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# Unregulated Corporate Internal Investigations: Achieving Fairness for Corporate Constituents

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# UNREGULATED INTERNAL INVESTIGATIONS: ACHIEVING FAIRNESS FOR CORPORATE CONSTITUENTS

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**Abstract:** This Article focuses on the relationship between corporations and their employee constituents in the context of corporate internal investigations, an unregulated multimillion-dollar business. The classic approach provided in the 1981 Supreme Court opinion, *Upjohn v. United States*, is contrasted with the reality of modern-day internal investigations that may exploit individuals to achieve a corporate benefit with the government. Attorney-client privilege becomes an issue as corporate constituents perceive that corporate counsel is representing their interests, when in fact these internal investigators are obtaining information for the corporation to barter with the government. Legal precedent and ethics rules provide little relief to these corporate employees. This Article suggests that courts need to move beyond the *Upjohn* decision and recognize this new landscape. It advocates for corporate fair dealing and provides a multifaceted approach to achieve this aim. Ultimately this Article considers how best to level the playing field between corporations and their employees in matters related to the corporate internal investigation.

## INTRODUCTION

Corporate internal investigations serve important societal functions. They allow the entity to discover misbehavior within the corpora-

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tion, make corrections, and model conduct to assure future compliance with the law and the regulatory structure.[1] Internal investigations offer a cooperative resolution for corporate improprieties, while incentivizing corporations to unmask misconduct.[2] Internal investigations also allow corporations to quietly investigate allegations that may later prove to be bogus, without fear that disclosure will hurt the company's reputation.

At the same time, corporate internal investigations can lead to abuses. They are privately structured, lacking regulatory oversight, and for the most part unmonitored in law.[3] They are a multimillion-dollar business with most of the control resting within the hands of the entity.[4] It has been argued that, at times, corporations' lawyers conducting internal investigations are deceptive (for example, by exploiting individuals' beliefs that the lawyers or the corporation are looking out for their constituents' interests) or coercive (for example, by employing actual or perceived threats against individuals who fail to cooperate).[5] Corporate officers and employees who later face criminal prosecution have challenged the admissibility of their statements to corporate counsel on a number of grounds, drawing on the law relating to attorney-client privilege, criminal procedure, and lawyers' professional conduct, among other areas.[6] But the law places only marginal limits on the conduct of corporate internal investigations and affords protection to corporate constituents only in extreme cases.[7]

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[1] *See* Mark P. Goodman & Daniel J. Fetterman, *Conducting Internal Investigations*, *in* DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS 87, 91 (Daniel J. Fetterman & Mark P. Goodman eds., 2011) (discussing management's obligation to investigate alleged wrongdoing to minimize the company's risk).

[2] *See infra* notes 83–101 and accompanying text.

[3] *See infra* note 15 and accompanying text.

[4] *See* Mei Lin Kwan-Gett, *Recommended Practices for Companies and Their Counsel in Conducting Internal Investigations*, PLI ETHICS PROGRAMS, Summer 2011, at 418 n.28. The terms "entity" and "corporation" are used largely interchangeably throughout this Article.

[5] R. WILLIAM IDE, III, AM. BAR ASS'N, TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, REPORT 16 (2006), *available at* http://apps.americanbar.org/buslaw/attorneyclient/materials/hod/emprights_report_adopted.pdf (describing coercive tactics); Lawton P. Cummings, *The Ethical Mine Field: Corporate Internal Investigations and Individual Assertions of the Attorney-Client Privilege*, 109 W. VA. L. REV. 669, 670 (2007) (describing the pressure on corporate counsel not to be fully forthright).

[6] *See, e.g.*, United States v. Stein, 541 F.3d 130, 136 (2d Cir. 2008) (criminal procedure); United States v. Norris, 722 F. Supp. 2d 632, 634 (E.D. Pa. 2010) (attorney-client privilege); Plaintiff's Original Petition at 2–3, Pendergest-Holt v. Stanford Grp. Co., No. 2009-22392 (N.D. Tex. Apr. 9, 2009) (attorney ethics rules and malpractice law).

[7] *See, e.g.*, *infra* notes 155–186 and accompanying text (describing the unfairness of one specific case). The law also places corporate counsel in what one court termed "a potential legal and ethical mine field." *In re* Grand Jury Subpoena: Under Seal, 415 F.3d 333,

To a small degree, ethics rules and corporate practice call upon lawyers to take steps to prevent or correct individuals' erroneous beliefs that the corporation's lawyers represent them, but the traditionally used warnings, to the effect that the lawyers represent only the corporation, do not overcome all expectations developed by employees who have grown accustomed to turning to corporate counsel when an issue with legal implications arises. Once the lawyers have clarified their role, the ethics rules do not forbid them from developing and taking advantage of individuals' expectation that the corporation's interests are aligned with their own and that the corporation, including its lawyers, will protect them.[8]

Consequently, individuals with little or no legal training, and unaware of the ramifications and personal consequences, readily cooperate in providing information to corporate lawyers conducting internal investigations, even when the corporation is already assisting government prosecutors or regulators in their investigation of corporate employees or anticipates doing so in exchange for leniency. The more problematic scenarios occur in situations that are never scrutinized by the judiciary, as they emanate from corporate internal investigations that remain essentially unregulated and private.

The ambiguous nature of the corporate constituent's identity as either aligned with or antithetical to the entity during a corporate internal investigation becomes a more pronounced issue as the number of corporate internal investigations continues to increase each year.[9] These investigations can commence for a host of different reasons,[10] and lawyers are often an integral part of the internal investigation because their

340 (4th Cir. 2005); *see* Katrice Bridges Copeland, *In-House Counsel Beware!*, 39 FORDHAM URB. L.J. 391, 432–33 (2011).

[8] *See infra* notes 199–204 and accompanying text.

[9] *See* Benton J. Campbell & Katelyn Beaudette, *The Way Forward: A Primer on Conducting an Independent Investigation*, DIRECTOR NOTES, 1, 1 (Feb. 2012), http://www.conference-board.org/retrievefile.cfm?filename=TCB-DN-V4N3-12.pdf&type=subsite ("Since 2001, public companies have retained outside counsel to conduct more than 3,000 internal investigations encompassing a staggering range of subject matters."). Some of these investigations may be limited to determining if one or a few employees have adhered to corporate compliance measures. The increased growth of Foreign Corrupt Practices Act (FCPA) cases and the fact that 2011 marked the "largest number of enforcement actions brought in a single year by the U.S. Securities and Exchange Commission (SEC) in the agency's history" has likely increased the need for corporate investigations. Campbell & Beaudette, *supra*, at 1.

[10] *See infra* notes 83–101 and accompanying text.

participation enables the corporation to claim attorney-client and work-product protections for the results of the investigation.[11]

In this investigative stage, the corporation may be undecided whether to come forward with evidence of wrongdoing that its lawyers discover or whether to assist the government should it proceed with an investigation or file charges against the company. Notwithstanding the frequent practice of bartering information obtained from an internal investigation in exchange for a non-prosecution, deferred prosecution, or other favorable treatment,[12] it may be uncertain at the very outset, or before the investigation concludes, whether the corporation is an ally or adversary of the government and likewise whether its interests are aligned with or adverse to its employee constituents. Even if the corporation anticipates turning over its investigative conclusions or other work product to the government, disclosing this intention to its constituents may undermine the investigation.[13] Thus, while the corporate internal investigation takes place, the constituent employees may be uncertain whether the company is their friend, or may believe incorrectly that they are being protected by the corporation.

Corporations' internal investigations contrast with government and regulatory investigations, which are subject to rules of criminal procedure and federal statutes to protect individuals from overreaching by investigators.[14] Because corporations' internal investigations

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[11] *See* Lucian E. Dervan, *International White Collar Crime and the Globalization of Internal Investigations*, 39 FORDHAM URB. L.J. 361, 363, 367–68 (2011) (describing the use of attorneys to "shield" the conclusions of internal investigations).

[12] *See* Harry First, *Branch Office of the Prosecutor: The New Role of the Corporation in Business Crime Prosecutions*, 89 N.C. L. REV. 23, 46 (2010).

[13] *See* Miranda v. Arizona, 384 U.S. 436, 516–17 (1966) (Harlan, J., dissenting) (suggesting that warnings will decrease the incidence of confessions). If the company decides to enter into a plea or a deferred or non-prosecution agreement, a key component of that agreement may be to provide information about wrongdoing by individual employees within the company. The company can secure an advantage by trading this information so that the government can prosecute individual wrongdoers. *See infra* notes 143–186 and accompanying text.

[14] Internal investigations do not provide rights such as the Fifth Amendment right against self-incrimination. *See* Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311, 353, 365–71 (2007) (describing the requirement for state action for Fifth Amendment protection to arise). An individual being questioned also does not have a Sixth Amendment right to counsel. *See Stein*, 541 F.3d at 152 (noting that the Sixth Amendment right to counsel attaches when adversarial judicial criminal proceedings have begun). Should an individual assert these rights, there is no judicial oversight for enforcement as these investigations are not part of a court proceeding. *See* Andrew Weissmann & David Newman, *Rethinking Criminal Corporate Liability*, 82 IND. L.J. 411, 425 n.45 (2007) (noting that even when prosecutors are involved after internal investigations, agreements are not overseen by the court).

are regarded by the law as private employment matters in which the government has no part, they are essentially unregulated by legal protections and unmonitored by courts as they occur.[15] Decisions of whether to conduct an investigation,[16] who will conduct one,[17] and its scope are for the entity to decide.[18] Generally Accepted Accounting Principles (GAAP)[19] and professional ethics rules of attorneys[20] provide only modest restraints on accountants and attorneys who conduct these investigations. The Department of Justice (DOJ), other federal agencies,[21] or a state government that may concurrently or subsequently investigate the corporate conduct in question is not a *direct*

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In contrast to the employees' lack of rights when investigated by the corporation, the corporation has rights when investigated by the government. Corporations are treated as persons for purposes of prosecution, so they are afforded some of the same rights provided to individuals. *See, e.g.*, Citizens United v. FEC, 130 S. Ct. 876, 899 (2010). In a few areas differences can be seen. For example, a corporation's documents may not have Fifth Amendment protection, although the act of producing those documents may be provided protection from self-incrimination. *See, e.g.*, Fisher v. United States, 425 U.S. 391, 402, 404–05 (1976).

[15] *See* Weissmann & Newman, *supra* note 14, at 425 n.45. Obstruction of justice statutes, however, which prohibit conduct such as destruction of documents that impedes the "due administration of justice," may be an overarching concern during an internal corporate investigation. *See* 18 U.S.C. §§ 1503–1518 (2006).

[16] The corporate board has fiduciary duties to shareholders and the company that may influence this decision. *See* H. Lowell Brown, *The Corporate Director's Compliance Oversight Responsibility in the Post* Caremark *Era*, 26 DEL. J. CORP. L. 1, 7–16 (2001) (describing directors' duties of care and loyalty).

[17] Routine internal investigations may be conducted by internal corporate counsel. Larger investigations are typically handled by outside independent counsel. *See* Kwan-Gett, *supra* note 4, at 417–19. It is often difficult to ascertain the complexity of the inquiry and the problems that may be forthcoming prior to actually conducting an internal investigation.

[18] Corporations typically have an independent committee from the board of directors that will provide oversight of the internal investigation, including setting its scope. *Id.* at 419–21.

[19] *See generally* DAN L. GOLDWASSER & M. THOMAS ARNOLD, ACCOUNTANTS' LIABILITY § 2.3 (1996) (discussing accounting standards).

[20] States pass rules of professional conduct for attorneys. *See generally ABA Model Rules of Professional Conduct: About the Model Rules*, A.B.A., http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct.html (last visited Dec. 12, 2012). For a discussion of applicable ethics rules, see *infra* notes 199–204 and accompanying text.

[21] The DOJ may not be the exclusive investigator of potential criminal conduct. For example, the SEC may investigate securities fraud or insider trading, the Internal Revenue Service (IRS) may be at the forefront in tax investigations, the Environment Protection Agency (EPA) will likely conduct joint environmental criminal investigations with the DOJ, and the U.S. Postal Service may be a participant with the Federal Bureau of Investigation (FBI) and DOJ in mail fraud prosecutions.

participant in the corporate internal investigation.[22] Although the DOJ may become an *indirect* participant in a corporate internal investigation, the procedural protection ordinarily applicable to government investigations does not apply as a result.[23]

Part I of this Article provides background material on the development of corporate criminality, government investigations, and the motivations and considerations of companies that are conducting internal investigations.[24] It highlights some of the problems that arise as a result of these internal investigations, but also notes the important purposes these investigations serve for the company and society.

Part II discusses the varying approaches that may be taken by the entity conducting an investigation.[25] As Part III notes, in some instances investigations are conducted with a long-term expectation of confidentiality.[26] Although counsel does not formally represent the individuals, the individuals expect the company to look out for its employees' interests and, therefore, to preserve the confidentiality of their statements unless it is in the shared interest of the company and its employees to disclose them.[27] This paradigm is illustrated by *Upjohn v. United States*,[28] and influenced by the Supreme Court's opinion in that case.

This contrasts with a growing number of instances in which the interests of the corporation and its individual employees are adverse because the corporation is, or expects soon to be, currying favor with public prosecutors or regulators.[29] Corporations effectively serve as

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[22] A state or federal government agency may be a direct participant if there had been a prior act of misconduct and the corporate entity was subject to a deferred prosecution agreement or non-prosecution agreement that included a government-appointed internal monitor who issued reports directly to the government.

[23] *But see Stein*, 541 F.3d at 136, 147 (extending procedural rights to employees after the fact due to "the government's overwhelming influence" in the corporation's decision to withhold funds for employees' counsel, and noting that the state action doctrine requires the government to exert "significant encouragement" on a private party before rights will be extended).

[24] *See infra* notes 35–113 and accompanying text.

[25] *See infra* notes 114–204 and accompanying text.

[26] *See infra* notes 205–243 and accompanying text.

[27] *See* Upjohn v. United States, 449 U.S. 383, 386 (1981).

[28] *See id.*

[29] Professor Susan B. Heyman has noted that current DOJ memoranda guide corporations in currying favor with the government and has suggested using a "bottoms-up" approach to "maintain[ ] employees' legal rights" and to "better serve the interests of the government, the corporations, the employees, the shareholders, and the general public." Susan B. Heyman, *Bottoms-Up: An Alternative Approach for Investigating Corporate Malfeasance*, 37 AM J. CRIM. L. 163, 167–69, 179 (2010) (discussing how providing individuals with incentives to cooperate could achieve deterrence). Professor Harry First has noted the "branch office" influence of the government in federal corporate prosecutions. *See* First,

agents of the government, providing federal prosecutors with proof of employee criminality.[30] When corporate criminal conduct exists, corporate counsel's allegiance to the entity translates into an investigation that is minimally independent and more practically an investigation to accumulate evidence that the government cannot obtain from the corporation without trading leniency for the corporation's waiver of privilege.[31] But the corporation's adversity to its constituents may not be evident to the individuals from whom the corporation's lawyers seek information.

Part II of the Article also looks at the classic context in which this issue can reach the courts—litigation over the attorney-client privilege. Case law, such as *Upjohn*, presumes that corporate counsel represents the entity exclusively and therefore employees cannot claim the protection of the privilege. This Article critiques both judicial doctrine that favors corporations and the government at individuals' expense[32] and

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*supra* note 12, at 28 (discussing how the government enlists corporations against employees to expose criminal liability within the corporation). *See generally* PROSECUTORS IN THE BOARDROOM: USING CRIMINAL LAW TO REGULATE CORPORATE CONDUCT (Anthony S. Barkow & Rachel E. Barkow eds., 2011) (discussing corporate monitors, deferred prosecution agreements, civil liability from corporate criminal misconduct, and other subjects related to the role of prosecutors in corporate issues emanating from corporate criminal conduct). Additionally, Professor Lisa Kern Griffin has discussed how corporate "partnering" with the federal government shifts to "individual culpability." *See* Griffin, *supra* note 14, at 329–40. Thus, in this paradigm, the emphasis in an internal investigation is on the "investigation"—the discovery of evidence for use in a future government proceeding.

[30] *See* First, *supra* note 12, at 62 (calling corporations "agents" of the prosecutor). There are enormous incentives for a company to serve a cooperating role. In the criminal arena, cooperation provides increased ability to secure a deferred or non-prosecution agreement. The *Principles of Federal Prosecution of Business Organizations*, the DOJ's guide for federal prosecutors considering whether to prosecute business organizations, states that prosecutors should weigh factors such as "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents." *Principles of Federal Prosecution of Business Organizations*, *in* OFFICE OF THE U.S. ATTORNEYS, U.S. ATTORNEYS' MANUAL § 9-28.300(A)(4) (2008), *available at* http://www.justice.gov/usao/eousa/foia_reading_room/usam/index.html. Government agencies also provide policies related to bringing actions against a corporation. *See, e.g.*, U.S. SEC. & EXCH. COMM'N, ENFORCEMENT MANUAL § 4.3 (2012), *available at* http://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

[31] *See* Ellen S. Podgor, *White Collar Innocence: Irrelevant in the High Stakes Risk Game*, 85 CHI.-KENT L. REV. 77, 78–81 (2010) (comparing Arthur Andersen LLP's prosecution, which eventually resulted in the company's bankruptcy, to accounting firm KPMG's deferred prosecution agreement).

