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CRIMINAL PROCEDURE WITHIN THE FIRM

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Samuel W. Buell*

It seems improbable that the theoretical and doctrinal framework of criminal procedure, developed mostly through a binary model of the individual and the state, would fit without modification in the tripartite model of the state, the firm, and the individual that characterizes the investigation and sanctioning of criminal conduct within legal entities. This intuition—which has been underexplored in spite of heated public debate about the state’s practices in this area—proves correct. I develop some components of a framework for understanding procedure for individual cases of criminal wrongdoing within firms and generating insights to guide reform. The process of pursuing individual cases within firms (as opposed to firm cases against firms) is distinctive for at least three reasons: in terms of causation and incentives, the presence of an organization materially alters the incidence of individual misconduct ex ante and the efficiency and efficacy of investigating and prosecuting that conduct ex post; the nature of the applicable substantive criminal violations (white collar crimes) causes such cases to ripen into criminal cases more slowly than those outside business firms; and lawyers have multiple roles in such cases not only ex post but also ex ante. I evaluate two current practices in light of these structural differences: state use of the fruits of employer coercion of employees’ waivers of the right to silence; and state negotiation with firms over the scope of firms’ indemnification of their agents for litigation costs. I conclude that some reforms of current practices in these areas would be beneficial but that calls for abolition of those practices are misguided.

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INTRODUCTION

The law and basic commitments of criminal procedure, though subject to unending contest at their margins, are reasonably mature. They have developed mostly in terms of a binary model of the individual's relationship to the state and its enforcement personnel. This model naturally leaves a gap. When the state investigates and prosecutes crime committed within legal organizations—that is, crime on the job—a third player, the legal entity, is present. The presence of a legal entity implies the need for a tripartite model and generates the intuition that existing theory and doctrine about criminal procedure might be incomplete or inadequate for this setting.

Insufficient attention has been paid to basic structural differences that distinguish the process by which the state pursues imposition of criminal sanctions on an individual who violates the law on the job from the process by which the state deals with crime “on the street.”¹ Both the state and the individual face special problems when encountering each other within the setting of the firm. To determine what procedures are necessary for the state to accomplish regulatory objectives and for the individual to receive due protections, the nature and implications of this setting must be understood. Voluminous literatures grapple with the imposition of civil and criminal enterprise liability on firms and with the relationship between the individual

1. An exception is Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001). Brown, however, principally compares the normative dimensions of substantive wrongdoing involved in street and corporate crime (and prevailing social norms about them), rather than contrasting problems of procedural law.

and the state when the individual acts at large. Little has been written about the application of criminal procedure to the individual who acts within a legal organization.

The state is increasingly active in the pursuit of “corporate wrongdoing,” a term that elides the distinction between wrongdoing by people *within* firms and wrongdoing *by* firms—or, more precisely, the attribution of individual wrongdoing to firms for sanctioning purposes. Given the increase in state activity and the lack of careful attention to the particular problem of criminal procedure *within* firms (as opposed to *against* them),² it should not be surprising that public controversy has erupted and that the ensuing discussion has, to date, been shallow and even shrill.³

In broad terms, business firms and the organized corporate bar are waging a sustained campaign of public criticism of the state (primarily, but not exclusively, the federal government), focused on the claim that criminal prosecutors and civil regulators have been overreaching in matters of procedure within firms by using their charging and settlement leverage to eliminate all manner of impediments to information gathering. The critics have not been precise about what they see as the problem with the state’s current enforcement methodologies. Sometimes the charge seems to be that the state is doing violence to basic procedural protections for the individual—that is, treating the firm’s *agent* unfairly, either generally or in relation to the actor on the street. At other times, the charge seems to be that the state is tilting the adversary process between itself and firms out of balance, by depriving *firms* of information control and bargaining power—presumably (though this is rarely specified) resulting in undesirable risk of errors in the legal system.⁴

2. Cf. Vikramaditya S. Khanna, *Corporate Defendants and the Protections of Criminal Procedure: An Economic Analysis* (Univ. of Mich. Law Sch. John M. Olin Ctr. for Law & Econ. Working Paper Series No. 29, 2004), available at <http://law.bepress.com/umichlwps/olin/art29> (considering the desirability of criminal procedure rules as applied to firms themselves).

3. See, e.g., George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 991 (2005) (arguing that government policy is “moving the process governing the American system away from the form the Founders expressly meant it to take—an accusatorial system—and toward something they feared—an inquisitorial system”); John F. Lauro, *Protecting Corporate Employees: The Need for a New Bill of Rights*, N.Y.L.J., Apr. 17, 2006, at 4 (urging state legislatures to enact a “Corporate Employees Bill of Rights”); Martin S. Pinales, *Standing up for Corporations*, CHAMPION, Sept.-Oct. 2006, at 4, 9 (“Using the fiction of the company to violate rights of individuals is unacceptable . . .”); see also *The Thompson Memorandum’s Effect on the Right to Counsel in Corporate Investigations: Hearing Before the S. Comm. on the Judiciary*, 109th Cong. (2006) (statement of Karen J. Mathis, President, American Bar Association) (objecting to policy “that erodes employees’ constitutional and other legal rights”).

4. Some of the recent broad-brush rhetoric about erosion of the right to counsel or erosion of the right to silence appears, when invoked on behalf of business firms, to be a reversion to outdated modes of thinking. At approximately the turn of the nineteenth century, the American legal system, in its early efforts to grapple with the modern business enterprise, mostly eschewed the idea that firms can or should be equated to people for rights-

With more clarity, the critics have described three specific procedural practices as objectionable and their complaints have triggered measures to change law and policy in those areas. The practices are state use of the fruits of employer coercion of employees to waive their rights to silence, state negotiation with firms over firms' indemnification of their agents for litigation costs, and state negotiation with firms over the scope of firms' assertions and waiver of their attorney-client privilege. The reform measures are two-fold at present. Senator Arlen Specter recently introduced a bill in Congress designed to prohibit the state from pursuing, encouraging, or making use of the fruits of any of these three practices.⁵ Shortly thereafter, the Department of Justice (DOJ) issued new guidelines (known as the "McNulty Memo"), revising its practices for how federal prosecutors handle organizational criminal cases, in ways designed to reduce the incidence of two of the three practices (privilege waivers and negotiation over firms' indemnification of their agents).⁶

In this Article, I have two objectives. My first goal is to establish what I see as the most useful orientation for evaluating procedural practices involved in the state's pursuit of individual wrongdoing within firms. I will demonstrate that the firm setting for criminal procedure is analytically distinct for several reasons, including that the phenomenon of wrongdoing itself differs in how it occurs within firms; that the state faces unique obstacles to the detection and proof of wrongdoing when it occurs within firms; that the kinds of wrongdoing that typically occur within business firms take substantially longer for the legal system to sort out than "ordinary," or street, crime; and that a key actor in the legal process—counsel—has multiple and very different functions in the firm setting.

Taken together, these characteristics of legal violations within firms lead to the conclusion that any effort to equate "ordinary" criminal procedure with criminal procedure within firms, or to attempt to simply transpose the doctrine

bearing purposes. See William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L.J. 393, 421-33 (1995).

5. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007); see also Margaret Aulino, *House Subcommittee Wants to Bolster Means to Combat Forced Waiver of Privilege*, 39 Sec. Reg. & L. Rep. (BNA) 419 (Mar. 19, 2007).

6. Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memo], available at http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf. The previous guidelines, consisting of written directives from the Deputy Attorney General to all federal prosecutors, were known after its author as the "Thompson Memo." Memorandum from Larry D. Thompson, Deputy Attorney Gen., U.S. Dep't of Justice, to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Jan. 20, 2003) [hereinafter Thompson Memo], available at http://www.usdoj.gov/dag/cftf/business_organizations.pdf. Before that, the guidelines were known as the "Holder Memo." Memorandum from Eric H. Holder, Jr., Deputy Attorney Gen., U.S. Dep't of Justice, to Component Heads and U.S. Attorneys, Bringing Criminal Charges Against Corporations (June 16, 1999).

and practices associated with the street to the firm, is a mistake. Not only is the social setting distinctive but so is the legal landscape: the individual's relationship to the state in the criminal process is ordinarily thought to be mediated by the Constitution as well as by statutes and rules purposely directed at criminal procedure; in the firm context, the state's pursuit of criminal sanctioning is controlled by a wider array of rules, norms, and incentives, including privilege law, substantive and vicarious liability regimes, contractual arrangements, economic incentives, and the nature of the firm.

My second objective is to demonstrate how seeing these differences in context reduces worry about the state's current practices and leads to a response to the calls for reform that, at most, would modestly restrain the state in some respects. To accomplish this, I will examine the two points of controversy that most directly concern the position of the individual in the criminal process within firms: the treatment of statements and their Fifth Amendment implications, and firms' indemnification of their agents for litigation costs. In terms of law, my conclusions will be that efforts to prohibit state involvement in these matters, including Senator Specter's bill, are seriously misguided and that the DOJ's recent changes to its policy controlling corporate investigations are inadequate in some respects and overly reactive in others.

My discussion will proceed as follows. In Part I, I will describe in more detail the public debate and the three issues of doctrine and practice that most trouble firms and their advocates at present. In Part II, I will describe the distinctive landscape on which wrongdoing within firms occurs and is sanctioned, by examining the three most salient structural features distinguishing the firm setting: the causal influence of firms on the incidence and sanctioning of crime; the slow maturation of criminal cases involving sophisticated economic activity; and the multiple roles performed by lawyers, both *ex ante* and *ex post*, with regard to actual and potential misconduct within firms.

In Part III, I will closely examine two of the issues of law and policy involved in current debate. First, I will consider the treatment of individuals' statements, particularly those resulting from employer coercion of employees to waive the right to silence and the state's encouragement of, and use of the fruits of, such compulsion. Second, I will deal with the state's involvement in firms' funding and selection of individual counsel. In each case, I will derive conclusions about desirable law and policy from consideration of the structural features of investigating wrongdoing within firms developed in Part II.

In Part IV, I will briefly address three important issues that cannot, but also need not, receive full treatment in this Article: the overbreadth of the law of criminal enterprise liability; the question of which institutions should make legal policy in this context; and one issue of doctrine and practice that is at the center of current debate but does not directly involve the procedural position of the individual rather than the firm—that is, the state's encouragement of firms to waive attorney-client privilege and work-product claims.

I. THE DEBATE AND ITS THREE CHIEF ISSUES

Critics assert that the state, principally through the DOJ but also through the Securities and Exchange Commission (SEC) and other regulators, has routinized three practices in the investigation of wrongdoing within firms that are troubling enough to call for their being severely limited if not banned. All three affect the ease with which the state accesses forms of information about individual conduct within business enterprises.

First, the state causes (critics might prefer “forces”) employers to coerce their employees into waiving the employees’ rights under the Fifth Amendment to refuse to make statements. The culprits here are written policies of the DOJ and SEC that say the state should consider, in the mix of factors affecting its charging and settlement discretion, an organization’s de jure and de facto policy with regard to requiring employees to answer questions in regulatory matters put by both the employer and the state.⁷

Second, the state encourages (critics might prefer “requires”) firms to provide the state, through the mechanism of waiver, with probative materials that would otherwise be shielded from disclosure by firms’ attorney-client privileges and the work-product doctrine. These materials have importance to the state because of two phenomena now routine in the affairs of business enterprises. First, in-house and outside counsel are ubiquitous in the transactional activities of firms, so legal advice or services are often an important part of the factual context for the activity being examined. Second, firms routinely use counsel (usually outside counsel) to conduct internal investigations of potential violations of the law and other misconduct. For many years, the state responded to these phenomena by pursuing policies that encouraged firms, through the exercise of the state’s charging and settlement discretion, to waive attorney-client privilege and work-product protections that would otherwise shield transaction-related communications involving lawyers and investigative information gathered by counsel ex post.⁸

Third, the state takes intrusive positions about whether, or under what circumstances, firms ought to indemnify agents who engage in wrongdoing for those agents’ litigation costs, particularly attorneys’ fees. The SEC published its conclusion in one recent enforcement action that a company’s expansion of the scope of employees who could be indemnified against the consequences of the SEC’s action “without being required to do so by state law or its corporate

7. Report of Investigation Pursuant to Section 21(a) of the Securities Exchange Act of 1934 and Commission Statement on the Relationship of Cooperation to Agency Enforcement Decisions, Exchange Act Release No. 44,969, 76 SEC Docket 220 (Oct. 23, 2001) [hereinafter Report of Investigation Pursuant to Section 21(a)], available at <http://www.sec.gov/litigation/investreport/34-44969.htm>; McNulty Memo, *supra* note 6, at 7; Thompson Memo, *supra* note 6, at 6-8.

8. Report of Investigation Pursuant to Section 21(a), *supra* note 7; Thompson Memo, *supra* note 6, at 7.

charter” was a factor causing the SEC to find that the company had failed adequately to cooperate in the inquiry.⁹ Until late 2006, the DOJ policy on charging firms with criminal violations provided that a prosecutor “may” consider in her charging and settlement discretion whether a “corporation appears to be protecting its culpable employees and agents” including, “depending on the circumstances, . . . through the advancing of attorneys fees.”¹⁰

Over the past two years, these three practices have caused an uproar among corporate actors and the corporate bar.¹¹ It is not clear whether protest is driven by changes in the *nature* of the state’s practices on the ground, an increase in the *number* of organizational investigations, a shift in the relevant political environment, or something else. The evidence is mixed, for example, on whether the state had moved to enforcing a “culture of waiver” in corporate investigations when previously privilege waivers were requested rarely or in more limited fashion, as the critics charged.¹²

9. Press Release, U.S. Sec. & Exch. Comm’n, Lucent Settles SEC Enforcement Action Charging the Company with \$1.1 Billion Accounting Fraud (May 17, 2004), *available at* <http://www.sec.gov/news/press/2004-67.htm>.

10. Thompson Memo, *supra* note 6, at 7-8. The policy noted that a corporation’s compliance with a state law mandate to provide indemnification could not be considered an instance of such protection. *Id.* at 8 n.4.

