporate enforcement. The 1970s and early 1980s featured control strategies that criminalized corporate behavior.⁶ The pendulum swung back in

recent federal prosecutions. Other executive branch authorities, of course, play a substantial role in corporate fraud prevention. The SEC pursues about five hundred civil actions a year, William R. McLucas et al., *An Overview of SEC Enforcement, Remedial, and Settlement Powers Before and After the Sarbanes-Oxley Act*, in 35TH ANNUAL INSTITUTE ON SECURITIES REGULATION 1111, 1113 (PLI Corp. Law & Practice, Course Handbook Series No. B-1396, 2003), and can call in both state and federal prosecutors through its Enforcement Division. Active state attorneys general (in New York, for example), and self-regulatory organizations like the New York Stock Exchange, also play enforcement roles. See *id.* at 1113–14 (discussing federal and state authorities other than DOJ that have focused on corporate fraud).

² Exec. Order No. 13,271, 67 Fed. Reg. 46,091 (July 9, 2002).

³ See Dale A. Oesterle, *Early Observations on the Prosecutions of the Business Scandals of 2002–2003: On Sideshow Prosecutions, Spitzer’s Clash with Donaldson Over Turf, the Choice of Civil or Criminal Actions, and the Tough Tactic of Coerced Cooperation*, 1 OHIO ST. J. CRIM. L. 443, 443 (2004) (describing magnitude of corporate scandals that were revealed in 2002).

⁴ Press Release, White House, Executive Order Establishment of the Corporate Fraud Task Force (July 9, 2002), available at <http://www.whitehouse.gov/news/releases/2002/07/20020709-2.html>.

⁵ See, e.g., Edward Iwata, *Enron Task Force Faces Big Pressure to Deliver: Some Say Squad Is Moving Too Slowly, but Case Is Huge*, USA TODAY, Aug. 21, 2002, at B1 (early reference to “Bush administration’s war on corporate crime”).

⁶ See JAMES GOBERT & MAURICE PUNCH, *RETHINKING CORPORATE CRIME* 309–10 (2003) (discussing increased enforcement role of SEC in response to financial scandals of 1970s and insider trading of 1980s). There are, in fact, interesting parallels between the current climate and the early 1980s, when a “pro-business administration was forced by events, public opinion and political self-interest to respond to major financial scandals.” *Id.* at 309.

the late 1980s and 1990s with calls for deregulation and cuts in regulatory agency budgets and personnel. But the turn of the century collapse of several corporate giants pulled the pendulum back in the other direction to a new high point on the arc of enforcement. Although surges of housecleaning are nothing new, the perceived scope of contemporary corporate crime has inspired particularly zealous tactics.

The ethos of the war on corporate crime arises to some degree from the parallel war on terrorism, which involves many of the same DOJ officials.⁷ Enron and the World Trade Center collapsed back-to-back in 2001, and combating terrorism has justified an executive branch power grab with spillover effects on federal prosecutions of corporate crime.⁸ The government has adopted a strategy focused on “punitive regulation.”⁹ The Corporate Crime Task Force releases annual scorecards that tally the convictions obtained, the total fines levied, and the number and corporate rank of defendants charged, with no mention of the longterm ethical and financial health of American companies.¹⁰

Faced both with the evaporation of billions (and perhaps trillions) of dollars in capital value in a few short years and with the spectacle of hundreds of public companies restating earnings, the government’s aggressive approach is understandable. Police power often expands

⁷ See, e.g., John S. Baker, Jr., *Reforming Corporations Through Threats of Federal Prosecution*, 89 CORNELL L. REV. 310, 348 (2004) (noting that Bush Administration’s “war on corporate crime” is headed by DOJ officials who are simultaneously involved in “war on terrorism”).

⁸ See *id.* (“[T]he new ‘wars’ on terrorism and corporate corruption have dovetailed The Justice Department . . . has become an extension of the Defense Department in the ‘war on terrorism’”). In December 2005, while speaking before a group of Houston business leaders, former Enron CEO Ken Lay accused DOJ’s Enron Task Force of unleashing its own “‘wave of terror’ through the relentless pursuit of innocent businessmen, the bullying of witnesses, and a host of other prosecutorial excesses.” Kathleen F. Brickey, *In Enron’s Wake: Corporate Executives on Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397, 398 (2006).

⁹ IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION* 25 (1992) (criticizing purely “punitive regulation” as inhibiting self-regulation and advocating “synergy between punishment and persuasion”).

¹⁰ See, e.g., CORPORATE FRAUD TASK FORCE, U.S. DEP’T OF JUSTICE, SECOND YEAR REPORT TO THE PRESIDENT, at iii (2004), available at http://www.usdoj.gov/dag/cftf/2nd_yr_fraud_report.pdf (counting five hundred convictions in one year and charges filed against nine hundred individuals, including sixty CEOs). The media have also contributed to the “head count” model of success. For example, in the first two years of the Task Force’s operations, CNN aired a daily “Corporate Criminal Scoreboard” on *Lou Dobbs Tonight*. See, e.g., *Lou Dobbs Tonight* (CNN television broadcast June 20, 2003) (transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/0306/20/ldt.00.html>) (“Well now our nightly look at the corporate America criminal scoreboard, 73 executives charged with criminal wrongdoing, 16 of them from Enron, only one executive has been sentenced to jail in the 564 days since Enron filed for bankruptcy.”).

when the government declares war, whether it is against external enemies or internal social ills. The PATRIOT Act is one contemporary example,¹¹ but prosecutors also arrogated new powers to fight organized crime in the 1960s and 1970s,¹² and to wage the “war on drugs.”¹³ In the case of corporate crime, new cooperation requirements allow prosecutors to compel individual employee statements, to constrain defense resources, and in some cases of derivative obstruction,¹⁴ effectively to create the crime.

B. Existing Compliance Obligations: Of Carrots and Sticks

The practices termed here “the new corporate criminal procedure” find their fullest expression in the Thompson Memorandum,¹⁵ which was issued in January 2003 and replaced in part by the McNulty Memorandum¹⁶ in December 2006. The provisions of these documents—which are formally a set of charging considerations—are policies that can best be understood against the backdrop of preexisting compliance obligations.

Corporate policing has long been a species of voluntary self-regulation, and cooperation between internal investigators and government regulators is not a new development.¹⁷ For example, in the 1970s, the SEC initiated a “voluntary disclosure program” grounded

¹¹ USA PATRIOT Act of 2001, Pub. L. No. 107-56, 115 Stat. 272 (codified in scattered sections of U.S.C.) (expanding federal law enforcement power, including wiretap authority).

¹² See Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922 (codified as amended at 18 U.S.C. §§ 1961–1968 (2000)) (including Racketeer Influenced and Corrupt Organizations (RICO) statute).

¹³ See Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (codified as amended at 21 U.S.C. § 841 (2000)) (prohibiting manufacture, distribution, creation, and possession of controlled substances).

¹⁴ By “derivative obstruction,” I mean those cases in which false statements or obstructive conduct arise organically from the investigation itself and are made to or directed at proxies such as internal investigators, auditors, counsel, the media, or shareholders.

¹⁵ Memorandum from Larry D. Thompson, Deputy Attorney Gen., to U.S. Attorneys, Regarding Principles of Federal Prosecutions of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memorandum], available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf.

¹⁶ Memorandum from Paul J. McNulty, Deputy Attorney Gen., to U.S. Attorneys, Regarding Principles of Federal Prosecutions of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memorandum], available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf.

¹⁷ See William R. McLucas et al., *The Decline of the Attorney-Client Privilege in the Corporate Setting*, 96 J. CRIM. L. & CRIMINOLOGY 621, 622 (2006) (noting that internal investigations and cooperation “have played an important role in resolving securities enforcement and criminal inquiries” for decades).

in “self-policing, remediation, and cooperation.”¹⁸ In the decade leading up to the Thompson Memorandum, compliance obligations and cooperation with federal prosecutors stemmed in large part from the incentive structure of the Sentencing Guidelines. Chapter Eight of the Guidelines, entitled “Sentencing of Organizations,” was promulgated in 1991.¹⁹ The Guidelines, like DOJ’s current policies, mix the prescriptive and the proscriptive, often resulting in sentences that more closely resemble injunctions than penalties. Organizations earn “carrots,” in the form of deductions in their culpability scores that translate into reduced fines, if they maintain “effective compliance and ethics programs” to prevent and detect violations of law, cooperate fully in ongoing investigations, self-report, and accept responsibility.²⁰ An organization is deemed to have an effective compliance and ethics program only if it “exercise[s] due diligence to prevent and detect criminal conduct” and “otherwise promote[s] an organizational culture that encourages ethical conduct and a commitment to compliance with the law.”²¹ Considerations for evaluating the effectiveness of a compliance program include “the organization’s history of violations and the existence and sufficiency of its efforts to prevent, police, discover, report, and help punish wrongdoing by its employees.”²² The Guidelines emphasize timely and thorough corporate cooperation as a precondition for a lenient sentence.²³ “To be timely,” the Guidelines provide, “cooperation must begin essentially at the same time as the organization is officially notified of a criminal investigation.”²⁴ To be thorough, “the cooperation should include the disclosure of all pertinent information known by the organization,” including information “sufficient for law enforcement personnel to

¹⁸ *Id.* at 624 (internal quotation marks omitted); see also Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 *IND. L.J.* 473, 487 (2006) (“Punishing organizations by assessing their performance in light of a legal responsibility for deterring and punishing crime is entrenched within the modern practice of entity criminal liability.”).

¹⁹ U.S. SENTENCING GUIDELINES MANUAL ch. 8 (1991).

²⁰ See *id.* § 8C2.5 (2004); Baker, *supra* note 7, at 317 (describing organizational sentencing guidelines as “carrot and stick” approach that “never had much carrot to it”).

²¹ U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a) (2004).

²² Buell, *supra* note 18, at 487.

²³ See U.S. SENTENCING COMM’N, PROCEEDINGS OF THE SECOND SYMPOSIUM ON CRIME AND PUNISHMENT IN THE UNITED STATES: CORPORATE CRIME IN AMERICA: STRENGTHENING THE “GOOD CITIZEN” CORPORATION 18–19 (1995) [hereinafter *THE GOOD CITIZEN CORPORATION*], available at <http://www.usc.gov/sympo/wcsympo.pdf> (stating that cooperation can result in leniency). The organizational sentencing guidelines are explicit about the value of cooperation, in contrast to the individual sentencing guidelines, which allow for open-ended departures from the guideline range where the government cites substantial assistance. See U.S. SENTENCING GUIDELINES MANUAL § 5K1.1 (2004) (“[A]ppropriate reduction shall be determined by the court . . .”).

²⁴ U.S. SENTENCING GUIDELINES MANUAL § 8C2.5 cmt. 12 (2004).

identify the nature and extent of the offense and the individual(s) responsible for the criminal conduct.”²⁵

In addition to these “carrots,” the Guidelines also provide “sticks” to punish uncooperative corporations. For fine calculation purposes, a corporation starts with five culpability points, but aggravating circumstances increase that figure by up to five points depending on the position of the offender in the hierarchy of the organization, by up to two points for a previous criminal, civil, or administrative adjudication, and by up to three points for obstruction of justice in the investigation or prosecution of the offense.²⁶ Furthermore, an organization of fifty or more employees that does not have an effective compliance program within the meaning of the Guidelines is subject to probation and to continuing court supervision until it develops one.²⁷

C. *The Thompson Memorandum: Mostly Sticks*

The Thompson Memorandum ostensibly fits within the existing tradition of enforced self-regulation, but it shifts the carrots and sticks of the organizational Guidelines upstream from the sentencing phase of the adjudicative process to the preindictment stage of the investigation. The Thompson Memorandum is a charging guideline entitled *Principles of Federal Prosecution of Business Organizations* that was issued by then–Deputy Attorney General Larry Thompson, acting as head of the Corporate Fraud Task Force, on January 20, 2003.²⁸ As a general matter, internal DOJ guidelines afford the ninety-four indi-

²⁵ *Id.*

²⁶ *Id.* § 8C2.5(a)–(e) (2004).

²⁷ *Id.* §§ 8D1.1(a)(3), 8D1.4(c)(1) (2004). The Sarbanes-Oxley Act also predates the Thompson Memorandum and imposes some related cooperation obligations. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.). Under Sarbanes-Oxley, the SEC promulgated new rules expanding attorneys’ fiduciary obligations to report potential violations to public corporations. Attorneys are now required to notify the general counsel or the CEO about any “credible evidence, based upon which it would be unreasonable, under the circumstances, for a prudent and competent attorney not to conclude that it is reasonably likely that a material violation has occurred, is ongoing, or is about to occur.” 17 C.F.R. § 205.2(e) (2006) (defining “evidence of a material violation”); *id.* § 205.3(b) (establishing notification requirement). Sarbanes-Oxley also increases liability for conduct that undermines government investigations, making it a crime for anyone to corruptly alter, destroy, mutilate, or conceal a record or document with intent to impair its use in an official proceeding. Sarbanes-Oxley Act of 2002 § 1102, 18 U.S.C. § 1512(c)(1) (Supp. III 2003).

²⁸ Thompson Memorandum, *supra* note 15. The Thompson Memorandum has been formally replaced by the McNulty Memorandum. See McNulty Memorandum, *supra* note 16.

vidual U.S. Attorney's Offices a great deal of discretion.²⁹ Nevertheless, because major corporate fraud prosecutions often cross jurisdictional lines, have national significance, and are overseen by a DOJ task force, these particular internal guidelines have some force. Indeed, the Thompson Memorandum factors have become the canonical text for assessing corporate cooperation, and they were reproduced in nearly identical form in the December 2006 McNulty Memorandum. There are nine factors prosecutors are directed to consider when they determine whether to charge a business entity with a crime:³⁰

1. the nature and seriousness of the offense, including the risk of harm to the public, and applicable policies and priorities, if any, governing the prosecution of corporations for particular categories of crime;
2. the pervasiveness of wrongdoing within the corporation, including complicity in, or condonation of, the wrongdoing by corporate management;
3. the corporation's history of similar conduct, including prior criminal, civil, and regulatory enforcement actions against it;
4. 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 corporate attorney-client and work product protection;³¹
5. the existence and adequacy of the corporation's compliance program;³²
6. the corporation's remedial actions, including any efforts to implement an effective corporate compliance program or to improve an existing one, to replace responsible management, to discipline or terminate wrongdoers, to pay restitution, and to cooperate with the relevant government agencies;
7. the collateral consequences, including disproportionate harm to shareholders, pension holders, and employees not proven per-

²⁹ Jed S. Rakoff, *The Exercise of Prosecutorial Discretion in Federal Business Fraud Prosecutions*, in *CORRIGIBLE CORPORATIONS & UNRULY LAW* 173, 179 (Brent Fisse & Peter A. French eds., 1985) (noting prosecutorial discretion is governed by policies whose enforcement "is sometimes lax and sometimes idiosyncratic"). On the use of internal guidelines in the morally ambiguous realm of business fraud prosecutions, see generally *id.* at 173–86.

³⁰ These factors appear in the Thompson Memorandum, *supra* note 15, at 3 (citations omitted). Differences between the Thompson Memorandum and the McNulty Memorandum are noted.

³¹ This last clause—"including, if necessary, the waiver of corporate attorney-client and work product protection"—was not included in the McNulty Memorandum. McNulty Memorandum, *supra* note 16, at 4.

³² The McNulty Memorandum amended this factor so that it applies only to "pre-existing" compliance programs. *Id.*

- sonally culpable and the impact on the public arising from the prosecution;
8. the adequacy of the prosecution of individuals responsible for the corporation's malfeasance; and
 9. the adequacy of remedies such as civil or regulatory enforcement actions.³³

Under this framework, much turns on the corporation's "cooperation" with the government, including its willingness to identify the "culprits" on its payroll.³⁴ The Thompson and McNulty Memoranda also weigh a corporation's willingness to sanction and terminate individual employees:

[W]hile cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, *e.g.*, through retaining the employees without sanction for their misconduct or through providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.³⁵

Although one of the factors for determining whether a corporation is cooperative is whether it "appears to be protecting its culpable employees and agents,"³⁶ the Memoranda never define who is "culpable" or what constitutes "protection." With the definition of those terms left largely to the interpretation of prosecutors, corporations struggle to "appear" compliant with shifting definitions.

The Thompson Memorandum superseded a very similar memorandum, the Holder Memorandum, which had been in force since June 16, 1999.³⁷ A small but significant change between the two Memoranda affects the mandatory nature of the considerations, the necessity of waiver, and the use of DPAs. The Holder Memorandum did not instruct prosecutors to reason backward from every crime committed in the corporate context to consider whether charges might be brought against corporations. The Thompson Memorandum, how-

³³ Thompson Memorandum, *supra* note 15, at 3.

³⁴ *Id.* at 6.

³⁵ McNulty Memorandum, *supra* note 16, at 11; *see also* Thompson Memorandum, *supra* note 15, at 7-8 (providing similar instructions).

³⁶ McNulty Memorandum, *supra* note 16, at 11; Thompson Memorandum, *supra* note 15, at 7.

³⁷ Memorandum from Eric Holder, Deputy Attorney Gen., to U.S. Attorneys, Regarding Bringing Criminal Charges Against Corporations (June 16, 1999), *available at* <http://www.usdoj.gov/criminal/fraud/policy/Chargingcorps.html>. The Holder Memorandum drew on the Sentencing Guidelines and the U.S. Attorney's Manual to set forth standards for the prosecution of corporate entities. *Id.* It made few waves at the time, but it is the immediate precursor to the Thompson Memorandum and the genesis of the current charging policy and the government's emphasis on cooperation.

ever, applies to all federal prosecutions of corporations.³⁸ By replacing loose guidelines with strict requirements, it altered the regulatory atmosphere:

Only if the crime in question was serious, pervasive in the organization and senior management had at least some culpability, either active or by virtue of willful blindness, did federal prosecutors generally consider a corporate indictment under the Holder Memorandum. Now, it seems that every case of corporate crime is a candidate for Thompson Memo analysis and potentially a corporate charge.³⁹

As a result, “prosecutors automatically invoke the Thompson Memorandum criteria at the outset of every investigation and immediately start ‘grading’ a company on its performance in the government’s investigation.”⁴⁰

Charging standards such as those set forth in the Thompson and McNulty Memoranda operate, in principle, to constrain prosecutorial discretion. In practice, however, prosecutors actually increase their autonomy to regulate and sanction corporate behavior by enforcing factors through another “semi-automatic response”⁴¹—the deferred prosecution agreement.

D. Deferred Prosecution Agreements

Deferred prosecution agreements are a form of probation, or “pretrial diversion,” according to which the government agrees to suspend charges against a company so long as the company fulfills every obligation set forth in a detailed “contract.”⁴² These agreements are a compromise intended to split the difference between declination of prosecution and a guilty plea. Their popularity with prosecutors has increased since the public opprobrium that followed the Arthur

³⁸ See U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL § 162 (2006), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00162.htm (“In conducting an investigation, determining whether to bring charges, and negotiating plea agreements, prosecutors *must* consider the [nine Thompson Memorandum] factors” (emphasis added)). The Holder Memorandum afforded prosecutors more discretion in deciding whether to apply the factors, whereas the Thompson Memorandum requires that they be considered “*in every matter* involving business crimes.” McLucas et al., *supra* note 17, at 632 n.43 (citing Thompson Memorandum, *supra* note 15, at 1).

³⁹ Mary Jo White, *Corporate Criminal Liability: What Has Gone Wrong?*, in 2 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 815, 820 (PLI Corp. Law & Practice, Course Handbook Series No. B-1517, 2005).

⁴⁰ *Id.*

⁴¹ *Id.* at 825.

⁴² In some cases, the government enters into “non-prosecution agreements” (NPAs), under which it agrees not to file charges at all if certain conditions are met. See, e.g., Nonprosecution Agreement—Boeing Co. (June 30, 2006), available at <http://www.corporatecrimereporter.com/documents/boeing2.pdf>.

Andersen case, in which the conviction of the accounting firm was ultimately overturned,⁴³ but not before the stigma of indictment drove it out of business entirely.

Entry into a DPA ordinarily will coincide with the filing of formal criminal charges against a company, the suspension of Speedy Trial Act considerations,⁴⁴ and the tolling of the statute of limitations. Prosecutors agree not to pursue the charges and to dismiss them after a period of time (generally between one and two years) if the corporation honors all of the terms of the agreement.⁴⁵ In return, corporations undertake reforms, pledge active and complete cooperation with the ongoing investigation, and pay substantial civil penalties and victim restitution.⁴⁶ Companies will often be required to engage the services of a monitor or examiner during the diversion period to review and report on compliance efforts.⁴⁷ DPAs not only promise thorough cooperation but also include a version of allocution: a recitation of the alleged illegalities and acceptance of responsibility for them.⁴⁸ A corporation that has entered into an agreement with such admissions can scarcely defend against any future indictment, so signing a DPA means committing to ongoing cooperation.⁴⁹

⁴³ Arthur Andersen LLP v. United States, 544 U.S. 696, 698 (2005).

⁴⁴ See 18 U.S.C. § 3161(h)(2) (2000) (excluding from speedy trial requirement periods of delay “during which prosecution is deferred” pursuant to agreement between parties); FED. R. CRIM. P. 48(b) (authorizing court to dismiss indictment “if unnecessary delay occurs”).

⁴⁵ U.S. DEP’T OF JUSTICE, CRIMINAL RESOURCE MANUAL §§ 712–715 (1997) [hereinafter CRIMINAL RESOURCE MANUAL], available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/crm00000.htm.

⁴⁶ See Benjamin M. Greenblum, Note, *What Happens to a Prosecution Deferred? Judicial Oversight of Corporate Deferred Prosecution Agreements*, 105 COLUM. L. REV. 1863, 1875–80 (2005) (summarizing terms of several corporate DPAs).

⁴⁷ *Id.* at 1877–80.

⁴⁸ CRIMINAL RESOURCE MANUAL, *supra* note 45, § 713 (stating that acceptance of responsibility forms part of deferral process).

⁴⁹ As the court noted in a recent decision concerning the withdrawal of attorneys’ fees from KPMG employees: “Anything the government regards as a failure to cooperate . . . almost certainly will result in the criminal conviction that KPMG has labored so mightily to avoid, as the admissions that KPMG now has made would foreclose a successful defense.” *United States v. Stein*, 435 F. Supp. 2d 330, 350 (S.D.N.Y. 2006). Acknowledging guilt is also complicated for corporations engaged in parallel civil proceedings, particularly because the allocution takes place on the government’s terms. In practice, corporations may admit wrongdoing in DPAs that, in the corporation’s view, never actually took place. As a result, corporate employees under oath in subsequent civil depositions may be forced to deny elements of the factual recitation in the DPA in order to testify truthfully, exposing themselves to powerful cross-examination, and the corporation to potentially extensive civil liability.

DPA's themselves are not a new device,⁵⁰ but they were rarely pursued in corporate criminal cases until the Thompson Memorandum encouraged their use as an alternative to indictment.⁵¹ In the last four years, DOJ has entered into twice as many DPAs as it did over the previous ten years.⁵² Current DPAs also have features that did not appear in earlier iterations, such as the waiver of attorney-client privilege,⁵³ the appointment of independent compliance monitors, the demand for business reforms subject to the direction and approval of DOJ, and the broad acknowledgment of wrongdoing.⁵⁴ Negotiation and implementation of these provisions allows the government to exercise a measure of control over personnel and business decisions. Mary Jo White, former U.S. Attorney for the Southern District of New York, has argued that the Thompson Memorandum factors are "being used by some prosecutors, not so much as factors in making their charging decisions, but as means to force companies to behave and reform themselves as the prosecutors, fashioning themselves as the new corporate governance experts, think they should."⁵⁵ DPAs increasingly include business restrictions that range well beyond the scope of the investigation, including terminating certain practices and products and restructuring management.⁵⁶

⁵⁰ The earliest corporate DPAs go back to the 1980s, but they were rare. See, e.g., *In re Prudential Secs. Inc.*, MDL No. 1005, 1995 WL 798907, at *8 (S.D.N.Y. Nov. 20, 1995) (early version of corporate DPA).

⁵¹ Thompson Memorandum, *supra* note 15, at 6.