[32] *See infra* notes 187–204 and accompanying text. A growing number of judicial decisions give deference to the corporation when a corporate executive claims that his or her attorney-client relationship precludes disclosure of information given as part of an internal corporate investigation. *See* Grace M. Giesel, Upjohn *Warnings, the Attorney-Client Privilege, and Principles of Lawyer Ethics: Achieving Harmony*, 65 U. MIAMI L. REV. 109, 151–58

ethics rules that fail to protect individuals, with the result that individuals are too susceptible to exploitation.[33]

Part III notes that although corporations may elect at times to protect their constituents and at other times to use the employees as chips with the government, there is no general duty of fair dealing required of the corporation to its constituents.[34] Presented here is an approach that expands upon the analysis used in *Upjohn* to address the applicability of the attorney-client privilege to individual employees in a manner that takes account of the importance of corporate fair dealing. The proposed multifaceted approach would help level the playing field between the individual constituent and the entity.

This Article also recommends that courts eliminate the presumption that corporate counsel exclusively represents the corporation during a corporate internal investigation. Ultimately, this Article stresses the need for corporate fair dealing during such investigations.

## I. Corporate Criminality and the Growth of Internal Investigations

Corporations have not always been subject to criminal charges. Section A of this Part looks at the development of corporate criminality, which explains the motivation for corporations to expend millions of dollars on internal investigations.[35] Section B focuses on the increased number of government investigations and threats of prosecution.[36] Corporations obviously seek to avoid criminal liability and the enormous collateral consequences that accompany a criminal charge, which can include possible shareholder civil actions. Section C discusses the attributes of corporate internal investigations—what they are, who conducts them, and the dynamic between individual employees and the corporation during these investigations.[37] Section D looks at the incentives for a company to conduct such an investigation, including

(2010). Equally problematic is government interference with executive representation during the corporate or government investigation. *See, e.g.*, *Stein*, 541 F.3d at 135–36 (discussing government interference with the payment of attorney's fees following the indictment of partners and employees of KPMG).

[33] *See infra* notes 199–204 and accompanying text. *See generally* Sarah Ribstein, Note, *A Question of Costs: Considering Pressure on White-Collar Criminal Defendants*, 58 Duke L.J. 857 (2009) (discussing the consequences and magnitude of defense expenses in white collar cases).

[34] *See infra* notes 205–243 and accompanying text.

[35] *See infra* notes 40–54 and accompanying text.

[36] *See infra* notes 55–66 and accompanying text.

[37] *See infra* notes 67–82 and accompanying text.

the opportunity to discern problems and prevent corporate exposure to criminal or regulatory proceedings.[38] Finally, Section E examines key aspects of an internal investigation, noting how lawyers are integral players in the process.[39]

### A. *Corporate Criminality*

Corporations are characterized as "persons" for purposes of criminal liability.[40] Initially, corporations were precluded from being criminally liable because as a "fiction," a corporation could not be imprisoned and could not have intent to commit a criminal act.[41] Over time, however, courts allowed corporate criminality when criminal culpability was predicated on an omission, as opposed to an affirmative act.[42] These strict liability crimes did not require a mens rea, so allowing criminal liability was consistent with the initial corporate criminal construct.[43] Eventually, courts moved to allowing corporate criminal liability beyond omission offenses, seeing no logical distinction between omissions and affirmative acts in the case of strict liability offenses.[44] The turning point was when corporate criminality was allowed with mens rea offenses.[45] In 1909, in *New York Central & Hudson River Railroad v. United States*, the U.S. Supreme Court authorized criminal prosecution of a corporation for violations of the Elkins Act, a federal law, when the violations involved affirmative acts by agents of the corporation.[46]

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[38] *See infra* notes 83–101 and accompanying text.

[39] *See infra* notes 102–113 and accompanying text.

[40] *See* 1 U.S.C. § 1 (2006) ("In determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words 'person' and 'whoever' include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.").

[41] *See* WAYNE R. LAFAVE, CRIMINAL LAW 741 (5th ed. 2010) (discussing the history of corporate criminal liability); John C. Coffee, Jr., *Corporate Criminal Responsibility*, *in* 1 ENCYCLOPEDIA OF CRIME AND JUSTICE 253, 257 (Sanford H. Kadish ed., 1983).

[42] *See* Ellen S. Podgor, *Corporate and White Collar Crime: Simplifying the Ambiguous*, 31 AM. CRIM. L. REV. 391, 394 (1994) (noting the different stages of corporate criminal liability's evolution).

[43] *Id.*

[44] LAFAVE, *supra* note 41, at 741.

[45] *See* Podgor, *supra* note 42, at 394.

[46] 212 U.S. 481, 491, 494–96 (1909) (imputing to a corporation the knowledge and purpose of "any director or officer thereof, or any receiver, trustee, lessee, agent or person acting for or employed by such corporation"). *New York Central* marked a radical departure from historical approaches. *See generally* Albert W. Alschuler, *Two Ways to Think About the Punishment of Corporations*, 46 AM. CRIM. L. REV. 1359 (2009) (contrasting the criminal punishment of corporations today with historical approaches).

Today, corporate criminality is premised upon either of two methodologies: respondeat superior, which is the majority position,[47] or the Model Penal Code approach, which asks whether a "high managerial agent" acted criminally for the benefit of the corporate entity.[48] Establishing a sufficient mens rea is facilitated by decisions finding that "collective knowledge" can be used to achieve the requisite mens rea.[49] Although many argue that the acts of a rogue employee should not subject a corporation to criminal liability,[50] courts have not endorsed a

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[47] Ellen S. Podgor, Introduction, *Corporate Criminal Liability*, 41 STETSON L. REV. 1, 2–3 (2011) (introducing a symposium on corporate criminal liability). Liability is found if the act is within the scope of the employee's employment and is for the benefit of the entity. *Id.* at 2.

[48] MODEL PENAL CODE § 2.07(1)(c), (4)(cx) (1985). To incur corporate criminal liability, the individual must commit the act for the benefit of the corporation, as opposed to the individual. *See* Standard Oil Co. of Tex. v. United States, 307 F.2d 120, 128–29, 131 (5th Cir. 1962) (reversing convictions that were premised on acts that did not directly benefit the corporation).

Scholars have suggested other approaches to ascertaining corporate criminality. *See* Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1098–1101, 1158–64 (1991) (proposing a corporate ethos standard and evaluating discussions of Gerhard O.W. Mueller, John Braithwaite, and Brent Fisse on corporate criminal liability); *see also* V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1532–34 (1996) (advocating for an adaptation of corporate civil liability strategies to avoid the costs of corporate criminal liability).

[49] *See* Alschuler, *supra* note 46, at 1365 & n.41 (citing cases finding collective knowledge sufficient for mens rea); Martin J. Weinstein & Patricia Bennett Ball, *Criminal Law's Greatest Mystery Thriller: Corporate Guilt Through Collective Knowledge*, 29 NEW. ENG. L. REV. 65, 70–79 (1994) (discussing early collective knowledge cases and expressing the importance of the collective knowledge doctrine in corporate criminal law). "[C]ollective knowledge holds a corporation criminally liable where one employee intends an action and another, albeit innocent, employee carries it out." Weinstein & Ball, *supra*, at 67. Courts will sometimes give a collective knowledge instruction that allows the jury to aggregate knowledge from different parts of the corporate organization to determine whether the corporation has the mens rea for the crime. *See* United States v. Bank of New Eng., 821 F.2d 844, 856 (1st Cir. 1987) (holding that "[s]ince the Bank had the compartmentalized structure common to all large corporations," a collective knowledge instruction was proper).

[50] A "good faith" defense would shelter "law-abiding corporations" from rogue employees by protecting "those who present 'good faith' efforts to achieve compliance with the law as demonstrated in their corporate compliance program." *See* Ellen S. Podgor, *A New Corporate World Mandates a "Good Faith" Affirmative Defense*, 44 AM. CRIM. L. REV. 1537, 1538 (2007) [hereinafter Podgor, *A New Corporate World*]. Many scholars have argued for a corporate "good faith" defense. *See* H. Lowell Brown, *Vicarious Criminal Liability of Corporations for the Acts of Their Employees and Agents*, 41 LOY. L. REV. 279, 326–28 (1995) (advocating for a good faith affirmative defense); William S. Laufer, *Corporate Liability, Risk Shifting, and the Paradox of Compliance*, 52 VAND. L. REV. 1341, 1420 (1999) (discussing alternative corporate criminal culpability models); Laurie L. Levenson, *Good Faith Defenses: Reshaping Strict Liability Crimes*, 78 CORNELL L. REV. 401, 468–69 (1993) (discussing a good faith defense to corporate criminality); Podgor, *A New Corporate World*, *supra*, at 1543 (advocating for a good faith defense); Ellen S. Podgor, *Educating Compliance*, 46 AM. CRIM. L. REV.

"good faith" exception to corporate liability.[51] The Supreme Court's 2010 decision in *Citizens United v. Federal Election Commission* regarding corporate campaign contributions emphasized the value of corporate personhood,[52] thereby offering a schematic for expanding prosecutions[53] of corporations.[54]

### B. *Government Investigations*

Government investigations of corporate misconduct have increased in recent years. In the wake of the Enron scandal,[55] President George W. Bush issued an executive order in 2002 that created the

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1523, 1529 n.39 (2009) [hereinafter Podgor, *Educating Compliance*] (citing to authors advocating for a "good faith" defense); Weissmann & Newman, *supra* note 14, at 451 (arguing that corporate criminal liability should be tied to corporations' implementation of effective compliance systems).

[51] *See* Podgor, *A New Corporate World*, *supra* note 50, at 1538 (noting that the legal system has not yet adopted a "'good faith' affirmative defense").

[52] 130 S. Ct. at 886.

[53] *See id.* at 900 ("The Court has thus rejected the argument that political speech of corporations or other associations should be treated differently under the First Amendment simply because such associations are not 'natural persons.'"). Citing a long list of cases, the Supreme Court in *Citizens United* stated that "[t]he Court has recognized that First Amendment protection extends to corporations." *Id.* at 899. This can be contrasted with Justice John Paul Stevens's concurrence and dissent in part, which states that "[t]he fact that corporations are different from human beings might seem to need no elaboration, except that the majority opinion almost completely elides it." *Id.* at 971. He also stated:

> It might also be added that corporations have no consciences, no beliefs, no feelings, no thoughts, no desires. Corporations help structure and facilitate the activities of human beings, to be sure, and their "personhood" often serves as a useful legal fiction. But they are not themselves members of "We the People" by whom and for whom our Constitution was established.

*Id.* at 972.

[54] *See generally* Joan MacLeod Heminway, *Thoughts on the Corporation as a Person for Purposes of Corporate Criminal Liability*, 41 STETSON L. REV. 137 (2011) (discussing the effect of *Citizens United* on corporate criminal liability); Elizabeth R. Sheyn, *The Humanization of the Corporate Entity: Changing Views of Corporate Criminal Liability in the Wake of* Citizens United, 65 U. MIAMI L. REV. 1 (2010) (examining the impact of the *Citizens United* decision on deferred- and non-prosecution agreements); Christopher Slobogin, Citizens United *and Corporate and Human Crime*, 41 STETSON L. REV. 127 (2011) (discussing four potential outgrowths of the *Citizens United* Court's position on corporate personhood).

[55] The Enron debacle serves as a strong force in bringing to the forefront corporate misconduct. It has been compared with national scandals such as "Teapot Dome; Watergate; [and] the 'Keating Five.'" NANCY B. RAPOPORT & BALA G. DHARAN, *Introduction* to ENRON: CORPORATE FIASCOS AND THEIR IMPLICATIONS, at ix, ix (Nancy B. Rapoport & Bala G. Dharan eds., 2004).

Corporate Fraud Task Force.[56] Although this Task Force was later renamed the Financial Fraud Task Force by President Barack Obama in 2009,[57] a focus on investigating and prosecuting corporate fraud remains.[58]

Government investigations are not limited to the DOJ, as regulatory agencies, state and local entities, and other administrative bodies may also investigate possible misconduct. It is also common to see parallel proceedings with both the DOJ and an agency like the Internal Revenue Service (IRS) or the Securities Exchange Commission (SEC) simultaneously investigating the same conduct. The SEC's increasing number of enforcement actions demonstrates its growing concern with fraudulent activities within the market.[59] Significantly, many of these investigations involve conduct extraterritorial to the United States.[60]

The increased number of deferred and non-prosecution agreements[61] entered into between the DOJ and a host of different corpora-

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[56] *See* Exec. Order No. 13,271, 67 Fed. Reg. 46,091–92 (July 11, 2002). President Bush created the Corporate Fraud Task Force "to hold wrongdoers responsible and to restore an atmosphere of accountability and integrity within corporations across the country." *See The President's Corporate Fraud Task Force*, U.S. DEP'T OF JUST., http://www.justice.gov/archive/dag/cftf/ (last visited Dec. 12, 2012).

[57] Exec. Order No. 13,519, 74 Fed. Reg. 60,123, 60,125 (Nov. 19, 2009); *see also* Press Release, U.S. Sec. & Exch. Comm'n, President Obama Establishes Interagency Financial Fraud Enforcement Task Force (Nov. 17, 2009), http://www.sec.gov/news/press/2009/2009-249.htm. President Obama's executive order stated that "[t]his Task Force shall replace, and continue the work of, the Corporate Fraud Task Force created by Executive Order 13271 of July 9, 2002." 74 Fed. Reg. at 60,125 § 7(b).

[58] *See About the Task Force*, FIN. FRAUD ENFORCEMENT TASK FORCE, http://www.stopfraud.gov/about.html (last visited Dec. 12, 2012) (highlighting securities fraud, mortgage scams, procurement fraud, and other frauds); *The President's Corporate Fraud Task Force*, *supra* note 56 (highlighting securities and commodities fraud, bank fraud, and other frauds). Some scholars think there should be more emphasis on actual corporate prosecutions. *See, e.g.*, Mary Kreiner Ramirez, *Prioritizing Justice: Combating Corporate Crime from Task Force to Top Priority*, 93 MARQ. L. REV. 971, 973 (2010) (calling for the establishment of a Corporate Crimes Division of the DOJ as opposed to ad hoc task forces).

[59] *See* Mary L. Schapiro, *Message from the Chairman*, *in* U.S. SEC. & EXCH. COMM'N, FY 2011 PERFORMANCE AND ACCOUNTABILITY REPORT 2, 2 (2011), *available at* http://www.sec.gov/about/secpar/secpar2011.pdf#2011review. "[T]he SEC filed 735 enforcement actions, an 8.6 percent increase from 2010 and more cases than ever previously filed . . . ." *Id.* "Since 2008, the SEC has filed 36 actions against 81 individual and corporate defendants alleging a wide range of misconduct arising from the financial crisis." *Id.* at 13. *See generally* Robert Khuzami, *Outline of Recent SEC Enforcement Actions*, *in* THE SEC SPEAKS IN 2011, at 171 (2011) (providing summaries of recent cases).

[60] *See* Dervan, *supra* note 11, at 363 & n.7, 366 (noting the globalization of internal corporate investigations, including cooperation among prosecutors in different countries, and discussing the challenges faced in conducting internal investigations abroad).

[61] *See* Sue Reisinger, *DOJ and SEC Use of Deferred and Non-prosecution Agreements in 2011*, CORP. COUNS., Jan. 10, 2012; *see also* Candace Zierdt & Ellen S. Podgor, *Corporate Deferred*

tions also provides ample evidence of government attention to corporate irregularities and fraud.[62] Although few prosecutions and regulatory proceedings against corporations go to trial,[63] settlement can be onerous. The fines levied against corporations for misconduct have reached new levels.[64] Following the highly publicized criminal prosecu-

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*Prosecutions Through the Looking Glass of Contract Policing*, 96 KY. L.J. 1, 4–6 (2007) (examining the increase in deferred and non-prosecution agreements). Non-prosecution agreements are merely letters between the government and the corporation; they provide no judicial oversight. *See* Zierdt & Podgor, *supra*, at 14–15 (contrasting judicial oversight and non-prosecution agreements).