11. *See, e.g.*, ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, REPORT TO THE HOUSE OF DELEGATES ON AUDIT ISSUES 1-3 (2006), *available at* <http://www.abanet.org/buslaw/attorneyclient/home.shtml> [hereinafter ABA REPORT ON AUDIT ISSUES]; ABA TASK FORCE ON ATTORNEY-CLIENT PRIVILEGE, REPORT TO THE HOUSE OF DELEGATES ON EMPLOYEE RIGHTS 6, 14 (2006), *available at* <http://www.abanet.org/buslaw/attorneyclient/home.shtml> [hereinafter ABA REPORT ON EMPLOYEE RIGHTS]; COMM. ON CAPITAL MKTS. REGULATION, INTERIM REPORT 86 (2006), *available at* http://www.capmktreg.org/pdfs/11.30Committee_Interim_ReportREV2.pdf (“[The DOJ should] revise its prosecutorial guidelines to *prohibit* federal prosecutors from seeking . . . the denial of attorneys’ fees to employees, officers, or directors.”); *id.* at 91 (“[The SEC should] revers[e] its longstanding position that indemnification of directors for damages awarded in Section 11 actions is against public policy”); *see also* sources cited *supra* note 3. It should be noted that the bar labors under a conflict of interest when arguing about reform related to the attorney-client privilege. A robust privilege improves the market for legal services. *See* Louis Kaplow & Stephen Shavell, *Legal Advice About Information to Present in Litigation: Its Effects and Social Desirability*, 102 HARV. L. REV. 565, 599 (1989).

12. *Compare* AM. CHEMISTRY COUNCIL ET AL., THE DECLINE OF THE ATTORNEY-CLIENT PRIVILEGE IN THE CORPORATE CONTEXT: SURVEY RESULTS 2-3 (2006), *available at* <http://www.acca.com/Surveys/attyclient2.pdf> (reporting that after mailing a (methodologically unsound) survey exclusively to corporate and defense counsel titled “Is the Attorney-Client Privilege Under Attack?,” nearly 75% of respondents agreed with the survey’s proposition that there is a “culture of waiver”), *with* Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 899 & nn.7-9 (2006) (noting disagreement about the empirical question). It is remarkable that some of the materials from critics, given their source, make glaring errors (or, worse, engage in obfuscation) with regard to the distinction between organizational and individual counsel. *See, e.g.*, ABA REPORT ON EMPLOYEE RIGHTS, *supra* note 11, at 3, 5 (stating that government policies of seeking waiver of corporations’ privileged materials “have contributed to an erosion of . . . individual rights”

In any event, the protest has been heard. Senator Specter recently introduced legislation that seeks to bar all federal officials, in the exercise of their charging and settlement discretion, from considering a firm's willingness to require its employees to answer questions in regulatory matters, to waive privilege and work-product protections, or to forego indemnifying employees for attorneys' fees.¹³ More or less coincident with this legislation, the DOJ issued new guidelines governing the conduct of its prosecutors in investigations of business enterprises.¹⁴ The new prosecution guidelines (the "McNulty Memo") speak to two of the three issues that have troubled critics.

With regard to privilege waivers, the McNulty Memo replaces the previous general guidance that waiver is desirable but not dispositive¹⁵ with more specific guidance. The McNulty Memo says that waiver is not a "prerequisite" to a finding that a firm has cooperated in an investigation but that waiver "may

and "are violative of the rights of employees"). Some evidence of disingenuousness is apparent in the recent news that corporate counsel oppose a proposed amendment to the Federal Rules of Evidence (proposed Rule 502, governing selective waiver) that would protect firms from privilege waivers as to private litigants in instances of waiver with respect to the state. Reportedly, the reason for the objection is that the existence of a protective rule on selective waiver would deprive counsel of the argument that a firm should not have to waive as to the state due to the collateral consequences of that waiver on the firm's position with other adversaries. See J.P. Finet, *Attorney-Client Privilege: Selective Waiver of Privilege Provision Likely to Be Pulled from Proposed Rule of Evidence*, [2007] Corp. Accountability & Fraud Daily (BNA) d8 (Jan. 31, 2007).

13. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3 (2007). This bill seeks to add to the United States Code the following language:

(b) IN GENERAL.—In any Federal investigation or criminal or civil enforcement matter, an agent or attorney of the United States shall not—

(1) demand, request, or condition treatment on the disclosure by an organization, or person affiliated with that organization, of any communication protected by the attorney-client privilege or any attorney work product;

(2) condition a civil or criminal charging decision relating to a organization, or person affiliated with that organization, on, or use as a factor in determining whether an organization, or person affiliated with that organization, is cooperating with the Government—

...

(B) the provision of counsel to, or contribution to the legal defense expenses of, an employee of that organization;

...

(E) a failure to terminate the employment of or otherwise sanction any employee of that organization because of the decision by that employee to exercise the constitutional rights or other legal protections of that employee in response to a Government request

Id.; see also COMM. ON CAPITAL MKTS. REGULATION, *supra* note 11 ("[The DOJ should] revise its prosecutorial guidelines to *prohibit* federal prosecutors from seeking waivers of the attorney-client privilege . . .").

14. McNulty Memo, *supra* note 6.

15. Thompson Memo, *supra* note 6, at 7 ("One factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including, if necessary, a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel.").

expedite” an investigation.¹⁶ It authorizes prosecutors to request a waiver only where there is “legitimate need” in an investigation, assessed by considering whether the information sought is beneficial and cannot be obtained another way, and whether the firm has otherwise fully disclosed relevant facts and would not suffer undue collateral consequences from waiver.¹⁷

The McNulty Memo permits prosecutors to consider a firm’s response to a waiver request in the exercise of their discretion if the request is for “purely factual information . . . relating to the underlying misconduct.”¹⁸ It bars prosecutors from considering a firm’s rejection of a waiver request if the request is for “attorney-client communications or non-factual attorney work product” (while saying that such requests should be made “only in rare circumstances”); however, it says prosecutors “may always favorably consider” a firm’s *agreement* to such a request.¹⁹

With regard to indemnification, critics’ concerns crystallized in a prosecution involving KPMG, the auditing and consulting firm, in which Judge Lewis Kaplan of the Southern District of New York threatened to dismiss an indictment after finding that prosecutors stated to the firm that their charging discretion would be influenced by whether the firm chose to continue to pay attorneys’ fees for agents for whom the firm was not obligated to do so.²⁰ Probably in response to Judge Kaplan’s opinion, the Specter Bill, and a chorus

16. McNulty Memo, *supra* note 6, at 8.

17. *Id.* at 8-9.

18. *Id.* at 9.

19. *Id.* at 10.

20. Judge Kaplan found this conduct of the government to be virtually unconstitutional under the Sixth Amendment’s counsel guarantee. *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330 (S.D.N.Y. 2006). I say “virtually” because Judge Kaplan did not actually do anything to the state or its case, perhaps because the constitutional basis for a dismissal or other remedy was lacking. *Compare id.* at 336 (“[The government] has violated the Constitution it is sworn to defend.”), *with id.* at 380 (stating that, in light of the court’s conclusions, the government now “may” use its leverage to cause defendants’ employer to advance defense costs “in order to avoid any risk of dismissal of this indictment or other unpalatable relief”). *See infra* text accompanying notes 140-41, 166. Instead, Judge Kaplan invited the defendants to file a civil suit, over which he has exercised “ancillary” jurisdiction, compelling KPMG to fund their defenses, on a theory of implied contract based on KPMG’s past pattern of paying the attorneys’ fees of its agents. *Stein I*, 435 F. Supp. 2d at 382; *see also* Complaint for Advancement, *Stein v. KPMG LLP*, No. 1:06-cv-5007-LAK (S.D.N.Y. July 10, 2006) (complaint in ancillary civil action), *available at* 2006 WL 2922089. New York courts at least would seem to frown on an implied contract theory in this context. *Hooper Assocs. v. AGS Computers, Inc.*, 548 N.E.2d 903, 905 (N.Y. 1989) (stating that agreement to indemnify for attorneys’ fees will not be implied between contracting parties absent “unmistakably clear” contractual language). Judge Kaplan has delayed trial of the criminal case pending resolution of the civil fee litigation. KPMG has appealed Judge Kaplan’s ruling that its fee dispute with its employees is not subject to mandatory arbitration. *United States v. Stein (Stein III)*, 452 F. Supp. 2d 230 (S.D.N.Y. 2006) (denying KPMG’s motion to dismiss civil claim relating to advancement of attorneys’ fees as precluded by contractual obligation to submit to binding arbitration, and setting case for jury trial); *KPMG Will Appeal a Legal-Fees Case*, WALL ST. J., Sept. 19, 2006, at C6.

of criticism from the corporate bar, the DOJ has changed its policy with regard to indemnification. The McNulty Memo provides that a prosecutor “generally should not take into account” in exercising her discretion whether a firm is advancing litigation costs to any individual.²¹ Advancement may be considered only with the approval of the Deputy Attorney General and only in an “extremely rare case[]” in which a firm uses advancement as a means to impede an investigation.²²

Finally, with regard to employer policies about employees’ obligations to answer questions in regulatory matters, the DOJ did not explicitly address this point when it recently modified its policy.²³ Nor has the SEC spoken recently on this subject—or, for that matter, on the other issues that trouble critics.²⁴ The DOJ’s recent moves have not mollified the critics,²⁵ and at least some in Congress have said that Senator Specter’s bill does not go far enough because it lacks enforcement measures to control prosecutors.²⁶ The SEC’s inaction also remains a point of serious objection among critics.

II. THE DISTINCTIVE SETTING OF THE FIRM

At least three distinguishing characteristics of firms, wrongdoing within firms, and the investigation of wrongdoing within firms are important in understanding procedure for pursuing crime within firms. In this Part, I will fully describe these three features: the effects of firms on the incidence of crime *ex ante* and its detection *ex post*; the slow ripening of criminal cases in the firm context; and the multiple roles of counsel in such cases. In Part III, I will then apply these features to the current controversies of law and policy described in Part I.

21. McNulty Memo, *supra* note 6, at 11.

22. *Id.* at 11 n.3.

23. Compare McNulty Memo, *supra* note 6, at 7 (stating that a prosecutor may gauge extent of corporation’s cooperation in part by considering corporation’s “willingness to provide relevant evidence”), with Thompson Memo, *supra* note 6, at 6 (stating that a prosecutor may gauge extent of corporation’s cooperation in part by considering corporation’s “willingness . . . to make witnesses available”).

24. See ABA Asks SEC to Revise Policy on Waiver of Lawyer/Client Privilege, 39 Sec. Reg. & L. Rep. (BNA) 284 (Feb. 26, 2007); Rachel McTague, *Attorney-Client Privilege: Former SEC Enforcement Official Says McNulty Memo Will Not Alter SEC Policy*, 5 Corp. Accountability Report (BNA) 81 (Jan. 26, 2007).

25. Pamela A. MacLean, *No Comfort from DOJ Waiver Rule: “McNulty Memo” on Attorney-Client Privilege Blasted by Critics*, NAT’L L.J., Jan. 22, 2007, at 8; see, e.g., David Douglass & Carlean Ponder, *Exceptions to the McNulty Memo: Do They Render the Revisions Illusory?*, WHITE-COLLAR CRIME REP., Feb. 27, 2007, at 2.

26. See Aulino, *supra* note 5.

A. Causation and Sanctioning of Criminal Wrongdoing

The first step in understanding criminal procedure within the firm is to describe the nature of the problem facing the state when it deals with violations of the law within firms. After all, questions about whether procedural restraints and protections are necessary, adequate, and effective only arise (at least in an interesting way) because there is a public concern that gives serious cause for the state to be intrusive. Wrongdoing within firms has two chief distinguishing characteristics for the legal system: firms causally affect the incidence of wrongdoing *ex ante*, and they contribute to or detract from the effectiveness of detection and sanctioning *ex post*.

1. Causation and ex ante effects

There is no such thing as an organization committing a crime. Firms don't commit crimes; people do.²⁷ However, an organization may bear an important causal relationship to its agent's criminal act by virtue of a variety of behavioral phenomena. One is economic incentives. Employees who seek to enhance their earnings and prestige may pursue organizational objectives, such as increased profits or higher stock prices, through criminal acts that the employees believe will cost less than the benefits that will flow from those acts.²⁸ In such an instance, an individual may commit a crime that she would not have committed but for her participation in the organization. An organization may influence the degree to which an agent rationally elects to pursue criminal conduct through direct and indirect incentives, even though those incentives may (indeed, virtually always do) fall short of a direct award for criminal behavior.²⁹

As subjects of deterrence efforts, actors in organizational settings are also different than actors outside organizations. Most organizational actors have control of organizational resources but not ownership of them (or at least as much of them as they control). Separation of ownership and control means that

27. See, e.g., Jennifer Arlen & Reinier Kraakman, *Controlling Corporate Misconduct: An Analysis of Corporate Liability Regimes*, 72 N.Y.U. L. REV. 687, 695 (1997).

28. But see Jonathan R. Macey, *Agency Theory and the Criminal Liability of Organizations*, 71 B.U. L. REV. 315, 319 (1991) (arguing that though corporate crime sometimes benefits firms, it is a mistake to treat management criminality as altruistic toward shareholders since "[t]he real aim of criminal behavior by organizations is to advance the careers of the responsible corporate actors").

29. A straightforward example would be managers who engage in accounting fraud in a firm that heavily rewards its managers for attaining earnings targets without regard to how they are attained. Such rewards do not inevitably lead to criminality; routinely, they do not. However, in many cases in which accounting fraud does occur, the firm's reward structure is an essential part of the causal structure of the crime. Of course, some agents, fearing personal liability, may engage in *less* risk-taking than their principals would desire, but such instances do not mobilize legal regimes and their procedural components because, by definition, they involve no occasion for sanction.

actors can draw upon firm resources to engage in (and profit from) activities that generate harm, while those same resources are unavailable to the legal system through imposition of individual liability on the actor. The individual actor thus may be insolvent in relation to the sanction needed to deter a particular instance of wrongdoing within a firm.³⁰

Beyond rational response to employer incentives, people behave differently in groups. Group forces make wrongdoing more likely to arise and can make it more virulent once it begins.³¹ Groups also differ along this dimension. Some organizations have cultures that constrain these tendencies and strongly promote legal compliance. No legal entity has an express policy of encouraging criminality, but some undoubtedly have cultures that enable and even promote an aggressive posture toward legal constraints, or do not condemn or punish misconduct unless it is detected publicly.³²

Firms are also characterized by team production.³³ The effect of this phenomenon on criminality is one of the principal insights motivating the law of conspiracy.³⁴ When the labor in criminality is divided, criminality is likely to be more effective and to cause greater harm. A crime in an organization therefore may present a greater threat to society than a similar crime committed by an individual outside the organizational setting.³⁵ Even where the tangible or measurable effect of a crime is the same inside versus outside an organization, an organizational crime may be more socially detrimental by virtue of the visibility and influence of organizations in society, that is, their expressive power. People may conclude more about the state of the social and moral fabric, and their confidence in markets and public institutions may be affected, from their observation of an instance of organizational versus isolated individual wrongdoing.³⁶

30. See Lynn M. LoPucki, *The Death of Liability*, 106 YALE L.J. 1 (1996) (examining extensively how judgment proofing at both individual and enterprise levels can thwart liability regimes).