⁵² Lawrence D. Finder & Ryan D. McConnell, *Devolution of Authority: The Department of Justice's Corporate Charging Policies*, 51 ST. LOUIS U. L.J. 1, 1 (2006); *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, CORP. CRIME REP., Dec. 28, 2005, <http://www.corporatecrimereporter.com/deferredreport.htm>. Agreements recently have been entered into with Bristol-Myers Squibb, KPMG, Monsanto, AIG, AmSouth Bancorp, AOL, Computer Associates, InVision Technologies, MCI, Symbol Technologies, Banco Popular, Merrill Lynch, PNC Financial Services, Prudential Securities, and Boeing, among others. Finder & McConnell, *supra*, at app.

⁵³ See *infra* Part III.B.

⁵⁴ Tables setting forth a comprehensive summary of post-Thompson Memorandum DPAs are available in Finder & McConnell, *supra* note 52, at 36–52. According to their summary, more than two-thirds of the DPAs since 2002 require a privilege waiver, and more than half impose a compliance monitor. *Id.* at 17.

⁵⁵ White, *supra* note 39, at 818. White, a forceful opponent of current corporate cooperation doctrine, actually conceived of the first (and much narrower) DPA for a corporate defendant in a 1994 settlement with Prudential Securities. *Id.*

⁵⁶ By way of example, the DPA between the government and Bristol-Myers Squibb made appointment of a board member contingent on the approval of the U.S. Attorney. See Deferred Prosecution Agreement—Bristol-Myers Squibb 3 (June 15, 2006) [hereinafter BMS DPA], available at <http://www.usdoj.gov/usao/nj/press/files/pdf/deferredpros.pdf>. Former Attorney General Eliot Spitzer, in his crusades against corporate crime in New York, also famously litigated "reforms" that ranged far beyond the correction of the abuses under investigation. In one case, he convinced a fund organization to reduce

DPA thus involve prosecutors in “corporate-wide behavior modification,” prescribing what is good corporate governance rather than just prohibiting wrongful conduct.⁵⁷ The agreements have grown increasingly ad hoc, and their provisions often “flunk the most elementary standards of business rationality.”⁵⁸ Consider the following description of an agreement between KPMG and prosecutors:

It requires KPMG to abandon numerous components of its tax practice; it imposes minimum thresholds of likelihood of success that must be met for KPMG to provide any client with an opinion supporting a tax position; it creates a mechanism for centralized review and approval of all significant tax opinions generated within the firm; it requires KPMG to implement and maintain a new compliance and ethics program; and it imposes an independent monitor on KPMG, for a period of at least three years, who has access to all firm records and personnel, powers to review compliance programs and personnel decisions, and duties to report regularly to the court and prosecutors.⁵⁹

To be sure, the widespread abuse of tax shelters at KPMG called for fundamental institutional change.⁶⁰ But through the DPA mechanism, the government involved itself directly in management decisions, in personnel issues, and even in determining which employees would be indemnified for legal fees arising from the investigation.⁶¹ Perhaps the most circular provision of the agreement allows KPMG to continue its separate engagement to audit DOJ’s own financial statements because the company’s agreement to the terms of the DPA rendered them a “responsible contractor.”⁶²

The government made a similar bid for a degree of management control when it negotiated a DPA with Computer Associates, the New York-based software giant. The company came under investigation

mutual fund fees as part of the settlement of unrelated charges. BROOKE A. MASTERS, *SPOILING FOR A FIGHT: THE RISE OF ELIOT SPITZER* 166–68 (2006).

⁵⁷ Baker, *supra* note 7, at 334.

⁵⁸ Richard A. Epstein, *The Deferred Prosecution Racket*, WALL ST. J., Nov. 28, 2006, at A14 (querying whether “any firm [can] act decisively with a government mole in its midst”).

⁵⁹ Buell, *supra* note 18, at 490 (citation omitted). For the agreement itself, see Letter from David Kelly, U.S. Attorney for the S. Dist. of N.Y., to Robert S. Bennett, Counsel to KPMG LLP (Aug. 26, 2005) [hereinafter KPMG DPA], available at <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf>. On January 3, 2007, prosecutors dropped the pending charges against KPMG because of its compliance with the DPA. Carrie Johnson, *Charge Against KPMG Dropped; Firm Cooperated over Tax Shelters, Prosecutors Say*, WASH. POST, Jan. 4, 2007, at D1.

⁶⁰ See Kara Scannel, *Ten More KPMG Executives Indicted over Shelters*, WALL ST. J., Oct. 18, 2005, at C4 (describing breadth of tax shelter scandal at KPMG).

⁶¹ See *infra* Part IV.B.

⁶² KPMG DPA, *supra* note 59, ¶ 21.

for its “35-day month” reporting practices that had led to \$2.2 billion in prematurely booked revenue.⁶³ In September 2004, the company entered into a DPA that demanded various remedial steps and a payout of \$225 million in compensation to shareholders.⁶⁴ Those steps were in addition to broad personnel changes that Computer Associates had already undertaken in response to the alleged misconduct, including the appointment of an interim chief executive officer, a new chief operating officer, a new chief financial officer, a new head of worldwide sales, and a new general counsel, as well as the termination of several other officers and employees.⁶⁵ The DPA also required Computer Associates to name a former SEC commissioner to the board of directors, to add two new independent directors, and to reorganize both the Finance Department (appointing a new controller, chief accounting officer, and financial controller for each primary business function) and the Internal Audit Department.⁶⁶ To oversee these changes, the government imposed a new Compliance Committee and a new Disclosure Committee and required enhanced corporate governance procedures and a comprehensive ethics program.⁶⁷ Moreover, the DPA precluded Computer Associates from asserting attorney-client or work product privilege as to requests by the FBI, the SEC, or the United States Attorney’s Office.⁶⁸ The waiver applied to any documents, information, records, or testimony that the agencies might request that were related to the underlying misconduct or to legal advice given contemporaneously with it.⁶⁹

When Bristol-Myers Squibb was investigated for conspiring to commit securities fraud arising out of “channel-stuffing” (enticing wholesalers to buy and hold quantities of prescription drugs),⁷⁰ the government elicited a DPA requiring a series of corporate reforms.⁷¹ The agreement called for the appointment of a government-approved

⁶³ Superseding Indictment at 7–21, *United States v. Kumar*, Cr. No. 04-846 (E.D.N.Y. June 28, 2005) (alleging “systemic, company-wide practice of falsely and fraudulently recording and reporting . . . revenue”); Alex Berenson, *Computer Associates Restates Timing of \$2.2 Billion in Sales*, N.Y. TIMES, Apr. 27, 2004, at C1 (reporting Computer Associates’s restatement of \$2.2 billion in revenue).

⁶⁴ Deferred Prosecution Agreement at 7–13, *United States v. Computer Assocs. Int’l, Inc.*, Cr. No. 04-837 (E.D.N.Y. 2004) [hereinafter *Computer Associates DPA*], available at <http://www.usdoj.gov/dag/ctff/chargingdocs/compassocagreement.pdf>.

⁶⁵ *Id.* at 3.

⁶⁶ *Id.* at 8–10.

⁶⁷ *Id.*

⁶⁸ *Id.* at 4–5.

⁶⁹ *Id.*

⁷⁰ BMS DPA, *supra* note 56, app. A, at 1 (statement of facts).

⁷¹ *Id.* These required reforms were in addition to a series of remedial actions that Bristol-Myers Squibb had already undertaken, which included payment of \$450 million in fines and restitution. *Id.* at 2–3.

board member,⁷² the adoption of specified internal controls,⁷³ the engagement of an independent monitor approved by DOJ,⁷⁴ and the endowment of a chair at Seton Hall University School of Law (the prosecuting U.S. Attorney's alma mater⁷⁵) dedicated to business ethics and corporate governance.⁷⁶ The U.S. Attorney also participated in a meeting of independent members of the Bristol-Myers Squibb board at which board members discussed ousting the CEO, just one day before the full board voted for dismissal.⁷⁷

E. Executive Arrogance in the Enron Era

Each of these cases of corporate fraud warranted investigation and enforcement. The financial devastation still being wrought fifteen years after the adoption of the organizational Sentencing Guidelines makes clear that shareholders and employees of public corporations require strong protections. The means employed, however, extend to new forms of supervision, ratcheted up through an accretive process without sufficient attention to the underlying policy goals. Infamous implosions like Enron and WorldCom inspire prosecutorial zeal that spills over onto small corporate failures, potentially benign practices, and cases in which the technical guilt of individual employees is open to question.

When firms such as Reliant Energy⁷⁸ and Milberg Weiss⁷⁹ refuse to agree to the terms set forth by the government or decline to waive

⁷² *Id.* at 3.

⁷³ *See, e.g., id.* at 7–8 (requiring corporate officers to meet quarterly with auditor prior to scheduled quarterly analyst call).

⁷⁴ *Id.* at 3.

⁷⁵ U.S. Attorney's Office, Dist. of N.J., Christopher J. Christie: United States Attorney, <http://www.justice.gov/usao/nj/about/usa.html> (last visited Jan. 8, 2007).

⁷⁶ BMS DPA, *supra* note 56, at 6 (“[The] position shall include conducting one or more seminars per year on business ethics and corporate governance . . . that members of BMS’s executive and management staff, along with representatives of the executive and management staffs of other companies in the New Jersey area, may attend.”).

⁷⁷ Brooke A. Masters, *Bristol-Myers Ousts Its Chief at Monitor’s Urging; Dolan Had Led Firm Since 2001*, WASH. POST, Sept. 13, 2006, at D1.

⁷⁸ Reliant Energy Services was indicted in April 2004 for the manipulation of California’s energy markets. The indictment alleged that Reliant drove up the price of electricity by shutting off its power generation to create the false appearance of a shortage. Indictment at 5–6, *United States v. Reliant Energy Servs., Inc.*, No. CR 4-125 (N.D. Cal. Apr. 8, 2004). In the press release announcing the indictment, a member of the Corporate Fraud Task Force stated that the government “expects every corporation to comply scrupulously with the law, to have internal systems that effectively identify criminal conduct committed by its employees, to disclose promptly to the government any such criminal conduct, and to cooperate fully in our investigations.” Press Release, Dep’t of Justice, *Reliant Energy Services, Inc. and Four of Its Officers Charged with Criminal Manipulation of California Electricity Market* (Apr. 8, 2004), available at http://www.usdoj.gov/opa/pr/2004/April/04_crm_223.htm (quoting Christopher A. Wray, Assistant Attorney General

attorney-client privileges, they become defendants. Because virtually no company will risk indictment, prosecutors have come to expect compliance with every government demand. When Merrill Lynch entered into its settlement agreement with the government in September 2003, subsequent to Arthur Andersen's indictment, a DOJ official compared the two firms and commented: "There's a right way and a wrong way to respond when the government comes knocking at your door."⁸⁰ Similarly, when KPMG representatives failed to hit the moving target of complete cooperation in one attempt to negotiate a DPA, the U.S. Attorney declared: "Let me put it this way. I've seen a lot better from big companies."⁸¹ "To ensure that a company does not become that 'rare' case resulting in a corporate indictment with all of its attendant negative consequences," Mary Jo White explains, "a company must not poke the government in the eye by declining any of its requests or suggestions"⁸²

and member of Corporate Fraud Task Force) (internal quotation marks omitted). Reliant claimed that it in fact disclosed its conduct to the government, agreed to a settlement with the Federal Energy Regulatory Commission (FERC), and assisted in making evidence available to investigators. Nevertheless, Reliant and the government failed to reach a DPA. According to the company, the shortfall in the negotiations was the company's refusal to concede that the conduct constituted a criminal offense. See *Reliant Indicted for Manufacturing California Energy Crisis*, ENV'T NEWS SERV., Apr. 9, 2004, <http://www.ens-newswire.com/ens/apr2004/2004-04-09-03.asp> (quoting prosecutor describing company as "uncooperative" and company spokesperson responding that company was cooperative but would not agree that conduct was criminal).

⁷⁹ Milberg Weiss was indicted for making \$11 million in undisclosed payments to three named plaintiffs in securities class actions. First Superseding Indictment at 23, *United States v. Milberg Weiss Bershad & Schulman LLP*, No. 5-587(A)-DPP (C.D. Cal. May 18, 2006). The firm refused to sign the DPA that the government proposed, see Julie Creswell, *U.S. Indictment for Big Law Firm in Class Actions*, N.Y. TIMES, May 19, 2006, at A1 (describing circumstances of indictment), and posted a statement on its website calling the demand for waiver of attorney-client privilege a "derogation of one of the bedrock principles of American law." Statement by Milberg Weiss Bershad & Schulman LLP (May 18, 2006), <http://www.milbergweissjustice.com/ourstatements.php>.

⁸⁰ John R. Emshwiller & Ann Davis, *Merrill Takes Enron Responsibility*, WALL ST. J., Sept. 18, 2003, at A3 (quoting Assistant Attorney General Christopher Wray) (internal quotation marks omitted).

⁸¹ *United States v. Stein*, 435 F. Supp. 2d 330, 348 (S.D.N.Y. 2006).

⁸² White, *supra* note 39, at 820–21. The Andersen case itself provides a classic example of the game of chicken in which some prosecutors and corporations have engaged. While criminal charges were under consideration, the accounting firm had voluntarily taken a number of remedial steps: It reported the destruction of documents relating to Andersen's work at Enron, terminated the partner responsible for orchestrating the destruction, attempted to cooperate with the government's investigation, and even made voluntary efforts to compensate some Enron creditors and plaintiffs with \$750 million. Kurt Eichenwald, *Enron's Many Strands: The Accountants; Miscues, Missteps and the Fall of Andersen*, N.Y. TIMES, May 8, 2002, at C1. Nevertheless, prosecutors were insistent that Andersen had failed to acknowledge the seriousness of the charge, in part because Andersen had been involved in earlier investigations (including as Waste Management's auditor), and the government therefore perceived the company as on its last chance. As a

The Thompson and McNulty Memoranda focus on cooperation for its own sake—in the sense of obedience to the demands of regulators—rather than on the development and enforcement of constructive norms of corporate conduct. The government’s routine threats of indictment also ignore the “minimal sufficiency principle” of effective regulation, which contemplates placing inducements in the foreground and holding sanctions in reserve.⁸³ When the government, as in the negotiation of the KPMG DPA, objects to individual severance packages,⁸⁴ redrafts internal memoranda,⁸⁵ instigates the termination of particular employees,⁸⁶ and pressures firms into changing the terms of indemnification agreements,⁸⁷ the “law-abiding selves” that exist within profit-driven business executives may no longer be motivated to assist with compliance.⁸⁸ The unilateral nature of DPAs ignores the possibility for persuasion rather than punishment. The government controls the interpretation of all the terms of the agreement, including what fulfills the requirement of cooperation and who counts as a culpable employee. Corporations, as a result, hold only the low cards in DPA negotiations, and individual employees are not even dealt in.

result of a prosecutorial posture widely regarded as “unusually aggressive,” negotiations broke down, the indictment of the firm effectively destroyed it, and the Enron victims thereby lost an opportunity to recoup \$750 million. *See id.* (describing investigation and indictment of Andersen).

⁸³ *See* AYRES & BRAITHWAITE, *supra* note 9, at 19 (arguing for “minimal sufficiency principle”—one technique for producing compliance that regulated entity does not view as solely function of extrinsic controls—because “the more sanctions can be kept in the background, the more regulation can be transacted through moral suasion, the more effective regulation will be”).

⁸⁴ *See Stein*, 435 F. Supp. 2d at 347–48 (noting that KPMG considered generous severance packages to be “a ticking bomb” because “the [U.S. Attorney’s Office] was unhappy that rich severance packages had been given to senior executives”).

⁸⁵ *Id.* at 346.

⁸⁶ *Id.* at 347.

⁸⁷ *Id.* at 352–53 (describing government pressure designed to force KPMG to “consider departing from its long-standing policy of paying legal fees and expenses of its personnel”).

⁸⁸ “Corporate actors are not just value maximizers—of profits or of reputation”; they are concerned as well “to do what is right, to be faithful to their identity as a law-abiding citizen, and to sustain a self-concept of social responsibility.” AYRES & BRAITHWAITE, *supra* note 9, at 22. Ayres and Braithwaite have further described the mixed motives of corporate executives:

Some corporate actors will only comply with the law if it is economically rational for them to do so; most corporate actors will comply with the law most of the time simply because it is the law; all corporate actors are bundles of contradictory commitments to values about economic rationality, law abidingness, and business responsibility. Business executives have profit-maximizing selves and law-abiding selves, at different moments, in different contexts, the different selves prevail.

Id. at 19.

II

THE SHIFT TO INDIVIDUAL CULPABILITY

The advent of compelled “partnering” with the government to avoid wholesale indictment of corporations coincides with a shift to retail prosecution of individuals. Using individuals as the currency to purchase a corporate deferral, however, runs contrary to the original purpose of DPAs. DPAs developed as a mechanism for resolving relatively minor cases without expending significant prosecutorial and judicial resources. They imposed a sanction less formal than probation on offenders who might benefit from supervision but did not merit prosecution. In current practice, by contrast, DPAs are used to settle significant cases of widespread harm, without judicial oversight of the terms of the agreements. Those terms include compelled cooperation and exposing individual agents to criminal liability and potentially severe sanctions. Since July 2002, regulators and prosecutors have obtained over one thousand convictions or guilty pleas⁸⁹ and levied billions of dollars in penalties in corporate fraud cases, but few corporate entities have been charged.

A. Focus on Employee Targets

The rapid increase in the use of DPAs stems in part from the government’s prosecution of the accounting firm Arthur Andersen. Although the revelations of abuses at Enron inspired the war on corporate crime and the launch of the Corporate Crime Task Force, the destruction by indictment of Enron’s auditor cautioned against charging business entities going forward. When the Supreme Court ultimately overturned Andersen’s conviction in *Arthur Andersen LLP v. United States*,⁹⁰ the opinion’s subtext admonished that not quite all is fair in the war on corporate crime. A unanimous Court held that the government had gone too far when it persuaded the trial judge that the law did not even require proof of Andersen’s criminal intent.⁹¹ The firm’s total demise despite its legal victory is the parable that informs many current charging decisions.⁹² As Joseph Grundfest stated when the decision was handed down:

⁸⁹ See Paul Davies & Kara Scannell, *Guilty Verdicts Provide ‘Red Meat’ to Prosecutors Chasing Companies*, WALL ST. J., May 26, 2006, at A1.

⁹⁰ 544 U.S. 696 (2005).

⁹¹ *Id.* at 706 (holding that jury instructions “failed to convey the requisite consciousness of wrongdoing”). For an overview of the legal issues in the *Andersen* case, see Buell, *supra* note 18, at 479–88.

⁹² On the heels of the indictment, before the trial had even begun, the \$9 billion company, with 28,000 employees, was “all but dead.” Eichenwald, *supra* note 82.

[T]o Andersen, the court's ruling doesn't matter, the original trial at which it was convicted didn't matter and the verdict at any coming trial won't matter.

Andersen was destroyed when it was indicted. No exoneration at trial and no ruling by the Supreme Court will cause it to rise, Lazarus-like, from the dead.⁹³

Prosecutors are justifiably reluctant to cause such extensive economic harm.⁹⁴ When DOJ announced the DPA with AOL, for example, it stated that the agreement was designed to "achieve[] a result that minimizes the collateral damage to shareholders and employees while imposing an appropriate punishment and protecting the rights of victims."⁹⁵

Following *Andersen*, three factors have converged to focus corporate criminal investigations on individual liability. First, the *Andersen* case itself has a running in *terrorem* effect that shifts the focus of both prosecutors and corporations to individual employee defendants.⁹⁶ Prosecutors frequently invoke *Andersen*, as DOJ officials did when comparing Merrill Lynch's acquiescence to the terms of a Non-Prosecution Agreement (NPA) to Arthur Andersen's earlier recalcitrance. The Enron Task Force Director stated, for example, that "[u]nlike Arthur Andersen before them, Merrill Lynch is to be commended for their responsible handling of this matter They have

⁹³ Joseph A. Grundfest, Op-Ed., *Over Before It Started*, N.Y. TIMES, June 14, 2005, at A23.

⁹⁴ See, e.g., Eric Holder, Op-Ed., *Don't Indict WorldCom*, WALL ST. J., July 30, 2002, at A14 ("[T]o ensure that even more innocent Americans are not harmed, prosecutors must not give in to the pressures of the day and feel compelled to indict more corporations simply because they can."); Kara Scannell, *Firms Are Getting Time to Clean up Their Acts: If Charge Could Be Deadly, Indictment Can Be Deferred as Violators Effect Change*, WALL ST. J., June 13, 2005, at C3 (noting that DPAs are "a popular choice for prosecutors seeking to punish bad corporate citizens without harming employees and shareholders"); James Comey, Deputy U.S. Attorney Gen., Statement at Justice Department News Conference (Sept. 22, 2004) (Lexis Nexis Media Transcripts) (stating that government has "no interest in swinging at a wrongdoer and knocking down thousands of innocent employees").

⁹⁵ Press Release, Dep't of Justice, *America Online Charged with Aiding and Abetting Securities Fraud; Prosecution Deferred for Two Years: Company Agrees to Cooperate with Investigation, Pays \$210 Million; Four Individuals Agree to Plead Guilty* (Dec. 15, 2004), available at http://www.usdoj.gov/opa/pr/2004/December/04_crm_790.htm (quoting Deputy Attorney General James B. Comey) (internal quotation marks omitted).

⁹⁶ See, e.g., Oesterle, *supra* note 3, at 475 ("Total capitulation to prosecutors by companies under threat of criminal sanction may be the only real business strategy left to save a financial firm's future."); Daniel Fisher & Peter Lattman, *Ratted Out: That Reassuring Corporate Attorney Who Asked You a Few Questions May Turn out to Be the Long Arm of the Law*, FORBES, July 4, 2005, at 49, 49 (noting that legacy of *Andersen* "lives on among fearful corporate executives and tough-talking prosecutors"); Grundfest, *supra* note 93 ("Andersen's demise did serve as a stern reminder to corporate America that prosecutors can bring down or cripple many of America's leading corporations simply by indicting them on sufficiently serious charges.").

done just what a company should do under such circumstances.”⁹⁷ In response to “the mere threat of indictment, [companies are] handing over internal documents, waiving the privilege that normally shields attorney-client communications and ratting out individual employees as targets for prosecution.”⁹⁸ Prosecutors, for their part, bolster their statistics by convicting individual defendants while avoiding the collateral consequences of the collapse of a big company and the potential embarrassment of postmortem corporate vindication.

Second, the Sarbanes-Oxley Act⁹⁹ heightens the vulnerability of individual employees. Provisions of the Act expand the definition of obstruction,¹⁰⁰ enhance potential penalties for individual criminal misconduct,¹⁰¹ and require that CEOs and CFOs of public companies personally certify financial statements filed with the SEC.¹⁰² By strengthening the enforcement power of prosecutors and adding charging options for obstruction, the law “increases the exposure of corporate managers and directors to criminal sanctions.”¹⁰³

Finally, the Thompson and McNulty Memoranda include two principles that have the effect of sharpening the focus on individual liability. In both Memoranda, the seventh enumerated charging consideration is the collateral consequences to innocent third parties and the public.¹⁰⁴ The eighth is “the adequacy of the prosecution of indi-

⁹⁷ Mary Flood, *Merrill Lynch Accepts Reforms: Firm Makes Deal to Avoid Charges*, HOUS. CHRON., Sept. 18, 2003, at 1 (quoting Leslie Caldwell, director of Enron Task Force) (internal quotation marks omitted).

⁹⁸ Fisher & Lattman, *supra* note 96, at 49.

⁹⁹ Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

¹⁰⁰ The Act includes a “Corporate Fraud Accountability” section that expressly criminalizes tampering with a record or otherwise impeding an official proceeding and imposes penalties of up to twenty years in prison for anyone who “alters, destroys, mutilates or conceals a record, document, or other object, or attempts to do so, with the intent to impair the object’s integrity or availability for use in an official proceeding.” *Id.* § 1102, 18 U.S.C. § 1512(c) (Supp. III 2003). The Act also imposes criminal liability on “[w]hoever knowingly alters, destroys, mutilates, conceals, covers up, falsifies, or makes a false entry in any record, document, or tangible object with the intent to impede, obstruct, or influence the investigation or proper administration of any matter within the jurisdiction of any department or agency of the United States.” *Id.* § 802, 18 U.S.C. § 1519.