[62] *See* Ryan D. McConnell et al., *Plan Now or Pay Later: The Role of Compliance in Criminal Cases*, 33 HOUS. J. INT'L L. 509, 563 (2011) (noting the spike in non-prosecution and deferred prosecution agreements after the famous bankruptcy of Arthur Andersen LLP following indictment); Peter Spivack & Sujit Raman, *Regulating the 'New Regulators': Current Trends in Deferred Prosecution Agreements*, 45 AM. CRIM. L. REV. 159, 159–61 (2008) (discussing the proliferation of deferred and non-prosecution agreements as a result of the DOJ's policy "to reform corrupt corporate cultures"); Zierdt & Podgor, *supra* note 61, at 4–6. *See generally* U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-10-110, DOJ HAS TAKEN STEPS TO BETTER TRACK ITS USE OF DEFERRED AND NON-PROSECUTION AGREEMENTS, BUT SHOULD EVALUATE EFFECTIVENESS (2009), *available at* http://www.gao.gov/new.items/d10110.pdf (exploring the DOJ's increased use of deferred and non-prosecution agreements, its tracking of such agreements, and discussing judicial involvement in the process).

[63] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 62, at 2 ("From fiscal years 2004 to 2009, for [U.S. Attorneys' offices], the number of [deferred prosecution agreements] and [non-prosecution agreements] was less than the number of corporate prosecutions, whereas for the Criminal Division, the number of [deferred prosecution agreements] and [non-prosecution agreements] was comparable to the number of corporate prosecutions."). Although there are many corporate prosecutions, very few lead to trial. This is due in large part to companies entering into deferred prosecutions or settling via plea negotiations. *See id.* Three recent prominent trials include *United States v. W.R. Grace*, *United States v. Aguilar* (*Lindsey Manufacturing Co.*), and *United States v. Arthur Andersen LLP.* Arthur Andersen LLP v. United States, 544 U.S. 696, 698 (2005); United States v. Aguilar, 831 F. Supp. 2d 1180, 1180 (C.D. Cal. 2011); Verdict Form as to Defendant W.R. Grace at 1, United States v. W.R. Grace, No. 05-07-M (D. Mont. May 8, 2009). *W.R. Grace* resulted in a verdict of not guilty. *See* David S. Hilzenrath & Carrie Johnson, *W.R. Grace Acquitted in Montana Asbestos Case, 3 Former Officials Also Found Not Guilty*, May 9, 2009, WASH. POST, at A14. In *Lindsey Manufacturing*, the court dismissed the case following a trial. *See Aguilar*, 831 F. Supp. 2d at 1180. In *Arthur Andersen*, the accounting firm was convicted at trial, but the Supreme Court reversed its conviction. *See Arthur Andersen*, 544 U.S. at 698.

[64] *See, e.g.*, Devlin Barrett, *Pfizer to Pay Record $2.3 Billion Penalty for Illegal Drug Promotions*, HUFFINGTON POST (Sept. 2, 2009, 10:19 PM), http://www.huffingtonpost.com/2009/09/02/pfizer-to-pay-record-23b-_n_275012.html; *Justice Department Hits ADM with $100 Million Criminal Fine. Shareholders, Victims Cry Foul*, CORP. CRIME REP., Oct. 21, 1996, at 1, 1; Press Release, U.S. Dep't of Justice, Novo Nordisk Agrees to Pay $9 Million Fine in Connection with Payment of $1.4 Million in Kickbacks Through the United Nations Oil-for-food Program (May 11, 2009), http://www.justice.gov/opa/pr/2009/May/09-crm-461.html; Press Release, U.S. Dep't of Justice, Saudi Arabia-Based Tamimi Global Company to Pay U.S. $13 Million to Resolve Criminal and Civil Allegations of Kickbacks and Illegal Gratuities (Sept. 16, 2011), http://www.justice.gov/opa/pr/2011/September/11-crm-1203.html; Press Release, U.S. Dep't of Justice, Siemens AG and Three Subsidiaries Plead Guilty to

tion of accounting firm Arthur Andersen LLP and the firm's subsequent collapse, companies fold to government threats of indictment and do virtually anything required to avoid being prosecuted.[65] This includes not only paying substantial fines and adopting enhanced corporate compliance programs (including, often, appointing an independent monitor), but also facilitating government investigations and prosecutions of individuals.[66]

### C. *Corporate Internal Investigations*

Although corporate internal investigations of misconduct are not new,[67] the increased focus on corporate criminality has made these investigations a growth industry in the corporate culture.[68] Upon notice of an internal problem, corporate boards can be quick to initiate an investigation to ascertain the corporation's risk of a prosecution or regulatory proceeding, and, if such risk exists, how to respond.[69] The possibility of shareholder derivative actions or other third-party civil claims

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Foreign Corrupt Practices Act Violations and Agree to Pay $450 Million in Combined Criminal Fines (Dec. 15, 2008), http://www.justice.gov/opa/pr/2008/December/08-crm-1105.html; Press Release, U.S. Dep't of Justice, UBS Enters into Deferred Prosecution Agreement (Feb. 18, 2009), http://www.justice.gov/opa/pr/2009/February/09-tax-136.html.

[65] *See Arthur Andersen*, 544 U.S. at 698 (reversing Arthur Andersen LLP's conviction); Charles D. Weisselberg & Su Li, *Big Law's Sixth Amendment: The Rise of Corporate White-Collar Practices in Large U.S. Law Firms*, 53 ARIZ. L. REV. 1221, 1239–42 (2011). Although the accounting firm was eventually successful on appeal at the U.S. Supreme Court, the collateral consequences of the firm's indictment had already destroyed the firm through bankruptcy. *See* Weisselberg & Li, *supra*, at 1239.

[66] *See* Zierdt & Podgor, *supra* note 61, at 2; *see also* Weisselberg & Li, *supra* note 65, at 1243–44 (discussing recent incentives for conducting an internal investigation).

[67] *See, e.g.*, *15 Hutton Employees Are Cited*, N.Y. TIMES, Sept. 6, 1985, at D6 (discussing how former U.S. Attorney General Griffin B. Bell cited fifteen employees of E.F. Hutton as a result of evidence gathered in an internal investigation); *see also* Zierdt & Podgor, *supra* note 61, at 4, 39 (discussing how deferred prosecutions are not new, which require defendants to comply with set conditions).

[68] "[W]e have reached a high water mark for government investigations in which the risk of becoming swept up in such an investigation is greater than ever before." Daniel J. Fetterman & Mark P. Goodman, *White Collar Landscape: Regulators, Targets and Priorities*, *in* DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS, *supra* note 1, at 1, 30; *see* Kwan-Gett, *supra* note 4, at 409 ("Since 2001, over 2,500 public companies have retained outside counsel to conduct internal investigations into suspected wrong-doing by corporate executives and employees.") (citing *Options Scorecard*, WALL ST. J. (Sept. 4, 2007), http://online.wsj.com/public/resources/documents/info-optionsscore06-full.html (providing examples of internal investigations related to stock-option grants and practices)).

[69] *See* Campbell & Beaudette, *supra* note 9, at 1–2.

looms in the background and complicates both the investigation and the corporation's response.[70]

There is no fixed definition of a corporate internal investigation, and no specific attributes or set structure. An internal investigation is in essence an effort by a company to learn what has happened within the corporation or what was done by the corporation.[71] In most instances the scope of this inquiry is decided by the corporation.[72]

Corporations give their lawyers access to corporate records, which become a principal source of information, but unlike government investigators, corporate counsel cannot employ grand juries, subpoenas, or court-authorized searches to gather information from third parties. Their investigation is private, not ancillary to any legal proceeding. Consequently, the other principal source of information is current officers and employees of the corporation, who may cooperate out of consideration for the corporation or as a matter of employment obligation, or who may decline to do so, but at the risk of being fired.[73] The individual who is questioned has no Fifth Amendment right against incrimination or right to counsel: *Miranda* rights do not apply.[74] The individual also has no due process right not to be coerced or tricked into cooperating.[75] And, as noted by Professor Lisa Kern Griffin, private sector employees do not enjoy immunity during investigations, comparable to what is offered to public employees pursuant to the Supreme Court's 1967 decision in *Garrity v. New Jersey*, holding that police offi-

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[70] *See* Brown, *supra* note 16, at 18–29 (describing a seminal shareholder derivative suit in which a company's directors failed to exercise good faith judgments about the company's information and reporting system). Although there are some risks to a corporation in conducting an internal investigation, there are also huge incentives to move in this direction. *See id.* at 25–26 (describing the criminal consequences of failing to assure legal compliance).

[71] *See* Kwan-Gett, *supra* note 4, at 410.

[72] *Cf. id.* at 419 (advising companies' independent committees to set the scope of a special counsel's investigation); Campbell & Beaudette, *supra* note 9, at 4 (advising independent committees to set the scope of the investigation). One exception might be when the internal corporate investigation was an outgrowth of a deferred or non-prosecution agreement and is being conducted by an appointed monitor. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 62, at 3–4 (describing corporate concerns with DOJ-selected monitors, including a lack of transparency in the scope of a monitor's work).

[73] *See* Campbell & Beaudette, *supra* note 9, at 5 ("The committee should clearly communicate that employees who do not cooperate risk termination.").

[74] *See* First, *supra* note 12, at 73. *Miranda* rights apply only during a custodial interrogation. *See Miranda*, 384 U.S. at 444 ("By custodial interrogation, we mean questioning initiated by law enforcement officers after a person has been taken into custody or otherwise.").

[75] *See* Griffin, *supra* note 14, at 366 n.288.

cers' statements to the attorney general, elicited under threat of "removal from office," were coerced statements.[76]

Although the private process of a corporate internal investigation lacks government power, it is not always lacking coercion. Clearly a company may not commit a crime, such as assault, to secure information from its employee. Putting a gun to the employee's head would not be legally tolerated. But a company does have the ability to fire an individual who fails to comply or participate in the company's investigation. The individual has no legal protection other than what may be stated in his or her employment agreement or implied in the contractual relationship.[77] In employment-at-will states this may offer little relief.[78] Additionally, the individual constituent ordinarily owes loyalty to his or her employer and may therefore feel an obligation to participate in the entity's internal investigation.[79] Thus, although the corporate entity does not have subpoena or grand jury powers, the company's constituents may nevertheless feel compelled to answer the questions of the attorney conducting the internal investigation.[80]

The corporation and its lawyer essentially have free rein. Any possible judicial scrutiny of this corporate conduct will occur only after the fact, if, for example, the individual is later indicted and challenges the admission of evidence that he or she provided during the internal investigation.[81] The corporation owns the information obtained during the internal investigation and may exchange it for a favorable disposition from the government.[82] The individual constituent has lost not only the confidentiality of the information but also the opportunity to barter this information with the government, leaving the employee basically powerless.

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[76] *See* 385 U.S. 493, 494, 500 (1967); Griffin, *supra* note 14, at 353–58.

[77] *See* Ribstein, *supra* note 33, at 874–75.

[78] Karen Patton Seymour & Allison Caffarone, *Defending Individuals in Government Investigations*, *in* DEFENDING CORPORATIONS AND INDIVIDUALS IN GOVERNMENT INVESTIGATIONS, *supra* note 1, at 517, 519.

[79] *See* Griffin, *supra* note 14, at 337 (implying existing loyalty between the corporation and its employees); McConnell et al., *supra* note 62, at 556 (noting that employees have an obligation to participate in "internal controls and compliance").

[80] *See* Griffin, *supra* note 14, at 355, 361 (arguing that because the threat of job loss renders one's subsequent statements "coerced" in other contexts, the same standard should be applied to corporate internal investigations).

[81] *See* Katrice Bridges Copeland, *Preserving the Corporate Attorney-Client Privilege*, 78 U. CIN. L. REV. 1199, 1218–20, 1228 (2010) (citing *Stein*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006), *aff'd*, 541 F.3d 130 (2d Cir. 2008) (holding that a company's preindictment conduct toward employees should receive judicial scrutiny only after indictment, and suggesting a similar outcome under current DOJ policy)).

[82] Cummings, *supra* note 5, at 681.

### D. *Incentives to Initiate a Corporate Internal Investigation*

There are many incentives for corporations to conduct internal investigations. For example, corporations may now need to move more swiftly as new legislation—such as the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010[83] and the Sarbanes-Oxley Act of 2002[84]—places added requirements on corporations to timely report misconduct.[85] Other recent statutes similarly require corporations to report misconduct, and an internal investigation may be necessary to assess whether the reporting is mandatory.[86] Leniency programs also can incentivize a corporation to investigate misconduct and self-report.[87] Increased whistle blowing within entities and external *qui tam* matters can also serve as a prelude to internal investigations.[88] Companies that enter into deferred and non-prosecution agreements may find themselves with an internal monitor and an obligation to review corporate conduct under the terms of the monitorship.[89] The DOJ's *Principles of Federal Prosecution of Business Organizations*, which guides prosecutors' discretion in determining whether a corporation will be indicted, takes into account "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its

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[83] Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010).

[84] Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002).

[85] *See* John F. Savarese & Carol Miller, *Internal Investigations 2011: Investigations in the Aftermath of Dodd-Frank*, *in* INTERNAL INVESTIGATIONS 2011: INVESTIGATIONS IN THE AFTERMATH OF DODD-FRANK 357, 359 (1891 PLI/Corp. 2011).

[86] For example, many environmental statutes have reporting requirements. *See, e.g.*, Oil and Hazardous Substance Liability, 33 U.S.C.A. § 1321(b)(5) (2012) ("Any person in charge of a vessel or of an onshore facility or an offshore facility shall, as soon as he has knowledge of any discharge of oil or a hazardous substance from such vessel or facility in violation of paragraph (3) of this subsection, immediately notify the appropriate agency of the United States Government of such discharge."); Notification Requirements Respecting Released Substances, 42 U.S.C. § 9603 (2006) ("Any person in charge of a vessel or an offshore or an onshore facility shall, as soon as he has knowledge of any release (other than a federally permitted release) of a hazardous substance from such vessel or facility . . . immediately notify the National Response Center . . . .").

[87] *See* Robert W. Tarun & Peter P. Tomczak, *A Proposal for a United States Department of Justice Foreign Corrupt Practices Act Leniency Policy*, 47 AM. CRIM. L. REV. 153, 172–83 (2010) (discussing the leniency programs available for antitrust violations).

[88] *See* Campbell & Beaudette, *supra* note 9, at 2. The whistleblower provisions of Dodd-Frank likely will increase the need for corporate internal investigations. *See* Savarese & Miller, *supra* note 85, at 3.

[89] *See generally* Vikramaditya Khanna & Timothy L. Dickinson, *The Corporate Monitor: The New Corporate Czar?*, 105 MICH. L. REV. 1713 (2007) (discussing the powers and fiduciary duties of corporate monitors).

agents."[90] The federal sentencing guidelines also incentivize corporations to "exercise due diligence to prevent and detect criminal conduct," which often necessitates an internal investigation.[91] Finally, because of the threat of shareholder lawsuits, internal corporate investigations may be required by corporate boards as a component of combating this litigation.[92]

The risk of corporate criminal liability places huge pressures on corporations. For attorneys or certain auditors, a criminal charge could lead to the immediate loss of clientele or customers. Arthur Andersen LLP's successful reversal of its criminal conviction at the Supreme Court proved irrelevant to the company as the collateral effect of the indictment and trial rendered it bankrupt.[93] Likewise, findings of criminality can result in program exclusion for those involved in the medical field, and defense procurement providers fear government debarment following a criminal conviction.[94]

Corporate internal investigations are the prelude to forthcoming criminal prosecutions and negotiations with the government.[95] When a corporation learns of possible wrongdoing, its reaction is typically to commence an internal investigation to ascertain the level and breadth of any misconduct.[96] Corporations are notified of possible wrongdoing

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[90] *Principles of Federal Prosecution of Business Organizations*, *supra* note 30, § 9–28.300(A)(4).

[91] *See* U.S. SENTENCING GUIDELINES MANUAL § 8B2.1(a)(1) (2011); *see also* Katherine M. Weiss, Upjohn Co. v. United States *as Support for Selective Waiver of the Attorney-Client Privilege in Corporate Criminal Investigations*, 48 B.C. L. REV. 501, 522–25 (2007). The federal sentencing guidelines use a "carrot and stick" approach, offering incentives to corporations to advance corporate good citizenship. *See* U.S. SENTENCING GUIDELINES MANUAL, *supra*, § 8B2.1 Background. The guidelines and commentary offer guidance on what constitutes an effective compliance program. *See id.* § 8B2.1(b) & cmt. nn.2–6 (including assigning responsibility for the program to high-level staff, training employees, and providing appropriate incentives to employees for compliance).

[92] *See* Campbell & Beaudette, *supra* note 9, at 3. Courts have noted the importance of having an effective compliance program and have placed civil obligations on boards to maintain adequate compliance programs. *See, e.g.*, McCall v. Scott, 239 F.3d 808, 817 (6th Cir. 2001) (discussing directors' duty to monitor corporate compliance); *In re* Caremark Int'l Inc. Derivative Litig., 698 A.2d 959, 967–70 (Del. Ch. 1996); *see also* Michael Volkov, Caremark, *FCPA and Corporate Governance*, WHITE COLLAR DEF. & COMPLIANCE (July 11, 2011, 12:59 PM), http://michaelvolkov.blogspot.com/2011/07/caremark-fcpa-and-corporate-governance. html.