31. I described social science literature relevant to this point in Samuel W. Buell, *The Blaming Function of Entity Criminal Liability*, 81 IND. L.J. 473, 493-98 (2006).

32. See, e.g., Tom R. Tyler & Steven L. Blader, *Can Businesses Effectively Regulate Employee Conduct? The Antecedents of Rule Following in Work Settings*, 48 ACAD. MGMT. J. 1143 (2005); Eric Van den Steen, *On the Origin of Shared Beliefs (and Corporate Culture)* (MIT Sloan Sch. of Mgmt., Working Paper No. 4553-05, 2005), available at <http://ssrn.com/abstract=793884>.

33. See Margaret M. Blair & Lynn A. Stout, *A Team Production Theory of Corporate Law*, 85 VA. L. REV. 247, 265-76 (1999).

34. See Neal Kumar Katyal, *Conspiracy Theory*, 112 YALE L.J. 1307, 1316-24, 1355-58 (2003).

35. I mean to limit this point to an observation about the relative effects of the *same* form of criminal liability. I do not mean to engage with the difficult debate over which harms society more: a financial crime depriving, for example, tens of thousands of people of substantial wealth or even livelihood versus a violent crime, for example, depriving one person of her life or inflicting lasting physical and psychic harm.

36. See Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J.

2. *Detection and ex post effects*

Ex post, the overlay of an organization in a case of criminality makes the detection and proof of crime more difficult for the state.³⁷ Private organizations are relatively opaque, the more so the larger and more sophisticated they are. Layers of hierarchy must be penetrated to reach principal actors. Division of labor makes ascription of responsibility for conduct and results challenging.³⁸ Organizational activities are often by nature highly complex, involving technologically advanced and specialized means of production that are difficult for outsiders to understand. And the mere presence of the firm implies an additional (and resource-rich) actor who may choose to expend effort to interfere with the state's project of identifying and proving wrongdoing. All of this adds up to a more difficult project for the state than the "ordinary" criminal case. The modern organizational case can easily involve hundreds of witnesses, millions of documents, and years of investigation requiring the labor of dozens of state actors.

3. *Enterprise liability*

Enterprise liability has been the legal system's chief response to both problems: how firms incentivize their agents ex ante to comply with or violate the law, and how firms impede or assist the state in detecting and sanctioning violations ex post. The insight that imposing sanctions at the level of the group is a means of causing the group to control its members and counteract its own tendencies to push its members in the wrong direction is a very old one.³⁹ As the modern organization has grown in size and sophistication and become ubiquitous, the insight has become more firmly entrenched in law and theory.⁴⁰ When the law threatens a firm with sanctions for its agent's violation of the law, it provides the firm with an incentive to (1) deter wrongdoing through incentives directed at agents (both carrots and sticks); (2) detect and stop wrongdoing before it grows and matures by monitoring agent conduct; and (3)

LEGAL STUD. 609, 618-22 (1998).

37. These problems are discussed in greater detail in Darryl K. Brown, *The Problematic and Faintly Promising Dynamics of Corporate Crime Enforcement*, 1 OHIO ST. J. CRIM. L. 521, 526-29 (2004).

38. See, e.g., Lewis A. Kornhauser, *An Economic Analysis of the Choice Between Enterprise and Personal Liability for Accidents*, 70 CAL. L. REV. 1345, 1370 (1982).

39. See Daryl J. Levinson, *Collective Sanctions*, 56 STAN. L. REV. 345 (2003).

40. Arlen & Kraakman, *supra* note 27, at 689. Note that enterprise liability may encourage organizations to control employees through a variety of mechanisms. Belief in the utility of enterprise liability does not require belief that agents are motivated to comply with rules only by the threat of employer sanctions. The specter of enterprise liability may also cause an organization to take steps to promote a normative culture of voluntary compliance and deference to rules. See Tyler & Blader, *supra* note 32, at 1146-54 (discussing research showing that tapping into employees' social values may be a more effective organizational strategy for inducing compliance).

develop evidence of wrongdoing after it occurs to facilitate sanctioning by the state.⁴¹

The firm has decided advantages over the state in the control and monitoring of the behavior of individuals who act within firms. The firm is much closer to the action, better educated about the activities under scrutiny, and a more efficient user of enforcement resources.⁴² While the organization does not have access to some means of sanctioning that the state enjoys (e.g., imprisonment), the organization can impose sanctions that the state cannot (e.g., reduced compensation and firing). The state's sanctions may be more severe, but they are probably more remote in how they affect the calculus of most agents contemplating violations of law.⁴³

The effects of enterprise liability can be manifold. Sanctioning firms causes them to sanction their own agents, which enhances deterrence both by increasing overall sanctions and, more importantly, by increasing the probability that some sanction will be imposed.⁴⁴ Sanctioning firms in a *nuanced* manner—for example, by modifying penalties according to a firm's efforts to detect and develop evidence of violations *ex post*—can ameliorate the state's special dilemmas in detecting and investigating violations of the law when they occur within the opaque context of the firm.⁴⁵ The firm can enhance

41. Arlen & Kraakman, *supra* note 27, at 691, 699; Kornhauser, *supra* note 38, at 1351; Reinier Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 866-67 (1984); Alan O. Sykes, *The Economics of Vicarious Liability*, 93 YALE L.J. 1231, 1241 (1984); *see also* Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994) (exploring how enterprise liability, if not carefully structured, can discourage firms from efforts to detect wrongdoing).

42. Arlen & Kraakman, *supra* note 27, at 692-93, 700-01; Kornhauser, *supra* note 38, at 1351.

43. *See* Paul H. Robinson & John M. Darley, *The Role of Deterrence in the Formulation of Criminal Law Rules: At Its Worst When Doing Its Best*, 91 GEO. L.J. 949, 954-55 (2003).

44. Arlen & Kraakman, *supra* note 27, at 706-07.

45. *Id.* at 695-741; Arlen, *supra* note 41, at 861-66; *see also* IAN AYRES & JOHN BRAITHWAITE, *RESPONSIVE REGULATION: TRANSCENDING THE DEREGULATION DEBATE* (1992) (advancing theory of "responsive regulation" of firms based on "enforcement pyramid" involving levels of regulation of varying severity and public-private control). I recognize two important complications to this account, though I do not think they vitiate these relatively well-settled insights. First, agency costs may reduce the extent to which firms respond to enterprise liability in the way we would expect. When managers making decisions for a firm are actually or potentially exposed to individual liability, they may steer the firm away from responses to enterprise liability that are in the firm's interests. *See* Brandon L. Garrett, *Structural Reform Prosecution*, 93 VA. L. REV. (forthcoming 2007) (manuscript at 34, on file with author) ("[C]ases where the current leadership of the organization shared a role itself in the wrongdoing" may not settle because "reforms may require purging the leadership and fundamentally changing the organizational mission."). For detailed and colorful accounts of recent such instances, *see* Peter Elkind, *The Law Firm of Hubris Hypocrisy and Greed*, FORTUNE, Nov. 13, 2006, at 154, and James Bandler & Charles Forelle, *Interested Parties: In Internal Probes of Stock Options, Conflicts Abound*, WALL ST. J., Aug. 11, 2006, at A1. Second, Coasean theory would hold that contractual bargaining between firms and agents

sanctioning effects in two ways: by policing its own agents and punishing them economically, and by sharing the products of its policing efforts with the state to assist the public project of imposing legal sanctions.

None of this is to deny that harnessing organizations in this fashion might carry costs that outweigh any social benefits, but determining whether that hypothesis is accurate requires a weighing of costs and benefits in the context of the particular legal incentive under consideration. Appreciating the effects of the firm on individual wrongdoing, *ex ante* and *ex post*, should be a starting point for any such discussion.

B. *Slow Ripening of Substantive Liability*

Effects of the firm aside, crime within firms is different because, in general, the substantive crimes committed in organizational settings are white collar offenses, a distinctive variety of crime for analytical purposes.⁴⁶ If in the ordinary firm case, the matter in question were an agent's commission of a crime of violence on the job (such as murdering an employee who had threatened to reveal a price-fixing conspiracy), it would be fairly clear early in the process that a crime had been committed. The principal challenge for the legal system would be collection of sufficient, admissible proof of the crime. Perhaps the system would confront a challenge of determining and proving perpetrator identity, though this is less likely in the organizational context where documents and eyewitnesses tend to be more prevalent than on the street or in the home.

When the substantive wrong involves fraud or other forms of harmful deception, however, often the primary issue for the legal system is determining whether a crime has been committed.⁴⁷ Especially in complex organizational settings, the wrongdoing can be deeply nested within legitimate and valuable economic activity. And the more sophisticated the fraud, the more difficult it is to identify as fraud (which is, in essence, the wrong of taking or attempting to take another's property by deceptive means structured so as not to fall within the basic prohibition against theft).⁴⁸ Fraudulent conduct evolves along with economic sophistication. What once was skewing weights and measures has

can undo any incentives the legal system adopts to compel firms to detect and punish agent wrongdoing. It seems doubtful that agents have the ability to demand extra wages to offset their expected costs of committing criminal acts, especially wages to offset steps an employer might take to increase the *probability* of sanction. Of course, agents also have no realistic ability to bargain for wages to offset the extreme disutility of an imprisonment sanction.

46. Stuart P. Green, *Moral Ambiguity in White Collar Criminal Law*, 18 NOTRE DAME J.L. ETHICS & PUB. POL'Y 501 (2004); Stuart P. Green, *The Concept of White Collar Crime in Law and Legal Theory*, 8 BUFF. CRIM. L. REV. 1 (2004).

47. William J. Stuntz, *Self-Defeating Crimes*, 86 VA. L. REV. 1871, 1873, 1883-86 (2000).

48. Samuel W. Buell, *Novel Criminal Fraud*, 81 N.Y.U. L. REV. 1971, 1973 (2006).

become complex manipulation of accounting conventions to misrepresent the earnings of public corporations.⁴⁹

The legal system has responded to the challenge of white collar crime in two ways. On one hand, it adopts extremely open-textured criminal prohibitions, such as antifraud statutes, that do not define the prohibited conduct with specificity, so as to remain applicable to innovative wrongdoing. On the other hand, it insists on locating culpability for violation of those open-textured prohibitions through deep inquiry into mental state. Mens rea both dominates the law of white collar crime and is distinctive there in relation to other precincts of criminal law. Inquiry into mental state in white collar cases often progresses past relatively thin cognitive states like the Model Penal Code's "knowledge" or "purpose" to concepts such as "willfulness," "bad purpose," and "consciousness of wrongdoing."⁵⁰ Inquiry into mistake of law also appears here more prominently than elsewhere in the criminal law.⁵¹

Even with this searching inquiry into mental state, the enforcer retains an exceptionally wide range of discretion in white collar cases. The law in this area strains to decisively mark out the boundary between civil and criminal sanctioning.⁵² The state makes decisions case by case, often after a searching inquiry into the facts, about what to treat as a crime and what to leave for civil regulation. The civil versus criminal question is often debated and negotiated in a kind of pre-charging litigation that involves regulated actors, their counsel, and state enforcers acting as quasi-adjudicators.⁵³

Most cases within firms ripen slowly. The question of whether the case is a *criminal* case at all often is not and cannot be determined until long after the machinery of criminal justice has been activated. This means there is a kind of procedural overbreadth. Criminal procedure may apply even where criminal law does not: subpoenas may go out, grand juries may be convened, people may be summoned for interviews with state regulators who carry guns and badges, search warrants may be executed, and so on—even though it might turn out in the end not just that no crime can be proved but that none was committed. To be sure, momentum in major investigations often means that the point of no return, at least from the perspective of the prosecutor, is passed relatively early. However, even if it becomes clear early on that someone is likely to be charged with something, the questions of who will be charged and

49. See MODEL PENAL CODE § 223.1 cmt.2 (1962); Buell, *supra* note 48, at 1987-96; *see, e.g.*, United States v. Ebbers, 458 F.3d 110, 113-16 (2d Cir. 2006).

50. MODEL PENAL CODE § 2.02 (1962). These points are developed in more detail in Buell, *supra* note 48, at 2031-36.

51. See Ratzlaf v. United States, 510 U.S. 135 (1994); Dan M. Kahan, *Ignorance of the Law Is an Excuse—but Only for the Virtuous*, 96 MICH. L. REV. 127 (1997).

52. See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"? Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193 (1991).

53. Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2121-29 (1998).

with what they will be charged are hotly contested, over a period of months or even years, and often are not resolved until the very end of the investigative process.

One might say that this is unremarkable. The regime of criminal procedure, after all, is premised on the idea that one set of rules applies equally to the innocent and the guilty.⁵⁴ The point is to structure the game to operate fairly prior to and apart from the question of whether the person subject to its machinations is a criminal. This premise includes the assumption that there will be cases in which the system goes through all its machinations only to discover that “we haven’t got our man.”

But this is naïve. In candor, we “peek” all the time in criminal procedure, even if it is not proper constitutional rhetoric to say so. For example, would the punitive regime of pretrial detention that adheres in the federal courts be tolerated if, on average, half or even twenty or thirty percent of charged persons detained before trial were acquitted?⁵⁵ The accuracy, speed, and clarity with which the question of substantive liability is resolved (or, if you prefer, with which we *believe* it to be resolved) undoubtedly affects the generosity of procedural rights. The longer it takes to resolve the question of substantive liability, and the more that question is subject to official discretion, the more problematic it may be to mobilize the full panoply of criminal enforcement powers early and in every case.

These concerns might cause one to want to pursue a separate regime of criminal procedure for cases within business enterprises that favors the target of state action more than the ordinary regime. But that is probably unpalatable because it offends most people’s notions of equality. In any event, defending the position that corporate actors are entitled to a kind of procedural set-off against their substantive liability disadvantages would require taking on the burden of evaluating the legal position of the corporate actor on a net basis. While the open-textured and mens rea-based nature of substantive law may disadvantage the corporate actor procedurally, that same actor has tremendous resource advantages over the average subject of criminal proceedings.⁵⁶ These advantages affect procedural protections at their most fundamental level. For example, one can easily view the quality of counsel as controlling the burden of proof: a defendant with a better-funded lawyer is much more likely to persuade a factfinder to entertain reasonable doubt.