¹⁰¹ *See, e.g., id.* § 903, 18 U.S.C. §§ 1341, 1343 (increasing maximum prison term for mail and wire fraud from five to twenty years).

¹⁰² *Id.* § 906, 18 U.S.C. § 1350.

¹⁰³ Geraldine Szott Moohr, *An Enron Lesson: The Modest Role of Criminal Law in Preventing Corporate Crime*, 55 FLA. L. REV. 937, 953 (2003). For a summary of the Sarbanes-Oxley provisions relevant to individual culpability, see Theodore V. Wells, Jr. et al., *Current Developments in the Government’s Corporate Prosecution Policy*, in 2 36TH ANNUAL INSTITUTE ON SECURITIES REGULATION 1023, 1027–28 (PLI Corp. Law & Practice, Course Handbook Series No. B-1456, 2004).

¹⁰⁴ McNulty Memorandum, *supra* note 16, at 4; Thompson Memorandum, *supra* note 15, at 3; *see also* Wells, *supra* note 103, at 1035 (explaining that Arthur Andersen’s down-

viduals responsible for the corporation's malfeasance."¹⁰⁵ Together, these principles encourage prosecutors to pursue individual wrongdoing. Both Memoranda, moreover, contain a directive to proceed against individual defendants even when corporate prosecution is deferred or when a guilty plea is entered for the entity.¹⁰⁶

B. *Inverted Entity Liability*

This new focus on individual employee liability inverts the concept of respondeat superior. Under the traditional doctrine, "principal" corporations can be convicted for virtually any crime committed by "agent" employees, officers, or directors who are acting within the scope of their employment and, at least in part, to benefit the corporation.¹⁰⁷ Because a corporation acts through individuals, it can be held liable for the collective knowledge of its employees.¹⁰⁸ The theory has been that culpability should be concentrated at the institutional level because of the diffusion of responsibility within organizations.¹⁰⁹ Entity liability is not uncontroversial, but it is generally understood that "[i]nstitutions influence people in ways that sometimes make it rational to blame institutions for what people do."¹¹⁰ Jennifer Arlen and Reinier Kraakman explain, moreover, that "corporate liability usefully enlists the firm in interdicting or deterring

fall was likely impetus for Thompson Memorandum's language suggesting consideration of innocent third parties).

¹⁰⁵ McNulty Memorandum, *supra* note 16, at 4; Thompson Memorandum, *supra* note 15, at 3.

¹⁰⁶ McNulty Memorandum, *supra* note 16, at 2 ("Only rarely should provable individual culpability not be pursued, even in the face of an offer of a corporate guilty plea or some other disposition of the charges against the corporation."); Thompson Memorandum, *supra* note 15, at 1 (same).

¹⁰⁷ *E.g.*, *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494–96 (1909) (upholding constitutionality of imposing criminal liability on corporation based on acts of its agents); *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 970–71 (D.C. Cir. 1998), (finding that corporation could be held criminally liable for employee's acts so long as employee had acted "with an intent (however befuddled) to further the interests of his employer"), *aff'd on other grounds*, 526 U.S. 398 (1999); White, *supra* note 39, at 817 ("If a single employee, however low down in the corporate hierarchy, commits a crime in the course of his or her employment, even in part to benefit the corporation, the corporate employer is criminally liable for that employee's crime.").

¹⁰⁸ *See United States v. Bank of New Eng.*, 821 F.2d 844, 856 (1st Cir. 1987) ("Corporations compartmentalize knowledge, subdividing the elements of specific duties and operations into smaller components. The aggregate of those components constitutes the corporation's knowledge . . .").

¹⁰⁹ For an analysis of the optimal distribution of liability between corporations and employees, see generally Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687 (1997).

¹¹⁰ Buell, *supra* note 18, at 491.

its wayward agents and assures that it fully internalizes the costs arising from its activities.”¹¹¹

It is not clear, however, that the converse is true. Do individuals sufficiently influence companies as large as KPMG to the extent that distributive justice is served by holding select midlevel employees accountable for widespread practices within the institution?¹¹² DPAs often require individuals to take on institutional failings, in concentrated form, in order to maintain the solvency of the corporation.¹¹³ The Thompson Memorandum actually directs prosecutors to look unfavorably on “attempts to shield corporate officers and employees from liability by a willingness of the corporation to plead guilty.”¹¹⁴ The reasoning seems to be that if corporate misconduct occurs, but the corporation is not to be indicted, some individuals must be held responsible in its stead.¹¹⁵ Corporations, moreover, can use deferred prosecution combined with individual culpability as a public relations tool to distance the corporation itself from the employee offenders.

C. *Individual Exposure and Unintended Consequences*

The focus on individuals converges with another phenomenon: It is increasingly the statements made during an investigation, rather than the alleged misconduct that triggered the investigation, that form the basis for criminal liability. To the extent that “cover-ups” displace underlying crimes,¹¹⁶ weight also shifts from the initial wrongdoing to

¹¹¹ Arlen & Kraakman, *supra* note 109, at 689.

¹¹² Cf. Lynn Sharp Paine, *Managing for Organizational Integrity*, HARV. BUS. REV., Mar.–Apr. 1994, at 106, 106 (“Rarely do the character flaws of a lone actor fully explain corporate misconduct.”).

¹¹³ See, e.g., Fisher & Lattman, *supra* note 96, at 49–50 (quoting former Assistant U.S. Attorney who observed that “[t]here was a time when companies would try to step up to the plate, even try to take a guilty plea to protect their individual employees . . . [n]ow it’s just the opposite”); William S. Laufer, *Corporate Prosecution: Cooperation and the Trading of Favors*, 87 IOWA L. REV. 643, 651–57 (2002) (criticizing practice of exchanging individual employee offenders for corporate leniency).

¹¹⁴ Thompson Memorandum, *supra* note 15, at 8; see also McNulty Memorandum, *supra* note 16, at 18 (“[P]rosecutors generally should not agree to accept a corporate guilty plea in exchange for non-prosecution or dismissal of charges against individual officers and employees.”).

¹¹⁵ Corporations and their individual agents do not, however, have interchangeable culpability. See GOBERT & PUNCH, *supra* note 6, at 282 (“Companies perforce act through individuals, but individuals also act through companies, and the criminal liability of the one should not preclude, or require, a prosecution of the other.”).

¹¹⁶ See Stuart P. Green, *Uncovering the Cover-Up Crimes*, 42 AM. CRIM. L. REV. 9, 36–37 (2005) (“[C]over-up cases are typically cheaper to prosecute, more comprehensible to the jury, and less subject to subtle nuances in proof.”); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 552 (2001) (noting that crimes such as false statements “can make criminal trials low-risk affairs for the government”). It is often difficult to prove accounting fraud beyond a reasonable doubt “to jurors whose heads are

the interaction between investigators and potential targets. Acts that are by themselves innocuous take on criminal significance because of the intense scrutiny that comes with cooperation. An employee may have a reasonable fear of prosecution that leads to evasive behavior later charged as obstructive, even though that employee may have been innocent of any wrongdoing prior to questioning.¹¹⁷

Deputizing corporate insiders has the intended result of producing more individual prosecutions, but there is reason to believe that it also has unintended consequences contrary to shareholders' best interests. First, corporate officers and board members may engage in additional wrongdoing to avoid detection and exposure to individual liability. Board members, for example, necessarily concern themselves not only with their fiduciary duties but also with their personal liability exposure. They may respond to the pressures of investigations with still more creative accounting¹¹⁸ and still fewer internal

swimming with GAAP, GAAS, FASB, SOPs, and the AICPA. On the other hand, even the laiest of laypersons can get his head around a lie or a destroyed document." Richard M. Strassberg et al., *Lawyers on Trial: Government Views Attorneys as 'First Line of Defense' Against Corporate Malfeasance*, N.Y. L.J., July 18, 2005, at 9, 12. Consider the case of Bruce G. Hill, the general counsel of a small Boston-based software company, Inso Corp., who was convicted on only one of two perjury charges for a false exculpatory statement but was found not guilty of the securities and wire fraud charges that had prompted the investigation in the first place. *Id.* Similarly, in a case in which four Merrill Lynch employees had been charged with aiding Enron's fraudulent accounting, the Fifth Circuit tossed out all of the conspiracy and wire fraud counts and left standing only the perjury and obstruction counts against a single Merrill Lynch defendant. *United States v. Brown*, 459 F.3d 509, 513 (5th Cir. 2006).

¹¹⁷ Members of the Supreme Court have recognized, for example, that the federal false statement statute, 18 U.S.C. § 1001 (2000), has the potential to "escalate completely innocent conduct into a felony." *Brogan v. United States*, 522 U.S. 398, 411 (1998) (Ginsburg, J., concurring) (quoting Transcript of Oral Argument at 36, *Brogan*, 522 U.S. 398 (No. 96-1579) (Solicitor General) (internal quotation marks omitted)); *see also* *United States v. Yermian*, 468 U.S. 63, 82 (1984) (Rehnquist, J., dissenting) (warning that majority's interpretation of § 1001 would "criminalize the making of even the most casual false statements so long as they turned out, unbeknownst to their maker, to be material to some federal agency function"). In *Brogan*, Justice Ginsburg noted with approval DOJ's policy against charging § 1001 violation in situations in which the suspect, during investigation, merely denies guilt in response to questioning by the government. 522 U.S. at 415 (Ginsburg, J., concurring) (citing U.S. DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL ¶ 9-42.160 (1997)).

¹¹⁸ Tom Kirchmaier & Mariano Selvaggi, *The Dark Side of 'Good' Corporate Governance: Compliance Fuelled Book-Cooking Activities* 13 (London Sch. Econ., Fin. Mkts. Group, Discussion Paper No. 559, 2006), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=895362 (concluding that higher audit intensity can "fuel managerial book cooking"); *see also* Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1369 (2006) ("Sanctioning first-order detection avoidance encourages 'second-order' detection avoidance. Sanctioning second-order encourages third. Sanctioning third encourages fourth. And so on.").

controls and records.¹¹⁹ Some individuals, moreover, may choose not to serve on boards at all in order to avoid exposure to personal liability:

Facing increased administrative responsibilities and costs as well as decreased nimbleness in managing companies that results from this imbalance of prosecutorial power, the most qualified candidates now often refuse board positions—a trend that hurts our markets by draining the most qualified human capital and thereby decreasing the efficiency of public corporations.¹²⁰

General counsels have not fared well themselves in the war on corporate crime, and they may also temper strong advocacy because of their own liability exposure.¹²¹ Thus, prosecutorial strategies meant in theory to improve corporate governance may in fact result in less, and less capable, oversight.

Second, given the scope of privilege waivers, deputizing corporate insiders to perform prosecutorial functions makes it difficult for employees to consult in good faith with counsel about compliance.¹²² A company's waiver of privilege extends to conversations between employees and corporate counsel that took place before the suspected wrongdoing even occurred.¹²³ As a result, employees who answer questions of company counsel, about any matter, are effectively building up evidence for unpredictable future criminal cases; waivers are so broad that it is as though employees are "speaking to prosecutors" every time they seek advice.¹²⁴ Over time, corporations will respond by excluding lawyers from the very situations in which competent legal advice might best be able to ensure compliance with the

¹¹⁹ See, e.g., Sanchirico, *supra* note 118, at 1360 ("Not knowing or caring to focus constant attention on whether any given set of notes will end up as, or lead to, damaging evidence, the individual too broadly refrains from recordation.").

¹²⁰ McLucas et al., *supra* note 17, at 641.

¹²¹ See, e.g., Strassberg et al., *supra* note 116 ("[T]he line between appropriate advice to limit or control the flow of information and obstruction of justice is exceedingly thin."). Computer Associates General Counsel Steven Woghin, for example, was indicted for, among other charges, advising some employees who later "failed to acknowledge" the thirty-five-day month accounting practice. See Information at 4, 10–11, 13, *United States v. Woghin*, No. 04 CR 847 (E.D.N.Y. Dec. 1, 2004).

¹²² See *Upjohn Co. v. United States*, 449 U.S. 383, 392 (1981) (stating that narrowing scope of attorney-client privilege "not only makes it difficult for corporate attorneys to formulate sound advice when their client is faced with a specific legal problem but also threatens to limit the valuable efforts of corporate counsel to ensure their client's compliance with the law").

¹²³ Laurie P. Cohen, *In the Crossfire: Prosecutors' Tough New Tactics Turn Firms Against Employees; As Sentencing Rules Stiffen, KPMG Axes Tax Partners, Won't Pay Their Legal Costs; What 'Cooperation' Entails*, WALL ST. J., June 4, 2004, at A1 (detailing KPMG's cooperation with prosecutors).

¹²⁴ George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 993 (2005).

law.¹²⁵ As one corporate attorney put it, “If you know the in-house lawyer is a mini-G-man, are you inviting him to important strategic meetings?”¹²⁶

Third, corporate cooperation doctrine may cause disloyalty within the corporation. The McNulty Memorandum states that a corporation’s cooperation in selecting targets of employee prosecution is “critical” because shared lines of authority, dispersed records and personnel, and the intervening promotion, transfer, or termination of culpable or knowledgeable employees all pose “obstacles” to a prosecutor determining for herself which individual is responsible for wrongdoing.¹²⁷ DPAs effectively deputize corporate counsel and auditors as government agents; corporations are expected not only to raise the hue and cry when misconduct occurs¹²⁸ but also to assist in identifying, apprehending, and prosecuting viable employee targets. The negotiation and implementation of DPAs thus tends to alter key relationships—not only between counsel and corporate clients but between management and employees as well.

Corporations have been expected not only to withdraw financial support from embattled employees but also to reveal individual defense strategies to prosecutors by reporting the documents that

¹²⁵ See McLucas et al., *supra* note 17, at 630 n.36 (summarizing survey of corporate counsel indicating that 96% found privilege facilitated their work as counsel and that 95% agreed that weakening it would “chill[] a client’s frank discussion of legal issues”) (citing EXECUTIVE SUMMARY: NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS SURVEY: THE ATTORNEY CLIENT PRIVILEGE IS UNDER ATTACK 2–3 (2005), available at [http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/\\$FILE/AC_Survey.pdf](http://www.nacdl.org/public.nsf/Legislation/Overcriminalization002/$FILE/AC_Survey.pdf)).

¹²⁶ Fisher & Lattman, *supra* note 96, at 50 (quoting Susan Hackett, senior vice president of Association of Corporate Counsel).

¹²⁷ McNulty Memorandum, *supra* note 16, at 7. DOJ officials have also stated that cooperation requires briefing the government on everything the corporation has learned in its internal investigations and bringing in “all the witnesses the government will need to figure out exactly what happened.” *Interview with United States Attorney James B. Comey Regarding the Department of Justice’s Policy on Requesting Corporations Under Criminal Investigation to Waive the Attorney Client Privilege and Work Product Protection*, U.S. ATT’YS’ BULL., Nov. 2003, at 1, 2 [hereinafter *Comey Interview*]. Cooperation, according to now–Deputy Attorney General Comey, means “telling the Government what the corporation knows about what happened, who did it, and how they did it.” *Id.*

¹²⁸ There are some analogies between this expectation and the role of the citizenry prior to the establishment of a robust corps of state prosecutors. See David A. Sklansky & Stephen C. Yeazell, *Comparative Law Without Leaving Home: What Civil Procedure Can Teach Criminal Procedure, and Vice Versa*, 94 GEO. L.J. 683, 688–89 (2006) (discussing nineteenth-century practice of hiring private prosecutors due to insufficient state resources); Daniel B. Yeager, *A Radical Community of Aid: A Rejoinder to Opponents of Affirmative Duties to Help Strangers*, 71 WASH. U. L.Q. 1, 30–31 (1993) (describing common law duty to report felonies). Of course, in this case, the “private attorneys general” in question are also the putative defendants.

employees request for use in their defense.¹²⁹ Internal investigations “often turn companies against the very executives and employees who are paid to act in the company’s best interests.”¹³⁰ The current investigative climate thus creates “conflict between the corporation and the individuals managing it or serving it.”¹³¹ Nor do employees always receive fair warning of the extent to which the corporation’s interests diverge from their own. When employees are questioned, they are generally offered the classic *Upjohn* warnings that advise them that corporate counsel represents the corporation,¹³² and that conversations and interviews are privileged only to the extent that the corporation chooses not to waive the privilege.¹³³ With the potent threat of liquidation pending, however, corporations must actively seek culpable employees; the hard truth is that nothing is internal, and the corporation’s and the employees’ interests are no longer aligned. That decline in the traditional loyalty relationships among employees, and between the corporation and its employees, is hardly an optimal condition for compliance or economic success.¹³⁴ As Ellen Podgor has

¹²⁹ Cohen, *supra* note 123 (describing measures taken by KPMG to satisfy expectations of prosecutors); see also Ellen S. Podgor, *White-Collar Cooperators: The Government in Employer-Employee Relationships*, 23 CARDOZO L. REV. 795, 803 (2002) (discussing conflicting interests in “information control” and noting that “[c]ooperation by either the employer or employee who is being investigated can disadvantage the other party in their defense”) (citing KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME* 6–8 (1995)); Vanessa Blum, *Justice Deferred*, LEGAL TIMES, Mar. 21, 2005, at 1 (discussing recent DPAs “requiring companies to assist in the prosecution of individual defendants”).

¹³⁰ McLucas et al., *supra* note 17, at 622.

¹³¹ *Id.* at 636; see also *Crime Without Conviction: The Rise of Deferred and Non Prosecution Agreements*, *supra* note 52 (“Ten years ago, it was—save the individuals and plead the corporation. Now, things have radically changed and it’s totally reversed. Now, the government has set up a system where it’s—save the corporation by sacrificing the individuals.” (quoting corporate defense attorney Theodore Wells)).

¹³² *Upjohn Co. v. United States*, 449 U.S. 383, 389, 394–95 (1981) (emphasizing, when upholding invocation of attorney-client privilege by corporation against government effort to obtain records of employee interviews, that corporation holds privilege and that “the employees themselves were sufficiently aware that they were being questioned in order that the corporation could obtain legal advice”). Corporate counsel that has been commandeered by the government may have an incentive to downplay *Upjohn* disclaimers because an employee concerned that her interests are not being served by corporate counsel will be less inclined to reveal damaging information and therefore less likely to earn the corporation coveted cooperation points under the Sentencing Guidelines.

¹³³ For an example of the minimal *Upjohn* and waiver warnings that employees receive prior to internal interviews, see *In re Grand Jury Subpoena*, 415 F.3d 333, 336, 340 (4th Cir. 2005), which describes “watered-down” *Upjohn* warnings provided by corporate counsel to AOL Time Warner employees.

¹³⁴ See JOHN HASNAS, *TRAPPED: WHEN ACTING ETHICALLY IS AGAINST THE LAW* 5–6, 59–84 (2006) (arguing that enforcement practices force violations of companies’ ethical responsibilities to employees who may be innocent); John Gibeaut, *Junior G-Men*, A.B.A. J., June 2003, at 46, 51 (“[C]orporate lawyers are particularly worried that Justice is trying to drive a wedge between companies and employees.”).

argued, “[p]lacing the employer and employee in an adversarial position, in an attempt to secure the benefits of cooperation, interferes with the overriding fiduciary employment relationship.”¹³⁵

Firms that cite loyalty to employees and resist government demands to produce them for prosecution may be penalized. When Milberg Weiss was indicted,¹³⁶ for example, the firm alleged that the government would not extend it a DPA because the firm refused to “make unfounded statements accusing its own partners of crimes and otherwise become an agent for the government.”¹³⁷ Furthermore, once employees are indicted, the government drives a wedge between them and their corporate employer, precluding advice or assistance from the company, and preventing confidential communication between the two parties.¹³⁸

By contrast, corporations that deliver their employees for prosecution are rewarded. Unlike Milberg Weiss, KPMG was able to secure a DPA by agreeing both to withdraw legal fees from employee defendants and to instruct employees who did retain counsel to focus on “law firms that were familiar with these types of proceedings and who understand that cooperation with the government was the best way to proceed.”¹³⁹ When KPMG pitched its cooperation to the government in negotiations for a DPA, it claimed that it told employees they would only have attorneys’ fees paid if they fully cooperated and pointed out that the corporation “took action” whenever prosecutors reported that an employee resisted an interview.¹⁴⁰ As a result, according to KPMG’s counsel, “current or former personnel who otherwise would not have cooperated did cooperate, and those who did not had their fees cut off and, in two instances, were separated from

¹³⁵ Podgor, *supra* note 129, at 803; *see also* Paine, *supra* note 112, at 112 (“A formal ethics program can serve as a catalyst and a support system, but organizational integrity depends on the integration of the company’s values into its driving systems.”).

¹³⁶ *See supra* note 79.

¹³⁷ John R. Wilke et al., *Milberg Indicted on Charges Firm Paid Kickbacks*, WALL ST. J., May 19, 2006, at A1.

¹³⁸ *See, e.g.*, McNulty Memorandum, *supra* note 16, at 11 (suggesting that providing information to employees pursuant to joint defense agreement cuts against finding corporation cooperative).

¹³⁹ *United States v. Stein*, 435 F. Supp. 2d 330, 345 (S.D.N.Y. 2006) (citation omitted). This might be viewed as the converse of the situation that arises when low-level drug defendants are represented by cartel lawyers. Those lawyers often are retained to protect the interests of the organization by preventing the defendant from providing information to the government, even if cooperation is in the best penal interests of the defendant. In the corporate cooperation context, employees may reveal or even create offenses by speaking to investigators, but they are compelled to speak in order to protect the corporation’s deferred prosecution agreement.

¹⁴⁰ *Id.* at 348–49.

the firm.”¹⁴¹ KPMG even adjusted the wording of an internal memorandum at the government’s request, informing employees that they could meet with government investigators without the assistance of counsel.¹⁴² When the government is involved in the fine points of drafting memoranda to employees, when it has pledged that it will examine any legal assistance to employees “under a microscope,”¹⁴³ and when it uses that inroad into corporate governance to expedite investigations, there may be little space left for integrated ethical management by the corporation itself.¹⁴⁴

Companies, furthermore, have little recourse if they disagree with the government about which employees are guilty of wrongdoing.¹⁴⁵ There is “no realistic choice but to cooperate fully with the government, even if evidence might later demonstrate that the government’s theories were legally infirm or that factual allegations couldn’t withstand cross-examination.”¹⁴⁶ The government, after all, did not ultimately sustain its case against Arthur Andersen, but the damage was long since done and the delayed vindication of a jury verdict or appellate ruling is cold comfort when a company is out of business. Because both the litigation costs and the public relations debacle of indictment can be fatal to corporations, especially in highly regulated industries, “they are often compelled to settle, even if it means taking positions contrary to their officers and employees,”¹⁴⁷ and even though “the case [is] largely settled before a court has weighed the first bit of evidence or tested a single legal theory.”¹⁴⁸ This is particularly problematic when the appropriate scope of an investigation,

¹⁴¹ *Id.* at 349.

¹⁴² *Id.* at 346–47 (“[T]he government’s purpose in demanding the supplement [to KPMG’s internal advisory memorandum to employees] was to increase the chances that KPMG employees would agree to interviews without consulting or being represented by counsel . . .”).

¹⁴³ *Id.* at 344.

¹⁴⁴ For a description of integrated ethical management and its potential for ensuring long-term compliance, see generally Paine, *supra* note 112.

¹⁴⁵ As former U.S. Attorney Mary Jo White has asked:

If a company, after thorough investigation, does not agree with the government on who is guilty of wrongdoing, what does the company do when the government is rattling its sabers about insufficient remediation? Throw overboard those the government believes have done wrong to save the company, or fight for them and try to convince the government that it is wrong? A horrible Hobson’s choice if a prosecutor is insistent.

White, *supra* note 39, at 822.

¹⁴⁶ Grundfest, *supra* note 93 (describing predicament facing American Insurance Group in 2005); see also Ken Brown et al., *Called to Account: Indictment of Andersen in Shredding Case Puts Its Future in Question*, WALL ST. J., Mar. 15, 2002, at A1 (pointing out that no major financial services firm has survived indictment).

¹⁴⁷ McLucas et al., *supra* note 17, at 639.