[93] *See* Podgor, *supra* note 31, at 78–79.

[94] *See* JEROLD H. ISRAEL ET AL., WHITE COLLAR CRIME LAW AND PRACTICE 676–80, 847 (Thomson Reuters 3d ed., 2009) (discussing debarment, license revocation, and professional practice exclusion).

[95] *See* Kwan-Gett, *supra* note 4, at 411 ("There is a reasonable likelihood that any major internal investigation will be followed by, or conducted parallel to, an actual (or anticipated) external investigation . . . .").

[96] *See id.* at 410.

through various sources, including internal whistleblowers, external *qui tam* actions, routine internal compliance measures implemented in response to sentencing incentives,[97] and judicial acknowledgments that corporate compliance is a necessary component of corporate governance.[98]

Internal corporate investigations can also accompany a criminal action. When a company is notified by the government of potential criminality, through receipt of either a search warrant or a subpoena *duces tecum*, the corporation must assess whether there is truth to the allegations and possibly accumulate the materials for submission to the grand jury.[99] Corporate investigations may also be a function of a post-indictment or deferred prosecution.[100] Agreements with the government often provide for monitors to be implanted within the entity to assure corporate compliance.[101] Internal investigations may occur in this context to assure that the entity abides by the law.

### E. *Conducting Corporate Internal Investigations*

Corporate investigations follow no set path. The internal investigation industry basically operates with little oversight as the investigations are unmonitored and unregulated. The individuals conducting the investigation are often accountants or lawyers, or those working at their direction.[102] Attorneys, and those contracted to work for the lawyers, can provide a better chance of maintaining an attorney-client privilege should the government seek to gather information acquired during the internal investigation.[103]

Practitioner's literature provides significant advice to those conducting internal investigations.[104] This literature addresses who should

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[97] *See supra* notes 87–92 and accompanying text.

[98] *See supra* note 92 and accompanying text; *see also* Stone v. Ritter, 911 A.2d 362, 369–70 (Del. 2006) (endorsing the Delaware Court of Chancery's 1996 decision in *In re Caremark International Inc. Derivative Litigation*, and finding director oversight liability when directors fail to "implement any reporting or information system or controls" or when they implement a system but then fail "to monitor or oversee its operations").

[99] *See* Kwan-Gett, *supra* note 4, at 410.

[100] *See* Khanna & Dickinson, *supra* note 89, at 1724–26 (describing the scope of a monitor's work).

[101] *See id.* at 1721.

[102] Kwan-Gett, *supra* note 4, at 409 ("Since 2001, over 2,500 public companies have retained outside counsel to conduct internal investigations into suspected wrong-doing by corporate executives and employees.").

[103] *See* Dervan, *supra* note 11, at 367–68.

[104] *See generally* Gary R. Brown, *Law School Didn't Prepare You for This, Tips for the Internal Investigation*, ACC DOCKET (Assoc. of Corporate Counsel, Wash., D.C.), May 2010, at 58 (advis-

conduct the internal investigation,[105] what should be investigated, when the internal investigation should occur,[106] where it should take place, how it should be conducted,[107] and why this should occur. For example, some writings advise counsel to quickly determine whether his or her client is a target, subject, or witness of the investigation.[108] The literature discusses the process of determining who will conduct the investigation, recognizing that outside counsel provides greater objectivity but inside counsel will have greater familiarity with the internal workings of the company.[109] Decisions are often made through the company's independent audit committee.[110] Practitioner literature offers advice on how to conduct the investigation and how to collect documents for review.[111]

Of particular significance is literature that recognizes the importance of interviews of employees, and the importance of preserving the attorney-client privilege while also advising interviewees that the attorney represents the corporation.[112] Much has been written about the warnings that should be given to employees of an entity when being questioned by corporate or external counsel conducting an internal investigation.[113]

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ing in-house counsel on conducting internal investigations, including staffing, research, interviews, and credibility assessments); ERNEST E. BADWAY ET AL., A PRIMER ON GOVERNMENT AND INTERNAL INVESTIGATIONS (2011), http://www.foxrothschild.com/newspubs/newspubsArticle.aspx?id=4294970249 (giving an overview of white collar criminal investigations, the decisions businesses face when under investigation, and the factors businesses should consider in those decisions); Campbell & Beaudette, *supra* note 9 (describing when and how corporate management should conduct an investigation).

[105] *See* J. Justin Johnston, *Corporate Investigations After the Mortgage Meltdown*, J. MO. B., Mar.–Apr. 2009, at 70, 73.

[106] *See* WILLIAM M. HANNAY, DESIGNING AN EFFECTIVE FCPA AND ANTI-BRIBERY COMPLIANCE PROGRAM §§ 4:2, 4:5 (2011).

[107] *See* David Z. Seide, *An Outline on Internal Investigations*, *in* INTERNAL INVESTIGATIONS 2010: HOW TO PROTECT YOUR CLIENTS OR COMPANY 214, 228–36 (1819 PLI/Corp. 2010).

[108] BADWAY ET AL., *supra* note 104, at 4.

[109] *See, e.g.*, Campbell & Beaudette, *supra* note 9, at 4.

[110] *See id.*

[111] *See* Seide, *supra* note 107, at 229–36 (discussing how to establish an investigative plan).

[112] *See* Gregory A. Markel & Jason M. Halper, *Internal Investigations*, *in* 1 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 5:47 (Robert L. Haig ed., 3d ed. 2011) (discussing the giving of *Upjohn* warnings); *see also infra* notes 220–221 and accompanying text (discussing *Upjohn* warnings).

[113] *See, e.g.*, Heyman, *supra* note 29, at 203–08 (describing the consequences of existing and proposed warnings). Some of the literature has even gone so far as to rename these warnings "Adnarim warnings"—*Miranda* spelled backward—to highlight the correlation, and lack thereof, to *Miranda* warnings. *See id.* at 204 & n.223 (quoting proposed, broader warnings); Robert G. Morillo & Robert J. Anello, *Beyond* 'Upjohn': *Necessary Warnings in*

## II. VARYING APPROACHES OF INTERNAL INVESTIGATIONS

The corporation's posture during internal investigations is not fixed. The corporate-constituent role can be set when the investigation first commences, or the relationship may change over time. Clearly, a company that learns that its employee was embezzling will take a position that is not aligned with the employee. Less certain is the corporation's posture when an internal investigation is triggered by an anonymous message left on a hotline for reporting internal misconduct.

Two approaches are described here: one in which the company is aligned with the individual, and another in which the company decides not to protect the individual. Section A presents the first approach: the model used in considering the role of the attorney-client privilege in the 1981 U.S. Supreme Court case, *Upjohn Co. v. United States*, which extended attorney-client privilege to specific communications between corporate employees and corporate counsel.[114] Section B describes the second approach: the reality of a modern-day internal investigation in which the government is an integral force in the entity's decision making.[115]

Irrespective of the approach taken, courts and ethics rules favor the entity over the individual when issues arise, as discussed in Section C.[116] When an individual constituent seeks to protect him- or herself in a criminal proceeding and tries to preclude the government from using evidence he or she provided during a corporate internal investigation, courts have for the most part held that the attorney-client privilege is controlled by the corporation, which may waive the privilege and disclose the constituent's statements to counsel, to the constituent's detriment.[117]

### A. *Corporate-Individual Alignment*

One approach to corporate internal investigations assumes a symbiotic relationship between the corporation and its individual employees. In general, the company and its employees are on the same team;

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*Internal Investigations*, N.Y. L.J., Oct. 4, 2005, at 3, 3 (discussing the problems inherent for lawyers in conducting internal investigations).

[114] 449 U.S. 383, 394–95 (1981) (protecting, under attorney-client privilege, communications from employees to corporate counsel when the communications were made at the behest of the employees' superiors and were concerning matters within the scope of their employment); *see infra* notes 118–142 and accompanying text.

[115] *See infra* notes 143–186 and accompanying text.

[116] *See infra* notes 187–204 and accompanying text.

[117] *See infra* notes 187–204 and accompanying text.

they are looking out for each other. Although indictment may follow for rogue employees and executives, the company's internal investigation is designed strictly for its internal review. If the corporation later reports its findings to the government, it does so as a good corporate citizen when criminality is unexpectedly discovered through this internal review, and not because the corporation all along had an incentive to obtain evidence as a bargaining chip.

The corporate internal investigation in this model is strictly "internal." It is intended to enable the company's counsel to give informed advice or other legal assistance and is conducted in secret with an expectation that confidentiality will be maintained long term. Employees provide information to the company's lawyers, not because they are coerced or tricked into doing so, but because they identify with the company's interest in obtaining legal assistance and understand that this is consistent with their own interest as employees. Thus, the relationship is cooperative. Although the internal investigation may have been instigated by a government investigation, subpoena, or notice, the federal government is neither an intended beneficiary of the investigation nor a *direct or indirect* participant in it.

The investigation may be conducted by in-house counsel or outside counsel, and it may be initiated by corporate counsel, the board of directors, or an audit committee.[118] Investigating counsel may go to enormous lengths to ensure that confidentially is maintained. This can include stamping all investigative materials "attorney-client privileged" and "work product," maintaining a separate filing depository, making certain that recorded statements contain opinions, and being careful not to allow for any voluntary disclosure of materials outside of the investigating group.[119] If the government decides to intercede to obtain

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[118] Brown, *supra* note 104, at 60; BADWAY ET AL., *supra* note 104, at 6. This acknowledgment that inside counsel may at times conduct the investigation should in no way be interpreted as an acceptance of having this counsel as the primary party overseeing the investigation. The use of internal counsel can present unique problems if the investigation escalates to a level that includes government involvement. *See* Kwan-Gett, *supra* note 4, at 417. That said, it is also important to recognize the realities of these investigations and the fact that when the initial determination is made to conduct an investigation, there may be little evidence of a significant problem that warrants the necessity to invest in the cost of outside attorneys. *Cf. id.* at 410 ("[I]nvestigations are thus meant to determine the validity and seriousness of the circumstances alleged or disclosed . . . .").

[119] *See* Philip R. Sellinger, *Preserving the Attorney-Client and Work-Product Privileges While Conducting Internal Corporate Investigations*, ABA SEMINAR ON WHITE COLLAR CRIME (1989), *reprinted in* ISRAEL ET AL., *supra* note 94, at 606 (West Publ'g Co. 1996) (listing the different ways counsel can be used in a corporate investigation to ensure that privilege is maintained).

reports, documents, or statements from the corporate investigation, the corporation is quick to assert its privilege and to advocate that it should be allowed to maintain the confidentiality of this corporate internal investigation.

Because the company and individual employees are aligned, individuals can cooperate in this investigation and not fear that their statements will be relayed to the federal government in order for the company to receive an advantage. Obviously, those with direct criminal exposure may be fearful to cooperate in the investigation, as the corporation remains free to relay criminal evidence to the government in order for the government to prosecute rogue employees. So too, the entity may pressure uncooperative individuals, invoking its power to fire an individual who fails to provide answers to its investigators. But the starting point for this investigation has the corporation and individual on the same page. If the company is in fact a "friend," proceeding in this manner does not place the individual at unfair risk.

The Supreme Court's decision in *Upjohn* is the classic illustration of this paradigm.[120] *Upjohn* involved an internal investigation by a pharmaceutical company that had received word from independent accountants of possible improper payments to "foreign government officials in order to secure government business."[121] The company took the initiative to investigate this alleged wrongdoing by sending a questionnaire to key employees "for the purpose of determining the nature and magnitude of any payments made by the Upjohn Company or any of its subsidiaries to any employee or official of a foreign government."[122] Managers were instructed of the "highly confidential" nature of this investigation.[123] Counsel also conducted interviews.[124]

Upjohn thereafter submitted disclosures of the questionable payments in reports to the SEC and the IRS, which provoked a government investigation to determine tax consequences owing from the company.[125] The IRS issued a summons seeking the files of Upjohn

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[120] *See* 449 U.S. at 387–88 (describing how the Upjohn Company refused to produce notes of interviews with employees or questionnaires despite an IRS subpoena).

[121] *Id.* at 386–87.

[122] *Id.* The investigation was conducted by Upjohn's general counsel, who consulted with both outside counsel and the chair of Upjohn's board of directors. *Id.* at 386. Upjohn's general counsel also served as Upjohn's vice president and secretary. *Id.*

[123] *Id.* at 387.

[124] *Id.* The general counsel for Upjohn, along with outside counsel, "interviewed the recipients of the questionnaire and some 33 other Upjohn officers or employees as part of the investigation." *Id.*

[125] *Id.*

Company's general counsel regarding the alleged payments, and the agency also sought the questionnaires and written notes of counsel from the interviews conducted.[126]

Upjohn declined to produce the requested items, citing attorney-client privilege and work-product protections.[127] Court proceedings followed, instigated by the IRS's petition seeking enforcement of the summons for production of these materials.[128] The case eventually reached the U.S. Court of Appeals for the Sixth Circuit, where the court ruled that a "control group test" should be employed to determine the scope of the attorney-client privilege.[129] Limiting the privilege to a "control group" promoted "consultation with counsel" among those individuals in the company who were the decisionmakers.[130]

The Supreme Court viewed the privilege more broadly, concluding that both the corporation's privilege and work-product protection extended to the lawyers' communications with employees.[131] The Court was quick to preface its opinion with a statement that it was not providing "a broad rule or series of rules to govern all conceivable future questions in this area," but it did reject the lower court's use of a "control group" test.[132]

The Court's ruling was premised on the importance of the attorney-client privilege in "encourag[ing] full and frank communication between attorneys and their clients."[133] It noted that the "control

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[126] *Upjohn*, 449 U.S. at 387–88. The IRS summons, issued pursuant to federal law, included the following request, which served as the crux of the issue in the case: "The records should include but not be limited to written questionnaires sent to managers of the Upjohn Company's foreign affiliates, and memorandums or notes of the interviews conducted in the United States and abroad with officers and employees of the Upjohn Company and its subsidiaries." *Id.*

[127] *Id.* at 388.

[128] *Id.* The U.S. District Court for the Western District of Michigan followed a magistrate's recommendation that the summons be enforced. *Id.*

[129] *Id.* at 390, 392; United States v. Upjohn Co., 600 F.2d 1223, 1226–27 (6th Cir. 1979), *rev'd*, 449 U.S. 383 (1981). The Sixth Circuit rejected a "subject matter" test. *Upjohn*, 600 F.2d at 1226–27.

[130] *Upjohn*, 600 F.2d at 1227.

[131] *See Upjohn*, 499 U.S. at 386.

[132] *Id.* at 386, 397. Chief Justice Warren Burger, concurring in part and in the judgment, preferred that the Court articulate a definitive standard. *Id.* at 402 (Burger, C.J., concurring). He rejected the "control group" test used by the lower court but promoted a test that would cover a communication when "an employee or former employee speaks at the direction of the management with an attorney regarding conduct or proposed conduct within the scope of employment." *Id.* at 402–03. Chief Justice Burger articulated specific attorney functions to which he thought the privilege should apply. *Id.* at 403.

[133] *Id.* at 389. In establishing the rule's purpose, the Court also discussed Federal Rule of Evidence 501, which provides that "the privilege of a witness . . . shall be governed by

group" test "frustrates the very purpose of the privilege by discouraging the communication of relevant information by employees of the client to attorneys seeking to render legal advice to the client corporation."[134] The Court reasoned that "the privilege exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."[135] In *Upjohn*, the employees were acting "at the direction of corporate superiors in order to secure legal advice from counsel" for the corporation.[136]

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the principles of the common law as they may be interpreted by the courts of the United States in light of reason and experience." *Id.* (citing 8 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW § 2290, at 542 (John T. McNaughton ed., rev. ed. 1961) (discussing the early history of privilege's common law development)). The Court noted that the privilege applied to corporations and that the government had not contested this general proposition. *Id.* at 390.

[134] *Id.* at 392. Unwilling to accept the "narrow" interpretation of the lower court, the Supreme Court held that the "communications must be protected against compelled disclosure." *Id.* at 392, 395. The Court, however, did not embrace an unqualified privilege, holding that the "privilege only protects disclosure of communications; it does not protect disclosure of the underlying facts by those who communicated with the attorney." *Id.* at 395. In reaching this conclusion, the Court cited a passage from *City of Philadelphia v. Westinghouse Electric Corp.*, which states in part:

> A fact is one thing and a communication concerning that fact is an entirely different thing. The client cannot be compelled to answer the question, "What did you say or write to the attorney?" but may not refuse to disclose any relevant fact within his knowledge merely because he incorporated a statement of such fact into his communication to his attorney.