54. See, e.g., *McNabb v. United States*, 318 U.S. 332, 343-44 (1943).

55. See Jeffrey Manns, *Liberty Takings: A Framework for Compensating Pretrial Detainees*, 26 *CARDOZO L. REV.* 1947, 1954-75 (2005).

56. See William J. Stuntz, *Lawyers, Deception, and Evidence Gathering*, 79 *VA. L. REV.* 1903, 1951-52 (1993) (noting how broad substantive law of white collar crime counteracts white collar defendants’ advantages in early access to counsel).

C. Multiple Roles of Counsel

The role of counsel is a pillar in criminal procedure's architecture but one that tends to be conceived of in terms that do not fit the case within the firm. Criminal procedure's lawyer is the lawyer of *Gideon* and *Strickland*: the constitutionally guaranteed, effective advocate who stands as a bulwark between the individual and the state in an adversarial litigation to determine criminal responsibility.⁵⁷ Rhetoric and reality are vastly different in this context, of course, but they both begin with the same conception of the lawyer's role.⁵⁸

What is most notable about this lawyer, for my purposes, is that she arrives on the scene fairly late. In general, her earliest appearance is to meet a client at the police station.⁵⁹ Most perpetrators of "ordinary" crimes lack the resources to retain counsel prior to their criminal conduct, and have weak incentives to do so. These actors tend to be overly optimistic about their risks of being caught,⁶⁰ they probably realize that lawyers are prohibited from overtly counseling clients about how to commit crimes without suffering sanctions, and they have little need for help in understanding the relatively simple legal rules that apply to their actions.⁶¹ Little can be accomplished by sharing criminal plans with a lawyer, unless, of course, the lawyer is an accomplice.⁶² The one significant exception to this model is the role of so-called "house counsel" to organized crime groups.⁶³

The lawyer of traditional criminal procedure—the accused's lawyer—is not absent in the firm case. But she arrives much earlier.⁶⁴ Routinely, subjects of state investigation learn early of the existence of the investigation, due to

57. *Strickland v. Washington*, 466 U.S. 668 (1984); *Gideon v. Wainwright*, 372 U.S. 335 (1963); see also *Johnson v. Zerbst*, 304 U.S. 458 (1938).

58. See, e.g., Eve L. Brensike, *Structural Reform in Criminal Defense: Relocating Ineffective Assistance of Counsel Claims*, 92 CORNELL L. REV. (forthcoming 2007) (manuscript at 7-9), available at <http://ssrn.com/abstract=942804>.

59. See *Kirby v. Illinois*, 406 U.S. 682 (1972) (stating that the Sixth Amendment right to counsel applies only at critical stages after the initiation of adversarial proceedings).

60. Robinson & Darley, *supra* note 43, at 992-93.

61. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2003).

62. See, e.g., *United States v. Cueto*, 151 F.3d 620 (7th Cir. 1998); *United States v. Cintolo*, 818 F.2d 980 (1st Cir. 1987).

63. See, e.g., *United States v. Locascio*, 6 F.3d 924, 931-36 (2d Cir. 1993).

64. The distinctions in criminal cases between the traditional lawyer and the modern organizational lawyer are thoroughly treated in Pamela S. Karlan, *Discrete and Relational Criminal Representation: The Changing Vision of the Right to Counsel*, 105 HARV. L. REV. 670 (1992). See also Stuntz, *supra* note 56, at 1949 (stating that two forms of cases in which defense lawyers get involved early are organized crime and white collar cases); Darryl K. Brown, *Executive-Branch Regulation of Criminal Defense Counsel and the Private Contract Limit on Prosecutor Bargaining* 15-16 (Wash. & Lee Legal Studies Research Paper Series, Working Paper No. 2006-08, 2006), available at <http://ssrn.com/abstract=916546> (stating that counsel in corporate cases, unlike counsel envisioned by right-to-counsel decisions, arrive on the scene much earlier).

subpoenas for documents, requests and subpoenas for witness statements, and the like.⁶⁵ And, as I discussed, this phase of the proceedings can last for months or years. Many agents of large firms are compensated sufficiently to have the resources to retain counsel early. It is worth their while to do so. Controlling and monitoring the flow of evidence can benefit defendants when it comes time to contest the state's case on the merits, and often a defendant who controls information will have opportunities to "win" the case before it gets started by persuading the state not to pursue legal remedies.⁶⁶

In addition, the lawyer for the accused (or the potentially accused) is joined in the organizational case by another lawyer, who often arrives even earlier: the attorney for the firm.⁶⁷ Actually, two lawyers represent the firm.⁶⁸ The transactional lawyer supplies advice coincident with the conduct that is the subject of investigation. Nowadays, it is not a stretch to say that counsel is present for most significant corporate transactions. The role of this lawyer includes both transaction facilitation (drafting documents, negotiating, and the like) and counseling (determining if transactions violate the applicable regulatory scheme, considering how they could be structured to avoid sanctions, and so on).

The other organizational lawyer is the firm's litigation attorney. This lawyer is distinctive from the traditional lawyer of criminal procedure not only because she arrives much earlier but also because she has a different client. Her loyalties are, or should be, to the interests of the organization, not to its employees or even the managers who direct her work.⁶⁹ In some circumstances, obligations to her firm client may require her to place managers in legal jeopardy.⁷⁰

Business enterprises, of course, have strong incentives to make use of litigation counsel. Even more than individual counsel in such cases, firm counsel can control and monitor the flow of information between the firm and the state, vastly improving the firm's position in negotiation and, if necessary, litigation with the state.⁷¹ Firm counsel now routinely undertake investigation

65. See generally 1 OTTO G. OBERMAIER & ROBERT G. MORVILLO, *WHITE COLLAR CRIME: BUSINESS AND REGULATORY OFFENSES* §§ 1.01-.06 (2006); 2 *id.* §§ 13.04, 17.01-.07.

66. Lynch, *supra* note 53, at 2121-29.

67. See MODEL RULES OF PROF'L CONDUCT R. 1.13 (2003).

68. For a thorough and incisive description of the special nature of organizational counsel and its development as an institution, see JOHN C. COFFEE, JR., *GATEKEEPERS: THE PROFESSIONS AND CORPORATE GOVERNANCE* 192-232 (2006).

69. MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003).

70. See, e.g., 17 C.F.R. § 205.3(b) (2007) (imposing a duty on attorneys practicing before the SEC to report managers' securities violations to corporate directors); MODEL RULES OF PROF'L CONDUCT R. 1.13(b) (2003) (declaring that if organizational lawyer knows manager is taking action in violation of obligation to organization, lawyer may take action in response).

71. See, e.g., Robert S. Bennett et al., *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era*, 62 *BUS. LAW.* 55, 58-87 (2006).

of wrongdoing within firms, sometimes before the state has begun or even considered an investigation of its own.⁷² These internal investigations have several objectives: to enable the firm to conduct business, such as by sanctioning its agents for wrongdoing and taking steps to prevent recurrence; to situate the firm in a position of superior knowledge for decisionmaking and advocacy in its dealings with regulators and, if necessary, courts; and to give the firm factual materials that have value to regulators and can be used to bargain over legal sanctions.

There is overlap, which is sometimes problematic, between the roles of the lawyer for the accused and the litigation counsel for the firm. In the early stages of a run-of-the-mill corporate internal investigation, neither the firm nor its agent are likely to retain individual counsel for the agent. In the absence of such individual counsel, the agent confronts a lawyer whose role can be confusing.⁷³ The firm's lawyer is employed to help the firm address the same problem of actual or potential legal sanctions that confronts the individual, and the lawyer may appear to be aligned with the individual against the state. But the firm's best option for resolving that problem frequently involves sacrificing the individual. Surely employees understand, in general, that employers ferreting out information about misconduct in the workplace may take action against employees who engage in wrongdoing. But employees may not understand the extent to which the employer may be interested in assisting the legal system in imposing sanctions. Rules of professional conduct ameliorate this problem by requiring lawyers for the firm to make disclosures to employees, but there is some evidence that these disclosure rules may not lead to sufficient notice.⁷⁴

72. See, e.g., Dan Hedges, *Two Major Failings*, NAT'L L.J., Oct. 2, 2006, at 23 (reporting actual or potential investigations into the backdating of stock option grants at hundreds of corporations).

73. See, e.g., MODEL RULES OF PROF'L CONDUCT R. 1.13 cmt. 2 (2003) (stating that an employee's communications with the organization's lawyer are covered by the confidentiality rule but the employee is not the client and the lawyer may not disclose to the employee information related to the representation of the organization except as necessary to carry out representation of organization); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 163(2) cmt. e (Tentative Draft No. 8, 1997) ("A constituent may mistakenly assume that the lawyer will act to further the personal interests of the constituent, perhaps even against the interests of the organization.").

74. See MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2003) ("[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."); RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 163(2) (Tentative Draft No. 8, 1997) ("[W]hen the lawyer knows or reasonably should know that the unrepresented non-client misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the non-client."); Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859; Bruce A. Green, *Interviewing Corporate Client Officers and Employees: Ethical Considerations*, PROF'L LIABILITY LITIG. ALERT (ABA Prof'l Liab. Litig. Comm.,

Even if (or when) individual counsel appears on the scene, the story about the overlapping roles of lawyers remains complicated.⁷⁵ Firms usually retain and pay the fees of individual counsel in government regulatory matters. One outside law firm typically serves as litigation counsel for the firm, while another single firm (often recommended by the first) is retained to supply representation for the employee-witnesses. Only when a conflict of interest fully ripens (e.g., when one employee has been directly implicated in criminal wrongdoing by another and has become an investigative “target”) will additional, independent (though often still employer-funded) outside counsel be retained for an employee. Even in cases of a separate, non-conflicted counsel being retained for a particular employee, firms usually obtain wide access to information relating to the representation—including, for example, information about government questioning and answers provided by witnesses in interviews and testimony—through the common contractual arrangement known as a “joint defense agreement.”⁷⁶

All of this is explained to employees, and they are given the option of choosing their own lawyers from the outset and declining to join mutual defense agreements, but few decline to participate in these arrangements. The savings to an individual are enormous, there is worry about being perceived by the employer as not a team player, and there are strong advantages to consulting with a lawyer who has access to most or all of what the firm knows—that is, documents and witness statements. These practices are perfectly rational, in the sense that they position organizations to have access to and control of information, and even to exert substantial influence in shaping the facts of a case, through conduct short of obstruction of justice such as orchestrated witness preparation.⁷⁷ But the practices are not commonly seen in “ordinary” criminal cases.

ABA Section of Litig., San Francisco, Cal.), Winter 2005, at 1; *see also* Daylian M. Cain et al., *The Dirt on Coming Clean: Perverse Effects of Disclosing Conflicts of Interest*, 34 J. LEGAL STUD. 1 (2005) (reporting results of behavioral study finding that the cognitive effect of requiring actors to disclose can be greater licensing of wrongdoing). An illustrative case of the confusing role of organizational counsel is described in *In re Grand Jury Subpoena (Sealed)*, 415 F.3d 333, 335-38 (4th Cir. 2005). While finding that the employees there did not have an attorney-client relationship with organizational counsel, the court remarked:

[O]ur opinion should not be read as an implicit acceptance of the watered-down “Upjohn warnings” the investigating attorneys [for the firm] gave the [employees]. It is a potential legal and ethical mine field. Had the investigating attorneys, in fact, entered into an attorney-client relationship with [the employees], as their statements to the appellants professed they could, they would not have been free to waive the appellants’ privilege when a conflict arose.

Id. at 340.

75. An illustration of this scenario is recounted in Alison Frankel, *Bend 'Em Like Bennett*, AM. LAW., Sept. 2006, at 17.

76. *See* United States v. Schwimmer, 892 F.2d 237 (2d Cir. 1989); ABA REPORT ON EMPLOYEE RIGHTS, *supra* note 11, at 10-11; Lisa A. Mathewson & Catherine M. Recker, *Joint Defense Agreements in the Corporate Context: No Guarantees*, CHAMPION, Sept.-Oct. 2005, at 20.

77. *See* Brown, *supra* note 64, at 10-11 (arguing that wealthy defendants can “over-

III. PURSUIT OF INDIVIDUAL CRIME WITHIN FIRMS

I will now examine in detail two of the three procedural issues that have produced recent controversy in the state's pursuit of crime within firms: state use of the fruits of employees' waiver of the right to silence and state involvement in firms' indemnification of their agents for costs of legal proceedings arising from wrongdoing within firms. (I will not discuss the attorney-client privilege issue in detail, for reasons explained in Part IV.) Current debate about these topics has usually jumped either to polemics or to specific reform measures, such as the government's recent tweaking of provisions in its prosecution guidelines. Accordingly, as to each topic, my objectives are primarily to develop underlying considerations of social policy and secondarily to address the wisdom of reforms. Examination of each problem both illustrates the structural features of pursuing wrongdoing in the firm context that I described in Part II and provides occasion to use those same contextual features to respond to the policy controversy at issue.

A. *Statements and the Fifth Amendment*1. *The Fifth Amendment*

At the surface, what happens to people's self-incrimination position when crime is investigated in the workplace might seem troubling. Generally speaking, employees are expected to cooperate with their employers' and the state's efforts to gather facts about wrongdoing within firms, including by answering questions. Of course, the employer (and even the state) does not have the power to literally take away an employee's right not to incriminate herself. She may refuse to answer, just like the citizen who is confronted by a police officer while walking down the street. But refusal in the workplace is much more costly than silence on the street. If firms are to *require* their agents to say what they know, some reason must be given to induce the agent to speak.

litigate" and impede enforcement, particularly in corporate cases that are expensive, time-consuming, and include early involvement of counsel); *id.* at 16-17 (stating that counsel representing multiple suspects can thwart prosecution by counteracting prisoner's dilemma and that these results can occur even when counsel are different but are paid by a single organizational benefactor); Daniel C. Richman, *Cooperating Clients*, 56 OHIO ST. L.J. 69, 119-26 (1995) (describing how common funding of counsel can cause individual lawyers to steer clients away from negotiating cooperation agreements with the state); Stuntz, *supra* note 56, at 1945 n.102 (stating that lawyers lawfully suppress information "through strategically framed witness interviews, cooperation with other targets of the investigation, discovery negotiations, suppression motions, and the like"); *id.* at 1946 (arguing that the "dominant" role of lawyers in white collar investigations is "to *limit* the government's access to relevant information"); *id.* at 1950 (stating that organizations can impede criminal investigations by "using common defense counsel for different suspects or simply by using organization resources to pay for a particular suspect's lawyer").