¹⁴⁸ *Id.* at 640.

legitimate targets, and the guilt or innocence of corporate actors are rarely clear-cut issues.¹⁴⁹ As the Supreme Court has acknowledged, corporate criminal behavior “is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct.”¹⁵⁰

III

THE SOLUTION IS ALSO THE PROBLEM

The foregoing discussion of how DPAs are leveraged to build cases against employee defendants raises the question of whether corporate cooperation doctrine violates individual constitutional protections, a topic discussed in detail in Part IV. Before turning to that issue, this Part analyzes how DOJ’s policies evolved as they did and suggests that current practices illustrate the counterproductive effects of using the blunt instrument of federal criminal law to address regulatory problems.

Part of the answer lies in the sheer enormity of the problem of corporate fraud. The harm is great, the charges are complex, and government resources are stretched thin. Given these challenges, the government’s commandeering of internal corporate investigators at first appears sound.¹⁵¹ Indeed, the organizational guidelines were adopted in part on the theory that strong private corporate compliance efforts would augment limited government resources.¹⁵² Unrav-

¹⁴⁹ On the fluid boundaries of white collar criminal conduct, see William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1883 (2000), who notes that “[w]hite-collar crime is very different from street crime [i]n white-collar cases it is often clear that the defendant did *something*; what isn’t clear is whether what the defendant did amounts to fraud,” and Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 BUFF. CRIM. L. REV. 165, 180–81 (2004), who observes that “[i]n some cases, neither prosecutors nor courts know whether the conduct at issue is encompassed by the criminal law,” as “[w]hether conduct is criminal can depend on the actor’s state of mind, the egregiousness of the conduct and resulting harm, and is sometimes a matter of degree” (footnotes omitted).

¹⁵⁰ *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 441 (1978) (discussing behavior proscribed by Sherman Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1–7 (1976))).

¹⁵¹ As former Attorney General Richard Thornburgh reportedly stated:

You’re trying to get every edge you can on those people who are devising increasingly more intricate schemes to rip off the public, hiring the best lawyers, providing the best defenses.

So you’re constantly pushing the edge of the envelope out to see if you can get an edge for the prosecution.

Jim McGee, *War on Crime Expands U.S. Prosecutors’ Powers: Aggressive Tactics Put Fairness at Issue*, WASH. POST, Jan. 10, 1993, at A1.

¹⁵² See Win Swenson, *The Organizational Guidelines’ “Carrot and Stick” Philosophy, and Their Focus on “Effective” Compliance*, in THE GOOD CITIZEN CORPORATION, *supra* note 23, at 27, 34 (stating that policy of organizational sentencing guidelines is “interactive”

eling the threads of an intricate corporate fraud scheme without extensive cooperation is also a daunting challenge, and a direct approach to potential employee cooperators may be constrained by ethical rules prohibiting contact with employee witnesses without the consent of the company.¹⁵³ In the KPMG tax shelter case, for example, before trial had even begun, government discovery materials included millions of pages of documents, plus “transcripts of 335 depositions and 195 income tax returns.”¹⁵⁴ It is simply impossible for federal agents to analyze that volume of material independently or to complete a timely investigation without borrowing from internal compliance reviews.¹⁵⁵ That enforced sharing is fine as far as it goes; the government needs to rely on existing internal reports, and corporations are accustomed to assisting in investigations by providing records and information.¹⁵⁶ Recently, however, prosecutors have attempted to keep pace with corporate defendants by asking for a great deal more, seeking to increase the efficiency and affordability of

and purpose is for limited government enforcement resources and efforts to be “augmented by the potentially highly effective efforts of companies themselves”).

¹⁵³ See, e.g., *United States v. McDonnell Douglas Corp.*, 132 F.3d 1252, 1253, 1257 (8th Cir. 1998) (upholding district court’s protective order prohibiting government attorneys from engaging in ex parte communications with defendant’s current employees).

¹⁵⁴ *United States v. Stein*, 435 F. Supp. 2d 330, 362 (S.D.N.Y. 2006) (citing Declaration of Michael Anderson ¶¶ 24, 27, 38–39, 41, *Stein*, 435 F. Supp. 2d 330 (No. 05-CR-0888)); see also, e.g., *Computer Associates DPA*, *supra* note 64, at 4 (“CA’s internal investigation was conducted with the assistance of a forensic accounting team . . . and involved more than 100 interviews and the review of hundreds of thousands of pages of documents and e-mails.”).

¹⁵⁵ Deputy Attorney General James Comey has acknowledged that prosecutors must rely on the work of internal investigators:

Some internal investigations cost millions of dollars and analyze hundreds of thousands of documents. Federal prosecutors don’t have funds for that, and would be unable to replicate that work. They can, however, work with a report of such an internal effort in order to conduct a thorough and complete Government investigation.

Comey Interview, *supra* note 127, at 4; see also Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 373 (2003) (observing that complex corporate fraud investigations require enormous “investment of time, money, and personnel” and that investigators need knowledge of “inner workings” of corporation and “day-to-day interactions among key players”); Pamela H. Bucy, “Carrots and Sticks”: *Post-Enron Regulatory Initiatives*, 8 BUFF. CRIM. L. REV. 277, 313 (2004) (noting that regulators rely on insiders to provide specific information about corporate wrongdoing and are “condemned to play catch up” without such information).

¹⁵⁶ See A.B.A. PRESIDENTIAL TASK FORCE ON THE ATTORNEY-CLIENT PRIVILEGE, TASK FORCE REPORT, MAY 2005, at 14 (2005), available at <http://www.abanet.org/buslaw/attorneyclient/materials/hod/report.pdf> (stating that seeking corporate cooperation is legitimate practice to extent that it primarily involves “providing relevant documents and information other than privileged communications and attorneys’ litigation work product”).

investigations by gaining access to the entire range of work done by corporate counsel and auditors.¹⁵⁷

A. *Problematizing the Private Enforcement Analogy*

In order to meet the challenges of corporate fraud investigations, the government has borrowed, reflexively, from a model of civil regulatory partnership and grafted it onto the quite different circumstances of federal criminal law enforcement.¹⁵⁸ In the short view, “partnering” with internal investigators as a solution to the high costs and slow reaction times associated with corporate criminal investigations seems both efficient and desirable. Hybrid public/private enforcement, after all, is often praised for producing superior results. Jody Freeman has argued that there is no purely public or purely private realm, only negotiated relationships between public and private actors, who together can produce aggregate accountability through horizontal negotiation.¹⁵⁹ “Private attorneys general” have deep historical roots,¹⁶⁰ and, “[a]lthough the government’s prosecutorial capacity has grown considerably since the nineteenth century, the gap between rule prescription and enforcement remains large enough to allow for a significant nongovernment role.”¹⁶¹

¹⁵⁷ See Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 902 (2006) (noting that DOJ policy on waiver “was intended to promote efficiency and costs savings”).

¹⁵⁸ See, e.g., CRIMINAL DIV., U.S. DEP’T OF JUSTICE, 2004 ANNUAL REPORT 30 (2004), available at <http://www.usdoj.gov/criminal/CRMAAnnualReport2004.pdf> (touting “flexible and innovative approaches” to enforcement that “strike the right balance between diligent enforcement and deterrence on the one hand, and proper incentives for companies to self report and cooperate on the other”).

¹⁵⁹ Jody Freeman, *The Private Role in Public Governance*, 75 N.Y.U. L. REV. 543, 547–48 (2000).

¹⁶⁰ See, e.g., LAWRENCE M. FRIEDMAN, CRIME AND PUNISHMENT IN AMERICAN HISTORY 29 (1993) (arguing that early American law enforcement “drew no clear lines between public and private”); David A. Sklansky, *The Private Police*, 46 UCLA L. REV. 1165, 1193–1229 (1999) (describing emergence of public policing and explaining that law enforcement has “never been an entirely public function”).

¹⁶¹ Freeman, *supra* note 159, at 662. A useful illustration of a successful public/private partnership in administrative law—including the motivation to self-regulate—comes from California’s Cooperative Compliance Program. Designated compliance officers from CAL-OSHA act “as problem solving consultants to the process rather than as mere enforcement agents.” *Id.* at 652. Many commentators hold out the FDA as another example of an agency that has developed a partnership with its regulated entities, particularly drug companies. The pharmaceutical industry uses “FDA approval” as a marketing tool, as a defense, and as evidence of due diligence:

Just as the drug companies have learned that it can be to their interest to cooperate with the FDA, so too has the FDA learned that overly aggressive measures to secure compliance can backfire and lead to counter-measures by the industry to evade controls and to continue legally questionable practices.

The literature on successful regulatory partnerships between external and internal enforcement suggests that there can and should be joint gains from trade, that the self-interest of the corporation and the incentive for compliance can intersect,¹⁶² and that it is possible to “harness[] private capacity to serve public goals.”¹⁶³ Nevertheless, the civil regulatory partnership model does not function properly, and in fact may create distortions, when it is imported into the realm of individual criminal prosecutions.

First, the adversarial criminal process is fundamentally different from the administrative context, both because the stakes of individual liberty are uniquely high, and, paradoxically, because the thorough oversight of which parties can avail themselves in the administrative state does not exist in criminal investigations. Rachel Barkow points out that “[a]ll agency proceedings—formal or informal, rulemaking or adjudication—are subject to extensive judicial review.”¹⁶⁴ Administrative agencies, moreover, “must give reasons if they change course from case to case, and there must be support for the agency’s decision in the administrative record.”¹⁶⁵ In the context of federal criminal law enforcement, by contrast, there is “no structural separation of adjudicative and executive power, and defendants have no right to a formal process or internal appeal within the agency.”¹⁶⁶

Although the FDA has now established that it is prepared to take on large companies when required, it also appreciates that there are times when a less confrontational approach can be more effective. . . . [T]he FDA exemplifies a ‘mature’ regulatory agency which has arrived at what has been called a form of ‘ascendancy’ through the judicious combination of compliance and deterrence strategies.

GOBERT & PUNCH, *supra* note 6, at 308.

¹⁶² For example, in the administrative law arena, Jody Freeman has argued:

Even if, consistent with rational actor theory, private actors are motivated only by self-interest, they might nonetheless have something to offer the regulatory process; conceivably, they could contribute to an effective and accountable regulatory regime.

. . . To some extent, informal agreements, norms, market mechanisms, third party oversight, and even formal contract, could conceivably augment accountability. While these complementary measures may not satisfy everyone, surely they are worth exploring—and without an appreciation of public/private interdependence they remain invisible.

Freeman, *supra* note 159, at 638.

¹⁶³ *Id.* at 549.

¹⁶⁴ Rachel E. Barkow, *Separation of Powers and the Criminal Law*, 58 *STAN. L. REV.* 989, 1022–23 (2006).

¹⁶⁵ *Id.* at 1023.

¹⁶⁶ *Id.* at 1025. Oversight is further limited because when prosecutors draw on private resources, the natural check on overreaching provided by the “costliness of investigations, combined with real budgetary limits” is eliminated. McLucas et al., *supra* note 17, at 639. Once prosecutors have commandeered private attorneys to investigate a corporation at its own cost, they have “no incentive to hold back on some investigations that would other-

A second hindrance to hybrid criminal enforcement is the cultural and experiential orientation of prosecutors.¹⁶⁷ Prosecutors, by nature and necessity, are adversarial; they do not have the administrative expertise to pursue regulatory goals or fashion settlements that enable economic growth while meeting those goals. But commanding the private sector is a quick fix for the challenges of prosecuting the complex and numerous manifestations of corporate criminality. The tactic is also “successful” in that it increases the indictment statistics—fines imposed and convictions obtained—that the government currently uses to measure its progress in the “war on corporate crime.”¹⁶⁸ Defendant corporations, in their own way, seek immediate gratification as well, keeping one eye on the quarterly report¹⁶⁹ and another on the public relations implications of investigation and indictment.¹⁷⁰

The government’s strategy of immediately threatening an indictment also lacks the flexibility necessary for an effective regulatory partnership. Successful models for combining internal corporate compliance and external government regulation tend to avoid such rigidity.¹⁷¹ Ian Ayres and John Braithwaite, for example, have proposed “tit-for-tat (TFT) enforcement,” according to which “the regulator refrains from a deterrent response as long as the firm is

wise be unproductive, and the government has nearly unlimited opportunity—with a very low threshold for cost-effectiveness—to find misconduct.” *Id.*

¹⁶⁷ See, e.g., Julie R. O’Sullivan, *The Federal Criminal “Code” Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 674 (recognizing “adversarial orientation, selection, and training” of prosecutors).

¹⁶⁸ See *supra* notes 9–10 and accompanying text. On the difficulty of measuring the deterrence impact of white collar crime prosecutions, see Daniel C. Richman & William J. Stuntz, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 615 (2005), which notes that DOJ’s annual *Performance and Accountability Report* “doesn’t even pretend to measure the effect of its fraud or corruption prosecutions on crime rates in those areas” and “simply recites numbers of convictions and amounts of recoveries and fines.”

¹⁶⁹ For example, the culture at Enron was famously intolerant of employee dissent and so single-mindedly focused on profit that, twice a year, the lowest fifteen percent of each group of employees was summarily replaced. PETER C. FUSARO & ROSS M. MILLER, *WHAT WENT WRONG AT ENRON* 51–52 (2002) (discussing “rank and yank” cycle at Enron); MIMI SWARTZ WITH SHERRON WATKINS, *POWER FAILURE: THE INSIDE STORY OF THE COLLAPSE OF ENRON* 59 (2003) (describing six-month review as cross between “star chamber” and “fraternity rush”).

¹⁷⁰ AYRES & BRAITHWAITE, *supra* note 9, at 115 (“Large corporations have an almost obsessive desire to prevent their dirty linen from being washed in public.” (citation omitted)).

¹⁷¹ *Cf. id.* at 110–16 (arguing that government-enforced self-regulation by industries is more flexible than direct government regulation and could prove more effective at preventing corporate malfeasance).

cooperating.”¹⁷² TFT involves escalating enforcement within the give-and-take of a cooperative relationship,¹⁷³ whereas the government’s reactive posture in corporate fraud prosecutions—immediate escalation from suspected violation to a potentially fatal indictment—lacks flexibility and is ill-suited to creating a cooperative relationship.

Although the optimal level of deterrence necessary to address private crimes like corporate fraud is contested,¹⁷⁴ as is the deterrent impact of compliance programs themselves,¹⁷⁵ there is reason to question whether compelled cooperation hinders enforcement. Commandeering internal investigations ultimately may prove to be a misguided policy, one that causes more problems than it solves. Because it has become standard practice for the government to ask for waivers and disclosures, and because statements made during investigations often form the only basis for criminal culpability, some corporations have limited internal investigations to pare down the amount of potential misconduct and proprietary information that must be revealed to the

¹⁷² *Id.* at 19, 21. Tit-for-tat (TFT) also improves information flow, which diminishes when investigators adopt an adversarial posture during their initial interaction with a firm: “Where inspectors walk into a workplace with the demeanor of a tough law enforcer, they get little information. Where they walk in with the demeanor of a friendly persuader, they get the information that can empower them as tough enforcers.” *Id.* at 34; see also Freeman, *supra* note 159, at 647 (“Even when firms expect to receive nothing more than the favorable exercise of enforcement discretion in return for voluntary compliance with a self-regulatory program, this is a significant benefit with implications for accountability.”).

¹⁷³ See BRENT FISSE & JOHN BRAITHWAITE, *CORPORATIONS, CRIME & ACCOUNTABILITY* 140–45 (1993) (suggesting “pyramid” model of enforcement escalating from warnings to prosecution). Ayres and Braithwaite likewise explain that room for escalation, with persuasion forming the base of the “enforcement pyramid,” is a key element of a successful strategy of mutual cooperation:

Defection from cooperation is likely to be a less attractive proposition for business when it faces a regulator with an enforcement pyramid than when confronted with a regulator having only one deterrence option. This is true even where the deterrence option available to the regulator is maximally potent.

Actually, it is especially true where the single deterrence option is cataclysmic.

AYRES & BRAITHWAITE, *supra* note 9, at 36. Here, indictment generally proves fatal, and with no degrees of fault, the private sector has no “room for improvement” and little to gain from public oversight. Cf. Buell, *supra* note 18, at 502 (noting that when institutional fault is imposed, “introspection within institutions is an adaptive behavior that can be critical to the success and, after failure, the recovery of firms”).

¹⁷⁴ See, e.g., Donald C. Langevoort, *Monitoring: The Behavioral Economics of Corporate Compliance with Law*, 2002 COLUM. BUS. L. REV. 71, 113–14 (noting that legal system is unlikely to be “particularly adept at determining optimality” and suggesting—given “the indeterminacy of adequate monitoring systems within any given firm”—setting bar for any affirmative monitoring requirement “at a moderate height”).

¹⁷⁵ See Kimberly D. Krawiec, *Cosmetic Compliance and the Failure of Negotiated Governance*, 81 WASH. U. L.Q. 487, 510 (2003) (“[L]ittle evidence exists at all concerning the effectiveness of internal compliance structures as a means to reduce socially harmful conduct . . . [T]he evidence that does exist is decidedly mixed, with many of the most methodologically sound studies indicating the lack of effectiveness of such structures.”).

government.¹⁷⁶ The punishment paradigm socializes corporations to seek avenues of resistance,¹⁷⁷ and cosmetic compliance programs may overlook ordinary housekeeping and thus produce minimal damaging evidence.¹⁷⁸ It is hardly a robust ethical standard “to aspire to get through the day without being indicted.”¹⁷⁹ But as Ayres and Braithwaite found in their analysis of corporate compliance, “[w]hen punishment rather than dialogue is in the foreground of regulatory encounters, it is basic to human psychology that people will find this humiliating, will resent and resist in ways that include abandoning self-regulation.”¹⁸⁰ A more nuanced approach, one that draws not only on the practice but also on the theory of hybrid enforcement,¹⁸¹ might capitalize on management’s concern with good corporate citizenship itself.¹⁸²

¹⁷⁶ See, e.g., Lorraine Woellert, *Justice Softens Investigation Guidelines*, BUSINESSWEEK.COM, Dec. 13, 2006, http://www.businessweek.com/bwdaily/dnflash/content/dec2006/db20061213_615165.htm (“[C]orporate higher-ups reportedly have refused to cooperate with company lawyers in internal investigations, making it harder for businesses to get to the roots of fraud.”).

¹⁷⁷ AYRES & BRAITHWAITE, *supra* note 9, at 20 (“A strategy based mostly on punishment fosters an organized business subculture of resistance to regulation wherein methods of legal resistance and counterattack are incorporated into industry socialization.”).

¹⁷⁸ See Paine, *supra* note 112, at 106 (arguing that “integrity-based approach to ethics management” that focuses on bringing about lawful conduct is more effective than legal compliance model focused on narrow objective of “prevent[ing], detect[ing], and punish[ing] legal violations”).

¹⁷⁹ *Id.* at 111 (quoting Richard Breeden, former SEC Chairman); see also GOBERT & PUNCH, *supra* note 6, at 334 (arguing that to avoid reputational harm and litigation costs, companies should “install and enforce a system of self-regulation that not only meets, but exceeds, the bare minimum standards that the law demands” and should do so “guided by the spirit of the law and not just its letter”).

¹⁸⁰ AYRES & BRAITHWAITE, *supra* note 9, at 25; see also *id.* at 19–20 (“Punishment is expensive; persuasion is cheap. A strategy based mostly on punishment wastes resources on litigation that would be better spent on monitoring and persuasion.”).

¹⁸¹ There is an interesting and unexamined parallel between the debates about public/private partnership in corporate compliance and less reactive law enforcement approaches to street crime, such as community policing. Community policing, at its best, emphasizes openness, problem-solving, partnership, and attention to the causes and patterns of crime. See generally, e.g., MALCOLM K. SPARROW ET AL., BEYOND 911: A NEW ERA FOR POLICING 129–49 (1990) (discussing cooperative approaches to law enforcement).

¹⁸² AYRES & BRAITHWAITE, *supra* note 9, at 22–23 (citing research supporting view that management is concerned with compliance for its own sake and pointing to “evidence of economically irrational compliance with the law”); cf. Moohr, *supra* note 103, at 963 (“In the end, criminal laws may have a greater impact on reinforcing behavior of the good citizen than changing behavior of the bad citizen.” (citing Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, LAW & CONTEMP. PROBS., Summer & Autumn 1997, at 23, 46–47 (1997))).

B. *Infringing on the Private Attorney-Client Relationship*

The most obvious symptom of an unproductive entanglement of public and private enforcement, and the first place to look for opportunities to restore equilibrium, is the forced waiver of corporate attorney-client privilege. The Thompson Memorandum directed prosecutors to consider an entity's refusal to waive its attorney-client and work product protections as an indicator of noncooperation and therefore a factor weighing in favor of indictment.¹⁸³ Like many aspects of Thompson Memorandum procedure, this "consideration" became a virtual requirement, one that placed corporate counsel in an untenable position. How does counsel conduct an honest investigation knowing that all uncovered material will likely be ceded to the government?¹⁸⁴ How do company investigators effectively question employees when they cannot promise confidentiality?¹⁸⁵ With post-Enron prosecutorial tactics chilling internal investigations, from whom can executives seek advice about compliance and liability?¹⁸⁶ To put it in the terms employed by Arlen and Kraakman in their analysis of

¹⁸³ Thompson Memorandum, *supra* note 15, at 3 (stating that cooperation includes "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 corporate attorney-client and work product protection").

¹⁸⁴ See Mark Sherman, *Firms Swap Info for Immunity: Details of Lawyer-Employee Talks Help Stave Off Charges*, COLUMBIAN (Clark County, Wash.), June 13, 2005, at E1 ("What it does is creates [sic] an environment within a company where nobody can feel comfortable seeking legal advice from a lawyer because you can't have any assurance sometime down the road that the company isn't going to waive the attorney-client privilege." (quoting David Zornow, attorney for Computer Associates defendant Stephen Richards) (internal quotation marks omitted)).

¹⁸⁵ See David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147, 147 (2000) ("[A] wedge has been driven between senior management and other employees as corporations rush to meet the requests of federal prosecutors for 'cooperation.'").

¹⁸⁶ See Am. Coll. of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307, 321 (2003) ("The chilling effect on corporate self-scrutiny is obvious and there will be a serious adverse impact on the ability of corporations to prevent the occurrence of future violations of law, and of counsel to conduct meaningful and effective internal investigations."). According to Zornow & Krakaur:

By waiving privileges prematurely, the corporate client may be deprived of legal advice based on counsel's full development of the facts and an assessment of the strengths and weaknesses of the government's case. There is a danger that prolonged discussions with counsel about possible options will be construed later as an attempt to frustrate or even obstruct the government's investigation.

Zornow & Krakaur, *supra* note 185, at 157; see also Timothy P. Harkness & Darren LaVerne, *Private Lies May Lead to Prosecution*, NAT'L L.J., July 24, 2006, at S1 (noting "growing concern within the criminal defense bar that the government was effectively transforming company lawyers into an arm of the state").

mitigation rules, commandeering corporate counsel ensures that the “liability enhancement effect” of uncovering wrongdoing will exceed the “deterrent effect” of monitoring, investigating, and reporting misconduct.¹⁸⁷ Compelled waiver is thus fundamentally at odds with the purpose of the privilege, which is “to allow clients to receive the most competent legal advice from fully informed counsel,”¹⁸⁸ and to encourage “full and frank” communication with counsel.¹⁸⁹ Corporations instead have the incentive to minimize internal documents and refrain from giving advice that suggests even a hypothetical consideration of fraudulent conduct.¹⁹⁰

The policy of compelling waivers of attorney-client privilege has shifted as a result of political pressure. In November 2004, the Sentencing Commission amended the Guidelines commentary to bring it in line with the Thompson Memorandum, adding that waiver could be a prerequisite to cooperation credit if “necessary in order to provide timely and thorough disclosure of all pertinent information known to the organization.”¹⁹¹ In April 2006, in response to activism in the legal and business communities, the Commission unanimously agreed to delete that language, and the change took effect on November 1, 2006.¹⁹² Formal revision of the Sentencing Guidelines, however, does not alone make a pronounced difference. When it comes to assessing credit for assisting an ongoing investigation at sentencing, corporate cooperation is only as valuable as prosecutors say it is. Prosecutors are unlikely to agree that a corporation that has retained its privilege is cooperative in other respects, and a corporation will have an uphill battle arguing to a court that it has helped the government more than prosecutors are letting on. In most cases, moreover, the charging

¹⁸⁷ See Arlen & Kraakman, *supra* note 109, at 707–08.