205 F. Supp. 830, 831 (E.D. Pa. 1962); *see Upjohn*, 499 U.S. at 395–96. The Court noted that the attorney-client privilege only resolved the "responses to the questionnaires and any notes reflecting responses to interview questions." *Upjohn*, 499 U.S. at 397. But this did not cover everything requested in the summons; thus there was a need to consider whether the work-product doctrine covered additional materials. *Id.* The Court relied on its holdings in *Hickman v. Taylor* and *United States v. Nobles* in discussing the policy rationales behind the work-product doctrine. United States v. Nobles, 422 U.S. 225, 236–40 (1975) (emphasizing the "strong public policy" of the work-product doctrine); Hickman v. Taylor, 329 U.S. 495, 497–98, 509–12 (1947) (creating and justifying the "work product" doctrine). The Court also looked at Rule 26 of the Federal Rules of Civil Procedure, remanding this aspect of the case to the lower court noting that "such work product cannot be disclosed simply on a showing of substantial need and inability to obtain the equivalent without undue hardship." *Upjohn*, 449 U.S. at 400–02. The Court stated that the Magistrate had applied the "'substantial need' and 'without undue hardship'" standard, and that "a far stronger showing of necessity and unavailability by other means than was made by the Government or applied by the Magistrate in this case would be necessary to compel disclosure." *Id.* at 401–02.

[135] *Upjohn*, 449 U.S. at 390.

[136] *Id.* at 394.

Privileges are narrowly construed because they denigrate the public interest in disclosure of relevant information in legal proceedings.[137] They are extended only to contexts in which they are presumed necessary to facilitate communications with counsel.[138] The *Upjohn* Court's presumption was that, absent protection of the privilege, corporate lawyers would not receive candid disclosures from corporate employees, which are necessary for the lawyers to advise and assist their corporate clients.[139] But why not? Companies can require their employees to speak and can threaten to fire them if they do not. Presumably, the *Upjohn* Court believed that what would motivate employees to speak freely was not coercion but their identification with the company's interests and, conversely, absent a promise of legal protection, that they would withhold information out of concern for their own or the company's shared interests.

Whether identifying with the corporation's ends or perceiving that it would not be in the corporation's best interest to receive the information without the guarantee of confidentiality afforded by the privilege, employees believe that their company will not disclose their communications to third parties unless it is in the shared interest of the company and the individual to do so.[140] Unlike third parties, whose communications with corporate counsel conducting the internal investigation are not privileged, employees' communications would be covered, as this provides an incentive to be forthcoming, which is something that is beneficial to both the individual and the company.

Underlying the theory and doctrine in *Upjohn* is a practical assumption that the company is aligned with the individual employees against the government.[141] Otherwise, the privilege would mean nothing to

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[137] *See* Giesel, *supra* note 32, at 127 (noting that privilege acts to obstruct truth-finding).

[138] *See id.* at 127 & n.73 ("[C]ourts have strictly confined [the privilege] within the narrowest possible limits consistent with the logic of its principle." (internal quotation marks omitted)).

[139] *See Upjohn*, 449 U.S. at 389, 395 (extending privilege protection to employee-counsel communications "to encourage full and frank communication").

[140] *See* Heyman, *supra* note 29, at 197 ("[E]mployees often have a false sense of security that their communications will be kept confidential under the protections of the attorney-client privilege and work-product doctrine.").

[141] *See Upjohn*, 449 U.S. at 389, 392, 395. Many cases have examined the attorney-client privilege and work-product doctrine in the corporate context. *See, e.g.*, *In re* Grand Jury Subpoenas Dated March 19, 2002 & August 2, 2002, 318 F.3d 379, 383–87 (2d Cir. 2002) (discussing preexisting third-party documents held by corporate counsel); *In re* Allen, 106 F.3d 582, 605–06 (4th Cir. 1997) (holding that a former employee's communications with entity counsel were covered under attorney-client privilege); *In re* Six Grand Jury Witnesses, 979 F.2d 939, 943–44 (2d Cir. 1992) (discussing the scope of the attorney-client and work-product privileges). Many cases also arise in the context of who has the authority to

corporate employees and the corporation's privilege would not have to protect employees' communications with corporate counsel.[142] The corporation fights to keep the government from obtaining information that it gathered for the corporation's internal use. There is no *direct or indirect* participation by the government in corporate counsel's efforts.

### B. *Corporate-Individual Discord*

At the opposite end of the spectrum is the corporate internal investigation that situates the government as an *indirect* participant in, or intended beneficiary of, the corporate internal investigation, rendering the corporation's interests adverse to those of its individual employees. Although the internal investigation starts out confidential, its work product is meant to be disclosed to the government, which will use the information against the corporate employees and treat the corporation leniently in exchange. In other words, like a government investigation, the object of the internal investigation is evidence gathering, not the facilitation of legal assistance. A central fact of this paradigm is that however the corporation might pretend to talk to its employees, the corporation is in fact the employees' foe.

In this approach, an alliance with its employees is not essential to the corporation's ability to obtain their cooperation. Corporations can fire individuals who fail to cooperate with an internal investigation.[143] Likewise, companies can offer perquisites to those who do provide information.[144] The scope of the investigation and what is said to those being investigated places corporations in a superior position to individuals who have no constitutional rights in this corporate investigatory process, allowing the entity to exploit employees for its own benefit.

In large part, the federal government's power to indict the corporation places the company in an adverse position to its employees and executives. The corporate entity has no choice but to be aligned with the government if it desires a beneficial resolution of any alleged criminal

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waive the privilege and voluntary disclosures. *See, e.g.*, *In re* Grand Jury Proceedings, 219 F.3d 175, 179 (2d Cir. 2000) (holding that a corporate officer can impliedly waive attorney-client privilege and work-product doctrine when testifying before a grand jury even when the corporation has explicitly refused to waive); United States v. Mass. Inst. of Tech., 129 F.3d 681, 684–86 (1st Cir. 1997) (discussing the effects of voluntary disclosures).

[142] The emphasis for counsel was on how best to protect attorney-client privilege and work-product doctrine. *See* Sellinger, *supra* note 119, at 606–09 (listing the different ways counsel can assure that privilege is maintained).

[143] *See* Campbell & Beaudette, *supra* note 9, at 5.

[144] *See* Gregory M. Gilchrist, *The Expressive Cost of Corporate Immunity*, 64 HASTINGS L.J. 1, 9–11 (2012).

activity. Even when no criminal activity is involved, entering into a cooperation agreement avoids the risks of going to trial, possibly encouraging a flood of shareholder lawsuits, and bankruptcy. Because most internal investigations are not within the court's view, there is nobody to offer relief to an executive or employee placed in the disadvantageous position of being asked to provide information to the investigating counsel—information that may later be used against the individual.

The problem, though, is that employees may be unaware of counsel's desire to secure information that will benefit the company at the employees' expense.[145] This sometimes becomes an issue in litigation over the admissibility of the individual's statements to corporate counsel after the corporation has waived the privilege and provided the evidence to the government.[146] In this context, individuals sometimes claim that they were implicitly represented together with the corporation and that they can therefore personally assert the privilege.[147] It may then become significant whether counsel complied with the ethics rules and recommended practices.[148] Typically, the corporation's lawyers caution employees that they represent the company only and that the company has the exclusive authority to assert or waive its privilege with respect to the employees' statements to counsel.[149] Sometimes, however, counsel does not make his or her role clear.[150] The individual employee may have previously dealt with corporate counsel and may assume that counsel continues to serve as his or her attorney. The corporation's lawyer may deliberately exploit this misunderstanding because emphasizing that counsel represents the entity may discourage the individual from cooperating.

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[145] *See* Giesel, *supra* note 32, at 164–65 (suggesting that in case after case, counsel fails to correct employees' misunderstandings because the omission permits corporate counsel to gain more useful information); *see* Heyman, *supra* note 29, at 203.

[146] *See* Jonathan N. Rosen, *In-House Counsel and the Government's War on Corporate Fraud*, CRIM. JUST., Fall 2010, at 5, 6 (discussing a district court that granted an employee's motion to dismiss on the grounds that corporate counsel was also the employee's personal counsel).

[147] *See* Giesel, *supra* note 32, at 113 n.8 (noting a case in which an employee claimed that corporate counsel represented the employee personally).

[148] *See* Rosen, *supra* note 146, at 6 (describing the affirmation of a district court's finding of corporate counsel's professional misconduct because the employee thought counsel represented him personally); *infra* notes 199–204 and accompanying text (describing attorney ethics rules).

[149] *See* Griffin, *supra* note 14, at 337.

[150] *See* Cummings, *supra* note 5, at 681 (describing how corporate counsel give "watered-down" warnings that leave employees with the mistaken belief that counsel represents them in addition to the corporation).

Unfortunately for the individual employee seeking the benefit of a personal attorney-client privilege, the applicable case law tends to favor the corporation and the government. Jurisdictions often follow the *Bevill* test, established by the U.S. Court of Appeals for the Third Circuit in the 1986 case, *In re Bevill, Bresler & Schulman Asset Management Corp.*[151] The *Bevill* test places on the individual asserting a privilege with the corporation's counsel the onus to prove the following five factors:

> First, they must show they approached [counsel] for the purpose of seeking legal advice. Second, they must demonstrate that when they approached [counsel] they made it clear that they were seeking legal advice in their individual rather than in their representative capacities. Third, they must demonstrate that the [counsel] saw fit to communicate with them in their individual capacities, knowing that a possible conflict could arise. Fourth, they must prove that their conversations with [counsel] were confidential. And, fifth, they must show that the substance of their conversations with [counsel] did not concern matters within the company or the general affairs of the company.[152]

The premise of the *Bevill* test is that corporations are ordinarily adverse to their employees, that employees understand that adversity, and that, therefore, employees will not regard the corporation's lawyer as their own except in the most limited circumstances. This test places a near-insurmountable burden on the individual employee seeking to show that he or she is entitled to assert attorney-client privilege.[153]

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[151] 805 F.2d 120, 123–25 (3d Cir. 1986).

[152] *In re Bevill*, 805 F.2d at 123–25 (alterations in original) (quoting *In re* Grand Jury Investigation, 575 F. Supp. 777, 780 (N.D. Ga. 1983)) (approving implicitly how the district court placed the burden on the employee to establish five factors to assert personal attorney-client privilege over communications with corporate counsel); *see also* United States v. Norris, 722 F. Supp. 2d 632, 639–40 (E.D. Pa. 2010) (noting that "the burden of demonstrating that a privileged relationship exists nonetheless rests on the party who seeks to assert it" (citing United States v. Costanzo, 625 F.2d 465, 468 (3d Cir. 1980))).

[153] Some circuits may still examine the individual's perception of whether an attorney-client privilege existed. *See* Cummings, *supra* note 5, at 676–77 (discussing circuits that favor the individual). A rare occasion might allow for individual consideration under *Bevill*. For example, one court stated that

> if the communication between a corporate officer and corporate counsel specifically focuses upon the *individual officer's* personal rights and liabilities, then the fifth prong of *In Matter of Bevill* can be satisfied even though the general subject matter of the conversation pertains to matters within the general affairs of the company.

Once the internal investigation concludes, the company may turn over its work product and the government may proceed against individuals, at which point there may be opportunities for judicial oversight and regulation. The government may be restrained in its ability to use the company essentially as its investigative or prosecutive agent.[154]

*United States v. Norris*, an unpublished 2011 Third Circuit decision affirming an employee's conviction for conspiracy to obstruct justice,[155] illustrates the risk of unfairness at the unregulated internal investigation stage. Ian P. Norris, a foreign national, served as the Chief Executive Officer (CEO) of the Morgan Crucible Company ("Morgan"), a United Kingdom corporation.[156] Norris was indicted in the U.S. District Court for the Eastern District of Pennsylvania following an antitrust

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*In re* Grand Jury Proceedings, 156 F.3d 1038, 1041 (10th Cir. 1998) (holding that the individual could not meet the test of showing that the matter related to the individual's personal rights).

[154] For example, in the 2008 case *United States v. Stein*, the U.S. Court of Appeals for the Second Circuit held that accounting firm KPMG's policy of conditioning and capping its employees' legal fees infringed on those employees' right to counsel because of the government's influence in setting KPMG's policy. 541 F.3d 130, 136 (2d. Cir. 2008). The court rejected the government's argument that KPMG's past fee practices for those facing indictment was voluntary, finding that the district court had determined "that absent any state action, KPMG would have paid defendants' legal fees and expenses without regard to cost." *Id.* at 156. In *Stein*, the court examined government actions that resulted in KPMG not paying the attorney's fees of thirteen former partners, employees, and one executive of the company who faced indictment. *Id.* at 135. The court found that "KPMG's adoption and enforcement of a policy under which it conditioned, capped and ultimately ceased advancing legal fees to defendants followed as a direct consequence of the government's overwhelming influence." *Id.* at 136. The court used the Memorandum of Deputy Attorney General Larry Thompson (the "Thompson Memorandum") as part of its basis for finding government interference with the defendants' right to counsel. *Id.* at 136, 142–44. The post-investigative restraint in *Stein* contrasts with the essentially unregulated nature of corporate internal investigations. In *Stein*, a court was able to intercede and provide relief to the corporate constituents because the case had passed the internal corporate investigation stage. *See id.* at 139 (describing how the employees were indicted after the company signed a deferred prosecution agreement and implying that most employee-defendants had not made proffer statements or pled guilty). Absent court oversight, one has to wonder if the defendants would have received paid counsel. It can be argued that the right to counsel does not accrue until criminal charges have been filed, and therefore there is no right during an investigatory stage. *See* Susan R. Martyn, *Accidental Clients*, 33 HOFSTRA L. REV. 913, 916–17 (2005) (noting that the right to counsel attaches when a person is accused of a crime). Professor Lisa Kern Griffin has discussed a possible extension of *Garrity* immunity for employees interviewed by internal investigators pursuant to pending deferred prosecution agreements. Griffin, *supra* note 14, at 353–58; *see* Garrity v. New Jersey, 385 U.S. 493, 494, 500 (1967). This contrast with internal corporate investigations suggests the need for better oversight during internal investigations.

[155] 419 F. App'x 190, 195 (3d Cir. 2011).

[156] *Id.* at 191–92; United States v. Norris, 719 F. Supp. 2d 557, 560 (E.D. Pa. 2010) (noting that Norris is a citizen of the United Kingdom), *aff'd*, 419 F. App'x 190 (3d Cir. 2011).

investigation.[157] He was subsequently extradited to the United States, tried, and convicted for conspiracy to obstruct justice.[158] The government, in a press release following sentencing, said "that Norris orchestrated an elaborate conspiracy with his subordinates to obstruct the grand jury's investigation by creating a false script that employees of both Morgan and its competitor were to follow when questioned during the investigation."[159] Norris's appeal did not provide him relief; he was left to pay the fine and serve the eighteen-month prison sentence.[160]

For purposes of this discussion, it is important to focus on an unsuccessful pre-trial, trial, and appellate argument raised by Norris concerning the court's permitting counsel who conducted the internal investigation to testify against Norris at his trial.[161] This argument sheds light on the workings of the internal corporate investigation and the clash between corporate individuals and the company.

Upon receipt of a subpoena from the government, the company (Morgan) retained counsel to handle its response to the subpoena and to conduct an internal investigation.[162] One partner in this outside firm, considered the "relationship partner," assigned the matter to an-

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[157] *See Norris*, 419 F. App'x at 191. The four-count indictment charged Norris with conspiring to fix prices in violation of 15 U.S.C. § 1, conspiracy to obstruct justice in violation of 18 U.S.C. § 371, and the specific offenses of obstruction underlying this conspiracy charge, including 18 U.S.C. § 1512(b)(1) and § 1512(b)(2)(B). *Id.* at 192. Norris could not be prosecuted for the conspiracy to fix prices because of an extradition issue. *Id.* at 192 n.1.

[158] *Id.* at 192. Norris was convicted of violating the conspiracy statute, 18 U.S.C. § 371, by conspiring to violate 18 U.S.C. § 1512(b)(1) and § 1512(b)(2)(B). Interestingly, he was acquitted of the actual substantive counts that served as the underlying conduct of the conspiracy. *Id.* He was sentenced to eighteen months imprisonment and was fined $25,000. *Id.*

[159] Press Release, U.S. Dep't of Justice, Former CEO of the Morgan Crucible Co. Sentenced to Serve 18 Months in Prison for Role in Conspiracy to Obstruct Justice (Dec. 10, 2010), http://www.justice.gov/opa/pr/2010/December/10-at-1426.html.

[160] *Norris*, 419 F. App'x at 191–92. The Third Circuit rejected Norris's arguments that the evidence was insufficient to show that he "corruptly persuaded others with intent to influence their grand jury testimony," that the jury had been improperly instructed on an element of one specific offense of obstruction, and that the trial court had erred by "failing to identify for the jury the overt acts alleged in the indictment." *Id.* at 193–95. The court also rejected Norris's argument that it was improper for counsel to testify at trial. *Id.* at 195. The U.S. Supreme Court denied certiorari on October 3, 2011. United States v. Norris, 132 S. Ct. 250 (2011) (denying certiorari).

[161] *See Norris*, 722 F. Supp. 2d at 639–40 (finding that corporate counsel did not represent Norris individually); *see also Norris*, 419 F. App'x at 195 (affirming the district court's denial of privilege).