The reason can only be what rests within the firm's control: denial of the compensation or employment that the firm confers upon the employee.

This might appear to place a person in a much worse, and perhaps anomalous, position with regard to questioning when it occurs in the workplace than when it occurs on the street—especially if the state's practices increase the likelihood and frequency with which the employer is apt to put the employee in this position. But to see whether the employee's situation is so much worse and whether her difference in position calls for protective measures, principles about self-incrimination must be considered. The case for affording constitutional protections to the employee who is placed in this situation turns out to be exceedingly weak.

a. Normative theories of self-incrimination

Set aside doctrine for a moment, at least as it applies to questioning in the workplace. *Should* Fifth Amendment protections against self-incrimination apply to private employer-employee relationships? An obvious argument on behalf of employers and the state says no: private organizations, in order to effectively pursue their missions, must enjoy the freedom to prohibit, detect, investigate, and sanction legal violations and other misconduct by employees. No system for control of the workplace could function unless the employer could require employees to answer questions about what occurs there. Nor could modern regulatory programs function in a remotely cost-effective manner by relying on private compliance efforts without such employer authority.

What might be said on behalf of the employee's interests? Answering this question requires a normative account of the privilege against self-incrimination. Unfortunately that project has proved taxing and somewhat unsuccessful; no theory can claim coalescence of the literature or absence of basic gaps or flaws.⁷⁸ Five theories have achieved prominence in the discussion of the right against self-incrimination. I will discuss why none of them supplies a justification for barring the state's use in criminal cases of employer-compelled statements.

Beginning with more established theories, the "cruel trilemma" rationale holds that the Fifth Amendment prevents the state from forcing a person to choose among three punishments: sanction for the charged crime imposed as a result of admitting guilt; sanction for perjury imposed as a result of falsely (and

78. Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 243-45 (2004); Akhil Reed Amar & Renée B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 857-58 (1995); see also John Fabian Witt, *Making the Fifth: The Constitutionalization of American Self-Incrimination Doctrine, 1791-1903*, 77 TEX. L. REV. 825, 834-36 (1999) (explaining why constitutional privilege was largely irrelevant to courts' treatment of admissibility of self-incriminating statements during the early years of the Republic).

provably) denying guilt; and sanction for contempt imposed as a result of refusing to testify.⁷⁹ This rationale does not explain why innocent persons deserve and receive Fifth Amendment protection,⁸⁰ or why the state can force equally painful choices, such as whether to be punished or testify against a friend or family member.⁸¹ It stumbles on the problem that most cases in which the state would need to rely on a confession to secure a conviction are unlikely to involve sufficient evidence to prove a perjury charge based on testimony denying guilt. It does not explain why the Fifth Amendment applies to statements given in contexts such as police interviews that do not carry contempt penalties for refusal to answer.⁸² To apply in the firm context, the theory would have to encompass protection against a “cruel quadrilemma,” since the individual facing employer compulsion has a fourth choice: refuse to answer and suffer employment sanctions. Under this theory, it is not clear what makes a set of choices constitutionally “cruel”; whatever might count as cruel, it seems doubtful that economic consequences would.

The “privacy” rationale holds that the right against self-incrimination is a constitutional sibling of the Fourth Amendment right against unreasonable searches and seizures.⁸³ Both prohibit the state from investigating crime in a manner that violates a person’s constitutional zone of privacy.⁸⁴ Extracting a self-incriminating statement is like removing an incriminating document from a person’s home. This argument suffers from a fatal problem of fit. The Fifth Amendment speaks in absolute terms and contains no “reasonableness” modifier, as does the Fourth.⁸⁵ Lots of things that might be styled as invasions of privacy are permitted under the Fourth Amendment, including search and seizure of a person’s home and effects under the authority of a warrant or any of numerous exceptions to the warrant requirement.⁸⁶ The state may extract

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

80. Allen & Mace, *supra* note 78, at 244; Stephen J. Schulhofer, *Some Kind Words for the Privilege Against Self-Incrimination*, 26 VAL. U. L. REV. 311, 318 (1991).

81. See *United States v. Davies*, 768 F.2d 893, 896-900 (7th Cir. 1985); *In re Grand Jury Proceedings (Sealed)*, 607 F. Supp. 1002 (S.D.N.Y. 1985); Amar & Lettow, *supra* note 78, at 890; William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1237-38 (1988).

82. See *Miranda v. Arizona*, 384 U.S. 436 (1966).

83. *Couch v. United States*, 409 U.S. 322, 328 (1973); *Murphy*, 378 U.S. at 55. *But see United States v. Mandujano*, 425 U.S. 564, 572 (1976) (plurality opinion) (“Nor can [the Fifth Amendment privilege] be invoked simply to protect the witness’ interest in privacy.”). During a brief period in the nineteenth century when courts flirted with affording the Fifth Amendment privilege to corporations, a move long since abandoned, privacy supplied the rationale. Witt, *supra* note 78, at 901-02.

84. See *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965); Robert S. Gerstein, *Privacy and Self-Incrimination*, 80 ETHICS 87 (1970).

85. U.S. CONST. amends. IV, V; see also *New Jersey v. Portash*, 440 U.S. 450, 459 (1979) (balancing with right against self-incrimination is “impermissible”); Amar & Lettow, *supra* note 78, at 872.

86. *Katz v. United States*, 389 U.S. 347, 353-57 (1967); *Warrantless Searches and*

physical evidence, such as blood, from the very body of a person.⁸⁷ If the Fifth Amendment protects privacy, then the immunity device is constitutionally insufficient and the state may no longer prove propositions before tribunals by compelling testimony with a promise not to use such testimony to prosecute the witness.⁸⁸ A privacy argument also would be weaker in the firm context, since persons reasonably hold less expectation of privacy in the workplace than at home.⁸⁹

The “fair play” rationale says that the Fifth Amendment, in effect, ensures that the state cannot use the defendant (through her own words) as an instrument to meet the state’s exclusive burden of proving criminal liability.⁹⁰ This claim is overbroad. It would also prohibit the state from doing a host of things that law has long permitted and that would seem essential to a workable system, including using documents authored by the defendant (even private diaries) and extracting and using the defendant’s DNA.⁹¹ “Fair play” is not a self-executing concept. It requires a normative account, with reference to context, of what play is fair and why. The purpose of requiring the state to shoulder a heavy burden of proof in criminal cases is robust error avoidance in the face of high error costs, not a prior commitment that the state carrying the load is, in some abstract sense, “fair” or “good.”⁹²

The “fair play” inquiry might nonetheless lead to the conclusion that self-incriminating statements are, as a class, unreliable—or at least that self-incriminating statements are unreliable when they are given in response to an element of coercion—and therefore error avoidance recommends a rule against their use.⁹³ This might be a valid point, if it carries empirical support. And it would certainly extend to the employment context. But it would lead to radically different Fifth Amendment doctrine, for all purposes, than exists at present. Perhaps no statements made to law enforcement officers pursuing criminal investigations would be admissible because of the coercion inherent in

Seizures, 35 GEO. L.J. ANN. REV. CRIM. PROC. 37, 37-128 (2006); *see also* Amar & Lettow, *supra* note 78, at 890-91 (explaining that the Fifth Amendment also permits the state to require testimony about “intensely private, highly embarrassing matters”).

87. *Schmerber v. California*, 384 U.S. 757 (1966); Stuntz, *supra* note 81, at 1233.

88. For this practice, see 18 U.S.C. § 6002 (2007); Allen & Mace, *supra* note 78, at 244, 262.

89. *See* *New York v. Burger*, 482 U.S. 691, 700 (1987).

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

91. *United States v. Doe*, 465 U.S. 605 (1984) (holding that the Fifth Amendment shields the act of producing business records but not their contents); *Shaffer v. Saffle*, 148 F.3d 1180 (10th Cir. 1998) (holding that extraction of DNA from a prisoner did not violate the Fourth or Fifth Amendments); *United States v. Doe*, 1 F.3d 87 (2d Cir. 1993) (holding that Fifth Amendment did not shield private diary from production in response to subpoena).

92. *In re Winship*, 397 U.S. 358, 363-64 (1970).

93. *See* *Murphy*, 378 U.S. at 55; ROGER W. SHUY, *THE LANGUAGE OF CONFESSION, INTERROGATION, AND DECEPTION* 40-50 (1998) (discussing evidence of fallibility of admissions in response to police questioning); Amar & Lettow, *supra* note 78, at 900-01.

such settings. Indeed, plea bargaining would seem to be ruled out, since all admissions of guilt made in exchange for leniency involve pressure.⁹⁴

Because these lines of argument have not fared well, more creative approaches have emerged. William Stuntz has argued that the Fifth Amendment privilege operates as if it were an excuse defense to the crime of perjury.⁹⁵ People commonly lie in order to preserve their liberty. Such lying is not only inalterable human nature but also morally unproblematic because it represents a choice of the lesser of two evils. Instead of forcing a person to choose the lesser evil, and then having to decide whether to excuse that person's perjury, the law affords an *ex ante* right to refuse to speak. The prophylactic, constitutional approach is more graceful and avoids unnecessary harm to innocent persons that would result from injecting a large quantity of guilty persons' false denials into the adjudication process.

Stuntz's argument is appealing, even if it is (as Stuntz explains) implausible as an account of constitutional purpose.⁹⁶ But it does little to explain what the Fifth Amendment might have to say about employer-compelled statements. In the workplace, the lesser evil is not perjury, but silence followed by job loss. An excuse theory of the Fifth Amendment would justify protections in the context of current practice within firms only if the Fifth Amendment were understood to guarantee employment.⁹⁷ Such an understanding of self-incrimination protections seems particularly implausible in the context of at-will employment.

In a similar vein with different methodology, Daniel Seidmann and Alex Stein recently posited that the Fifth Amendment privilege has a strong instrumental justification.⁹⁸ The right to silence gives the guilty suspect facing interrogation a rational option other than lying. In the absence of the right, most guilty suspects would lie, increasing the quantity of false statements confronting legal actors (investigators, enforcers, judges, jurors, etc.). More false statements would worsen the position of innocent suspects attempting to convince factfinders of their truthful claims of innocence, because the innocents would find themselves "pooled" with guilties in more of a "lemons" market than would inhere if most guilty suspects remained silent.⁹⁹

94. FED. R. CRIM. P. 11; Stuntz, *supra* note 81, at 1270-72.

95. Stuntz, *supra* note 81, at 1228-29.

96. *Id.* at 1231 & n.7.

97. An additional complication for Stuntz's theory, in positive terms, is that it does not account for why one might want to afford a right to refuse to submit to a polygraph examination even if the exam were infallible, or why the law does not afford a right to refuse to produce subpoenaed documents or provide handwriting exemplars even though such acts can involve fabrication and alteration. Allen & Mace, *supra* note 78, at 265-66.

98. Daniel J. Seidmann & Alex Stein, *The Right to Silence Helps the Innocent: A Game-Theoretic Analysis of the Fifth Amendment Privilege*, 114 HARV. L. REV. 430, 458-61 (2000); see also *Murphy*, 378 U.S. at 55 ("[T]he privilege, while sometimes a shelter to the guilty, is often a protection to the innocent." (internal quotations omitted)).

99. Seidmann & Stein, *supra* note 98, at 458-61.

Seidmann and Stein have expanded on a very interesting theoretical insight that has serious empirical vulnerabilities. One has to believe that factfinders believe guilty suspects make heaviest use of the privilege, or in other words that factfinders *disregard* the dictates of the same Fifth Amendment that Seidmann and Stein are justifying, which prohibits this inference. But first, one has to believe that factfinders think about suspect statements in a market sense at all, that is, that they consider the overall tendency of suspects to behave one way or another rather than simply the behavior of the suspect they confront. One also has to believe that rational innocent suspects, or at least most of them, do not seek the protection of the Fifth Amendment privilege, even though the most informed rational actors in the criminal justice system—the defense lawyers—counsel virtually every client, at least initially, to invoke the right regardless of the client’s guilt or the facts of the case.¹⁰⁰

In the firm context, Seidmann and Stein’s theory becomes harder to support. One would also have to believe that the employer’s threat of job termination for refusal to answer questions places the rational guilty suspect in the same position as the rational guilty suspect in a hypothetical world in which silence were not an option. But guilty suspects in firm cases, facing employer threats of job loss for refusal to answer, might rationally choose to lose their jobs rather than lie. Which suspects make that choice would depend on individual calculations about the strength of the state’s case as (and if) it develops over time. This is hard to model. In any event, if the principal motive is to maximize the factfinder’s access to accurate information, affording employees the ability to refuse to answer questions in organizational inquiries would plainly leave the factfinder worse off than in a world in which many (but not all) employees gave statements, even if some “lemons” discount had to be applied to that pool of statements.¹⁰¹ It is hard to imagine a single investigation of wrongdoing committed in a firm progressing past square one under a regime that told employees: “You may refuse to answer questions in any internal inquiry and no penalty will follow.”¹⁰²

100. See Richard Lempert, *The Economic Analysis of Evidence Law: Common Sense on Stilts*, 87 VA. L. REV. 1619, 1693 (2001) (explaining how innocent defendants can have good reasons to decline to testify).

101. See T.H. Waters III, Note, *Between a Rock and a Hard Place: An Examination of a “Costly” Right to Silence for Corporate Employees in Criminal Investigations*, 25 REV. LITIG. 603, 624-31 (2006).