¹⁸⁸ McLucas et al., *supra* note 17, at 629 & n.33 (citing, inter alia, United States v. United Shoe Mach. Corp., 89 F. Supp. 357, 358 (D. Mass. 1950) (“To induce clients to make [free and honest] communications, the privilege to prevent their later disclosure is said by courts and commentators to be a necessity.” (emphasis removed))).

¹⁸⁹ *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981); see also *id.* at 389–95 (stating that corporate attorney-client privilege extends to communications between all employees and corporate counsel made in course of assisting with internal investigation in order to facilitate “sound and informed advice”); White, *supra* note 39, at 821 (“[W]e want officers of a company to consult counsel freely, not be afraid to consult because whatever is said will surely be handed over to the government someday soon.”).

¹⁹⁰ See Fisher & Lattman, *supra* note 96, at 50 (quoting Stephen Saltzburg’s observation that notes of conversations seeking advice on compliance “could become a virtual admission of guilt if they indicate the employee recognized the potential illegality of his actions”).

¹⁹¹ U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) cmt. 12 (2004).

¹⁹² U.S. SENTENCING GUIDELINES MANUAL § 8C2.5(g) cmt. 12 (2006); *Vote by U.S. Sentencing Commission Said to Stem Erosion of Attorney-Client Privilege*, 74 U.S.L.W. No. 38, at 2598 (Apr. 11, 2006).

decision with respect to the corporate entity remains the critical juncture in the case, so there is little opportunity to advance such arguments.

A bipartisan coalition of interest groups¹⁹³ has also pressed DOJ to review and adjust its policies and practices relating to charging decisions, and a recent report issued by the American Bar Association concurred in that recommendation.¹⁹⁴ Ten former DOJ officials expressed similar views in a letter to the Attorney General on September 5, 2006, stating that the waiver policy expressed in the Thompson Memorandum discourages corporate personnel from consulting with counsel, thereby impeding “the lawyers’ ability effectively to counsel compliance with the law” and harming “not only the corporate client, but the investing public as well.”¹⁹⁵ According to the letter:

¹⁹³ The coalition includes the United States Chamber of Commerce, the Business Roundtable, the National Association of Manufacturers, the National Association of Criminal Defense Lawyers, the Association of Corporate Counsel, the American Chemistry Council, Business Civil Liberties, Inc., the Financial Services Roundtable, Frontiers of Freedom, the National Defense Industrial Association, the Retail Industry Leaders Association, the Washington Legal Foundation, and the American Civil Liberties Union. ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, REPORT OF AUGUST 2006, at 2 n.5 (2006) [hereinafter ABA REPORT], available at http://www.abanet.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf.

¹⁹⁴ *Id.* at 17; *Speakers Mull Fixes for Perceived Erosion of Corporations’ Attorney-Client Privilege*, 74 U.S.L.W. No. 19, at 2294–96 (Nov. 22, 2005). The American Bar Association told the Sentencing Commission that corporate employees would be less likely to consult counsel if their communications were not confidential, and that the breakdown in communications would make it more difficult for attorneys to counsel clients on how to comply with the law. See *ABA Assails Sentencing Guideline Comment on Waiver of Attorney-Client Privilege*, 74 U.S.L.W. No. 74, at 2119–20 (Aug. 30, 2005). On May 2, 2006, ABA President Michael Greco sent Attorney General Alberto Gonzalez a letter calling on him to revise the Thompson Memorandum as follows:

Attorneys within the Department shall not take any action or assert any position that directly or indirectly demands, requests or encourages an organizational entity or its attorneys to waive its attorney-client privilege or the protections of the work product doctrine. Also, in assessing an entity’s cooperation, attorneys within the Department shall not draw any inference from the entity’s preservation of its attorney-client privilege and the protections of the work product doctrine. At the same time, the voluntary decision by an organizational entity to waive the attorney-client privilege and the work product doctrine shall not be considered when assessing whether the entity provided effective cooperation.

Letter from Michael S. Greco, President, Am. Bar Ass’n, to Alberto Gonzales, Attorney Gen. (May 2, 2006), available at http://www.abanet.org/poladv/letters/attyclient/060502letter_acprivgonz.pdf.

¹⁹⁵ See *Former Federal Prosecutors Want Changes in DOJ Client Privilege Policy*, 75 U.S.L.W. No. 9, at 2131–32 (Sept. 12, 2006). The signatories to the letter include former Attorneys General Griffin Bell and Richard Thornburgh, as well as former Solicitors General Theodore Olson, Ken Starr, Walter Dellinger, and Seth Waxman.

[Prosecutors] can get the information [they] need[] in ways that do not impinge upon the attorney-client relationship—for example, through corporate counsel identifying relevant data and documents and assisting prosecutors in understanding them, making available witnesses with knowledge of the events under investigation, and conveying the results of internal investigations in ways that do not implicate privileged material.¹⁹⁶

On September 12, 2006, the Senate Judiciary Committee held a hearing on the Thompson Memorandum's impact on the right to counsel in corporate investigations,¹⁹⁷ and on December 7, 2006 Senator Arlen Specter proposed the Attorney-Client Privilege Protection Act,¹⁹⁸ which would broadly prohibit prosecutors from negatively assessing cooperation because a corporation asserted the privilege.

The McNulty Memorandum, issued on December 12, 2006, was DOJ's response¹⁹⁹ and an effort to forestall reintroduction of the

¹⁹⁶ *Id.* (internal quotation marks omitted).

¹⁹⁷ 152 CONG. REC. D942 (daily ed. Sept. 12, 2006) (noting conclusion of Judiciary Committee hearing); see also Transcript, *The Thompson Memorandum's Effect on the Right to Counsel in Corporate Investigations: Hearing Before the Sen. Judiciary Comm.*, Sept. 12, 2006 (LEXIS, Fed. News Serv.). A House Judiciary Subcommittee also explored the issue of forced waivers of attorney-client privilege at a hearing in March 2006. Molly McDonough, *Justice Memo Stirs up Another Storm*, A.B.A. J. E-REP., Apr. 28, 2006 (on file with the *New York University Law Review*).

¹⁹⁸ The legislation was not formally introduced, but Senator Specter brought it to the Senate floor and put its text in the Congressional Record. 152 CONG. REC. S11438-39 (daily ed. Dec. 7, 2006) (statement of Sen. Specter). The bill would prohibit prosecutors from "requesting that an organization waive its attorney-client privilege" or "conditioning any charging decision or cooperation credit on waiver or non-waiver of privilege, the payment of an employee's legal fees, the continued employment of a person under investigation, or the signing of a joint defense agreement." *Id.* at S11439. Among the findings in the bill is that "[w]aiver demands and other tactics of Government agencies are encroaching on the constitutional rights and other legal protections of employees." *Id.* Senator Specter introduced the legislation on January 4, 2007. *Sen. Specter Continues Efforts to Force DOJ to Stop Seeking Corporate Waiver of Privilege*, 75 U.S.L.W. No. 28, at 2435 (Jan. 30, 2007).

¹⁹⁹ On October 21, 2005, DOJ had issued another memorandum, the McCallum Memorandum, which was initially greeted as an attempt to address objections to compelled waiver. The Memorandum, however, merely orders a district-by-district review of the policy and requests that line prosecutors obtain approval before seeking waiver. The McCallum Memorandum provides:

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. . . . [E]ach United States Attorney or component head retains the prosecutorial discretion necessary, consistent with their circumstances, to seek timely, complete, and accurate information from business organizations.

Specter legislation in the 110th Congress. As detailed in Part I.C, the explicit reference to the willingness to waive privileges as evidence of corporate cooperation is deleted.²⁰⁰ Now, prosecutors must establish a “legitimate need” for privileged information and seek DOJ approval before requesting it.²⁰¹ Should a corporation decline a request for privileged information about legal advice it has received, prosecutors are directed not to consider that refusal against the corporation in making a charging decision.²⁰² As the McNulty Memorandum itself makes clear, however, there is little recourse for a defendant corporation pressed to waive privileges in violation of the stated policy. The document, with all of the remaining Thompson Memorandum factors intact, may continue to allow prosecutors to seek corporate submission without, in turn, creating any substantive or procedural rights with which corporations can defend themselves.²⁰³

Furthermore, the new policy still grants corporations credit for “voluntarily” waiving applicable privileges, which can make refusal just as costly.²⁰⁴ Although the McNulty Memorandum places new constraints on the circumstances under which prosecutors may request waivers, prosecutors rarely need to request them when they are empowered to make the bottom-line assessment of whether corporations qualify as “cooperative.”

Modifications to the Sentencing Guidelines and the Thompson Memorandum will provide some relief from the consequences of compelled cooperation, but only at the margins.²⁰⁵ The harmful side

Memorandum from Robert D. McCallum, Jr., Acting Deputy Attorney Gen., to U.S. Attorneys 1 (Oct. 21, 2005) [hereinafter McCallum Memorandum], available at http://lawprofessors.typepad.com/whitecollarcrime_blog/files/AttorneyClientWaiverMemo.pdf. In fact, observers expected that the McCallum Memorandum would simply expedite requests for privilege waivers by streamlining and institutionalizing the approval process. See McLucas et al., *supra* note 17, at 633 (“The McCallum Memo ensures that each U.S. Attorney across the country will be ready to strike with a demand for a privilege waiver.”).

²⁰⁰ McNulty Memorandum, *supra* note 16, at 4.

²⁰¹ *Id.* at 8–9.

²⁰² *Id.* at 10.

²⁰³ See *id.* at 19 (noting that memorandum provides internal guidance only and “is not intended to, does not, and may not be relied upon to create any rights, substantive or procedural, enforceable at law by any party in any matter civil or criminal”).

²⁰⁴ *Id.* at 10 (“Prosecutors may always favorably consider a corporation’s acquiescence to the government’s waiver request in determining whether a corporation has cooperated in the government’s investigation.”).

²⁰⁵ Other potential privilege reforms aimed at the counterproductive effects of current practices include the much-debated self-evaluative privilege and the recently proposed selective waiver, which might increase the likelihood of self-policing by offering the shelter of confidentiality. Selective waiver is controversial, with the majority of courts disfavoring retention of the privilege after any voluntary disclosure. See *In re Columbia/HCA Healthcare Corp. Billing Practices Litig.*, 293 F.3d 289, 302–04 (6th Cir. 2002) (rejecting selective waiver); Douglas R. Richmond, *The Attorney-Client Privilege and Associated*

effects of compelled cooperation and intrusion into the sphere of corporate governance via DPAs remain. Executive branch self-regulation in the form of nonbinding internal guidelines does little to address the coercive atmosphere of threatened entity indictment.

IV

THE CONSTITUTIONAL IMPLICATIONS OF COMMANDEERING INTERNAL INVESTIGATORS

In light of the government's control over internal investigators under the current paradigm of corporate criminal procedure, the constitutional safeguards that apply when public officials question targets should extend to the context of employee interviews. Against the backdrop of DPAs and the requirements of the Thompson and

Confidentiality Concerns in the Post-Enron Era, 110 PENN ST. L. REV. 381, 406–14 & n.198 (2005) (criticizing claims of selective waiver and collecting cases rejecting and recognizing such claims). A proposed amendment to the Federal Rules of Evidence, Proposed Rule 502, provides:

[A] disclosure of a communication or information covered by the attorney-client privilege 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.

Memorandum from David F. Levi, Chair, Standing Comm. on Rules of Practice and Procedure, to Advisory Comm. on Evidence Rules 5 (May 15, 2006), available at http://www.uscourts.gov/rules/Excerpt_EV_Report_Pub.pdf. The proposed rule was published for public comment on August 10, 2006. *Public Comment Sought, Hearings Set on Proposed New Privilege Waiver Rule*, 75 U.S.L.W. No. 9, at 2141 (Sept. 12, 2006). If ultimately enacted by Congress as required by the Rules Enabling Act, 28 U.S.C. § 2074(b) (2000), the rule would clarify the scope of waiver triggered by partial disclosure and the consequences of inadvertent disclosure in the contexts of the attorney-client privilege and work-product protection. More significantly, the rule would permit selective waiver in making disclosures to a federal office or agency in the exercise of its regulatory, enforcement, or investigative authority. *Change to Evidence Rule Would Allow Partial Waiver to Government Agencies*, 75 U.S.L.W. No. 1, at 2007 (July 4, 2006). The idea behind this revision is to prevent confidential materials turned over to DOJ from providing a template for civil litigation. See Finder & McConnell, *supra* note 52, at 17 (“Each pre-trial agreement contains a plaintiff’s lawyer’s dream . . .”). The proposed rule is stalled, however, and the provision on selective waiver of privilege is likely to be withdrawn in light of opposition from the plaintiffs’ bar as well as defense lawyers. *Selective Waiver of Privilege Likely to Be Pulled from Proposed Rule of Evidence*, 75 U.S.L.W. No. 30, at 2471, 2471 (Feb. 13, 2007).

Another approach for which some commentators have argued is the preservation of a self-evaluative privilege to protect aspects of internal investigations. *E.g.*, Ronald J. Allen & Cynthia M. Hazelwood, *Preserving the Confidentiality of Internal Corporate Investigations*, 12 J. CORP. L. 355, 379–81 (1987) (suggesting that self-evaluative privilege could result in more effective management and more law-abiding corporate behavior); Michael Goldsmith & Chad W. King, *Policing Corporate Crime: The Dilemma of Internal Compliance Programs*, 50 VAND. L. REV. 1, 30–32 (1997) (“The self-evaluative privilege is intended to promote confidential self-analysis and self-criticism; it often protects evaluations, recommendations for change, and internal reviews against requests for disclosure.”).

McNulty Memoranda, the Fifth Amendment should afford employees some protection against the adverse consequences of coerced disclosures, even when an agent of the corporation poses the actual questions.

The Self-Incrimination Clause of the Fifth Amendment provides that, “[n]o person . . . shall be compelled in any criminal case to be a witness against himself.”²⁰⁶ For Fifth Amendment protections to apply in the context of compliance investigations, two elements must be satisfied. First, statements taken under these circumstances must be compelled.²⁰⁷ Second, that compulsion must actually or functionally be brought to bear by a state actor.²⁰⁸ When internal investigators acting pursuant to a DPA pressure employees to answer questions under the threat of job loss, both of these requirements are met.

A. *Importing Garrity Immunity*

The Supreme Court has long recognized that not all compulsion takes place in police interrogation rooms under bright white lights.²⁰⁹ In a series of decisions beginning with *Garrity v. New Jersey*,²¹⁰ the Court described the conditional threat of job loss if a defendant does not waive the privilege against self-incrimination as coercive.²¹¹ In *Garrity*, investigators questioned the defendant police officers in connection with a state inquiry into the alleged fixing of traffic tickets.²¹² Before being questioned by state agents, each officer was warned that

²⁰⁶ U.S. CONST. amend. V.

²⁰⁷ *See, e.g.*, *Fisher v. United States*, 425 U.S. 391, 399 (1976) (“[T]he Court has never on any ground . . . applied the Fifth Amendment to prevent the otherwise proper acquisition or use of evidence which . . . did not involve compelled testimonial self-incrimination of some sort.”).

²⁰⁸ *E.g.*, *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 190 (1988) (“[D]eprivation of a federal right may be attributed to the State if it resulted from a state-created rule and the party charged with the deprivation can fairly be said to [be] a state actor.” (citing *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982))).

²⁰⁹ *See, e.g.*, *Blackburn v. Alabama*, 361 U.S. 199, 206 (1960) (stating, in due process case, that “blood of the accused is not the only hallmark of an unconstitutional inquisition”); *Chambers v. Florida*, 309 U.S. 227, 238–40 (1940) (holding that unconstitutional coercion, for due process purposes, can be mental as well as physical); *Bram v. United States*, 168 U.S. 532, 547–48 (1897) (extending prohibition on compelled testimony to both “physical” and “moral” compulsion).

²¹⁰ 385 U.S. 493 (1967).

²¹¹ *Id.* at 500 (holding that evidence received from police officers required either to answer questions asked in administrative inquiry or to risk losing their jobs was coerced and that subsequent use of it violated Fifth and Fourteenth Amendments). In *Garrity*, the police officers were actually advised that they had a Fifth Amendment right to refuse to answer, although to do so might mean job loss, *id.* at 494, whereas in the case of corporate investigations, employees generally are not apprised that they have Fifth Amendment rights at all.

²¹² *Id.* at 494.

any statements could be used against him, that he had the privilege to refuse to answer, but that if he refused, he would be subject to removal from office pursuant to New Jersey's forfeiture-of-office statute. Over their objections, some of the officers' answers were then used in their prosecutions for conspiracy to obstruct the administration of traffic laws. The Supreme Court held that admitting the statements into evidence against the defendants constituted coerced self-incrimination.²¹³ Subsequent cases have extended the privilege to preclude the admission of statements by defendants such as attorneys who were threatened with disbarment for refusing to submit to interrogation by regulators.²¹⁴

According to *Garrity*, the government may not threaten action that coerces a public employee into forfeiting her right against self-incrimination, and it must grant an employee immunity from the use of compelled statements in a subsequent criminal prosecution before she is required to answer questions about her public responsibilities.²¹⁵ “[W]hen a State compels testimony by threatening to inflict potent sanctions unless the constitutional privilege is surrendered, that testimony is obtained in violation of the Fifth Amendment and cannot be used against the declarant in a subsequent criminal prosecution.”²¹⁶ Put another way, a governmental threat of termination is coercive because it would be unconstitutional to carry out that threat as an adverse consequence of invoking the Fifth Amendment privilege.²¹⁷ There is no precise metric of coercion, and gauging it is a normative

²¹³ *Id.* at 500.

²¹⁴ *Spevack v. Klein*, 385 U.S. 511, 516 (1967) (“The threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion to make a lawyer relinquish the privilege.”). Although refusal to answer such questions can be grounds for disbarment, and failure to cooperate may likewise lead to the termination of a private employee, the use of statements elicited with the threat of these adverse consequences is constitutionally prohibited. See *Gardner v. Broderick*, 392 U.S. 273, 279 (1968) (“[The Fifth Amendment] does not tolerate the attempt, regardless of its ultimate effectiveness, to coerce a waiver of the immunity it confers on penalty of the loss of employment.”); *Uniformed Sanitation Men Ass’n v. Comm’r of Sanitation*, 392 U.S. 280, 284 (1968) (holding it unconstitutional for public employees to be presented with “choice between surrendering their constitutional rights or their jobs”); *cf. Minnesota v. Murphy*, 465 U.S. 420, 436 (1984) (holding that requiring probationer to “choose between making incriminating statements and jeopardizing his conditional liberty by remaining silent” would be impermissible).

²¹⁵ See *Uniformed Sanitation*, 392 U.S. at 284 (arguing that public employees required to answer questions “on pain of dismissal from public employment” would ordinarily be able to invoke their “right to immunity” in later proceedings).

²¹⁶ *Lefkowitz v. Cunningham*, 431 U.S. 801, 805 (1977).

²¹⁷ See Mitchell N. Berman, *Coercion Without Baselines: Unconstitutional Conditions in Three Dimensions*, 90 GEO. L.J. 1, 45 (2001) (“To challenge an offer on grounds that it constitutes coercion is . . . essentially to mount an anticipatory attack on the performing of the act that the state threatens.”).

inquiry about the appropriate level of government force.²¹⁸ But a starting point is the “moral baseline” entitlement to maintain self-protective silence without sanction.²¹⁹

The government’s current practices violate that baseline when conditional threats take the form: “If you do not waive Fifth Amendment protections, then you will be fired.” Corporations receive negative assessments of their own cooperation if they fail to terminate employees who invoke constitutional protections, and the threat of job loss is thus routine and real.²²⁰ With every statement in an internal investigation of potential significance, exposed employees, like the police officers in *Garrity*, are confronted with a version of the “cruel trilemma” of self-incrimination, perjury, or contempt:²²¹ They can admit wrongdoing and incriminate themselves (or others), falsely deny and in doing so commit a crime, or refuse to answer and face summary dismissal from their jobs.²²² An employee who confesses under such circumstances does so while between a “rock” and a “whirlpool.”²²³

The Court has recognized that job loss alone is a sufficiently severe sanction to coerce a statement within the meaning of the Fifth Amendment when an individual subjectively believes that she must speak or face job loss and when it is objectively reasonable for her to hold that belief. Employee statements obtained by proxy investigators in government-directed compliance investigations meet those

²¹⁸ Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 247 (2004) (“[C]ompulsion and incrimination are both continuous variables—questions of degree.”).

²¹⁹ See Máximo Langer, *Rethinking Plea Bargaining: The Practice and Reform of Prosecutorial Adjudication in American Criminal Procedure*, 34 AM. J. CRIM. L. (forthcoming 2006) (manuscript at 11–12 & n.33, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=931669) (defining baseline as “what is predicted or morally expected in a situation” and using this baseline concept to identify coercive plea proposals (citing ROBERT NOZICK, *SOCRATIC PUZZLES* 23–31 (1997) (defining baseline as “expected course of events”))).

²²⁰ See, e.g., Buell, *supra* note 18, at 505 (“In order to obtain the benefits of cooperation with the government, principally avoidance or mitigation of entity criminal sanctions, firms typically require such employee cooperation on pain of employment consequence (usually firing).”).

²²¹ *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964).

²²² See Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 447 (2000) (explaining that any move made by suspect in initial confrontation “inevitably increases his chances of conviction and thus worsens his position”).

²²³ Cf. *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967) (“Where the choice is ‘between the rock and the whirlpool,’ duress is inherent in deciding to ‘waive’ one or the other.”).

requirements.²²⁴ As one internal investigator involved in the WorldCom case recounted:

The company had pledged complete and full cooperation, and we were determined to get to the bottom of things. The employees had a choice. They were either going to give what we considered to be full and credible testimony and tell us everything they knew about what had gone on, or they were going to be fired right there, on the spot, and we were going to refer their names to every law-enforcement authority who would take our call. That is their choice.²²⁵

Nor is job loss the only economic sanction that constitutes coercion within the meaning of the Fifth Amendment.²²⁶ The Supreme Court has held, for example, that there is no “difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a [government] contractor.”²²⁷ In *Lefkowitz v. Turley*,²²⁸ state law provided that if a contractor refused to surrender his constitutional privilege before a grand jury, his existing state contracts would be canceled and he would be barred from future contracts with the State for five years.²²⁹ The Court saw no constitutional distinction between discharging an employee and depriving a contractor of the opportunity to secure public work; the Court’s focus was on the State’s effort to compel testimony by imposing some economic sanction as the price of invoking the Fifth Amendment right.²³⁰ Similarly, in *Lefkowitz v. Cunningham*,²³¹ dismissal from unpaid party offices that carried pres-

²²⁴ *United States v. Stein*, 440 F. Supp. 2d 315, 328 (S.D.N.Y. 2006) (citing *United States v. Waldon*, 363 F.3d 1103, 1112 (11th Cir. 2004)); *see also* *United States ex rel. Sanney v. Montanye*, 500 F.2d 411, 415 (2d Cir. 1974) (“[W]e [do not] perceive any consequence flowing from the fact that the threat in the present case was conveyed through a private employer, admittedly acting as an agent of the police, rather than through a person on the public payroll.”).

²²⁵ Panel Discussion, *Fordham University School of Law Center for Corporate, Securities & Financial Law: Bigger Carrots and Bigger Sticks: Issues and Developments in Corporate Sentencing*, 11 *FORDHAM J. CORP. & FIN. L.* 161, 179 (2006) (statement of Richard Breeden, former SEC Chairman and court-appointed monitor in WorldCom investigation). In describing his interactions with WorldCom employees during the internal investigation, Breeden further stated that he approached them as follows: “This is your Judgment Day, right here and right now, and you have to decide which side of the law you are going to be on. Are you going to cooperate fully and unburden your conscience or are you not?” *Id.*

²²⁶ *See Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977) (“[D]irect economic sanctions and imprisonment are not the only penalties capable of forcing the self-incrimination which the Amendment forbids.”).

²²⁷ *Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973); *see also id.* at 85 (“[A]nswers elicited upon the threat of the loss of employment are compelled.”).

²²⁸ 414 U.S. 70.

²²⁹ *Id.* at 71.

²³⁰ *Id.* at 83.