[162] *Norris*, 722 F. Supp. 2d at 634.

other partner to handle the response for the grand jury.[163] For over a two-year period, this latter attorney served as the main internal corporate investigator and as the company's connection to the DOJ Antitrust Division.[164] As internal investigator, this attorney requested that Morgan executives provide documents for his review.[165] He also interviewed key executives in the United Kingdom.[166] During his investigation, the attorney found that subordinates of the defendant, Norris, had created "non-contemporaneous meeting summaries ('scripts')" of the meetings between representatives of Morgan and representatives of its competitors, and that these "scripts" were being used by employees in answering the attorney's questions.[167] The attorney eventually turned these "scripts" over to the Antitrust Division.[168]

As one might surmise, the "scripts" became a component of the government's case against Norris for conspiracy to obstruct justice.[169] The trial court was then faced with the question of whether the investigating attorney could testify against Norris.[170] The backdrop of this issue concerned whether the internal investigating attorney represented Norris, the employee, in addition to Morgan, the company.[171] Norris presented strong evidence confirming his belief that counsel served concurrently as his personal attorney.[172] This evidence included the fact that the attorney was at Norris's side when he was interviewed by Canadian antitrust authorities[173] and that the attorney's law firm "provided Norris with a letter identifying the Law Firm as Norris' counsel in case

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[163] *Id.* at 635.

[164] *Id.* at 634–35.

[165] *Id.* Specifically, the attorney requested that Morgan's executives "[p]rovide any documents (located in the U.S. and abroad) describing or referring to any meeting or other communication between (i) any of the relevant individuals and (ii) representatives of any competitor in the relevant business area." *Id.*

[166] *Id.*

[167] *Id.*

[168] *Norris*, 722 F. Supp. 2d at 636. The attorney negotiated "an agreement with the Antitrust Division that by providing certain documents, including the scripts (the 'selected documents'), Morgan would not waive its right not to produce other foreign-based documents." *Id.* at 635. There is conflicting evidence on whether the attorney had permission from Morgan's executives to submit these documents to the government. *Id.* at 636.

[169] *Norris*, 419 F. App'x at 193.

[170] *Id.* at 192.

[171] *See Norris*, 722 F. Supp. 2d at 634.

[172] *Id.* at 636–37.

[173] *Id.* at 636. The attorney was also at Norris's side during a regulatory proceeding before the Federal Trade Commission. *Id.* at 637.

he encountered difficulties with immigration officials."[174] Additionally, the relationship partner—that is, the original attorney assigning the case to the investigating attorney—testified that he "understood the Law Firm also represented Norris personally."[175] Contrary evidence was presented by the internal investigating attorney, who "told Norris that he represented the company (Morgan) and did not represent Norris personally."[176]

Interestingly, the government recognized this ambiguity and explicitly asked the law firm to specify by name the individuals it represented,[177] to which the firm responded, "this [Law Firm] represents the parent company, its affiliates and its current employees."[178] Despite this

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[174] *Id.* at 637. This letter was marked "Privileged and Confidential Communication From Counsel," and it instructed Norris to contact his lawyer if he ran into problems with the Immigration and Naturalization Service when flying into the United States. Joint Appendix at 407–08, *Norris*, 419 F. App'x 190 (No. 10-4658) (letter of Oct. 29, 1999, to Ian Norris from Winthrop, Stimson, Putnam & Roberts). The letter stated, "Give us a call, and we'll handle it from there." *Id.* at 407. It also stated "your lawyers are" and then provided the names of the individual lawyers within the firm. *Id.* at 408. The letter included the lawyers' telephone, cellular, home, and in one case pager numbers for Norris were he to encounter problems at the border. *Id.* at 408. Additionally, Norris had letters addressed "To Whom It May Concern" for the INS, FBI, and DOJ. *Id.* at 409–10 (letter of Nov. 1, 1999, to "whom it may concern" from Winthrop, Stimson, Putnam & Roberts); *id.* at 411 (letter of Nov. 1, 1999, to "whom it may concern" from Winthrop, Stimson, Putnam & Roberts). These letters explicitly stated that Norris wished to remain silent and that federal agents were "prohibited by law from interrogating him at this time." *Id.* at 409–11. One letter also stated, "[w]e also hereby advise and represent to you that our client has authorized us to accept service on his behalf of any grand jury subpoena addressed to him." *Id.* at 409–10.

[175] *Norris*, 722 F. Supp. 2d at 635, 637.

[176] *Id.* The internal investigating attorney also testified at a preliminary hearing that "[a]t no time did Norris ask [the corporate attorney] to represent him personally." *Id.*

[177] Joint Appendix, *supra* note 174, at 3416–17 (letter of July 30, 2001, from Lucy P. Mcclain, DOJ, to Sutton Keany, Pillsbury Winthrop LLP).

[178] *Norris*, 722 F. Supp. 2d at 636. An internal email supported the firm's answer to the government attorney. *Id.* It stated that the firm represented Morgan's current employees, "including but not limited to, Mike and Bruce." *Id.* A follow-up letter to the government stated in part:

> [T]his [Law Firm] represents Morganite Industries, Inc. and its parent company, The Morgan Crucible Company plc, in connection with matters related to the investigation which you are conducting on behalf of the Division. We presumptively also represent all current employees of the companies in connection with the matter. Only Messrs. Cox and Muller were at one time identified as individuals that you would like to have appear before the grand jury; when that occurred, we acted on their behalf. We continue to do so. Should you wish to call other current employees, I assume that we would also represent those individuals.

*Id.*

evidence, the trial court found that Norris had not asked the attorney to represent him personally and had never discussed personal legal matters with him.[179] Therefore, the court held that the attorney could testify against Norris at his trial.[180]

The trial court used the well-accepted *Bevill* test[181] and placed the onus on Norris to prove its five factors.[182] Finding that Norris's proof was deficient, the court ruled that Norris could not claim an attorney-client privilege.[183] The Third Circuit upheld this decision finding that the district court was the fact finder and that it "did not legally err in applying this test."[184]

Whether or not Norris reasonably believed that the company's lawyers also represented him personally, he certainly reasonably believed that his interests were aligned with those of the company. Indeed, the two-year time span of this corporate internal investigation, the fact that the internal investigators were not immediately supplying documents to the government and were preserving the corporate privilege, and the fact that the lawyer accompanied Norris to regulatory hearings and provided him with legal documentation asserting a representative capacity, all indicate that the company and Norris were not initially taking opposite positions.[185] One has to wonder whether Norris would have supplied the company investigators with the script if he thought his interests were not aligned with the company. The evidence provided to the government by Morgan proved detrimental to Norris. Morgan, however, may have been able to use the evidence as leverage to obtain for the company a favorable plea agreement with the government.[186]

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[179] *Id.* at 637.

[180] *Id.* at 639–40.

[181] *See supra* notes 151–153 and accompanying text.

[182] *Norris*, 722 F. Supp. 2d at 638.

[183] *Id.* at 639–40.

[184] *Norris*, 419 F. App'x at 193–95.

[185] *See Norris*, 722 F. Supp. 2d at 635–37.

[186] Morgan Crucible Company pled guilty in 2002 to tampering with witnesses and destroying documents and paid a fine of one million dollars. *See* Press Release, U.S. Dep't of Justice, Former CEO of the Morgan Crucible Co. Found Guilty of Conspiracy to Obstruct Justice (July 27, 2010), http://www.justice.gov/atr/public/press_releases/2010/260826.htm. Morganite Inc., a subsidiary of Morgan, pled guilty to fixing prices, paying a ten million dollar fine. *Id.* The plea agreement outlines the company's agreement for cooperation, although it explicitly excludes Norris and three others from being required to cooperate with the government as part of this agreement. *See* Plea Agreement at 12–17, United States v. Morganite, Inc., No. 02-733 (E.D. Pa. Nov. 4, 2002).

### C. *How Law and Ethics Favor Corporate Superiority*

#### 1. Legal Theory Favoring the Entity

Although the *Norris* case has its idiosyncrasies, the legal theory presented in this case with respect to attorney-client privilege in the corporate sphere is not unique.[187] In several recent cases in which a corporate internal investigation has provided the government a clear basis for a prosecution of executives and employees, those individual executives and employees have argued that the attorney conducting the investigation was serving as the individual's own counsel.[188] Courts, however, adhere to the principle that "corporate officers and directors may not claim a privilege for communications made to counsel in their corporate capacities,"[189] favoring the position that counsel represents the corporation and not the specific individuals who provided evidence to this counsel as part of an internal investigation. Individuals do not appear to make the alternative argument that, although the lawyers may have represented the company exclusively, there was an implied understanding that the company would not disclose the individual's statements to the government without the individual's agreement, or that the employment relationship otherwise required the company to consider the individual's interests in deciding whether to waive privilege.

Courts routinely reference the *Bevill* decision in holding that the entity has the power to control the release of the privilege between the entity and the corporate constituent.[190] Individual employees, thus, are faced with the impossible task of proving that counsel represented

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[187] *See* Lucian E. Dervan, *Overcriminalization 2.0: The Symbiotic Relationship Between Plea Bargaining and Overcriminalization*, 7 J.L. ECON. & POL'Y 645, 647–48 (2011) (discussing the "creative use of the obstruction of justice laws" in another case, the Computer Associates prosecution, *United States v. Kumar*).

[188] *See, e.g.*, United States v. Graf, 610 F.3d 1148, 1157 (9th Cir. 2010) (finding that a corporate investigating attorney represented the company, and had no individual attorney-client relationship with the company's employees); *In re* Grand Jury Subpoena: Under Seal, 415 F.3d 333, 335 (4th Cir. 2005) (denying motions to quash grand jury subpoenas for items claimed by AOL Time Warner employees to be attorney-client-privileged materials from an internal investigation). *See generally* Paul B. Murphy & Lucian E. Dervan, *Attorney-Client Privilege and Employee Interviews in Internal Investigations*, WHITE-COLLAR CRIME REP., Aug. 2006 (discussing the attorney-client privilege in internal investigations); Rosen, *supra* note 146 (discussing the consequences of a company's decision to cooperate with the government).

[189] *Norris*, 722 F. Supp. 2d. at 637 (citing *In re Bevill*, 805 F.2d at 124–25 and Maleski v. Corporate Life Ins. Co., 641 A.2d 1, 4–5 (Pa. Commw. Ct. 1994)).

[190] *See, e.g.*, *Graf*, 610 F.3d at 1159; United States v. Ruehle, 583 F.3d 600, 608 n.7 (9th Cir. 2009).

them individually. For example, the statements of three former employees of AOL Time Warner who had been interviewed by general and retained counsel were found not to be privileged.[191] This was despite the fact that the individuals believed "that the information [they] disclosed to the investigating attorneys was privileged under the common interest doctrine."[192] The U.S. Court of Appeals for the Fourth Circuit placed the burden on the corporate constituent to prove that the statements were privileged.[193]

The possible consequences of denying attorney-client privilege to individual employees are not limited to the government's use of the individuals' statements against them. Individuals who provide false statements to the company's counsel may be prosecuted for obstruction of justice when corporate counsel in turn conveys those statements to the government. For example, in the highly publicized Computer Associates investigation, the government prosecuted the former CEO and chair of the board under an obstruction of justice statute for acts that included allegedly lying to private outside counsel who was conducting an internal investigation.[194] This issue was never reviewed by the appellate court because the case was resolved via plea agreement.[195]

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[191] *In re Grand Jury Subpoena: Under Seal*, 415 F.3d at 335–36.

[192] *Id.* at 337. The "common interest doctrine" refers to the "joint defense privilege," a way to protect communications between parties that have entered into a joint legal strategy under the attorney-client privilege. *Id.* at 337, 341.

[193] *Id.* at 338–39. The Fourth Circuit stated:

> [W]e conclude that appellants could not have reasonably believed that the investigating attorneys represented them personally during the time frame covered by the subpoena. First, there is no evidence that the investigating attorneys told the appellants that they represented them, nor is there evidence that the appellants asked the investigating attorneys to represent them. To the contrary, there is evidence that the investigating attorneys relayed to Wakeford the company's offer to retain personal counsel for him at the company's expense, and that they told John Doe 1 that he was free to retain personal counsel. Second, there is no evidence that the appellants ever sought personal legal advice from the investigating attorneys, nor is there any evidence that the investigating attorneys rendered personal legal advice. Third, when the appellants spoke with the investigating attorneys, they were fully apprised that the information they were giving could be disclosed at the company's discretion. Under these circumstances, appellants could not have reasonably believed that the investigating attorneys represented them personally.

*Id.* at 339–40.

[194] *See* United States v. Kumar, 617 F.3d 612, 617, 618 (2d Cir. 2010) ("Specifically, the government alleged that Kumar, past CEO and chairman, in an effort to cover up the existence of the 35-day month practice, lied to [Computer Associates' ("CA's")] outside counsel, instructed CA's general counsel to coach CA employees to lie, authorized CA's general

The government's legal theory may be fair when the employee understands that the company is acting as the government's agent for investigative purposes and intends to provide the employee's statements to the government. But the company is unlikely to make this intention plain because doing so places the attorney-client privilege at risk as the ambiguous communication might not be considered confidential.[196] Additionally, the employee may be less likely to cooperate with counsel if there is an indication that the statements may eventually be evidence used against him or her.

Further, the employee may expect not only confidentiality but also loyal and competent advice. For example, an employee of the Stanford Group Company sued for malpractice the law firm and partner she thought were representing her individually before the SEC.[197] Her complaint claimed that the attorney was representing the interests of Allen Stanford, the Stanford Companies, and other alleged defendants and that this conflicting representation resulted in her interests not being protected and her being criminally charged.[198] Thus, the conse-

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counsel to pay a $3.7 million bribe to an individual to procure his silence, and lied to FBI agents and others during his interview at the [U.S. Attorney's Office].").

[195] *Id.* at 619–20.

[196] It is a necessary element of the privilege that statements be made in confidence to counsel for the purpose of legal assistance. Giesel, *supra* note 32, at 123 n.55 (quoting WIGMORE, *supra* note 133, § 2292). If the lawyer's intended role is to serve as a mere conduit—for example, to convey the information to a third party—then there is no expectation of confidentiality, and hence no privilege, from the outset. *See id.*

[197] Plaintiff's Original Petition, *supra* note 6, at 2–3. The employee claimed that the evening prior to meeting with her, the law firm partner "had solicited a multi-million dollar retainer from Allen Stanford [former Stanford Group chairman] to represent him personally." *Id.* at 5.

[198] *See* Plaintiff's First Amended Complaint at 4, Pendergest-Holt v. Sjoblom, No. 3:09-cv-00578 (N.D. Tex. Mar. 30, 2009). This case was eventually dismissed without prejudice. Lisa A. Cahill, *Cases Highlight Minefield in Internal Investigations*, N.Y. L.J., May 21, 2009, at 4, 9. The complaint stated:

> [D]uring the sworn oral testimony, [the attorney] gave contradictory answers about whether, as an attorney, he represented Plaintiff by stating: 'I represent the company Stanford Financial Group and affiliated companies,' while contradicting that very statement, by also informing Plaintiff and the SEC, on the record, as follows:
>
> > Q. Just so we're clear. As I understand your statement, you do not as far as you're concerned, represent the witness here today?
> >
> > A. *I represent her* insofar as she is an Officer or director of one of the Stanford affiliated companies.

Plaintiff's First Amended Complaint, *supra*, at 6; *see also* Plaintiff's Original Petition, *supra* note 6, at 6; Cahill, *supra*, at 9; Ashby Jones, *Did Pendergest-Holt Lawyer Up Too Late?*, WALL

quences of a legal theory favoring the entity can be severe for the individual caught up in an internal investigation.

2. Ethical Considerations

Although ethics rules require clarity when lawyers are dealing with an unrepresented party, the corporate standards appear to favor the entity's interest in access to and control over its employees' information. Rule 4.3 of the American Bar Association's Model Rules of Professional Conduct requires lawyers generally to make "reasonable efforts to correct the misunderstanding" if an unrepresented person misunderstands the role of the attorney.[199] Specifically, the attorney must clarify his or her role when dealing with corporate constituents.[200] But at the same time, the rule presumes that corporate counsel represents the company exclusively. Rule 1.13, which governs corporate representation, begins with the statement that "[a] lawyer employed or retained by an organization represents the organization acting through its duly authorized constituents."[201] This sentence is matched in the *Restatement of Law Governing Lawyers*, which states that "[w]hen a lawyer is employed or retained to represent an organization: (a) the lawyer represents the interests of the organization as defined by its responsible agents acting

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ST. J. L. BLOG (Mar. 4, 2009, 8:56 AM), http://blogs.wsj.com/law/2009/03/04/did-pendergest-holt-lawyer-up-too-late/.

[199] MODEL RULES OF PROF'L CONDUCT R. 4.3 (2009). The rule states:

> In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding. The lawyer shall not give legal advice to an unrepresented person, other than the advice to secure counsel, if the lawyer knows or reasonably should know that the interests of such a person are or have a reasonable possibility of being in conflict with the interests of the client.