102. The problems of Fifth Amendment theory are so substantial that some theorists have largely abandoned the normative field and have sought to offer positive accounts of existing precedent that aspire only to bring rationality and predictability to the cases. See Allen & Mace, *supra* note 78, at 245-46; Amar & Lettow, *supra* note 78, at 857-60. At least one of those descriptions would jettison even the line of cases that affords some Fifth Amendment protection to employees in the context of *public* employment (the “*Garrity*” doctrine, which I will discuss shortly) as an erroneous departure from constitutional doctrine. Amar & Lettow, *supra* note 78, at 868, 905-06. *But see* Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1362-65 (2001) (urging alteration rather than abandonment of the *Garrity* doctrine).

b. Positive Fifth Amendment law

A case for constitutional measures to address the employee's situation fares just as poorly in terms of existing Fifth Amendment doctrine. The Fifth Amendment privilege principally protects a person from the *use* of compelled statements against the person in a criminal action.¹⁰³ It does not bar the use of statements in non-criminal actions.¹⁰⁴ Arguably, it does not prohibit state compulsion of statements *per se*.¹⁰⁵ The Fifth Amendment does not prevent the admission of privately compelled statements in criminal proceedings.¹⁰⁶ And legal entities enjoy no Fifth Amendment privilege.¹⁰⁷ The Constitution would thus appear to have little to say about employer-compelled statements in investigations within firms.

Whether the *state* can make use of the fruits of such an employer process is another question. The courts have considered this question in the line of cases beginning with *Garrity v. New Jersey*, which hold that the state may not use a statement extracted from an employee, upon threat of termination for refusal to answer, against that employee in a criminal prosecution.¹⁰⁸ Of course, the

103. See *Ullman v. United States*, 350 U.S. 422, 430 (1956); *Smith v. United States*, 337 U.S. 137, 147 (1949); *Bram v. United States*, 168 U.S. 532, 548 (1897).

104. See *United States v. Balsys*, 524 U.S. 666 (1998); *Allen v. Illinois*, 478 U.S. 364 (1986); *Minnesota v. Murphy*, 465 U.S. 420 (1984).

105. Amar & Lettow, *supra* note 78, at 875 n.64; Kate E. Bloch, *Fifth Amendment Compelled Statements: Modeling the Contours of Their Protected Scope*, 72 WASH. U. L.Q. 1603, 1685-86 (1994); Steven D. Clymer, *Are Police Free to Disregard Miranda?*, 112 YALE L.J. 447, 450 (2002) (arguing that the privilege is an exclusionary rule). This last point has been debated, as a matter of both positive reading of precedent and normative theory; the question also requires consideration of how the Due Process Clause restrains more extreme state interrogation measures. Susan R. Klein, *No Time for Silence*, 81 TEX. L. REV. 1337 (2003) (arguing that the Fifth Amendment regulates police conduct, not just admission of wrongly procured evidence); Peter Westen, *Self-Incrimination's Covert Federalism*, BERKELEY J. CRIM. L. (forthcoming 2007) (examining the question of whether privilege is a "self-executing exclusionary rule"). However, this discussion leads to the question of whether an individual may recover damages for suffering an illegal interrogation. Klein, *supra*, at 1349-50. I am interested only in the question of how statements may be used in criminal proceedings. Even if it is accurate to describe the Fifth Amendment as barring certain forms of interrogation, it seems unlikely that such a bar would extend to employer-compelled statements that otherwise involve no physical or extraordinary psychological coercion.

106. See *United States v. Grimes*, 142 F.3d 1342, 1349-50 (11th Cir. 1998); *Smith v. Detroit Entm't L.L.C.*, 338 F. Supp. 2d 775, 780-81 (E.D. Mich. 2004).

107. See *Wilson v. United States*, 221 U.S. 361 (1911); *Hale v. Henkel*, 201 U.S. 43 (1906).

108. See *Lefkowitz v. Cunningham*, 431 U.S. 801 (1977); *Lefkowitz v. Turley*, 414 U.S. 70 (1973); *Garrity v. New Jersey*, 385 U.S. 493 (1967); see also *Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation*, 392 U.S. 280 (1968) (finding it unconstitutional to dismiss sanitation workers for refusing to answer questions in grand jury); *Gardner v. Broderick*, 392 U.S. 273 (1968) (holding the same as to dismissal of police officer for refusing to answer questions in grand jury); *Spevack v. Klein*, 385 U.S. 511 (1967) (holding the same as to revocation of a lawyer's license on the ground that he refused to answer

Garrity doctrine is limited to *public* employees.¹⁰⁹ The doctrine has not been extended even to statements extracted by private employers, licensors, and the like whose activities are routinely intertwined with state action, including the investigation and sanctioning of violations of the law. (The most common example is statements taken by self-regulatory organizations in the financial markets, such as the NASD and NYSE.)¹¹⁰

One court has advanced a theory for clearing the state action obstacle. In *United States v. Stein*, Judge Lewis Kaplan of the Southern District of New York held that when an employer requires its employees to give statements as part of an effort to qualify for benefits in negotiating with the state over enterprise liability, and where the state pursues an express policy of considering employers' positions on employee statements as a factor in exercising its charging and settlement discretion, those employees' statements cannot be used in any criminal prosecution.¹¹¹ Judge Kaplan's theory presents slippery-slope problems and invites manipulation. The theory requires a means of determining (1) the degree of state involvement that renders the employer's conduct state action, and (2) the degree of employer action that renders that action compulsion. These are hard lines to draw and to control once drawn.¹¹²

Consider a series of five cases on the dimension of state action. In Case 1, an organization pursues its own preexisting and consistently applied policy of requiring employees to answer questions in regulatory inquiries, on penalty of

questions in a bar disciplinary proceeding). *But see Sanitation Men*, 392 U.S. at 284 (observing that there would have been no right to remain silent had the inquisition been confined to "questions specifically, directly, and narrowly relating to the performance of their official duties").

109. *See Luna v. Massachusetts*, 354 F.3d 108, 111-12 (1st Cir. 2004).

110. *See, e.g., D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155 (2d Cir. 2002) (holding that an investigative arm of NASD that included a unit that existed for the purpose of facilitating state action, the "Criminal Prosecution Assistance Unit," was not a state actor for purposes of the Fifth Amendment); *United States v. Solomon*, 509 F.2d 863 (2d Cir. 1975) (holding that NYSE is not a state actor for purposes of the Fifth Amendment even though it regulates securities markets in tandem with the SEC); *United States v. Antonelli*, 434 F.2d 335 (2d Cir. 1970) (holding that a private security guard was not a state actor when conducting interrogation, the fruits of which were later used by police).

111. *United States v. Stein (Stein II)*, 440 F. Supp. 2d 315 (S.D.N.Y. 2006). Judge Kaplan attempted to limit his rule by suppressing statements from only those defendants who first refused to be interviewed but then gave statements after they were explicitly told by the employer that non-cooperation would lead to termination. *Id.* at 330-33.

112. On the state action question, the line-drawing problem plainly is not addressed by Judge Kaplan's reliance on a case in which the Second Circuit found state action where an employer, at police request, wore a concealed transmitting device while administering a polygraph examination to an employee who was a murder suspect. *Id.* at 334-36; *see United States ex rel. Sanney v. Montanye*, 500 F.2d 411 (2d Cir. 1974). The Second Circuit decision that is apposite is *D.L. Cromwell*, 279 F.3d 155, in which the court affirmed Judge Kaplan's ruling below that there was no state action in the collection of incriminating evidence by a separate unit of a self-regulatory organization specially constituted to assist "federal and state authorities in their investigations of securities matters." *Id.* at 157, 161 ("[E]ven heavily-regulated private entities generally are held not to be state actors.").

employment sanction. In Case 2, the state expresses a general view that organizations that do not have such policies are, all else equal, less serious about regulatory compliance than organizations that do. In Case 3, an employee refuses to answer regulators' questions in a particular inquiry and the regulator informs the employer of that fact so the employer can know both that its employee is violating its policy and that the state has information suggesting that the employer's policy may be ineffective or insincere. In Case 4, employees refuse to answer questions from the regulator in a particular inquiry; the regulator then informs the employer that its charging and settlement discretion may be affected by a conclusion that the employer either does not have a compliance-friendly policy or does not follow its purported policy. In Case 5, the regulator adds to its communication in Case 4 that its discretion will be affected by whether the employer fires the employees who refused to answer questions.

Cases 1 and 2 are desirable if, as seems indisputable, preventing and deterring violations in the organizational context necessitates firms having procedures for policing their agents' conduct. Neither case can plausibly be described as involving the state in compulsion of any particular statement. Case 3 is simply a necessary feature of the state pursuing the position in Case 2. Case 4 might seem to present the breakpoint for purposes of state action but Case 4, just like Case 3, could as easily be described as a necessary step to the state pursuing the position in Case 2. For the state to encourage organizations to take a cooperative posture toward compliance, the state must make that position meaningful by enforcing it through some aspect of legal action. Case 5 intuitively seems over the line and undesirable, but arguably the state accomplishes the same result as in Case 5 simply by stopping its action at the level of Case 4.¹¹³ Further complicating the state action problem, if Case 4 were made the breakpoint at which employee statements carry a suppression remedy, employers and employees could guarantee suppression of employee statements simply by refusing to heed the state's hortatory statements and forcing the state to put teeth in its position.¹¹⁴

Similar problems for extending *Garrity* attend the matter of employer compulsion. What does the employer have to do, or threaten to do, to the employee to make the employee's statement compelled?¹¹⁵ A rule turning on

113. For examples resembling Case 5, see John Carreyrou & Barbara Martinez, *Board Members at Bristol-Myers Told to Fire CEO*, WALL ST. J., Sept. 12, 2006, at A1; Monica Langley & Ian McDonald, *Marsh Directors Consider Having CEO Step Aside*, WALL ST. J., Oct. 22, 2004, at A1.

114. See *Solomon*, 509 F.2d at 869 (finding no principled basis on which to confine the state action doctrine if applied to self-regulatory inquiries by stock exchanges since that "is but one of many instances where government relies on self-policing by private organizations to effectuate the purposes underlying federal regulating statutes").

115. See *United States v. Washington*, 431 U.S. 181, 188 (1977) (stating the test for compulsion to be "whether, considering the totality of the circumstances, the free will of the witness was overborne"); see also Allen & Mace, *supra* note 78, at 250-52 (explaining that if

economic detriment, aside from being a severe departure from existing *Garrity* doctrine, would be unmanageable. An employee would be able to manipulate virtually any interaction with the employer over a questioning issue into a case of suppression, by forcing the employer to threaten some consequence to the employee. Such a rule would be overbroad in relation to the interests that might justify extending *Garrity*. And it would lead to spillover problems in other areas of Fifth Amendment doctrine turning on compulsion.

One might choose the threat of job termination as the necessary and sufficient condition for compulsion.¹¹⁶ This would supply a bright line but it is difficult to distinguish this act by the employer from other severe penalties that can be imposed without offending settled Fifth Amendment law.¹¹⁷ For example, the sometimes high reputational penalty (especially for a prominent executive) that might follow public assertion of the Fifth Amendment right does not render any statement made in the shadow of that penalty compelled.¹¹⁸ The state uses much more severe pressure than possible job loss to induce waiver of the right, particularly by offering to forego additional imprisonment in plea bargaining.¹¹⁹ So it is not self-evident that the threat to fire should be a trigger for raising self-incrimination hackles. Yet there is no *greater* employer-imposed sanction, and settling on a *lower* trigger-point (reduction in pay? suspension?) would mire courts in line-drawing problems.

There is a bigger and truly decisive problem with extending *Garrity* to private employers than grappling with state action or compulsion. The problem involves the *consequences* of a finding that an employer-induced statement is compelled.¹²⁰ Arguably, if the individual's statement has been taken in

free will does exist, then either all choices are products of free will or there is no method for determining when free will is "overborne"; further explaining that, in reality, the compulsion test is objective and turns on government action, although the location of the threshold remains in question and is developed in a common law manner along a continuum). *But see Stein II*, 440 F. Supp. 2d at 328-29 (contending that compulsion is measured both objectively and subjectively, based on whether individual actually and reasonably believed she had no choice but to speak).

116. *See Garrity v. New Jersey*, 385 U.S. 493, 497 (1967) ("The option to lose [one's] means of livelihood or to pay the penalty of self-incrimination is the antithesis of free choice to speak out or to remain silent."). Still, even the line provided by job termination might not turn out to be all that bright. *See Sanney*, 500 F.2d at 415 (finding no compulsion, even if there had been state action, because the discharge of a "transient manual laborer" from his job "as a driver's assistant, which [he] had held for one or two days, can hardly be labelled [sic] a 'substantial economic sanction'" equivalent to ending the police careers of the *Garrity* officers).

117. *See Lefkowitz v. Turley*, 414 U.S. 70, 83 (1973) ("We fail to see a difference of constitutional magnitude between the threat of job loss to an employee of the State, and a threat of loss of contracts to a contractor.").

118. *See Smith v. United States*, 337 U.S. 137, 147 (1949); *Hale v. Henkel*, 201 U.S. 43, 66-67 (1906).

119. *Allen & Mace*, *supra* note 78, at 252.

120. *Amar & Lettow*, *supra* note 78, at 858 ("The key question, though rarely recognized as such, is what sort of immunity the [self-incrimination] clause requires before a

violation of her right against self-incrimination, the remedy must return her to the position she would have occupied had she enjoyed and exercised the right. The settled understanding is that this means the law must prohibit, in any criminal proceeding, both the introduction of her statement as state's evidence at her trial ("use immunity") and the introduction at her trial of any evidence the state obtained as a result of anything she said in her statement ("derivative use immunity").¹²¹ The *Garrity* cases have implied that use plus derivative use immunity (so-called "*Kastigar* immunity") is the required remedy in the *Garrity* context.¹²² What has been called "*Garrity* immunity" probably means suppression of both the statement and its fruits. After all, the well-established regime of compulsion under an immunity grant is premised on tolerating the denial of the Fifth Amendment privilege only because the immunity grant protects a person as fully as the privilege.¹²³

The appearance of *Kastigar* in the firm context would abundantly complicate matters. By consensus of the federal courts, derivative use immunity must include at least a prohibition on evidentiary use of fruits of the statement (e.g., admission of a document discovered through something revealed orally in an interrogation); some courts have held that nonevidentiary use of fruits (e.g., a prosecutor's decision to change the guiding theory of an investigation or case in response to something revealed orally in an interrogation) is also prohibited.¹²⁴ Some authority prohibits even the "*indirect* evidentiary use" of fruits, a rule that famously upset the conviction of Oliver North on the ground that grand jury witnesses who had been exposed to his immunized congressional testimony allowed that testimony to refresh their recollections.¹²⁵ All of these protections designed to preserve the Fifth Amendment right are enforced with the procedural rule that the state, facing a

person may be made to tell all outside his own 'criminal case,' beyond the earshot of the petit jury.').

121. *Kastigar v. United States*, 406 U.S. 441 (1972).