²³¹ 431 U.S. 801.

tige and political influence was deemed “inherently coercive”²³² because of the indirect economic consequences and reputational costs. If the threatened loss of contracting privileges or the removal from an unpaid office for failure to provide incriminating information can amount to coercion under *Garrity*,²³³ then so too should the proxy pressure to assist an ongoing public investigation or face termination of employment and the withdrawal of other forms of institutional support such as indemnification.²³⁴

Potential corporate defendants questioned in the course of an investigation commanded and largely directed by the government should be able to avail themselves of Fifth Amendment protections. That interviews might be initiated while a DPA is merely under negotiation does not change the analysis. It is clear, for example, that the Fifth Amendment protects against any disclosure in the course of an administrative investigation that an individual reasonably believes could be used against her (either directly or indirectly) in a criminal prosecution.²³⁵ An individual may not be forced to answer questions “in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.”²³⁶ And a witness may refuse to answer questions “unless and until he is

²³² *Id.* at 807.

²³³ These precedents are settled law, but they rest, to be sure, on a broad view of coercion. According to Alan Wertheimer’s theory of coercion, for example, an employee’s statement in the face of these threats may be nonvolitional because the external pressures diminish mental capacity, and because the fact that an employee gains nothing by confessing leaves reason to doubt that the choice to speak reflects her underlying preferences. See ALAN WERTHEIMER, *COERCION* 118, 171 (1987). In many cases, confession is a short-sighted and potentially irrational choice, given the likelihood of job loss in any event, and thus it is a decision that employees will not merely “regret having to make” but will actually “regret having made.” See *id.* at 171; *id.* at 118 (“Although it may be in the short-term interest of the one interrogated to confess (to stop the interrogation), it is typically no more in his long-term interest than a decision to refuse life-saving surgery because the pain is too much to bear.”).

²³⁴ Cf. Albert W. Alschuler, *A Peculiar Privilege in Historical Perspective: The Right to Remain Silent*, 94 MICH. L. REV. 2625, 2633 n.30 (1996) (“Some private sanctions . . . (for example, a discharge from employment), are more severe than some criminal sanctions (for example, unsupervised probation.)”); ABA REPORT, *supra* note 193, at 17–18 (arguing that withdrawing attorneys’ fees to punish uncooperative employees, manipulating joint defense agreements, and terminating employees who exercise right to silence is singularly coercive). The McNulty Memorandum ostensibly curtails this practice by stating that “[p]rosecutors generally should not take into account whether a corporation is advancing attorneys’ fees to employees or agents under investigation and indictment.” McNulty Memorandum, *supra* note 16, at 11.

²³⁵ *Kastigar v. United States*, 406 U.S. 441, 444–45 (1972).

²³⁶ *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973) (concerning two architects for New York State who refused to waive privilege in grand jury investigation into corruption in public contracting practices); see also *Malloy v. Hogan*, 378 U.S. 1, 11 (1964) (holding that privilege is available to witnesses in civil proceedings).

protected at least against the use of his compelled answers and evidence derived therefrom in any subsequent criminal case in which he is a defendant.”²³⁷

B. *Delegated Coercion*

The pressure at issue in internal investigations pursuant to DPAs is, of course, more attenuated than the public employee scenarios. When corporations themselves are compelling employee statements, but doing so at the behest of the government, the government’s wrongful threat is delegated.

The KPMG case again provides an example. KPMG’s DPA with the government contemplates total disclosure of the content of internal interviews, full and active cooperation in identifying culpable employees, and the production of all potential employee witnesses.²³⁸ In August 2006, a federal court in the Southern District of New York ruled that statements by former KPMG partners to the government were compelled.²³⁹ The court concluded that the government “both through the Thompson Memorandum and the actions of the USAO, quite deliberately coerced, and in any case significantly encouraged, KPMG to pressure its employees to surrender their Fifth Amendment rights.”²⁴⁰ Prosecutors, according to the court’s order, “brandished a big stick—[they] threatened to indict KPMG.” They also “held out a very large carrot”—they suggested KPMG could avoid indictment if it would deliver to the government “employees who would talk, notwithstanding their constitutional right to remain silent.”²⁴¹

That corporations are expected to “deliver” compliant employees, and even remove obstacles to their prosecution, is expressly set forth in the Thompson Memorandum, and the McNulty Memorandum likewise states that whether or not the government labels a corporation cooperative depends in part on “a corporation’s promise of support to culpable employees and agents.”²⁴² The Thompson and McNulty Memoranda also encourage prosecutors to consider whether a corporation has provided “information to the employees about the government’s investigation pursuant to a joint

²³⁷ *Turley*, 414 U.S. at 78.

²³⁸ KPMG DPA, *supra* note 59, ¶ 8.

²³⁹ *United States v. Stein*, 440 F. Supp. 2d 315, 332 (S.D.N.Y. 2006).

²⁴⁰ *Id.* at 337.

²⁴¹ *Id.* at 337–38.

²⁴² McNulty Memorandum, *supra* note 16, at 11; *see also* Thompson Memorandum, *supra* note 15, at 8 (directing prosecutors to consider corporation’s protection of its employees and facilitation of investigation when granting immunity from prosecution).

defense agreement.”²⁴³ In a June 2006 ruling in the KPMG case, the court reasoned that employee defendants “are entitled to a fair shake” but do not get one when the corporation acts as a proxy for the government.²⁴⁴ The requirement of “fairness in criminal proceedings,” the court wrote, “applies to the structure and conduct of the entire criminal justice system,”²⁴⁵ and the Thompson Memorandum violates this fairness principle by sanctioning “extrajudicial action by the government that deliberately or recklessly tilts the playing field against a criminal defendant.”²⁴⁶ There is an obvious objection to the KPMG court’s assertion that employees have a substantive due process entitlement to a public corporation’s resources—which may themselves represent ill-gotten gains from accounting irregularities—to defend themselves against fraud charges.²⁴⁷ As a descriptive matter, however, the practice of threatening to withdraw legal support from employees underscores the impropriety of the threat and thus the applicability of a different prong of the Fifth Amendment: the privilege against self-incrimination.

²⁴³ McNulty Memorandum, *supra* note 16, at 11; Thompson Memorandum, *supra* note 15, at 8.

²⁴⁴ *United States v. Stein*, 435 F. Supp. 2d 330, 357 (S.D.N.Y. 2006). Enterasys Networks executives recently obtained a continuance from a New Hampshire judge for an investigation into whether the government exerted undue influence to cut off their legal payments, which have since been restored. Lynnley Browning, *Judges Press Companies That Cut Off Legal Fees*, N.Y. TIMES, Apr. 17, 2006, at C1; Nathan Koppel, *U.S. Pressures Firms Not to Pay Staff Legal Fees*, WALL ST. J., Mar. 28, 2006, at B1.

²⁴⁵ *Stein*, 435 F. Supp. 2d at 359.

²⁴⁶ *Id.* at 362 n.159. It is not clear, however, that individual defendants possess the substantive due process right cited by the court “to obtain and use in order to prepare a defense resources lawfully available to [them], free of knowing or reckless government interference.” *Id.* at 361. Perhaps a better argument is that withdrawing financial support from employees unless they waive Fifth Amendment protections imposes an unconstitutional condition. *See, e.g., Frost & Frost Trucking Co. v. R.R. Comm’n*, 271 U.S. 583, 593 (1926) (rejecting State’s attempt to compel “surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold”). Mitchell Berman asks when “the principle that a state may not do indirectly what it is prohibited from doing directly” trumps “the principle that the greater power (to withhold the benefit entirely) includes the lesser power (to grant it on condition).” Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 U. CHI. L. REV. 795, 873 (1998). The answer, Berman suggests, turns on whether the government’s motives—in this case to shortcut the investigation—are legitimate. *Id.* at 874–75.

²⁴⁷ In those cases in which employees have a statutory right to attorneys’ fees under state law or pursuant to the explicit terms of the employment contract, the issue is more straightforward. Indeed, the revisions to the McNulty Memorandum now explicitly provide that “a corporation’s compliance with governing state law and its contractual obligations [to advance employee attorneys’ fees] cannot be considered a failure to cooperate.” McNulty Memorandum, *supra* note 16, at 11.

Because the prosecutors' conduct in obtaining a statement is a central consideration in the admissibility of a confession,²⁴⁸ the background noise of this government interference in an employee's potential defense matters a great deal. Although employee statements need not be "voluntary in the sense that [defendants] wanted to make them or that they were completely spontaneous, like a confession to a priest, a lawyer, or a psychiatrist,"²⁴⁹ nor can they result from improper interrogation. The prospect of self-financing a defense in a large fraud prosecution may be more disastrous than job loss,²⁵⁰ and to threaten it "infect[s]" employee statements with coercion.²⁵¹

The constitutional significance of derivative compulsion is controversial because its logical consequences, particularly in the employment context, could be "absurd."²⁵² Akhil Amar and Renee Lettow, for example, have argued that even in the case of government employment, "no impermissible Fifth Amendment compulsion exists from reasonable employment decisions because no one is compelled to work for the government in the first place."²⁵³ Amar and Lettow's argument, however, rests in part on the notion that employers are perfectly entitled to terminate employees when their failure to provide information raises doubts about their integrity.²⁵⁴ To be sure, the Fifth Amendment does not preclude employers from asking questions or from terminating employees who refuse to answer them. What it does prohibit, however, is the in-court use of any statements obtained from employees under threat of termination, if that threat is relayed from the government.²⁵⁵ Even Amar and Lettow acknowledge that

²⁴⁸ See, e.g., Allen & Mace, *supra* note 218, at 256 (suggesting that prevailing Fifth Amendment decision rule "locat[es] the various types of pressure along a continuum and us[es] social conventions to determine how much pressure is permissible").

²⁴⁹ Stein v. New York, 346 U.S. 156, 186 (1953).

²⁵⁰ See Bucy, *supra* note 155, at 312 ("Defending against criminal prosecution can be financially disastrous. Conviction likely will result in painful and publicly visible changes in lifestyle for the offender and her family.").

²⁵¹ Cf. Garrity v. New Jersey, 385 U.S. 493, 497 (1967) (holding that statements made under threat of job loss "were infected by the coercion" and could not "be sustained as voluntary").

²⁵² Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 868 (1995) (criticizing extension of Fifth Amendment privilege to economic coercion taking place outside of criminal justice system).

²⁵³ *Id.* at 906.

²⁵⁴ *Id.* at 868 (querying whether President Reagan could have "refused to appoint Oliver North to be Secretary of State—or fired him from his subcabinet White House office, for that matter—on the simple ground that North's invocation of the Fifth Amendment raised sufficient doubt about his worthiness to serve in a position of high honor and power").

²⁵⁵ Cf., e.g., Eugene Volokh, *Freedom of Speech and Workplace Harassment*, 39 UCLA L. REV. 1791, 1816–17 (1992) ("An antiharassment policy that a private employer creates

the pressure the government applies when it leverages its sovereign power in the employment context can pass a point beyond which it becomes an “unconstitutional condition.”²⁵⁶ The government’s demands for proprietary information and unprecedented intervention into employee relations in recent cases such as the KPMG prosecution pass this point.

Neither the doctrinal requirements nor the theoretical underpinnings of the Fifth Amendment privilege turn on a distinction between direct and delegated coercion. Converting the public pressure of a pending indictment into the private weight of professional and personal ruin does not permit the government to extract, and introduce in a courtroom, statements that employees otherwise would not have made. Given a broad reading, the doctrinal requirement of “compelled testimonial self-incrimination” encompasses employee statements in internal investigations commandeered by the government. The Supreme Court has noted that the Fifth Amendment requires a liberal construction to prevent “stealthy encroachment” on, and the “gradual deprecation” of, the rights it secures.²⁵⁷ The plight of individual employees within current corporate cooperation doctrine represents just such an erosion “by well-intentioned, but mistakenly, over-zealous executive officers.”²⁵⁸

Even the narrowest conceptions of the rationales that animate the Fifth Amendment support its extension to the government’s use of coerced employee statements in the war on corporate crime. The self-incrimination privilege itself is not beyond controversy: David Dolinko has systematically discredited its conventional rationales,²⁵⁹ and other commentators have noted that it emerged as a “procedural remedy for a substantive wrong,”²⁶⁰ that it is fundamentally ahistorical, and that it is a “mandate in search of a meaning.”²⁶¹ Because its

on its own would raise no First Amendment difficulties. But the fact that an employer has the right to do something to its employees does not mean that the government may force the employer to do it.”).

²⁵⁶ Amar & Lettow, *supra* note 252, at 906.

²⁵⁷ *Gouled v. United States*, 255 U.S. 298, 304 (1921); *see also* *Boyd v. United States*, 116 U.S. 616, 635 (1886) (suggesting that it is through “obnoxious thing in its mildest and least repulsive form” that “illegitimate and unconstitutional practices get their first footing”).

²⁵⁸ *Gouled*, 255 U.S. at 304.

²⁵⁹ *See generally* David Dolinko, *Is There a Rationale for the Privilege Against Self-Incrimination?*, 33 UCLA L. REV. 1063 (1986) (arguing that privilege is unsupported by viable principles and that it is mere “historical relic”).

²⁶⁰ William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1228, 1231 (1988).

²⁶¹ Amar & Lettow, *supra* note 252, at 922; *see also* John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791–1903*, 77 TEX. L. REV. 825, 908 (1999) (arguing that privilege is “an inconsistent combination of difficult-to-justify broad rules and a hodgepodge of miscellaneous exceptions”).

justification is unmoored, there are various points of entry for an argument to extend the privilege, including the *nemo tenetur prodere seipsum* provision of canon law that “no one is obliged to produce himself,” natural law theories of self-preservation, historical aversion to inquisitorial-based schemes (the anticoercion rationale), and intuitions about both autonomy and fair play in criminal proceedings.²⁶²

The example of the Computer Associates executives indicted exclusively for conversations with the law firm they retained to facilitate cooperation underscores the relevance of *nemo tenetur prodere seipsum*. Those defendants “produced themselves” for prosecution; they found themselves defending against obstruction charges only because of their efforts to achieve compliance. By submitting to interviews, they were “ensnared by ambiguous circumstances”²⁶³ and created some of the very offenses for which they later incurred liability. Respect for the instinct of self-preservation is perhaps the most enduring rationale for the privilege.²⁶⁴ It finds expression in Justice Goldberg’s “cruel trilemma” formulation from *Murphy v. Waterfront Commission*.²⁶⁵ Employees confronted in the course of compliance investigations governed by DPAs have no self-preservation option at

²⁶² See *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) (cataloguing various justifications for privilege).

²⁶³ See *Grunewald v. United States*, 353 U.S. 391, 421 (1957) (citation omitted) (noting that invocation of Fifth Amendment privilege does not imply guilt, as one of privilege’s “basic functions” is protection of innocent persons).

²⁶⁴ This rationale is enduring but not uncontroversial. Some courts and commentators find the justification self-evident. *E.g.*, *Brown v. Walker*, 161 U.S. 591, 637 (1896) (Field, J., dissenting) (“The essential and inherent cruelty of compelling a man to expose his own guilt is obvious to every one, and needs no illustration.”); R. Kent Greenawalt, *Silence as a Moral and Constitutional Right*, 23 WM. & MARY L. REV. 15, 36 (1981) (“[W]e may hesitate to say that someone has a moral duty to bring conviction and imprisonment upon himself.”). Others have not viewed the force of the trilemma argument as so clear-cut. It is a problem, Justice Scalia wrote in *Brogan v. United States*, “wholly of the guilty suspect’s own making.” 522 U.S. 398, 404 (1998). An innocent person, on the other hand, “will not find himself in a similar quandary (as one commentator has put it, the innocent person lacks even a ‘lemma’).” *Id.* (citing Ronald J. Allen, *The Simpson Affair, Reform of the Criminal Justice Process, and Magic Bullets*, 67 U. COLO. L. REV. 989, 1016 (1996)). The argument that it is cruel to make a defendant an instrument of her own condemnation has also been widely criticized in the academic literature. See, *e.g.*, Amar & Lettow, *supra* note 252, at 890 (“[A]s a descriptive theory, the psychological cruelty argument simply does not hold water.”); Dolinko, *supra* note 259, at 1094–95 (noting excruciating choices faced by witnesses such as rape victims, and parents compelled to testify against their children, and arguing that “[i]t seems perverse to suggest that a legal system willing to impose such extremely difficult choices on witnesses who may be innocent of any wrongdoing, or on . . . victims of a vicious crime, would balk at imposing such a choice on people most of whom face a ‘trilemma’ only because they broke the law”); Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 318 (1991) (contending that trilemma is cruel only to guilty and that people cannot “escape hard choices that are a consequence of their own voluntary decisions”).

²⁶⁵ 378 U.S. at 55.

all; they are between the “rock and the whirlpool” portrayed in *Garrity*.²⁶⁶

A corollary to the self-preservation argument is the anticoercion rationale, which has long been recognized as a crucial element of the privilege. The Supreme Court observed in *Knapp v. Schweitzer*²⁶⁷ that the “sole—although deeply valuable—purpose of the Fifth Amendment privilege against self-incrimination is the security of the individual against the exertion of the power of the Federal Government to compel incriminating testimony with a view to enabling that same Government to convict a man out of his own mouth.”²⁶⁸ Likewise, in the *Garrity-Lefkowitz* line of cases discussed above,²⁶⁹ the Court reiterated that “the touchstone of the Fifth Amendment is compulsion.”²⁷⁰ Under even the most parsimonious reading of the privilege—that it serves simply to prohibit “improper methods of interrogation”²⁷¹—it might apply to scenarios of delegated coercion. When KPMG employees were confronted with the unsubtle threat either to give statements or to lose both their jobs and any means of mounting a defense, they arguably experienced an improper method of interrogation.²⁷²

Although “the rule excluding involuntary confessions does not protect against hard choices when a person’s serious misconduct has placed him in a position where these are inevitable,”²⁷³ to require unprotected submission to interviews makes employees complicit in the deprivation of their liberty and thereby crosses the constitutional line. The KPMG court recognized, for example, that because the government coerced KPMG to apply pressure to its employees, prosecu-

²⁶⁶ *Garrity v. New Jersey*, 385 U.S. 493, 498 (1967).

²⁶⁷ 357 U.S. 371 (1958).

²⁶⁸ *Id.* at 380; *see also* Green, *supra* note 116, at 32–33 (citing “moral intuitions about the right of self-preservation” and “basic human right not to assist the government in causing one’s own destruction”).

²⁶⁹ *See supra* text accompanying notes 209–34.

²⁷⁰ *Lefkowitz v. Cunningham*, 431 U.S. 801, 806 (1977); *cf.* *Bram v. United States*, 168 U.S. 532, 542–43 (1897) (applying rule that Fifth Amendment bars introduction of coerced statements regardless of source of coercion, in case predating state action doctrine).

²⁷¹ *Alschuler, supra* note 234, at 2626.

²⁷² *United States v. Stein*, 440 F. Supp. 2d 315, 332 (S.D.N.Y. 2006) (“KPMG coerced [the defendant’s] appearance by conditioning payment of his legal fees on his appearance and cooperation.”).

²⁷³ *United States v. Solomon*, 509 F.2d 863, 872 (2d Cir. 1975). According to the *Solomon* court’s reasoning, statements made to the New York Stock Exchange were not protected because the consequences to the questioned officer of a brokerage firm were uncertain. *Id.* “*Garrity*’s interpretation of the privilege,” the court held, “applies only when the interrogator has the power to compel testimony against which the privilege would be a shield and the state has sought to shatter the shield by the threat that raising it will involve consequences as devastating as in that case.” *Id.* at 870–71.

tors were able to secure cooperation and “waivers of constitutional rights that the government itself could not obtain.”²⁷⁴ The court’s opinion echoes Barbara Babcock’s observation that “when the state may deprive a person of all liberty, . . . the duty of the citizen to cooperate with the government comes to an end,”²⁷⁵ as well as Justice Fortas’s view that the individual has “the sovereign right to refuse to cooperate; to meet the state on terms as equal as their respective strength would permit; and to defend himself by all means within his power—including the instrument of silence.”²⁷⁶

The intuitive objection to the use of compelled employee statements—sought and obtained through an investigative “partnership” between the employer and the government—is that the practice deviates from baseline Fifth Amendment requirements. The Fifth Amendment is intended to “remove[] the temptation to employ short cuts to conviction that demean official integrity.”²⁷⁷ Coercing a waiver of the right to silence through a delegated threat of termination is just such a bypass, and public constitutional norms should prevent it despite the formalism of the state action requirement.

²⁷⁴ *Stein*, 440 F. Supp. 2d at 333.

²⁷⁵ Barbara A. Babcock, *Fair Play: Evidence Favorable to an Accused and Effective Assistance of Counsel*, 34 STAN. L. REV. 1133, 1138 (1982) (discussing Fifth Amendment concern with individual autonomy and space “free from the government’s malignant or benign interference”); see also *United States v. Wade*, 388 U.S. 218, 261–62 (1967) (Fortas, J., concurring in part and dissenting in part) (arguing that Fifth Amendment privilege protects individual from cooperating in deprivation of his own liberty); LEONARD W. LEVY, *ORIGINS OF THE FIFTH AMENDMENT: THE RIGHT AGAINST SELF-INCRIMINATION* 432 (1968) (stating that Fifth Amendment requires “determination of guilt or innocence” in our society to be made “by just procedures in which the accused made no unwilling contribution to his conviction”). *But see* Amar & Lettow, *supra* note 252, at 893 (“At times, the fair balance idea collapses into a sporting theory of justice—the idea that we should boost the odds for criminals just to keep the game interesting, above and beyond the valuable and important ‘handicap’ that the government must prove its case beyond reasonable doubt.”); Dolinko, *supra* note 259, at 1139 (“It is simply not true that a citizen is absolved of *all* duty ‘to cooperate with the government’ when his liberty is at stake—he is not, for example, free to ignore a summons, to flee to a foreign country, or to suborn perjury.”).

²⁷⁶ Abe Fortas, *The Fifth Amendment: Nemo Tenetur Prodere Seipsum*, CLEV. B. ASS’N J., Apr. 1954, at 91, 98; see also *Withrow v. Williams*, 507 U.S. 680, 692 (1993) (“[The Fifth Amendment] requir[es] the government in its contest with the individual to shoulder the entire load . . .” (quoting *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) (quoting 8 JOHN HENRY WIGMORE, *EVIDENCE IN TRIALS AT COMMON LAW* § 2251, at 317 (John T. McNaughton ed., rev. 1961)))).

²⁷⁷ Robert B. McKay, *Self-Incrimination and the New Privacy*, 1967 SUP. CT. REV. 193, 209, *quoted in* Dolinko, *supra* note 259, at 1066.

C. Accountable State Action

As a general matter, of course, private employers are not considered state actors.²⁷⁸ Nevertheless, when the actions of private employers induce employees to provide incriminating evidence against themselves—in order to comply with an existing DPA or to position the corporation in ongoing negotiations for a DPA—their actions may be “fairly attributable” to the government within the meaning of the Fifth Amendment.²⁷⁹ For example, the KPMG court found the requisite state action present even though the actual threat—cutting off payment of legal expenses for any employee who refused to talk to the government or invoked the Fifth Amendment—came from KPMG.²⁸⁰

Although the Fifth Amendment does not apply to entirely private investigative activity,²⁸¹ investigators who are privately employed but functionally conscripted by the government straddle the public/private boundary. I am mindful of Jody Freeman’s admonition that “scholars who seek to constrain the private exercise of authority through the extension of constitutional limits to nonstate actors face an uphill battle.”²⁸² Nevertheless, internal investigations expressly prompted and directed by prosecutors fit within the “extraordinary cases” in which Freeman acknowledges that a state action argument may succeed.²⁸³ A private employer can terminate an employee who refuses to cooperate with the government, and the Fifth Amendment places no constraints on the private use of economic pressure to extract incriminating statements, but those lines of authority can be distinguished from the case of a corporation acting pursuant to a DPA. The government’s mere approval of a private party’s initiatives is insufficient to establish state action, but the government “can be held

²⁷⁸ For an insightful and comprehensive discussion of the neglected state action problem in criminal procedure, see Sklansky, *supra* note 160, at 1229–69.

²⁷⁹ See *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002) (holding that actions of private entity are “fairly attributable” to government where state “‘has exercised coercive power [over a private decision]’” (quoting *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982)) (alteration in original)).