*Id.*

[200] *Id.* R. 1.13(f). Subsection (f) of Rule 1.13 states:

> In dealing with an organization's directors, officers, employees, members, shareholders or other constituents, a lawyer shall explain the identity of the client when the lawyer knows or reasonably should know that the organization's interests are adverse to those of the constituents with whom the lawyer is dealing.

*Id.* A different provision of the Model Rules, which applies to lawyers who represent multiple constituents in a corporation, permits concurrent representation only when the interests of the constituent and the corporation do not conflict. *See id.* Rs. 1.13(g); 1.7.

[201] *Id.* R. 1.13(a).

pursuant to the organization's decision-making procedures."[202] Both ethics rules emphasize corporate counsel's relationship to the entity over counsel's relationships with the entity's constituents.

Additionally, the rules do not require corporate counsel to clarify the company's relationship to the constituent, to disclose the company's intention to assist the government, or otherwise to provide information needed to dispel misconceptions and allow the employee to make an informed decision whether to speak to counsel. Although other ethics rules can also come into play here,[203] those rules do not specifically instruct corporate counsel to notify corporate constituents that the information they provide as part of an internal investigation can and likely will be used against them and will not be protected by an attorney-client privilege.[204] Nor do they require corporate counsel to let employee constituents know that the entity may barter their information for its own corporate benefit. There is also no ethics requirement, in the corporate context, that the investigating attorney offer legal counsel to the constituent or suggest that the constituent should have counsel.

## III. COURT CONSIDERATIONS IN LEVELING THE PLAYING FIELD

Scholars have explored the contours of the *Bevill* test and noted its deficiencies, focusing on the question of when an individual establishes an attorney-client relationship with corporate counsel.[205] Professor Grace M. Giesel, for example, has called for enhanced clarity between lawyers and individual employees within the corporation, including

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[202] RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 96(1) (2000) (first subsection). The second subsection of this rule provides that this is qualified when the lawyer:

> knows of circumstances indicating that a constituent of the organization has engaged in action or intends to act in a way that violates a legal obligation to the organization that will likely cause substantial injury to it, or that reasonably can be foreseen to be imputable to the organization and likely to result in substantial injury to it, the lawyer must proceed in what the lawyer reasonably believes to be the best interests of the organization.

*Id.* § 96(2).

[203] *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 8.4(c) (2009) ("It is professional misconduct for a lawyer to . . . engage in conduct involving dishonesty, fraud, deceit or misrepresentation.").

[204] *See, e.g., id.* Rs. 1.13, 4.3, 8.4.

[205] *See, e.g.*, Cummings, *supra* note 5, at 675–76, 678–81 (analyzing the theoretical basis for the attorney-client privilege); Giesel, *supra* note 32, at 151–58 (discussing the cases that have used *Bevill* in finding that the investigating attorney represented the corporation as opposed to the individual).

having a written record that memorializes the disclosures regarding representation of the investigating attorney.[206] Others have addressed the general unfairness of the government's ability to extract privilege waivers from corporations,[207] critiquing the various DOJ memoranda pertaining to benefits available to a company for providing attorney-client privileged information.[208]

Our focus, in contrast, is on how the *Upjohn* decision and other attorney-client privilege cases fail to recognize today's reality where the entity may have multiple concerns in an internal investigation. Maintaining the confidentiality of the internal investigation may or may not be the route eventually taken by the corporation. A corporation may also change its position, starting initially with the protections provided by *Upjohn*, but later wishing to waive those restrictions to secure a resolution favorable to the company.

It is important to recognize the legitimacy of internal investigations, which may expose criminal conduct, but it is also important to eliminate deceptive and coercive conduct on the part of corporations. This is particularly difficult, as the unfair conduct may come to light only in an after-the-fact court hearing that is held when an employee is charged with

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[206] Giesel, *supra* note 32, at 164–68. Along similar lines, Professor Susan B. Heyman has suggested that a "bottoms-up" approach, focusing on the individual and including incentives for both corporations and individuals to cooperate in investigations, would be beneficial. Heyman, *supra* note 29, at 167–69.

[207] *See* Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-front Assault on the Attorney-Client Privilege (and Why It Is Misguided)*, 48 VILL. L. REV. 469, 484, 515 (2003); Christopher T. Hines, *Returning to First Principles of Privilege Law: Focusing on the Facts in Internal Corporate Investigations*, 60 U. KAN. L. REV. 33, 84 (2011); Gregory C. Sisk & Pamela J. Abbate, *The Dynamic Attorney-Client Privilege*, 23 GEO. J. LEGAL ETHICS 201, 202–04 (2010). *But see* Julie R. O'Sullivan, *Does DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No,"* 45 AM. CRIM. L. REV. 1237, 1238–39 (2008) (responding to claims of the demise of the attorney-client privilege and noting the power imbalance between corporations and the government). A strong coalition has developed to protect the attorney-client privilege in the corporate setting. *See* IDE, *supra* note 5, at 1–2 (describing the coalition's work to influence U.S. Sentencing Commission and DOJ policy); Memorandum, Coalition to Preserve the Attorney-Client Privilege, Comprehensive Reform Still Critically Needed to Protect Attorney-Client Privilege and Employee Legal Rights (Jan. 14, 2009), http://www.nacdl.org/WorkArea/DownloadAsset.aspx?id=17443 (listing organizational members of the Coalition to Preserve the Attorney-Client Privilege).

[208] *See* Copeland, *supra* note 81, at 1210–37 (discussing the Attorney-Client Privilege Protection Act of 2009 and the history of different DOJ memoranda). Although the Thompson Memorandum has been modified to remove the incentive for a corporation to give attorney-client-privileged material to the government, Professor Heyman has noted that the "top-down" practice still entails coercion and waiver in practice. *Id.* at 169.

criminal conduct and then seeks to assert the privilege regarding statements made during an internal investigation.

Offered here is a model for resolving an individual constituent's claim that his or her statements to corporate counsel are covered by the attorney-client privilege. It is meant to incentivize corporations to act fairly throughout the process, even when the investigation is unregulated and private. After-the-fact court monitoring, in the context of deciding privilege claims, would provide "expressive rhetoric" to companies to proactively adhere to conduct that is noncoercive and nondeceptive.[209]

This Part describes three aspects of this model, all of which arise in the context of the attorney-client privilege. First, a conceptual model of fair dealing needs to be at the forefront of corporate conduct when there is an interaction between the corporation and the individual as part of an internal investigation.[210] Second, courts evaluating the corporate-individual relationship need to go beyond the constricted approach offered by courts using the *Bevill* test or similar methods that favor the entity without full examination of the circumstances of a particular case.[211] Suggested here are a constellation of different considerations that could be used by courts in deciding who will be allowed to maintain an attorney-client privilege. Finally, the burden of proof should be placed on the entity to show that it has treated its employee constituents fairly.[212] All three aspects of the proposed model emphasize the need to distinguish the initial holding in *Upjohn* to reflect the reality of a modern-day internal investigation.

### A. *Conceptualizing Corporate Fair Dealing*

Courts are quick to adopt a *Bevill* approach without examining how the corporation's internal investigation differs from the classic approach embodied in the *Upjohn* case. To evaluate this landscape properly, two questions need to be examined. First, how should the corporation and its lawyer conduct themselves at the outset to make it clear whether the

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[209] *Cf.* Gilchrist, *supra* note 144, at 57 ("Maintaining the expressive value of criminal prosecutions .... means structuring a system of liability, prosecutorial discretion, and criminal penalties that express clear condemnation when it is appropriate to do so."); Dan M. Kahan, *What's* Really *Wrong with Shaming Sanctions*, 84 TEX. L. REV. 2075, 2081–86 (2006) (arguing that laws that are "perceived as affirming the values of only some cultural perspectives and as denigrating others" are vulnerable to being overturned).

[210] *See infra* notes 213–221 and accompanying text.

[211] *See infra* notes 222–242 and accompanying text.

[212] *See infra* note 243 and accompanying text.

corporation is aligned with its individual constituents? Second, if the entity fails to clarify its role, how should courts evaluate the corporate dynamic for purposes of attorney-client privilege and representation by counsel? The essence of this discussion is the role of fair dealing by the entity to its corporate constituent.

A corporation should have a duty of fair dealing with its employees. General employment law provides that "[e]mployers must realize that if they are going to reap the profits and rewards of employee loyalty and enhanced workmanship which are coaxed by implied promises made to the workforce, then such employers must be held to their word."[213] This provides an implied "covenant of good faith and fair dealing," which includes not creating or exploiting a misperception.[214] Although employment contracts may provide for duties of good faith and fair dealing, only a minority of states have allowed terminated employees to succeed with claims that the employer owes the employee a duty of good faith and fair dealing absent such a contractual provision.[215]

This employment theory is not explicitly replicated in corporate law with respect to the corporation's duties to its constituents. Although directors and officers of a corporation have duties of fair dealing to the corporation and through them to the stockholders,[216] these fiduciary duties are not manifested in corporate law for the corporation's dealings with its employees. Likewise, individual employees of an entity have duties of fair dealing to the entity, but the reverse is less certain without turning to basic employment principles.[217]

Corporate counsel conducting an investigation may have, or appear to have, a common interest with corporate executives and employees. But counsel also is often caught between his or her allegiance to, and representation of, the entity and the practical need to counsel and acquire information from corporate executives and employees.

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[213] Price v. Fed. Express Corp., 660 F. Supp. 1388, 1392–93 (D. Colo. 1987) (discussing the corporation's obligations to its employees).

[214] *Id.*

[215] James J. Brudney, *Reluctance and Remorse: The Covenant of Good Faith and Fair Dealing in American Employment Law*, 32 COMP. LAB. L. & POL'Y J. 773, 773–74 (2011); *see, e.g.*, Fortune v. Nat'l Cash Register Co., 364 N.E.2d 1251, 1255–56 (Mass. 1977) (holding that even though a terminated salesperson's contract was at-will, the employer owed the individual an implied covenant of good faith).

[216] *See* Brown, *supra* note 16, at 8 n.11 (describing officers' duty of fair dealing to the corporation and shareholders).

[217] *See* Brudney, *supra* note 215, at 794 (noting that employees' duty of loyalty is derived from a master-servant agency framework rather than a theory of mutual responsibility).

Corporate investigating counsel is thus caught in what one court termed "a potential legal and ethical mine field."[218]

Equally troubling is the predicament of the corporate executive or employee who has been working closely with in-house counsel over a period of years. A trust relationship may have developed between the parties, as it may be a common practice for corporate counsel to obtain information from the constituent on various corporate matters. In an *Upjohn* world, the counsel and the individual work together for the benefit of the company. In today's reality, however, the employee or corporate executive can now find him- or herself suddenly pitted against the corporation and its counsel whom he or she once thought of as the person encouraging the sharing of information in a trusting relationship. Yet, the individual constituent may be unaware, because of his or her longstanding relationship with counsel, that their interests now differ.

Counsel may attempt to alleviate any concern by providing warnings to the employee. These warnings, referred to as *Upjohn* warnings,[219] fail to negate the fact that the corporation will still try to secure information from its employees that may ultimately be harmful to them.[220] These *Upjohn* warnings should not be accepted as alleviating the direct conflict that the corporation has with its constituents.[221] In

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[218] *In re* Grand Jury Subpoena: Under Seal, 415 F.3d 333, 340 (4th Cir. 2005).

[219] Despite being called "Upjohn warnings," *Upjohn* did not deal with warnings to employees at all. Giesel, *supra* note 32, at 110 n.2. *See generally* Upjohn v. United States, 449 U.S. 383, 386 (1981). According to practitioners' literature, the warnings referred to as *Upjohn* warnings should include: a warning that the attorney represents the company and not the employee; a warning that the attorney does not represent the employee's interests; a warning that although the conversation is protected by attorney-client privilege, privilege belongs to the company, not the employee; and a warning that the company will decide whether to waive the privilege, including whether to give the information to third parties. *See, e.g.*, Campbell & Beaudette, *supra* note 9, at 7.

[220] As is common to police agencies, providing *Miranda* warnings can result in not receiving desired information. *See* Miranda v Arizona, 384 U.S. 436, 516–17 (1966) (Harlan, J., dissenting). Hearing that one is entitled to counsel or that statements can be used against oneself may cause a suspect to choose silence or retention of a lawyer. *See id.* Obviously, a major difference in this corporate setting is that the investigating corporate counsel has not been schooled by and is not a *direct* part of a police agency. Another major difference is that unlike a police investigative agency that is meeting the defendant for the first or second time, there may be a longstanding relationship premised upon the attorney-client privilege between the corporate investigating counsel and the employee. It may be only now, during the internal investigation, that criminal misconduct is alleged, and it is not in the individual's benefit to have this alliance with the corporation.

[221] The conflicting position of internal investigating counsel is recognized in legal scholarship, matching the growing body of practitioner literature instructing investigating counsel to give *Upjohn* warnings when speaking with individual employees. *See* Cindy A.

many cases, the individual employee will perceive that the corporation's lawyer represented him or her in the past. Even if the lawyer advises that he or she is now representing only the company, the individual will expect some loyalty. One would not be allowed to move from defending a criminal client to then prosecuting the defendant. The conflict remains and cannot be avoided by language offered by a coercive party, an employer who may eventually barter the information for its own benefit. Even if the employee does not expect loyalty from the corporation's lawyer, the employee will expect loyalty from the corporation. The *Upjohn* warnings do not advise the employee that the corporation's interests are potentially adverse and that in exchange for leniency, the corporation may assist the prosecution by conveying the employee's communications, thereby facilitating a prosecution of the employee.

Recognizing a duty of fair dealing by a corporation to its individual constituents would allow courts to evaluate conflicts between the entity and individual without summarily finding that the entity's view controls. The good faith of the employer in its internal investigation would be paramount in ascertaining the rights and remedies of the individual constituent. As a matter of fair dealing, corporations and their attorneys conducting an internal investigation should have to be candid about whether the corporation intends to cooperate with the government and the resulting risks to the employees. When the corporation leads its employees to understand that their interests are aligned with those of the entity, the corporation assumes an implied duty not to waive the privilege with regard to the employees' communications without their consent, or at least fairly to consider the employees' interests in deciding whether to waive the privilege.

This suggested approach is not without concerns. Obviously, the use of a conceptual standard comes at the risk of diminishing reliability and consistency. The existing *Bevill* standard, which places the decision making on attorney-client privilege basically within the power of the corporation, offers certainty that cannot be replicated with either a conceptual or multifaceted approach.

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Schipani, *The Future of the Attorney-Client Privilege in Corporate Criminal Investigations*, 34 DEL. J. CORP. L. 921, 949, 954–60 (2009) (discussing the modern-day attorney-client privilege in light of deferred prosecution agreements and cooperation); John E. Sexton, *A Post-*Upjohn *Consideration of the Corporate Attorney-Client Privilege*, 57 N.Y.U. L. REV. 443, 465 & n.93 (1982) (noting the attorney's potential conflict of interest stemming from disparate corporate and employee interests).

### B. *A Multifaceted Approach*

If the entity fails to clarify properly its role at the initial stages of the corporate internal investigation and fails to designate whether it is aligned or not with its employee, this failure should weigh heavily in determining whether the corporation can unilaterally waive the privilege and provide its employee's statements to the government. In these situations, courts may need to evaluate the corporate dynamic for purposes of attorney-client privilege claims. To this end, it is important that courts scrutinize the entity-constituent relationship rather than summarily finding corporate superiority to the detriment of the individual.

To accomplish this, courts need to examine a host of factors when considering the investigating corporate counsel's role in conjunction with the rights of the individual employee. This Section offers several considerations for a court to use in determining whether the corporation and its constituents are aligned or in conflict. Although this multifaceted approach may offer some reliability and consistency to this process, it is important to note that there is no formula or quantitative analysis that provides definitive clarity to the issue. Rather, a fact-specific approach is warranted, and these factors are merely attributes for courts to consider in balancing corporate and individual interests.

#### 1. Guilt of the Corporate Constituent

Some may argue that the disintegration of the corporate-employee relationship is warranted in situations in which the individual has deliberately committed criminal conduct that imposes liability on the corporation. One cannot, however, assume that all corporate constituents act solely for individual benefit and thus should be the subject of a criminal prosecution. Obviously, within organizations there can be rogue employees who act criminally for personal motives. But there also can be employees who receive no personal benefit and may be committing criminal acts solely to benefit the corporation.[222] Employees may have responded to demands from the corporation that were impossible to satisfy through lawful means.[223] The superior negotiating

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[222] *See, e.g.*, Podgor, *Educating Compliance*, *supra* note 50, at 1525 n.14 (noting the case of Jamie Olis, who received no monetary benefit from his alleged criminal conduct of a fraudulent tax scheme on behalf of his company, Dynegy, for which he was Senior Director of Tax Planning).