122. *Lefkowitz v. Cunningham*, 431 U.S. 801, 809 (1977); *Turley*, 414 U.S. at 84; *United States v. Veal*, 153 F.3d 1233, 1240 n.7 (11th Cir. 1998); *Kinamon v. United States*, 45 F.3d 343, 347 (9th Cir. 1995); *United States v. Koon*, 34 F.3d 1416, 1431 n.11 (9th Cir. 1994); *In re Grand Jury Subpoenas*, 40 F.3d 1096, 1100-02 (10th Cir. 1994); Clymer, *supra* note 102, at 1317-18, 1327-28. *But see* Bloch, *supra* note 105, at 1631-32, 1692-93 (arguing that the *Garrity* cases have left open the question of whether *Kastigar*-type protections apply to such statements).

123. *Kastigar*, 406 U.S. at 457, 462 (stating that immunity puts the witness "in substantially the same position as if the witness had claimed his privilege in the absence of a state grant of immunity" (quoting *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 79 (1964))).

124. *See* *United States v. Semkiw*, 712 F.2d 891 (3d Cir. 1983); *United States v. McDaniel*, 482 F.2d 305 (8th Cir. 1973). *But see* *United States v. Bolton*, 977 F.2d 1196 (7th Cir. 1992); *United States v. Byrd*, 765 F.2d 1524 (11th Cir. 1985). *See generally* Witt, *supra* note 78, at 881-87 (describing the development of testimonial (in place of transactional) immunity statutes as coinciding with the rejection of old common law evidentiary rules against admission of party statements).

125. *United States v. North*, 920 F.2d 940 (D.C. Cir. 1990).

Kastigar challenge to a prosecution, exclusively bears the “heavy” burden of disproving taint.¹²⁶ This burden can be met only by demonstrating that each piece of evidence that will be used to prove the case was derived from an independent source.¹²⁷

“*Kastigar* immunity” can amount to transactional immunity, even if the state has a high degree of control over the evidence.¹²⁸ Tamper-proof procedures that seal off evidence may be necessary to allow a later prosecution of the immunized person.¹²⁹ The problem grows exponentially when actors other than the state control the gathering and use of evidence, even when those actors’ interests are partially aligned with those of prosecutors, such as Congress or (the most common *Garrity* actor) police disciplinary authorities.¹³⁰ These problems would be at their apex in criminal cases within firms because (1) civil regulatory agencies, beyond the control and knowledge of criminal authorities, often investigate and take statements in a matter before it progresses to the criminal stage;¹³¹ and (2) a firm and its employees would have the ability and the motive to confer “*Garrity* immunity” and cause that immunity to permeate the state’s enforcement efforts by disseminating immunized statements. The latter scenario is precisely what is meant by the idea of an “immunity bath.”¹³²

The Fifth Amendment, perhaps surprisingly, thus turns out to be an unprofitable source in understanding and responding to current controversy

126. *Kastigar*, 406 U.S. at 460-61; *see also* *United States v. Nanni*, 59 F.3d 1425, 1432 (2d Cir. 1995) (“In determining whether the immunized testimony could have influenced the government’s decision to pursue its line of investigation, if it appears that that pursuit could have been motivated by both tainted and independent factors, the court must determine whether the government would have taken the same steps ‘entirely apart from the motivating effect of the immunized testimony.’” (quoting *United States v. Biaggi*, 909 F.2d 662, 689 (2d Cir. 1990))).

127. *Kastigar*, 406 U.S. at 460-61.

128. Amar & Lettow, *supra* note 78, at 878-79; Clymer, *supra* note 102, at 1324-27.

129. *See* *United States v. Poindexter*, 951 F.2d 369, 376 (D.C. Cir. 1991); *see also* *United States v. Hsia*, 131 F. Supp. 2d 195, 201 (D.D.C. 2001) (“[U]nless every ‘i’ is dotted and every ‘t’ is crossed, the government has an almost insurmountable burden to demonstrate that the use of immunized testimony, no matter how indirect, has not been tainted by knowledge of [its immunized content].”).

130. Bloch, *supra* note 105, at 1666-67; Clymer, *supra* note 102, at 1312-13, 1328-36; *see also* *United States v. Solomon*, 509 F.2d 863, 870 (2d Cir. 1975) (claiming that it “would clearly be intolerable” to extend *Garrity* to give self-regulatory entities such as stock exchanges the power to grant immunity).

131. *See* Garrett, *supra* note 45 (manuscript at 29 tbl.1) (finding that 60% of recent deferred prosecution agreements in criminal matters involving firms were reached in conjunction with civil regulatory inquiries).

132. *See* Arroyo v. *United States*, 359 U.S. 419, 433 (1959) (Clark, J., dissenting); *United States v. Morrison*, 535 F.2d 223, 229 (3d Cir. 1976). Judge Kaplan’s opinion in *Stein II* was silent on remedy beyond suppression of the employee statements from direct use in the government’s case. *United States v. Stein (Stein II)*, 440 F. Supp. 2d 315, 338 (S.D.N.Y. 2006). If they have not already done so, the *Stein* defendants should probably move to dismiss the entire case on ground of taint.

over the treatment of employee statements in the state's investigation of crime within firms. A more promising approach than attempting to transpose law and theory developed in other contexts is to consider the relevance of the structural characteristics described in Part II that distinguish the investigation of crime within the firm from "ordinary" crime.

2. *The firm context and prescriptions*

The firm can facilitate or encourage violations of the law and can present special barriers to the detection and proof of crime. But the state can exploit the same organizational form to overcome those barriers, by leveraging the organization to increase the availability of witness statements.¹³³ Witness statements are essential to the development of facts about wrongdoing that occurs within team production. Certainly the law would not want to enhance firms' ability to complicate the discovery of facts by giving firms the power to immunize their own agents. And persons who may be involved in, or simply witnesses to, wrongdoing that occurs within firms should not be advantaged over ordinary persons in having a special ability to confer immunity upon themselves.

But the state's need for statements is particular in the firm context. This setting is far from the police interrogation room. Few if any cases of white collar violations in large organizations are proven at trial by introducing confessions. The state proves such cases with documents and testimony by knowledgeable insiders. The state needs a witness statement not so much to prove a case against *that* witness as to develop that witness into a witness against someone else, or to develop a sufficient understanding of what happened within the firm to locate and understand documentary and other proof. In terms of their use against the defendant, a defendant's prior statements are likely to be important, at most, on cross-examination if the defendant chooses to testify, a circumstance in which ordinary Fifth Amendment suppression does not apply.¹³⁴

The slow ripening of the organizational criminal case means that individuals are often forced to calculate their risks early in an investigation with limited or no information about potential outcomes. Early in the process, any given employee is unlikely to be able to predict whether she will end up, to use the vernacular, as a target (likely to be charged), a subject (implicated in wrongdoing), or a witness (with knowledge but not implicated). Adding employment consequences including possible job loss to the risk calculus heightens a person's self-incrimination dilemma.

133. See *United States v. Solomon*, 509 F.2d 863, 870 (2d Cir. 1975) ("[T]here would be a complete breakdown in the regulation of many areas of business if employers did not carry most of the load of keeping their employees in line and have the sanction of discharge for refusal to answer what is essential to that end.").

134. *Harris v. New York*, 401 U.S. 222 (1971).

But there is still more to the picture of the individual's position. The role of lawyers in firm cases cuts in two directions with regard to self-incrimination. Early involvement of usually able counsel means that the employee may have greater access to better legal advice than the ordinary citizen in making the self-incrimination decision. But that legal advice may be conflicted due to economic incentives, as well as pressures toward group conformity. Particularly early in an investigation, the firm has a strong interest in communicating internally and externally that no wrongdoing has occurred and that it and its employees have nothing to hide. Counsel for the firm, and even individual counsel retained by the firm, therefore face some pressure, not applicable to counsel outside the firm context, to encourage clients to speak (or at least not to advise them with the usual vigor to remain silent).

Perhaps not by accident, procedures have developed in the investigation of crime within firms that appear to reflect, at least in part, this balance of interests. Prosecutors routinely offer employees "proffer" protection in investigative interviews with the state. Proffer protection consists of a contract in which the state promises limited use immunity, between no protection and immunity coextensive with full Fifth Amendment protections (*Kastigar* immunity). Usually the protection consists of a promise not to use the individual's statements as evidence in the state's case-in-chief, with reservation of the right to use the statements as leads to other evidence and as evidence (in cross-examination, for example) to rebut defense evidence that contradicts the statements.¹³⁵ Employers have no power to offer proffer protections that would bind the state, of course; not all prosecutors offer the protection to all interview subjects; and many subjects refuse the protection, especially early in investigations, for fear that asking for it will make the subject appear (especially to the employer) to be someone who at least knows of wrongdoing and possibly also fears liability.

The proffer practice offers a partial response to controversy over the state providing employers with incentives to induce employees to make statements. The balance of interests with regard to the problem of self-incrimination within the firm might lead to the following prescriptions: employers should be permitted to require employees to answer questions in regulatory inquiries; the state should be free to consider in its charging and settlement decisions whether firms have effective policies designed to further regulatory compliance; the state should not be free to dictate to employers any particular sanction for any particular employee; and employees should not bear unnecessary and exceptional burdens on their ability to calculate the risks of self-incrimination. If so, a regime that provided employee statements with use but not derivative

135. See, e.g., *United States v. Mezzanatto*, 513 U.S. 196 (1995); *United States v. Barrow*, 400 F.3d 109 (2d Cir. 2005); *United States v. Velez*, 354 F.3d 190 (2d Cir. 2004); *Stein II*, 440 F. Supp. 2d at 321-22 & n.20 (S.D.N.Y. 2006); see also Richard B. Zabel & James J. Benjamin, Jr., "Queen for a Day" or "Courtesan for a Day": *The Sixth Amendment Limits to Proffer Agreements*, WHITE-COLLAR CRIME REP., Oct. 2001, at 1.

use protection would accommodate much of both the state's and the individual's legitimate interests.¹³⁶

This regime could be made more law-like than present proffer practice in one of three ways. Courts could extend *Garrity* to the private employer but change its remedy by holding that *Garrity* immunity consists solely of direct use immunity, not full *Kastigar* immunity. This would be a rather brute and possibly untenable judicial maneuver, especially given state action doctrine.

Alternatively, Congress could legislate the same degree of protection for employee statements. But this requires Congress to do something awkward, unusual, and probably impossible to enforce, that is, tell the executive branch that it may not consider something in the exercise of its discretion.¹³⁷ To give use immunity to employee statements, Congress would have to say a statement receives use immunity when it is made in response to state questioning following (1) the state communicating to the employer that the employer's policy on employee cooperation may be a factor in charging and settlement and (2) the employer then requiring the employee to answer the state's questions or face employment consequences. The bill that Senator Specter recently introduced, which would inadvisably prevent the state from considering *anything* having to do with employer policies on regulatory interviews, glaringly suffers from this problem.¹³⁸ The bill not only fails to recognize the appropriate balance of interests in its effort to ban the state from encouraging employers to require their employees to share information, but is also silent on how a court could possibly enforce a prohibition on "thinking *x* when

136. This also matches the prescription that one analysis of the Fifth Amendment has provided for constitutional doctrine as whole: the Supreme Court should abandon *Kastigar*'s prohibition on the use of the fruits derived from compelled pretrial statements. Amar & Lettow, *supra* note 78, at 858, 911; *see also* Bloch, *supra* note 105, at 1605 (noting the illogic that the existing doctrine affords more protection to fruits of statements taken in formal, court-supervised immunity process than to statements extracted from uncounseled suspects in back rooms of police stations); Clymer, *supra* note 102, at 1313 (similarly noting a disparity that "borders on absurd" between the doctrine's treatment of *Garrity*-type statements and confessions extracted by police interrogation); Witt, *supra* note 78, at 916-18 (questioning limited protections for fruits of illegal interrogations). I concede that the effectiveness of this approach would depend on all active jurisdictions pursuing it in coordinated fashion, since nothing requires one jurisdiction to abide by another's proffer promises.

137. *Cf. Morrison v. Olson*, 487 U.S. 654, 694 (1988) (rejecting the claim that the independent counsel statute was unconstitutional in part on the ground that "with the exception of the power of impeachment—which applies to all officers of the United States—Congress retained for itself no powers of control or supervision over an independent counsel"). An exception, of course, would be unconstitutionally discriminatory enforcement. *See United States v. Armstrong*, 517 U.S. 456, 464 (1996) (noting that the prosecutor is constitutionally prohibited from selecting a defendant for prosecution on the basis of the defendant's race).

138. Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 3 (2007).

exercising discretion,” and what the remedy would be for a violation, even if it were detectable.¹³⁹

A more promising avenue for reform would be for executive branch agencies to alter their policies to require prosecutors and other regulators to afford contractual proffer protection whenever requested by employees who give statements in organizational investigations under employer policies requiring employee cooperation. No such provision was included, or apparently considered, in the DOJ’s new policy guidelines for prosecutors in organizational cases.

Such reform measures would still leave unregulated employee statements to employer representatives in internal inquiries, which are often shared with the state. But the executive branch could also adopt a policy of not using such statements as direct evidence against employees. Such a policy would make sense in light of the principal use of such statements by the state as leads and investigative tools rather than trial evidence. Admittedly, this move would not address what happens when the state proceeds as far as subpoenaing an employee to testify, but that context encompasses a substantial minority of the questioning that occurs in corporate investigations.¹⁴⁰

139. The D.C. Circuit’s decision in *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973), may be informative. The court ordered an executive branch agency, the Department of Health, Education, and Welfare, to enforce a federal statute (Title VI) only because the statute included specific enforcement procedures, because the agency’s failure was comprehensive nonenforcement rather than case-specific declination, and because the agency was funding the same institutions that were in violation of the regulatory regime it refused to enforce. *Id.* at 1162; *see also* 42 U.S.C. § 3612(o) (2007) (requiring the DOJ to file suit under the Fair Housing Act if certain requirements are met). The *Adams* court was careful to distinguish rulings in which the court refused to intervene in the exercise of the executive branch’s enforcement discretion in criminal prosecutions. *Adams*, 480 F.2d at 1162. Finally, *Adams* is understood as an exceptional case. *Salvador v. Bennett*, 800 F.2d 97, 99-100 (7th Cir. 1986).