²⁸⁰ *United States v. Stein*, 440 F. Supp. 2d 315, 334–35, 337 (S.D.N.Y. 2006).

²⁸¹ A long line of *Miranda* cases, for example, has limited the Fifth Amendment’s scope to governmental agencies. *E.g.*, *United States v. Antonelli*, 434 F.2d 335, 337 (2d Cir. 1970) (“The federal exclusionary rule enforcing adherence to the intentment of the Fifth Amendment, like the Fourth Amendment, has long been construed as ‘a restraint upon the activities of sovereign authority’ and not as ‘a limitation upon other than governmental agencies.’” (quoting *Burdeau v. McDowell*, 256 U.S. 465, 475 (1921))); Sklansky, *supra* note 160, at 1232, 1239–44 (“[L]ower courts without exception have refused to impose the prophylactic protections of *Miranda* on private interrogators.”).

²⁸² Freeman, *supra* note 159, at 579.

²⁸³ *Id.*

responsible for a private decision . . . when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State.”²⁸⁴

Typically, state action issues arise when “a private party has taken the decisive step that caused the harm to the plaintiff, and the question is whether the State was sufficiently involved to treat that decisive conduct as state action.”²⁸⁵ Precedents on determining the presence of state action “have not been a model of consistency,”²⁸⁶ and attempts to tease out public elements of compulsion by private employers are “seriously incomplete.”²⁸⁷ Among the traditional tests is whether the incidents of governmental authority aggravate the injury caused by the private actor.²⁸⁸ Another formulation is that challenged conduct is “fairly attributable to the State”²⁸⁹ when it is caused by a person for whom the government is “responsible”²⁹⁰ because “he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to

²⁸⁴ *Blum*, 457 U.S. at 1004.

²⁸⁵ *Nat’l Collegiate Athletic Ass’n v. Tarkanian*, 488 U.S. 179, 192 (1988).

²⁸⁶ *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 632 (1991) (O’Connor, J., dissenting); see also Louis Michael Seidman, *The State Action Paradox*, 10 CONST. COMMENT. 379, 391 (1993) (“No area of constitutional law is more confusing and contradictory than state action.”); Richard L. Stone & Michael A. Perino, *Not Just a Private Club: Self Regulatory Organizations as State Actors When Enforcing Federal Law*, 1995 COLUM. BUS. L. REV. 453, 465 (“Judging where the government sphere should end and the private one should begin . . . has proved to be an elusive task.”).

²⁸⁷ Alschuler, *supra* note 234, at 2633 n.30.

²⁸⁸ *Edmonson*, 500 U.S. at 627 (holding that preemptory challenge by private civil litigant constitutes state action); see also *Georgia v. McCollum*, 505 U.S. 42, 54 (1992) (holding that race-based preemptory challenge by criminal defendant constitutes state action). That the incidents of governmental authority aggravate the injury of compelled statements in internal interviews is made clear when those statements are subsequently introduced in court against the employee defendant. See John M. Burkoff, *Not So Private Searches and the Constitution*, 66 CORNELL L. REV. 627, 666 (1981) (“When the State affirmatively accepts illegally seized evidence in its criminal justice system, thereby authorizing or encouraging actions by private parties that would be unconstitutional if performed by governmental officials, it ignores reality to . . . assert that there is no ‘sufficiently close nexus between the State and the challenged action.’” (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974))); cf. *Michigan v. Tucker*, 417 U.S. 433, 440–41 (1971) (stating that to allow introduction at criminal trial of testimony obtained through coercion in other proceedings would “practically nullif[y]” Fifth Amendment privilege). *But see Colorado v. Connelly*, 479 U.S. 157, 166 (1986) (“The most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.”).

²⁸⁹ *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 937 (1982).

²⁹⁰ *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982) (“[C]onstitutional standards are invoked only when it can be said that the State is *responsible* for the specific conduct of which the plaintiff complains.”).

the State.”²⁹¹ Cases such as *Blum v. Yaretsky*²⁹² suggest that when a corporation receives “significant encouragement” to assist the government in a criminal investigation, the corporation is acting as a government proxy and its acts can be attributed to the government for purposes of constitutional analysis.²⁹³ The Ninth Circuit has similarly held that the government “cannot escape liability when it compels a result, even though the government does not actually engage in the unlawful act but, instead, pressures another to do so.”²⁹⁴ The threat of Arthur Andersen’s fate brings significant pressure to bear on corporations, and that threat “provides a sufficient nexus” between a private entity’s employment decision at the government’s behest and the government itself.²⁹⁵

The cases on the constitutional significance of the government’s use of economic coercion applied through a private employer suggest that it is not the nature of the employment that matters as much as the source of the pressure. In *United States ex rel. Sanney v. Montanye*,²⁹⁶ where an employer administered a polygraph test at the behest of the government, the Second Circuit held that it “is not the public or private status of the person from whom the information is sought but the fact that the state has involved itself in the use of a substantial economic threat to coerce a person into furnishing an incriminating statement.”²⁹⁷ The court did not, therefore, “perceive any consequence flowing from the fact that the threat . . . was conveyed through a pri-

²⁹¹ *Lugar*, 457 U.S. at 937.

²⁹² 457 U.S. 991.

²⁹³ *Id.* at 1004. The *Blum* Court found, however, that the mere fact that private nursing homes were subject to state regulations did not convert private physicians’ decisions to transfer patients to a lower level of care into state action, because the decisions “ultimately turn[ed] on medical judgments made by private parties according to professional standards that are not established by the State.” *Id.* at 1008.

²⁹⁴ *Sutton v. Providence St. Joseph Med. Ctr.*, 192 F.3d 826, 838 (9th Cir. 1999); see also *Carlin Commc’ns, Inc. v. Mountain States Tel. & Tel. Co.*, 827 F.2d 1291, 1295 (9th Cir. 1987) (holding that private telephone company was state actor when it terminated services of another company at direction of county attorney because county attorney threatened to bring charges if it refused).

²⁹⁵ *Sutton*, 192 F.3d at 837 (“[G]overnmental compulsion alone [may] provide[] a sufficient nexus . . . to attribute a private entity’s conduct to the government.”). In *Carey v. Continental Airlines, Inc.*, 823 F.2d 1402 (10th Cir. 1987), the Tenth Circuit imposed a slightly higher standard: “When a constitutional claim is asserted against private parties, to be classified as state actors under color of law they must be jointly engaged with state officials in the conduct allegedly violating the federal right.” *Id.* at 1404. Even under that “joint engagement” approach, however, questioning of employees under an active DPA would qualify as state action because the government is effectively directing the internal investigation.

²⁹⁶ 500 F.2d 411 (2d Cir. 1974).

²⁹⁷ *Id.* at 415.

vate employer, admittedly acting as an agent for the police, rather than through a person on the public payroll.”²⁹⁸

The negative assessment of corporate cooperation that results from the failure to respond punitively to employees who invoke their constitutional protections “involves” the government in the corporation’s use of economic threats. The government is responsible, through the state action doctrine, for unconstitutional conditions (such as the withdrawal of legal support) that are imposed upon employees according to the express requirements in a DPA. The *Montanye* court further found that public involvement “is no less real for having been indirect and no less impermissible for having been concealed. The state is prohibited in either event from compelling a statement through economically coercive means, whether they are direct or indirect.”²⁹⁹ The government wields indirect power via corporate actors comparable to its direct power to compel incriminating testimony by threatening the loss of one’s position as a police officer, as in *Garrity*,³⁰⁰ the adverse consequences of disbarment, as in *Spevack*,³⁰¹ or the loss of a civil service job, as in *Uniformed Sanitation Men Ass’n v. Commissioner of Sanitation*.³⁰²

The most significant obstacle to finding state action in this arena comes from a line of cases involving the National Association of Securities Dealers (NASD), a private sector regulator of the securities industry that licenses, governs, and disciplines brokerage firms and securities representatives.³⁰³ Like corporate investigators acting pursuant to DPAs, NASD officials perform a quasi-public regulatory function and routinely pass information on to prosecutors and the SEC. Nevertheless, their actions are not generally considered government conduct because, as the Second Circuit held in *Desiderio v. National Ass’n of Securities Dealers, Inc.*,³⁰⁴ the NASD “is a private corporation that receives no federal or state funding,” and “[i]ts creation was not mandated by statute, nor does the government appoint its members or serve on any NASD board or committee.”³⁰⁵ It was

²⁹⁸ *Id.*

²⁹⁹ *Id.*

³⁰⁰ *Garrity v. New Jersey*, 385 U.S. 493 (1967).

³⁰¹ *Spevack v. Klein*, 385 U.S. 511 (1967).

³⁰² 392 U.S. 280, 284 (1968).

³⁰³ See *United States v. Bloom*, 450 F. Supp. 323, 330 (E.D. Pa. 1978) (finding that NASD is not state actor). But see *Intercontinental Indus. v. Am. Stock Exch.*, 452 F.2d 935, 941 (5th Cir. 1971) (finding that stock exchange is state actor).

³⁰⁴ 191 F.3d 198 (2d Cir. 1999).

³⁰⁵ *Id.* at 206; see also *Martens v. Smith Barney, Inc.*, 190 F.R.D. 134, 135 (S.D.N.Y. 1999) (dismissing due process claim because NASD “exercise[s] insufficient state action to trigger constitutional due process protections”).

dispositive in *Desiderio* and related cases, however, that the government was not aware *ex ante* that the interviews were being conducted. A lack of prior knowledge precluded finding the requisite “close nexus” between the coercive conduct and the state.³⁰⁶ The NASD cases turned in large part on the fact that requests for interviews arose organically within the NASD and were not “generated by governmental persuasion or collusion.”³⁰⁷ In the case of ongoing compliance investigations pursuant to the contractual obligations imposed by DPAs, in contrast, heightened government involvement in internal investigations does provide that nexus. Internal investigators are the functional equivalent of informants, who act as *de facto* agents of the government when they intend “to elicit incriminating remarks.”³⁰⁸

In *United States v. Antonelli*,³⁰⁹ the Second Circuit similarly found no constitutional violation in a security guard’s failure to advise a dockworker of his *Miranda* rights before questioning because of the lack of a “*de facto* connection” between the security guard and “any public law enforcement agency,” and because the guard had not been influenced or assisted in his questioning of the dockworker by any government official.³¹⁰ Here, however, the government is entwined in the specific conduct leading to the deprivation of constitutional rights. According to the Thompson Memorandum factors, “a company’s failure to ensure that its employees disclose whatever they knew, regardless of their individual rights and concerns, might weigh in favor

³⁰⁶ *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001) (stating that actions of private party constitute state action if there is “such a ‘close nexus between the State and the challenged action’ that seemingly private behavior ‘may be fairly treated as that of the State itself’” (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 351 (1974))); *see also* *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002) (holding that Fifth Amendment constrains private entity only insofar as its actions are “fairly attributable” to government); *United States v. Shvarts*, 90 F. Supp. 2d 219, 222 (E.D.N.Y. 2006) (“It is . . . beyond cavil that questions put to the defendants by the NASD in carrying out its own legitimate investigative purposes do not activate the privilege against self-incrimination.”).

³⁰⁷ *Cromwell*, 279 F.3d at 163; *see also* *United States v. Szur*, No. S5 97 CR 108, 1998 WL 132942, at *15 (S.D.N.Y. Mar. 20, 1998) (finding no state action where federal investigators did not request searches and were not even aware that they had taken place).

³⁰⁸ *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (1986) (finding that informant actions that are deliberately calculated “to elicit incriminating remarks” after right to counsel has attached constitute state action and therefore violate Sixth Amendment); *see also* *Arizona v. Fulminante*, 499 U.S. 279, 287–88 (1991) (holding jailhouse confession was coerced in violation of Fifth Amendment where paid informant made credible threat of violence while acting as agent of government).

³⁰⁹ 434 F.2d 335 (2d Cir. 1970).

³¹⁰ *Id.* at 336–37 (“It would be a strange doctrine that would so condition the privilege of a citizen to question another whom he suspects of stealing his property that incriminating answers would be excluded as evidence in a criminal trial unless the citizen had warned the marauder that he need not answer.”).

of indicting the company,”³¹¹ and that threat induces corporations to compel employee statements.

A closer analogy comes from the Fourth Amendment context, where evidence received by private individuals will nonetheless be excluded as though the product of a government search if the private individual “act[ed] as an agent of the Government or with the participation or knowledge of any governmental official.”³¹² A search conducted by an airline employee, for example, was equivalent to a government search because previous searches had been encouraged and rewarded by government agencies.³¹³ Likewise, a private railroad company administering drug tests pursuant to Federal Railroad Administration requirements was found to be engaged in state action. The government had expressed not only a strong preference for the testing but also a desire to “share the fruits of such intrusions.”³¹⁴ Pursuant to current corporate cooperation doctrine, the government not only has prior knowledge and a share in the fruits of internal interviews, it actually imposes a requirement on corporations, through DPAs, to conduct those interviews and to sanction employees who decline to submit. Corporate investigators thus work on behalf of the government to “find the culprits and turn them in.”³¹⁵

³¹¹ *United States v. Stein*, 440 F. Supp. 2d 315, 335 (S.D.N.Y. 2006).

³¹² *United States v. Jacobsen*, 466 U.S. 109, 113 (1984) (quoting *Walter v. United States*, 447 U.S. 649, 662 (1980) (Blackmun, J., dissenting)) (internal quotation marks omitted).

³¹³ *United States v. Walther*, 652 F.2d 788, 793 (9th Cir. 1981) (holding that search constituted state action because government “had knowledge of a particular pattern of search activity . . . and had acquiesced in such activity”); *see also id.* at 792 (citing cases involving searches by airline employees).

³¹⁴ *Skinner v. Ry. Labor Executives’ Ass’n*, 489 U.S. 602, 615 (1989) (holding that Federal Railroad Administration regulations prescribing blood and urine tests rendered railroad’s performance of those tests state action).

³¹⁵ Steve Seidenberg & Tamara Loomis, *DOJ Gets Tougher on Corporations: Revised Guidelines for Bringing a Criminal Case*, NAT’L L.J., Feb. 24–Mar. 3, 2003, at A13, *quoted in* Oesterle, *supra* note 3, at 477. Another careful distinction drawn for due process purposes lies between the government’s use of the SEC’s civil investigative authority and the prosecution of parallel criminal cases. *See, e.g., United States v. Stringer*, 408 F. Supp. 2d 1083, 1089–90 (D. Or. 2006) (holding that where federal prosecutors had used SEC civil investigation to mask ongoing criminal investigation, misconduct warranted dismissal of indictment and suppression of all evidence collected by SEC). Merging civil and criminal strands of investigation has prompted courts to declare the government’s conduct “so grossly shocking and so outrageous as to violate the universal sense of justice.” *Id.* at 1089 (quoting *United States v. Smith*, 924 F.2d 889, 897 (9th Cir. 1991)). And in the trial of former HealthSouth CEO Richard Scrusby, his SEC deposition was suppressed because the court ruled that the civil and criminal investigations improperly merged when the U.S. Attorney’s Office “gave the S.E.C. advice” about the context of the deposition. *United States v. Scrusby*, 366 F. Supp. 2d 1134, 1137 (N.D. Ala. 2005). The court’s conclusion that the government had manipulated simultaneous SEC and DOJ investigations for its own purposes led to the dismissal of three of the perjury counts against Scrusby. *Id.* at 1135. Yet, in the context of corporate criminal investigations, the government relies on the state

Statements received under these circumstances are obtained through state action. By commanding a particular action, even if that action is taken entirely by a private party, the government “put[s] its own weight on the side of the proposed practice”³¹⁶ and removes it from the sphere of “private initiative.”³¹⁷ The line is drawn between government “acquiescence” (or inaction)³¹⁸ and government “commandment,”³¹⁹ and cooperation requirements under DPAs fall on the latter side of the line.

D. Strategic State Action

Pressure on employees, via DPAs, stands alone as a constitutional problem, but it is brought into sharper relief by the government’s treatment of employee statements as obstruction. Recognizing state action in internal investigations pursuant to DPAs makes sense not only in light of the case law but also in light of the inconsistencies in the government’s position. The government argues that employers are “acting alone” when they obtain true and incriminating statements, but it also claims that government agents are functionally in the room whenever employees make false statements.

Recent prosecutions of minimizing or self-preserving statements made to nongovernmental parties rest on a novel theory of obstruction. In a case involving false reporting of market information by Greg Singleton, a gas trader employed by El Paso Merchant Energy, the government added obstruction charges arising from statements that Singleton made solely to an outside law firm retained by his employer.³²⁰ According to the indictment, Singleton “did not disclose” to outside counsel, “falsely denied,” and “otherwise concealed” the fact that employees had provided false information to trade publi-

action doctrine to argue that interviews by internal investigators, effectively deputized by the government and entirely within its control, do not require basic Fifth Amendment protections.

³¹⁶ *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 357 (1974); *see also* *Peterson v. City of Greenville*, 373 U.S. 244, 248 (1963) (“When the State has commanded a particular result, it . . . has removed that decision from the sphere of private choice.”).

³¹⁷ *Skinner*, 489 U.S. at 615.

³¹⁸ *See, e.g.,* *Flagg Bros. v. Brooks*, 436 U.S. 149, 164–66 (1978) (finding that warehouseman’s sale of goods to collect unpaid storage fees, pursuant to New York’s Uniform Commercial Code, did not constitute state action because statute permitted, but did not require, remedy).

³¹⁹ *See* *Stone & Perino*, *supra* note 286, at 471 (discussing “distinction between [government] acquiescence and commandment”).

³²⁰ Superseding Indictment at 16–21, *United States v. Singleton*, Crim. No. H-06-080, 2006 WL 1984467 (S.D. Tex. July 14, 2006); *see also* *Harkness & LaVerne*, *supra* note 186 (“Recent developments confirm that the U.S. Department of Justice views the obstruction of justice laws as reaching conduct that many had considered to be without criminal consequence.”).

cations.³²¹ There was no allegation that Singleton made misstatements directly to the government; it was a case of exclusively “private” lies.³²²

The Computer Associates investigation provides another example of charges based upon alleged misrepresentations to internal investigators. CEO Sanjay Kumar pled guilty in April 2006 to eight counts of securities fraud and obstruction of justice.³²³ The latter charges arose from false statements about accounting fraud to the auditors and attorneys Kumar himself had hired.³²⁴ The government brought the charges on the theory that, in lying to the company’s outside counsel, Kumar had misled federal prosecutors because the results of the internal investigation were passed on to the government during subsequent cooperation efforts.³²⁵ The government learned of the earlier statements only because the company agreed to a broad waiver of its privilege and turned over all materials relevant to its previous compliance investigation. The indictment effectively alleged that, because the law firm was retained in part to facilitate cooperation with the government, false justifications provided to attorneys were “intended” to be presented to the government.³²⁶ The government also charged obstruction on the basis of Kumar’s failure to make disclosures to outside counsel; in other words, incomplete cooperation is itself obstructive.³²⁷ The cases against Kumar and codefendant

³²¹ Superseding Indictment, *supra* note 320, at 20. The indictment alleges that the attorneys who met with Singleton told him that his comments could be disclosed to “third parties, including government agencies,” *id.*, and consequently that statements he made to those attorneys were tantamount to intentional obstruction. *Id.* at 21. The indictment does not, however, allege that Singleton “intended” or “knew” that his statements would be supplied to government investigators, only that he “believed” they would be. Harkness & LaVerne, *supra* note 186. The Supreme Court, however, has rejected the related argument that a defendant who lied to a federal agent functionally lied to the grand jury simply because the defendant knew of the pending investigation. *United States v. Aguilar*, 515 U.S. 593, 601 (1995) (“[W]hat use will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear before the grand jury is . . . speculative [and] . . . cannot be said to have the ‘natural and probable effect’ of interfering with the due administration of justice.”).

³²² Harkness & LaVerne, *supra* note 186. Singleton was convicted of one count of wire fraud, but the jury deadlocked or found him not guilty on the false reporting and obstruction charges. John C. Roper, *Verdict, Deadlock in Gas Trading Case*, HOUS. CHRON., Aug. 4, 2006, at 3.

³²³ Alex Berenson, *Software Chief Admits to Guilt in Fraud Case*, N.Y. TIMES, Apr. 25, 2006, at A1.

³²⁴ *Id.*

³²⁵ See *id.* (describing Kumar’s indictment for lying to lawyers and internal investigators); Alex Berenson, *Case Expands Type of Lies Prosecutors Will Pursue*, N.Y. TIMES, May 17, 2004, at C1 (describing plea agreements of three Computer Associates executives indicted for lying to internal investigators).

³²⁶ Superseding Indictment, *supra* note 63, at 23, 28.

³²⁷ See *id.* at 22–23, 27.

Stephen Richards, former head of worldwide sales at Computer Associates, gathered force from the guilty pleas of three other Computer Associates executives.³²⁸ Each of those defendants was convicted of obstruction of justice for statements made to company counsel in the course of the internal investigation, and not one of the indictments included allegations that they directly misled the government or the grand jury.³²⁹ They were convicted of lying to prosecutors without ever talking to them.³³⁰ Computer Associates General Counsel Stephen Woghin was also indicted for “proxy obstruction”: statements professing innocence made in a press release and false justifications made to inside auditors.³³¹

The earlier prosecution of three former executives of the Rite Aid Corporation likewise illustrates the government’s willingness to charge obstruction on the basis of statements made to internal investigators or material information that is withheld from them. Defendants Martin Grass and Eric Sorkin pled guilty to, among other things, obstruction of justice, and defendant Franklin Brown was convicted at trial of conspiracy to obstruct justice, largely as a result of interactions with internal investigators retained by Rite Aid.³³²

These prosecutions of false and incomplete statements to corporate counsel and auditors necessitate the finding of an official, public dimension to the interactions, that is, of some intent to impede a government investigation or proceeding.³³³ The government thus stands

³²⁸ Kumar and Richards initially challenged the indictment, but the district court denied their motion to dismiss the obstruction counts. Memorandum and Order, *United States v. Kumar*, CR No. 04-846 (E.D.N.Y. Feb. 21, 2006). In doing so, the court rejected the defendant’s argument that statements made to counsel employed by them to represent the company in connection with the government’s ongoing DOJ and SEC investigations had an “insufficient nexus” with the judicial proceedings. *Id.* at 8–9.

³²⁹ See Information at 8–10, 12–14, *United States v. Kaplan*, CR No. 04-330 (E.D.N.Y. Apr. 8, 2004), available at <http://www.usdoj.gov/dag/cftf/chargingdocs/kaplaninfo.pdf>; Information at 8–10, 13–14, *United States v. Rivard*, CR No. 04-329 (E.D.N.Y. Apr. 8, 2004), available at <http://www.usdoj.gov/dag/cftf/chargingdocs/rivardinfo.pdf>; Information at 9–13, 16–17, *United States v. Zar*, CR No. 04-331 (E.D.N.Y. Apr. 8, 2004) [hereinafter *Zar Information*], available at <http://www.usdoj.gov/dag/cftf/chargingdocs/zarinfo.pdf>. For a brief summary of the indictments, see Berenson, *supra* note 325.

³³⁰ In the case of Computer Associates CFO Ira Zar, the government alleged that he had armed outside counsel with “false justifications the purpose of which was to counter or explain away evidence of the 35-day month practice.” *Zar Information*, *supra* note 329, at 10.

³³¹ Information, *supra* note 121, at 8–9.

³³² See Indictment at 76–80, *United States v. Grass*, No. 1:02-CR-00146 (M.D. Pa. June 21, 2002), available at www.usdoj.gov/dag/cftf/chargingdocs/grassetalind.pdf (detailing charges against Grass, Sorkin, and Brown).