[223] *See* Mary Kreiner Ramirez, *The Science Fiction of Corporate Criminal Liability: Containing the Machine Through the Corporate Death Penalty*, 47 ARIZ. L. REV. 933, 964–66 (2005) (discussing corporate culture and how employees may have to "navigate through the political,

position of the corporation, however, allows it to negotiate a benefit to the detriment of the less culpable party—the individual who has no motive other than to enhance the entity's position in the market.

Thus, omitted from the existing judicial review process is the culpability of the individual. Individuals who act merely to benefit the corporation and receive no personal incentives should not be placed in an inferior position on issues such as attorney-client privilege. Instead, courts might require, in appropriate circumstances, that corporations also protect individuals who act improperly because of their strong allegiance to the company.

2. Culpability of the Corporate Entity

Equally likely is a corporate culture that breeds criminal conduct. Although prosecutorial discretion provides prosecutors with the ability to prosecute, reach a plea agreement, defer prosecution, or reach a non-prosecution agreement, the assessment of the evidence used in making the determination may be skewed when provided by a corporate entity that has resources beyond an individual employee.[224] Corporate counsel's allegiance to the corporation will make him or her advocate for prosecutors to use their prosecutorial discretion to minimize corporate liability. In contrast, the unrepresented or poorly represented employee may not be able to make as strong a case as the entity.

Therefore, considering the culpability of the corporation is just as important as looking at the culpability of an individual employee. The corporation that has a criminal "ethos"[225] and wishes to throw its constituents to the prosecution to protect the entity should receive less protection than a corporation with a strong compliance program that was not adhered to by a small number of rogue employees.

3. Corporate Willful Blindness

Likewise, a corporation that opts for willful blindness and fails to investigate wrongdoing among its constituents should not be allowed to

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economic, socio-cultural, physical, and technological demands of regulators" in performing their job functions).

[224] *See, e.g.*, Schipani, *supra* note 221, at 961 ("[P]rosecutors have considerable discretion in determining when, whom, how, and even whether to prosecute for violations of federal criminal law." (internal quotation marks omitted)).

[225] Pamela H. Bucy, *Corporate Ethos: A Standard for Corporate Criminal Liability*, 75 MINN. L. REV. 1095, 1099–1101 (1991) (discussing how one should examine the "corporate ethos" in determining the standard of criminal liability).

then turn on these same individuals when it initially took a laissez-faire approach to governing internal conduct. Knowledge of corporate or individual misconduct may be found when an individual or corporation is willfully blind. The Model Penal Code describes "knowledge of the existence of a particular fact" to include a situation in which "a person is aware of a high probability of [the fact's] existence, unless he actually believes that it does not exist."[226] Most recently, in the 2011 patent infringement case, *Global-Tech Appliances, Inc. v. SEB S.A.*, the U.S. Supreme Court ruled that willful blindness requires that "(1) the defendant must subjectively believe that there is a high probability that a fact exists and (2) the defendant must take deliberate actions to avoid learning of that fact."[227]

An entity that puts its head in the sand[228] and avoids knowing the truth of criminal conduct occurring within the company should bear greater liability than an individual who honestly thinks his or her conduct is legal and acceptable under corporate norms. Courts, therefore, might consider whether the entity was willfully blind in ascertaining whether the constituent had a trust in the entity and corporate counsel that created an attorney-client relationship.

4. High Managerial Agent or Low-Level Employee

Courts should also consider the placement of the individual in the corporate structure. A high-level managerial agent is more likely to interact with corporate counsel.[229] In contrast, a lower-level employee may not even know the identity of corporate counsel, not to mention that the company even has corporate counsel.

Whereas corporate criminality is typically premised upon respondeat superior, the Model Penal Code takes a minority approach and also considers whether the alleged criminal act related to a member of the board of directors or a "high managerial agent acting in behalf of the corporation within the scope of his office or employment."[230] Although

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[226] MODEL PENAL CODE § 2.02(7) (1985).

[227] 131 S. Ct. 2060, 2068, 2070 (2011).

[228] *See* United States v. Giovannetti, 919 F.2d 1223, 1228–29 (7th Cir. 1990) (indicating that willful blindness is known as the "ostrich" defense). *But see* United States v. Black, 530 F.3d 596, 604 (7th Cir. 2008) (clarifying that ostriches really do not bury their heads in the sand when frightened).

[229] *See* Michael L. Waldman, *Beyond* Upjohn*: The Attorney-Client Privilege in the Corporate Context*, 28 WM. & MARY L. REV. 473, 494 (1987) ("[L]awyers are involved intimately with company management and operations.").

[230] *See* MODEL PENAL CODE § 2.07(1)(c) (1985). The Model Penal Code also states that

high managerial agents should likely assume a greater culpability for knowledge of corporate acts, they also are more apt to secure legal guidance. Thus, the placement of the individual within the company may be indicative of his or her interaction with corporate or investigating counsel, such as whether there has been a reliance on counsel and the entity in accord with the perception of the individual constituent.[231]

5. Prior Involvement with Corporate Counsel

An examination of the employee's prior involvement with corporate counsel may also provide information that allows a court to ascertain whether the employee properly relied on the corporate counsel as being his or her own when the corporate constituent was cooperating with the internal investigation. Some of the questions a court might consider here are: Did counsel routinely appear with the individual at regulatory hearings? Did counsel often meet with the individual to work on legal matters such as answering interrogatories in civil matters? Who was at the employee's side when he or she appeared in a court hearing? Did the constituent often turn to counsel seeking answers to corporate policy questions?

When individuals routinely turn to counsel for legal advice, it can set a tone that said counsel is representing the individual in addition to the corporate entity. Looking at the relationship between the constituent and corporate counsel can offer clues as to whether an attorney-client relationship actually existed. More importantly, it can also provide evidence of whether the individual constituent rightfully relied on the existence of an attorney-client bond.

6. Size and Structure of the Entity

Corporations with many employees are treated differently for purposes of sentencing than entities with fewer employees. For example, larger organizations are expected to "devote more formal operations

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> "high managerial agent" means an officer of a corporation or an unincorporated association, or, in the case of a partnership, a partner, or any other agent of a corporation or association having duties of such responsibility that his conduct may fairly be assumed to represent the policy of the corporation or association.

*Id.* § 2.07(4)(c).

[231] A neutral investigation is usually conducted by attorneys that are not within the office of corporate counsel. Outside counsel is typically hired to assure a thorough and conflict-free investigation.

and greater resources in meeting the requirements" or applicable guidelines than are smaller organizations.[232] As a result, larger companies can receive a greater "culpability score" in the federal sentencing guidelines. So, too, organizations that tolerate criminal activity are assessed at different levels depending on the number of employees, with an entity with a higher number of employees receiving a greater culpability score than the entity with fewer individuals.[233] Using this same analysis, it would seem appropriate to consider the size of the organization in determining whether the corporation should bear the brunt of the criminality and whether counsel should be more focused on compliance in the larger corporate setting.

Equally important is whether the corporation is a public company subject to SEC regulation or a small, closely held corporation, such as a family-run entity. In a closely held corporation, it may be more difficult to ascertain who exactly counsel is representing. This suggests that perhaps courts should use a different standard with respect to the attorney-client privilege for closely held companies.[234]

7. Expansiveness of the Company

Corporations that have many domestic or foreign offices may raise additional considerations. Do employees routinely need to advise counsel of activities in these foreign countries? Does counsel routinely oversee the activities of corporate employees? A longstanding relationship can create reliance between the parties that is sufficiently unique to warrant a court moving beyond the strict language found in the *Bevill* standard.

Likewise, for constituents of international companies operating outside the United States, with little understanding of U.S. law, it may be common to defer to corporate counsel. One has to wonder, for example, about the level of knowledge of Ian P. Norris, the Morgan Crucible Company's indicted CEO, discussed earlier in this Article. After all, he was not a citizen of the United States and was operating in a company

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[232] U.S. SENTENCING GUIDELINES MANUAL § 8B2.1 cmt. n.2(C) (2011).

[233] *See id.* § 8C2.5. Differences in the culpability score are based on factors of whether there are more than ten, fifty, two hundred, one thousand, or five thousand employees. *Id.* "[T]olerance of the offense by substantial authority personnel" (meaning, individuals who have significant discretion over the entity's actions) that is "pervasive throughout the organization" can also influence the culpability score. *Id.*

[234] Paul J. Sigwarth, Note, *It's My Privilege and I'll Assert It If I Want To: The Attorney-Client Privilege in Closely-Held Corporations*, 23 J. CORP. L. 345, 356–64 (1998) (discussing the uniqueness of a closely held corporation for purposes of the attorney-client privilege).

that was located outside this country.[235] In this regard, one can ask whether it would make an individual more likely to rely on the corporate counsel where operating as part of an international organization?

On the other hand, a large company with many different offices may be very removed from corporate counsel. Such an attenuated connection to counsel would be less likely to lead an individual to rely on a belief that he or she was being represented by the counsel and corporation.

8. Crime Involved

One cannot assume that all crimes should be treated the same when determining whether corporate counsel was aligned with its corporate constituent. Some crimes may be more personally focused whereas others may be more corporate. For example, liability under the Foreign Corrupt Practices Act arises only with the involvement of a public company.[236] Antitrust crimes can also stem from corporate settings.[237] In contrast, a perjury charge is personal to an individual.[238] Other crimes may cross into both the corporate and personal spheres.[239] For example, companies as well as individuals have been charged with the crime of obstruction of justice.[240]

Looking at the specific crime may offer some guidance. If the crime is specific to the person, one has to wonder why corporate counsel might be accompanying that person to the grand jury. Alternatively, a corporate charge under the Sherman Act may indicate that counsel is there to represent the company.

Here again, this factor alone does not offer conclusive guidance in determining if the corporation's actions are consistent with the interests of its constituents. But using this factor in examining the totality of the circumstances may provide insight as to the role of the investigating counsel relative to the entity's constituents.

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[235] *See supra* notes 155–160 and accompanying text.

[236] 15 U.S.C. §§ 78m, 78dd-1 to dd2, 78ff (2006).

[237] *See id.* § 1 (making restraint of trade illegal).

[238] *See* 18 U.S.C. § 1621 (2006).

[239] For example, the Racketeered Influenced and Corrupt Organization Act (RICO) offers a host of state and federal offenses that can serve as predicate acts for a RICO charge. *See id.* §§ 1961–1963.

[240] *See, e.g.*, Arthur Andersen LLP v. United States, 544 U.S. 696, 702–03 (2005) (company charged with obstruction of justice); United States v. Stewart, 433 F.3d 273, 279 (2d Cir. 2006) (individual, Martha Stewart, charged with obstruction of an agency proceeding).

### 9. Entity's Efforts to Dispel the Perception That Counsel Represents the Individual

In civil matters, the perception of the client can play a crucial factor in determining the existence of an attorney-client relationship. Some courts use contract law, others tort law, and finally some examine both disciplines.[241] Reasonable reliance can be a key component in determining whether an attorney-client relationship was formed through negligence on the part of the attorney.[242]

What is noticeable in the corporate context is that courts are reluctant to consider these factors, adhering instead to a corporate bias that labels counsel as representing the corporation. In this regard, corporate efforts to dispel the individual's perception that counsel is representing them personally should be factored into the court's analysis of the dynamic between counsel and its constituent.

When counsel gives clear *Upjohn* warnings—which include a strict statement that counsel's role is limited to protecting the corporation's interests—and obtains a written acknowledgment that counsel does not represent the individual, the *Upjohn* warnings would weigh in favor of the entity's claim that it did not represent the individual constituent. The entity would have strong evidence that its constituent's perception of an attorney-client relationship was unfounded when the constituent was given documentation explicitly showing that he or she had been fully apprised that counsel solely represented the entity.

That said, a written statement should not be conclusive of a finding that counsel did not represent a corporate constituent. One could easily envision an employee being coerced to sign such documentation out of fear of being fired. *Upjohn* warnings should not be a proxy for alleviating corporate liability, but rather should be one factor that a court might consider. Looking at the totality of the circumstances is important to truly ascertain the voluntariness of such a document and the circumstances surrounding its endorsement.

Moreover, even the conventional *Upjohn* warnings do not dispel an individual employee's expectation of loyalty from a corporation's lawyer with whom he or she has had past dealings. Nor do the warnings dispel the individual's belief that there is a unity of interest between the individual and the corporation and that the corporation will treat the individual fairly in its dealing with the government. A court should thus

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[241] *See* Martyn, *supra* note 154, at 919–20 (discussing how courts identify attorney-client relationships).

[242] *See id.* at 919.

consider the employee's reasonable expectations that the corporation and lawyer will look out for the individual's interests in assessing whether the corporation has met its obligations of fair dealing.

10. Other Factors

Although many considerations are noted here, it is important to recognize that no list can exhaust all the possible considerations that might reflect whether the corporation has acted in good faith with its constituents. Courts need to think about all the factors outlined here, but must also be open to other factors that might be offered by the parties.

There is a cost to a multifaceted approach in that it limits consistency and reliability. Different courts may find that specific circumstances warrant different resolutions. As with all legal decision making, the addition of more factors may result in less predictability. But this downside is surpassed by the fact that these factors will allow courts to evaluate all circumstances and provide a more balanced approach than the existing methodology.

### C. *Burden of Proof*

An additional point that can level the playing field so that courts are not summarily siding with corporations without consideration of the circumstances would be to adopt a burden of proof that places the onus on the corporation to show why the attorney-client privilege should be either respected or rejected. The existing *Bevill* approach places the burden on individuals to prove that counsel was representing them personally if they wish to achieve an attorney-client privilege.[243] This framework empowers the party that least needs the assistance. It fails to consider that the entity may have the resources and power to assure that the employee's argument does not survive. So, leveling the playing field does not merely call for an examination of the constellation of factors, but also for a recognition that the burden of proof and presumptions should not flow automatically to the entity rather than the individual.

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[243] *See supra* notes 151–153 and accompanying text.

## CONCLUSION

Criminal procedure jurisprudence has developed for well over a century to establish limits on government investigators' ability to extract confessions from individuals for use against them in criminal prosecutions.[244] The law targets both deceptive and coercive methods of extracting admissions.[245] The nineteenth-century evidence law, now largely supplanted, identified conduct that led to out-of-court admissions that were deemed insufficiently reliable to be admitted at trial. Twentieth-century constitutional case law, which developed initially out of the Due Process Clause of the Fifth Amendment to the U.S. Constitution and later out of the right against self-incrimination and the right to counsel, expanded beyond concerns about reliability to protect a host of other interests.[246]

In recent years, analogous concerns have been raised about corporate lawyers' methods of obtaining admissions from corporate employees for later use in criminal prosecutions. The government's role as an *indirect* participant in internal corporate investigations increases the corporation's superiority in the process and motivates this growing concern. The unregulated nature of corporate internal investigations exacerbates the disparity between the positions of the corporation and the individual. The practice of distancing corporate counsel from its constituents by giving *Upjohn* warnings during internal investigations fails to eliminate the individual's reasonable expectation that his or her interests are aligned with the corporation. This failure is particularly problematic when the corporation later uses information it gained from its employee to achieve leniency for the corporation at the individual's expense.

In *Upjohn*, the U.S. Supreme Court held that a corporation could claim the attorney-client privilege with respect to its lawyers' confidential communications with corporate constituents in the context of an internal investigation. The Court was not asked to consider, and did not address, whether the constituent also could claim the privilege or bar the corporation from waiving the privilege, and the Court has failed to address this question since. Lower courts have assumed, however, that except in exceptional circumstances, the privilege is exclusively for the

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[244] *See, e.g.*, *Miranda*, 384 U.S. at 458–66 (describing the history of the privilege against self-incrimination).

[245] *See id.* at 448 ("[C]oercion can be mental as well as physical.").

[246] *See generally* Steven Penney, *Theories of Confession Admissibility: A Historical View*, 25 AM. J. CRIM. L. 309 (1998) (detailing the "long and convoluted history" of the admissibility of confessions).

corporation to assert or waive, without regard to the interests of the constituent who made the communications in question. *Upjohn* addressed a corporation aligned with its constituents. But this does not reflect the contemporary reality of all internal investigations.

Although *Upjohn* implicitly recognized an alignment of interests between the corporation and its employees, it did not address whether, as a consequence, corporate employees may assert the privilege with regard to their communications with counsel in an internal investigation. To the extent that *Upjohn* implied that corporations have exclusive authority to assert the privilege or to barter the individual's statements to the government, it should be reconsidered. The standard for determining when a corporation may waive the privilege and disclose what its constituent communicated to corporate counsel should take into account whether, in eliciting the individual's statements and then seeking to disclose them, the corporation would be violating its duty of fair dealing to the individual. If disclosure would violate fair dealing in light of the various factors set forth in this Article, the company should not be permitted to disclose the constituent's statements without the constituent's authorization.

Courts presently use an efficient approach that can deprive corporate constituents of fairness and good faith by the company. Courts need to expand upon the current attorney-client privilege jurisprudence to take account of a corporation's duty to treat its employees fairly and not to exploit them.