³³³ See 18 U.S.C. § 1512(c)(2) (Supp. IV 2004) (imposing sanction on anyone who “obstructs, influences, or impedes any *official proceeding*, or attempts to do so” (emphasis added)). The false statement provision also requires that the information concern a matter

in the shoes of internal investigators for strategic state action purposes only: It lays claim to the questions if the answers are obstructive but denies any responsibility if an employee confesses truthfully and under duress. There is, if anything, a more compelling case for perceiving the government's weight on the scales in the coercive environment of corporate cooperation than there is for recognizing obstruction by proxy in cases of organic false statements that may be morally blameless.³³⁴

The larger questions raised by derivative obstruction offenses merit further exploration; I have touched on them briefly to highlight both the significance of the statements that employees may be compelled to make in internal investigations and the incoherence of declining to apply constitutional protections on state action grounds. Because this is the current charging paradigm, because the government claims to be interchangeable with corporate investigators for purposes of imposing liability for falsehoods, and because prosecutors prosecute the false denials, minimizing responses, and "failures to report" that arise from internal investigations, the government should also accord the subjects of those investigations constitutional protections. Extending immunity, moreover, would lead to fewer false statements, and the obstruction that does take place would be a more considered act of will, and therefore a more justifiable basis for punishment.

E. The Compliance-Enhancing Function of Excluding Coerced Statements

Applying *Garrity* protections in the context of employee statements compelled by an existing DPA would mean excluding those statements and their fruits in subsequent individual prosecutions. Such immunity would preclude a shortcut that prosecutors currently

"within the jurisdiction . . . of the United States." 18 U.S.C. § 1001 (2000); *see also* United States v. Facchini, 874 F.2d 638, 641 (9th Cir. 1989) (defining "jurisdiction" in § 1001 as "a direct relationship [that] obtains between the false statement and an authorized function of a federal agency or department").

³³⁴ *See, e.g.*, John Shepard Wiley Jr., *Not Guilty by Reason of Blamelessness: Culpability in Federal Criminal Interpretation*, 85 VA. L. REV. 1021, 1035–56, 1155–61 (1999) (positing "mandatory culpability" rule of statutory interpretation that would require government to prove "moral culpability" in cases where criminal statute "might reach conduct that is not inevitably nefarious" and applying rule to cases concerning prosecutions of false statements (citation omitted)); Stuntz, *supra* note 260, at 1242–61 (arguing that self-preserving lies used to avoid more serious consequences are excusable and do not merit punishment). *But see* Seidmann & Stein, *supra* note 222, at 453 n.79 ("[W]e do not see a good reason for excusing suspects' and defendants' perjury. . . . [S]uch lies harm not only 'the system,' but also innocent suspects. . . . [because they] enable the guilty to pool with the innocent.").

favor,³³⁵ but it would not hinder investigations as much as they fear. Although granting immunity will, on occasion, mean more investigative work and less evidence, the Supreme Court has repeatedly “rejected the notion that citizens may be forced to incriminate themselves because it serves a governmental need.”³³⁶ Extending *Garrity* would neither prevent questioning nor interfere in any personnel decisions, because eliciting truthful and incriminating statements is not in and of itself a violation of the Fifth Amendment.³³⁷ The government can leverage a DPA to ask questions directly or by proxy through internal investigators, and corporate employers can terminate employees deemed uncooperative. The statements that result, however, should not be introduced in court.

This remedy emerges as well from *Kastigar v. United States*,³³⁸ in which the Court settled on use and derivative use immunity as a “rational accommodation between the imperatives of the privilege and the legitimate demands of government to compel citizens to testify.”³³⁹ Logistically, an exclusionary rule with the scope of *Kastigar* would require modifications to the conduct of investigations, but none that impose an onerous burden on prosecutors. Mechanisms are in place in every U.S. Attorney’s office to deal with immunized statements through the use of taint teams.³⁴⁰ “*Garrity* cleaning,” for

³³⁵ The Thompson Memorandum states, for example, that privilege waivers are favored because they “permit the government to obtain statements of possible witnesses, subjects, and targets, without having to negotiate individual cooperation or immunity agreements. In addition, they are often critical in enabling the government to evaluate the completeness of a corporation’s voluntary disclosure and cooperation.” Thompson Memorandum, *supra* note 15, at 7.

³³⁶ *Lefkowitz v. Cunningham*, 431 U.S. 801, 808 (1977) (“Government has compelling interests in maintaining an honest police force and civil service, but this Court did not permit those interests to justify infringement of Fifth Amendment rights in *Garrity*, *Gardner*, and *Uniformed Sanitation*, where alternative methods of promoting state aims were no more apparent than here.”).

³³⁷ *See Chavez v. Martinez*, 538 U.S. 760, 769 (2003) (Thomas, J., plurality opinion) (explaining that Fifth Amendment privilege does not extend to defendant whose statements were never admitted at trial); *United States v. Washington*, 431 U.S. 181, 187–88 (1977) (“[F]ar from being prohibited by the Constitution, admissions of guilt by wrongdoers, if not coerced, are inherently desirable.”); Sklansky, *supra* note 160, at 1264 (“Where the Fifth Amendment is concerned, the introduction of compelled testimony at trial is understood to be the violation . . .”).

³³⁸ 406 U.S. 441 (1972).

³³⁹ *Id.* at 446. *But see generally* Amar & Lettow, *supra* note 252, at 858 (advocating pure rule of testimonial use immunity barring compelled testimony from being introduced against defendant in criminal trial, but generally admitting fruits of pretrial statements).

³⁴⁰ Taint teams would review reports and redact any employee statements compelled by threat of termination in order to ensure that subsequent investigative and strategic developments are not “fruits” of the improperly obtained information. Prosecutors can document the preexisting case against individual defendants before taking their statements or directing internal investigators to do so to preserve the utility of existing evidence. Prose-

example, is a common practice in civil rights prosecutions involving police officers according to which a prosecutor otherwise unconnected to the case reviews reports and statements before the prosecution team sees them in order to ensure that they do not contain coerced statements subject to exclusion. Nor will every employee statement merit exclusion. An employee seeking immunity or a defendant arguing for exclusion would first have to make the showing of government-sponsored coercion and demonstrate both that she subjectively believed that she had no choice but to speak and that the belief she held was objectively reasonable.³⁴¹

Although fewer prosecutions of low- and mid-level employees may result from an extension of immunity, the high-level executives are less likely to experience managerial coercion, and those prosecutions would proceed apace. Immunity could also have the positive practical impact of expediting investigations and increasing compliance by reducing the cost to employees of providing truthful information. Neither the federal use immunity statute nor the Fifth Amendment precludes the use of a defendant's false statements in subsequent prosecutions for these offenses,³⁴² which gives employees an incentive to tell the truth. Recognizing this species of immunity will not, therefore, protect employees who derail investigations with false statements. In addition, granting immunity does not forfeit the opportunity to prosecute underlying corporate crimes on the basis of evidence obtained from other sources.³⁴³

cutors also may resort to the "inevitable discovery" doctrine to clear the logistical hurdle that immunity raises. See *Nix v. Williams*, 467 U.S. 431, 448 (1984) (holding that when "the evidence in question would inevitably have been discovered without reference to the police error or misconduct, there is no nexus sufficient to provide a taint and the evidence is admissible").

³⁴¹ *United States v. Stein*, 440 F. Supp. 2d 315, 328 (S.D.N.Y. 2006); see also *United States ex rel. Sanney v. Montanye*, 500 F.2d 411, 415 (2d Cir. 1974) (holding that threat of economic sanctions against temporary manual laborer was objectively insufficient to deprive him of free choice to refuse to answer his employer's questions).

³⁴² See *United States v. Apfelbaum*, 445 U.S. 115, 121-32 (1980) (holding that neither federal immunity statutes nor Fifth Amendment privilege precluded use of defendant's immunized testimony at subsequent prosecution for making false statements). As the *Apfelbaum* Court noted, however:

If the rule is that a witness who is granted immunity may be placed in no worse a position than if he had been permitted to remain silent, the principle that the Fifth Amendment does not protect false statements serves merely as a piece of a legal mosaic justified solely by *stare decisis*, rather than as part of a doctrinally consistent view of that Amendment.

Id. at 128 n.11.

³⁴³ Another objection to the application of use and derivative use immunity proceeds as follows: Private employers would be deciding whether to ask the questions and therefore would have the power to conclude that information sought is broadly necessary to the public interest. Obtaining that information might outweigh the need for the in-court evi-

This form of immunity imports into the “cruel trilemma” the better alternative to speak truthfully about incriminating matters without doing immediate damage to oneself. Confronting employees with the choice to lie, tell all, or forfeit their jobs and benefits forces them into what game theorists call a “first move dilemma.”³⁴⁴ Recognizing the privilege against self-incrimination under these circumstances converts truthful responses into a winning move.³⁴⁵ Intense pressure to confess, on the other hand, “unacceptably tempts law-breaking” in the form of “self-protective perjury.”³⁴⁶ Immunity makes truth a significantly more attractive choice than silence (with its adverse economic consequences) or the fabrication alternative (with its risk of prosecution for obstruction-type offenses). The application of immunity thus “sharply reduces the cost of telling the truth,” “so that the one remaining legal option costs no more than the eliminated silence option.”³⁴⁷ The outcome is more truthful information, at the cost of some prosecutorial flexibility, but to the potential advantage of internal compliance generally.³⁴⁸

dence itself, but that conclusion is normally supervised and approved by the Attorney General before it is adopted by government agencies. If private employers are making the decision, there would be no such supervision, and considerations of the public interest thus would be delegated, unwisely, to private individuals. *Cf. Adams v. Maryland*, 347 U.S. 179 (1954) (affirming Congress’s power to pass laws establishing immunity for witnesses testifying in congressional hearings, regardless of whether Attorney General deems witness’s statement worthy of protection). If the application of immunity in a particular case is questionable, however, prosecutors could raise objections to any motion to exclude employee statements. The fact that the corporation itself remains vulnerable to prosecution on the basis of the compelled statements would also deter strategic behavior.

³⁴⁴ See Seidmann & Stein, *supra* note 222, at 444 (describing guilty suspect as held in “zugzwang, both psychologically and from a purely rational point of view”); *id.* at 447 (“By moving first, the suspect inevitably increases his chances of conviction and thus worsens his position.”). Zugzwang is a term for a position in a game such as chess in which a player confronts two losing moves and the inability to pass. *Id.* at 447 n.56.

³⁴⁵ The privilege against self-incrimination adds the ability to pass to the equation; it is “an *option of refusal*, not a prohibition of inquiry.” WIGMORE, *supra* note 276, § 2268, at 402 (emphasis added).

³⁴⁶ Stuntz, *supra* note 260, at 1242–43 (arguing that privilege against self-incrimination reflects society’s “moral preference for truth” by preventing guilty defendants from perjuring themselves).

³⁴⁷ *Id.* at 1273. Immunity costs little because it is being applied in situations “that create a serious temptation to lie and in which excusing lies is systematically affordable.” *Id.* at 1293.

³⁴⁸ In the larger picture, immunity advances prosecutorial objectives as well by decreasing the number of false statements and thus reducing misinformation that can seriously damage investigations. See Seidmann & Stein, *supra* note 222, at 491 (“By removing the option to remain silent, the legal system . . . encourage[s] defendants to lie.”); *id.* at 499 (“[S]uspects who exercise the right to silence would otherwise make false exculpatory statements.”); Stuntz, *supra* note 260, at 1293 (“[S]ubstitut[ing] silence for perjury [ultimately] should make the process function more smoothly, not less.”).

The traditional defense of the state action doctrine in criminal procedure—that it preserves private freedom of action³⁴⁹—does not apply where the government’s commandeering of internal investigations already has invaded the autonomy of the corporation. Although courts have rejected similar Fifth Amendment arguments on the ground that there would be a breakdown in business regulation if employers did not engage in private enforcement,³⁵⁰ current practices prevent self-regulation because they fail to leave private space for sincere questioning and candid response.³⁵¹ Without constitutional protections, or any means to distinguish between private corporate counsel and agents of public enforcement authorities, even good-faith employees, out of sheer self-preservation, will resist proffering truthful information about potential infractions.

CONCLUSION

The government’s “war on corporate crime” shows no signs of slowing,³⁵² and prosecutors continue to place a premium on expediency in individual prosecutions. The government’s current approach,

³⁴⁹ See, e.g., *Edmondson v. Leesville Concrete Co.*, 500 U.S. 614, 619 (1991) (“One great object of the Constitution is to permit citizens to structure their private relations as they choose subject only to the constraints of statutory or decisional law.”); *Lugar v. Edmondson Oil Co.*, 457 U.S. 922, 936 (1982) (“Careful adherence to the ‘state action’ requirement preserves an area of individual freedom by limiting the reach of federal law and federal judicial power.”); Ronald J. Krotoszynski, Jr., *Back to the Briarpatch: An Argument in Favor of Constitutional Meta-Analysis in State Action Determinations*, 94 MICH. L. REV. 302, 335 (1995) (“[S]tate action doctrine preserves a sphere of individual freedom of action”); Sklansky, *supra* note 160, at 1234 (“The libertarian thrust of [the Bill of Rights] bolsters the case for limiting their scope to abusive conduct by government agents.”).

³⁵⁰ See, e.g., *United States v. Solomon*, 509 F.2d 863, 869 (2d Cir. 1975) (holding that interrogation of officer of member firm by New York Stock Exchange did not trigger privilege against self-incrimination). In *Solomon*, Judge Friendly reasoned that “there would be a complete breakdown in the regulation of many areas of business if employers did not carry most of the load of keeping their employees in line and have the sanction of discharge for refusal to answer what is essential to that end.” *Id.* at 870.

³⁵¹ See Zornow & Krakaur, *supra* note 185, at 156–57 (“In all situations where the company decides to waive privilege to please the prosecutor, the role of criminal counsel is repositioned from that of the client’s confidential legal advisor and the government’s adversary into a conduit of information between the client and the government.”).

³⁵² In fact, the “war”—which had suffered from Arthur Andersen’s belated vindication and several high-profile acquittals and mistrials such as Enron Broadband, Duke Energy, HealthSouth, Qwest, Quattrone, and Tyco—shows new signs of vitality. Davies & Scannell, *supra* note 89 (“The convictions of former Enron Corp. executives Kenneth Lay and Jeffrey Skilling culminate a crackdown on turn-of-the-century corporate malfeasance. They also will likely embolden the government to continue its campaign.”); see also Brickey, *supra* note 8, at 419 (“The showcase trial of Enron’s Skilling and Lay will not be the end of the road. Dozens of executives charged in similar fraud prosecutions are now awaiting trial, and additional fraud investigations are clearly underway.”).

however, is both questionable policy and the cause of significant unfairness. Prosecutors should make more up-or-down decisions concerning charges against corporate entities rather than relying on threats alone and seeking flawed intermediate solutions in DPAs. Five appropriately targeted entity prosecutions may well have achieved deterrence goals—while leaving room for self-regulation and avoiding the unfairness of coerced employee statements—more effectively than the fifty DPAs currently pending.

Even setting aside whether the end of fighting corporate crime can be achieved via the Thompson and McNulty Memoranda, the means here violate important Fifth Amendment protections. That realization has been slow to take hold because the courts, which are best-suited to safeguard individual rights, rarely have opportunities to review corporate cooperation cases.³⁵³ DPAs involve no judicial supervision and no independent screen.³⁵⁴ As a result, “problematic legal issues may well simmer just below the surface with no resolution, and the opportunity to test the issues will not arise.”³⁵⁵ Because DPAs generally forestall judicial oversight of substantive liability issues, procedural safeguards for the negotiation and implementation of DPAs are essential. The individual rights perspective advanced here provides a route into court, and I advocate it as a way to expose

³⁵³ See Stuntz, *supra* note 116, at 541 (“[A]ppellate judges are much more likely than legislators or prosecutors to take the interests of defendants into account.”); William J. Stuntz, *The Political Economy of Criminal Justice*, 119 HARV. L. REV. 780, 825–26 (2006) (arguing for vesting “competitive” discretionary authority over charging and sentencing in trial judges as check on “concentrated discretion” currently exercised by prosecutors). Cultural pressures prevent prosecutors from addressing individual rights head on, and when they do, it is usually with hollow mandates like the McCallum Memorandum, *see supra* note 199. Similarly, political forces prevent any real or perceived contraction of criminal liability through legislative action.

³⁵⁴ DPAs and NPAs filed pretrial do not require judicial approval, but those filed once a case is pending—such as the individual DPA extended to Frank Quattrone in August 2006—must be submitted to the court. *See* Memorandum from Michael J. Garcia, U.S. Attorney, S. Dist. of N.Y., to Frank Quattrone, Relating to Deferred Prosecution, No. 03 CR 582 (GBD) (Aug. 22, 2006), *available at* <http://wsj.com/public/resources/documents/QuattroneDeferredProsecutionAgreement.pdf>.

³⁵⁵ McLucas et al., *supra* note 17, at 640; *see also* Harry Litman, *Pretextual Prosecution*, 92 GEO. L.J. 1135, 1154–55 (2004) (noting that suppositions underlying pretextual charges are never examined and that “[d]oubts or flaws in the charging decision are all subsumed in the jury’s verdict”); Stuntz, *supra* note 116, at 571 (“[B]y criminalizing more than it means to enforce, the system transfers adjudication from courts and juries to prosecutors. . . . That makes the prosecutor the effective adjudicator of the fraud offense—and if she adjudicates badly, the legal system will impose no penalty on her.”); *cf.* Barkow, *supra* note 164, at 1024–28 (discussing lack of procedural safeguards in federal criminal adjudication relative to administrative state); Daniel C. Richman, *Federal Criminal Law, Congressional Delegation, and Enforcement Discretion*, 46 UCLA L. REV. 757, 762–63 (1999) (noting that when defendants plead guilty to obtain more lenient sentences, they also give up chance to challenge underpinnings of their indictments).

and address the dysfunctions of current DPAs. In the pending KPMG case, for example, motions to exclude statements compelled by the corporation in compliance with a DPA afforded some judicial oversight of the government's charging strategies.³⁵⁶ In some recent cases that have proceeded to trial, juries provide another check on prosecutorial overreaching.³⁵⁷

The executive branch self-regulation in the McNulty Memorandum does not, however, provide clear remedies or sufficient protection. As a general matter, resorting to prosecutorial discretion to curtail executive branch power rings hollow; prosecutors simply have no incentive to ratchet down investigations or screen out undeserving defendants when liability for morally blameless conduct is so expansive and the pressure to obtain convictions is so great.³⁵⁸

³⁵⁶ See *United States v. Stein*, 440 F. Supp. 2d 315, 337–38 (S.D.N.Y. 2006) (suppressing statements made by some KPMG employees to internal investigators because they were coerced by KPMG's threats of economic sanctions and because KPMG's coercive tactics were attributable to federal government); *United States v. Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006) (finding government's use of Thompson Memorandum to force KPMG to withhold legal assistance from its employees violated employees' Fifth and Sixth Amendment rights). Credit Suisse First Boston investment banker Frank Quattrone also recently had his criminal conviction reversed by the Second Circuit Court of Appeals. *United States v. Quattrone*, 441 F.3d 153 (2d Cir. 2006).

³⁵⁷ Juries have, for example, rejected the government's arguments in numerous recent cases. See, e.g., Jonathan D. Glater, *Jury Finds Ex-Tyco Lawyer Not Guilty of All Charges*, N.Y. TIMES, July 16, 2004, at C1 (describing acquittal of Tyco's General Counsel, Mark Belnick, of all charges related to his improper receipt of corporate funds); *Split Verdict Reached in Trial of Former Energy Traders*, N.Y. TIMES, Aug. 5, 2006, at C4 (recounting that Dynegy traders were convicted on wire fraud count, but jury acquitted or could not reach decision on conspiracy and false reporting counts); Stephen Taub, *Lawyers Seek Answers to Symbol Mistrial*, CFO.COM, Feb. 27, 2006, http://www.cfo.com/article.cfm/5570030/c_5569386?f=TodayInFinance_Inside (noting that after six-week trial and four days of deliberations in Symbol Technologies case, jurors reported they had "exhausted all options" and judge declared mistrial).

³⁵⁸ The long menu of federal crimes from which prosecutors can choose exacerbates the problem. Prosecutors can bring obstruction and false statements charges as pretext or "insurance allegations" either to supplement or to supplant charges of underlying fraudulent conduct. On the broad interpretation of federal criminal law, see Steven D. Clymer, *Unequal Justice: The Federalization of Criminal Law*, 70 S. CAL. L. REV. 643, 662–68 (1997), who states that the Court's failure to apply any restrictive interpretation to jurisdictional elements of federal criminal law has created an excess of offenses for federal prosecutors to charge, and O'Sullivan, *supra* note 167, at 666–75, who argues that the federal criminal code's "overbreadth, vagueness, and redundancy" has allowed judges and prosecutors excessive discretion in their interpretation and application of federal criminal law. On the naïveté of relying on prosecutorial discretion, see *United States v. Wells*, 519 U.S. 482, 512 n.15 (1997) (Stevens, J., dissenting), who observes that "[i]t is well settled that courts will not rely on 'prosecutorial discretion' to ensure that a statute does not ensnare those beyond its proper confines"; O'Sullivan, *supra* note 167, at 674, who notes that "because prosecutorial discretion is largely exercised outside the public eye, it is difficult to document, let alone to regulate or check"; and Stuntz, *supra* note 116, at 579–80, who contends that "[e]nforcement discretion permits overcriminalization, which in turn encour-

What the proposed extension of immunity will accomplish is ultimately an empirical question, but I theorize that it will have several positive effects. With respect to individual employees, it may mitigate unfairness by making it more difficult to convict for marginal misconduct, which could also support underlying law enforcement norms.³⁵⁹ Immunity may also privilege good-faith employees by making truth cheaper than the fabrication alternative, and it could improve the sorting of innocent and guilty defendants by protecting employees who are blameless at the outset of the investigation but then become “ensnared by ambiguous circumstances.”³⁶⁰ This retail approach to the Fifth Amendment issue also has the potential to recalibrate the distinction between public and private enforcement and thereby address the wholesale problem of the unintended consequences and unproductive policy impact of DPAs. Although extending immunity may produce some modest reduction in individual prosecutions, it also may increase the quality of information and its flow to internal compliance mechanisms.

Deputizing internal investigators, compelling privilege waivers, and constraining individual defendants’ legal resources no doubt streamlines investigations. But “[i]f the exercise of constitutional rights will thwart the effectiveness of a system of law enforcement,

ages more discretion” and that “[t]he result is an unwritten criminal ‘law’ that consists only of enforcers’ discretionary decisions.” For a thoughtful discussion of how prosecutors *should* exercise discretion, see David A. Sklansky, *Starr, Singleton, and the Prosecutor’s Role*, 26 *FORDHAM URB. L.J.* 509, 530–31 & nn.108–10 (1999).

³⁵⁹ See, e.g., Lynch, *supra* note 182, at 47 (“Both in justice to those so labeled, and to preserve the always-threatened moral capital of the criminal law from dilution, conviction of crime must ordinarily be reserved for those who violate deeply held and broadly agreed social norms.”); Moohr, *supra* note 103, at 974 (suggesting that “using criminal law as a last resort, instead of as a primary mechanism, reinforces its legitimacy” and that “[l]egitimacy is an important factor in encouraging law-abiding behavior because when the system is viewed as morally credible, even those who have not internalized the social norm are inclined to obey the law.”); Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 *J.L. & ECON.* 255, 278 (1993) (arguing that expanding range of acts labeled criminal dilutes its stigmatizing effect); Stuntz, *supra* note 149, at 1881–86 (arguing that prosecuting marginal misbehavior in white collar cases has not strengthened public norms against lying or fraud); *id.* at 1886 (“[W]hite-collar crime is likely to come to seem increasingly trivial as the laws forbidding it become increasingly broad.”).

³⁶⁰ *Slochower v. Bd. of Educ.*, 350 U.S. 551, 558 (1956); see also *Murphy v. Waterfront Comm’n*, 378 U.S. 52, 55 (1964) (observing that privilege, “while sometimes a ‘shelter to the guilty,’ is often a ‘protection to the innocent’” (citing *Quinn v. United States*, 349 U.S. 155, 162 (1955))); William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 *VA. L. REV.* 1903, 1906 (1993) (commenting that “odd pattern of Fifth Amendment protections” actually “benefit[s] innocent defendants at the expense of the guilty” because it “facilitate[s] sorting by the government”). *But see Dolinko, supra* note 259, at 1975–76 (“[I]t is difficult to take seriously the notion that the privilege is justified as a safeguard for the innocent.”).

then there is something very wrong with that system.”³⁶¹ Our adversarial system does not favor bypasses; sometimes prosecutors just have to do the work themselves or forego criminal charges.

³⁶¹ Escobedo v. Illinois, 378 U.S. 478, 490 (1964).