140. A related complication is whether employees should face legal sanctions for false statements in interviews conducted by employers. *See, e.g.*, *Indictment, United States v. Singleton*, No. 4:06CR080 (S.D. Tex. Mar. 8, 2006) (on file with author) (charging the defendant with obstruction of justice for lying to employer’s outside counsel in the internal investigation of potential regulatory violations). In the run-of-the-mill case, this cause of action seems normatively unattractive and might face a serious hurdle under existing interpretations of the obstruction of justice statutes that require a close “nexus” between any falsehood and the legal proceeding the falsehood is intended to obstruct. *United States v. Aguilar*, 515 U.S. 593, 598-601 (1995). A different case might be an instance in which a corporate manager intentionally supplied outside counsel with an elaborate and falsely exculpatory account of a transaction, with the expectation and hope that counsel would provide that account to the state, causing the state to abandon its inquiry. *See* Timothy P. Harkness & Darren LaVerne, *Private Lies May Lead to Prosecution*, NAT’L L.J., July 24, 2006, at S1 (describing the government’s pursuit of this theory in case in which the former CEO of Computer Associates provided outside counsel with a false explanation in an accounting fraud investigation that the CEO expected counsel to provide to the government). Such conduct is akin to a person causing an agent such as a lawyer to provide a false document to a tribunal. *E.g.*, *United States v. Sun Myung Moon*, 718 F.2d 1210, 1223 (2d Cir. 1983).

B. *Selection and Funding of Counsel*

I will now address a second problem of law and policy: the state's involvement in firms' indemnification of agents for legal expenses. Again, I will begin with existing law and then move to consideration of how the structural characteristics of crime within firms can assist analysis of reform.

1. *The Sixth Amendment and indemnification*

Some constitutional ground clearing is necessary. The Sixth Amendment generally assures a person her counsel of choice, although even that core guarantee is not absolute.¹⁴¹ The legal system may override an individual's selection of counsel when that choice would seriously compromise accuracy and legitimacy of legal process.¹⁴² (Thus, constitutional law might actually *restrict* a firm's freedom to fund an agent's defense, rather than guarding such funding from state intrusion.)

The Sixth Amendment also guarantees that counsel be effective, and requires the state to provide sufficient funding to ensure such performance.¹⁴³ Of course, the funding guarantee is infamously set virtually below ground.¹⁴⁴ The Sixth Amendment promises no particular quantity of resources; the question is simply whether *some* counsel has been provided and whether that counsel was able to perform "effectively" under a standard of ex post review that excuses all manner of deficient lawyering.¹⁴⁵ The importance or complexity of a case certainly drives up defense costs,¹⁴⁶ but it does not have much impact on what the Constitution guarantees. A thousand dollars may be constitutionally sufficient to fund a defense in a case in which the state seeks to

141. *Wheat v. United States*, 486 U.S. 153 (1988).

142. *Id.* at 162; *see also* *United States v. Purnett*, 910 F.2d 51, 55 (2d Cir. 1990) (noting that the right to proceed pro se is not absolute).

143. *Strickland v. Washington*, 466 U.S. 668, 684-91 (1984) (explaining the contours of the Sixth Amendment right to effective counsel); *United States v. Parker*, 439 F.3d 81, 90 (2d Cir. 2006) (stating that public funding for indigent defendants ensures that the constitutional mandate of effective assistance of counsel is satisfied).

144. Stephanos Bibas, *The Psychology of Hindsight and After-the-Fact Review of Ineffective Assistance of Counsel*, 2004 UTAH L. REV. 1.

145. *Id.*; *see also* *Wheat*, 486 U.S. at 159 ("[A] defendant may not insist on representation by an attorney he cannot afford.").

146. JOSEPH WARREN BISHOP, JR., *THE LAW OF CORPORATE OFFICERS AND DIRECTORS: INDEMNIFICATION AND INSURANCE* § 6:30 (Supp. 2006) ("The sort of litigation in which corporate executives are involved . . . is likely to be protracted, complex, and expensive. If the executive must pay lawyers out of his or her own pocket, until it can be determined whether his or her conduct was up to the statutory standard and within the context of official corporate capacity, the executive may find it hard to raise the cash to pay the kind of lawyers that are needed." (footnotes omitted)).

execute a person.¹⁴⁷ And the Sixth Amendment right does not attach at all until the initiation of adversarial judicial proceedings.

The effective assistance doctrine thus turns out to be mostly inapplicable to the setting of the organizational criminal case. One cannot mount a constitutional argument for a guarantee of access to private funding for criminal defense in business firms without entirely reworking the Sixth Amendment right to grant far more public resources to the indigent defendant. Such a move may not be feasible due to political constraints on the use of government resources and concerns about creating rules that could seriously disrupt the criminal process by leading to frequent reversal of convictions.

The reverse side of the counsel coin is that the Constitution generally places no *restraint* on a person's ability to spend resources on a criminal defense.¹⁴⁸ The effect of this is to create sliding-scale justice (actually, sliding-scale law) under which, all else equal, the wealthy face a lower expected sanction than the poor. But restricting how one spends one's wealth, much less how one spends it on one's freedom, is seen as un-American. This is not to say that the state has *no* ability to intrude upon private funding of a defense. A criminal defendant enjoys no right to use the fruits of her crime to fund an effort to defeat sanctioning for that crime.¹⁴⁹ Even this limitation, however, has provoked serious objection.¹⁵⁰

The controversy in the firm criminal case is not the question of whether a firm's agent may spend her own funds on her defense, but rather the question of whether the *firm's* funds may be deployed for the agent's defense. This issue is, for the most part, a component of the general subject of indemnification of agents by their principals. As such, the issue implicates policy choices and contractual bargaining rather than constitutional law. The issue also represents a fairly narrow slice of the indemnification subject. The concern is not indemnification for sanctions. At least in a criminal case, most would agree that indemnifying an agent for monetary penalties for a criminal act is undesirable.¹⁵¹ And, of course, one generally cannot be indemnified against a

147. See Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 818-19.

148. *United States v. Farmer*, 274 F.3d 800, 802 (4th Cir. 2001) (noting that the Sixth Amendment extends to an individual's right to spend his "legitimate, nonforfeitable assets" on his own defense).

149. *Caplin & Drysdale, Chartered v. United States*, 491 U.S. 617 (1989); *United States v. Monsanto*, 491 U.S. 600 (1989).

150. See, e.g., Todd Barnet & Ivan Fox, *Trampling on the Sixth Amendment: The Continued Threat of Attorney Fee Forfeiture*, 22 OHIO N.U. L. REV. 1 (1995).

151. See, e.g., CAL. INS. CODE § 533.5(a) (2007) ("No policy of insurance shall provide, or be construed to provide, any coverage or indemnity for the payment of any fine, penalty, or restitution in any criminal action or proceeding . . ."). While Delaware law allows a corporation to indemnify an officer in some circumstances for criminal fines, DEL. CODE ANN. tit. 8, § 145(a) (2007), an ex post decision to indemnify is permitted only if the officer "acted in good faith." *Id.* A Delaware corporation may contract ex ante to supply

sanction of imprisonment, at least not one of substantial length.¹⁵² The issue here is simply indemnification for legal costs associated with resisting the state's effort to *impose* a sanction.

The present legal regime governing this subject consists principally of state law and federal executive branch policy. Under the dominant Delaware regime, a corporation *must* indemnify, for all costs, a director or officer who prevails in litigation on the merits.¹⁵³ Corporations may, and almost always do, cover this obligation by purchasing director and officer liability insurance.¹⁵⁴ A corporation *may* indemnify an agent for costs if the agent acted in "good faith," "reasonably believed" her actions to be in or not opposed to the interests of the firm, and—if the action is criminal—had "no reasonable cause" to believe her actions were "unlawful."¹⁵⁵ A corporation may also advance litigation expenses to a director or officer provided that the director or officer promises to repay such funds if she is not successful on the merits.¹⁵⁶ To engage in any such act of permissive indemnification *ex post*, a corporation must obtain the approval of its shareholders or the majority of its "disinterested" directors or act in reliance on a legal opinion of an independent attorney.¹⁵⁷ However, a corporation enjoys the freedom to contract *ex ante* to provide any other indemnification and advancement rights to its agents.¹⁵⁸

additional indemnification rights in criminal cases. *Id.* § 145(f). Whether it is a good idea to allow indemnification for criminal sanctions is debatable. There may also be market constraints on managers' ability to persuade corporations to agree *ex ante* to indemnify for intentional criminal violations.

152. Kraakman, *supra* note 41, at 876; *see also* LoPucki, *supra* note 30, at 85 (suggesting that incarceration would be needed to control wrongdoing in world of judgment-proof actors). *But see* Richard A. Posner, *Optimal Sentences for White-Collar Criminals*, 17 AM. CRIM. L. REV. 409, 410 (1980) (arguing that given sufficient penalties and offender assets, fines can fully substitute for imprisonment in imposing disutility on offenders).

153. DEL. CODE ANN. tit. 8, § 145(c) (2007). According to one survey, all but six states mandate indemnification when a director or officer prevails in a criminal case on the merits. Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279, 287 (1991).

154. Sean J. Griffith, *Uncovering a Gatekeeper: Why the SEC Should Mandate Disclosure of Details Concerning Directors' and Officers' Liability Insurance Policies*, 154 U. PA. L. REV. 1147, 1162-74 (2006).

155. DEL. CODE ANN. tit. 8, § 145(a) (2007). It seems odd, or least calls for explanation, that Delaware law would afford a mistake-of-law claim in determining entitlement to indemnification irrespective of whether the underlying criminal law recognizes an executive's lack of belief that her actions were "unlawful" as a defense.

156. *Id.* § 145(e).

157. *Id.* § 145(d). Of course, shareholder vote is almost never used because it is burdensome, and directors and retained counsel are limited in their genuine independence from management. BISHOP, *supra* note 146, § 6:31; Joseph W. Bishop, Jr., *Sitting Ducks and Decoy Ducks: New Trends in the Indemnification of Corporate Directors and Officers*, 77 YALE L.J. 1078, 1079-80 (1968).

158. DEL. CODE ANN. tit. 8, § 145(f) (2007); *see* Brown, *supra* note 64, at 28-32 (arguing that if the state's policy on indemnification and advancement does not frown on firms that fulfill preexisting contractual obligations, firms and managers will simply contract

Other regimes have tweaked this scheme, to further fairly obvious policy objectives. For example, California law appears to provide that indemnification is not available for an agent who prevails in litigation on merely technical grounds.¹⁵⁹ New York law requires special disclosure to shareholders about the corporation's indemnification policies and actions.¹⁶⁰ The Model Business Corporations Act provides that, in order to obtain advancement, an agent must affirm that she has a good faith belief that she has met the relevant standard of conduct and so may obtain indemnification.¹⁶¹

Federal agencies have sometimes pursued policies about indemnification that disfavor it more than state law. As discussed in Part I, prior DOJ policy contained a proviso that a prosecutor "may" consider whether a firm is protecting culpable agents through providing attorneys' fees. This statement, and the practices of some federal prosecutors acting in accordance with it, generated heated complaints that caused the DOJ to modify the policy.¹⁶² The DOJ's new McNulty Memo provides that a prosecutor in exercising her discretion "generally should not take into account" whether a firm is advancing litigation costs to any individual.¹⁶³ Advancement may be considered only with the approval of the Deputy Attorney General and only in an "extremely rare case" in which a firm uses advancement to impede an investigation.¹⁶⁴

The SEC has not modified its position on indemnification. It explained in one recent enforcement action that a company's expansion of the scope of employees who could be indemnified against the consequences of the SEC's

ex ante for advancement and indemnification in most or all cases, removing such activities from the state's charging and settlement calculus). Delaware law contains similar rules governing the indemnification activities of partnerships and limited liability companies. DEL. CODE ANN. tit. 6, §§ 15-110, 17-108, 18-108 (2007).

159. See CAL. CORP. CODE § 317(a) (2007) (following the Model Business Corporations Act but omitting the words "or otherwise" after "on the merits" in statutory formulation); see also Grover R. Heyler, *Indemnification of Corporate Agents*, 23 UCLA L. REV. 1255, 1262 (1976). California law also gives courts authority to review a corporation's determination that the standard for permissive indemnification has been met. CAL. CORP. CODE § 317(e) (2007). Delaware law holds that defendants are entitled to partial indemnification if they prevail on one count of a criminal indictment but not on others. *Merritt-Chapman & Scott Corp. v. Wolfson*, 321 A.2d 138, 141 (Del. Super. Ct. 1974).

160. N.Y. BUS. CORP. LAW § 725 (2007). New York law also permits a director or officer to apply to a court for indemnification if the corporation denies it. *Id.* § 724.

161. MODEL BUS. CORP. ACT § 8.53(a)(1) (2004). The Act also provides for court-ordered indemnification. *Id.* § 8.54.

162. See, e.g., sources cited *supra* note 3; see also COMM. ON CAPITAL MKTS. REGULATION, *supra* note 11; *id.* at 91 ("[The SEC should] revers[e] its longstanding position that indemnification of directors for damages awarded in Section 11 actions is against public policy"); U.S. CHAMBER OF COMMERCE, REPORT AND RECOMMENDATIONS OF THE COMMISSION ON THE REGULATION OF U.S. CAPITAL MARKETS IN THE 21ST CENTURY 169 (2007), available at <http://www.uschamber.com/publications/reports/0703capmarketscomm> (arguing that DOJ should not base charging decisions on information relating to indemnification).

163. McNulty Memo, *supra* note 6, at 11.

164. *Id.* at 11 n.3.

action, including attorneys' fees, "without being required to do so by state law or its corporate charter" was a factor causing the SEC to find that the company had failed adequately to cooperate in the inquiry.¹⁶⁵ The SEC has declared that indemnification for the costs of violating the securities laws is contrary to desirable policy and should be disallowed, although federal courts appear divided on whether to advance the SEC's position by denying indemnification for securities liability.¹⁶⁶ The SEC's position is consistent with the traditional approach of insurers, who generally refuse to write policies covering intentional violations of law.¹⁶⁷

2. *The firm context and prescriptions*

Again, it is beneficial to view this problem in terms of the structural characteristics of wrongdoing in the firm context.

165. Press Release, U.S. Sec. & Exch. Comm'n, *supra* note 9.

166. 17 C.F.R. § 229.510 (2007) (requiring inclusion of language in registration statements warning investors if the company indemnifies against securities violations and informing investors that the SEC views such indemnification as contrary to the policy of the securities laws); *id.* § 229.512(h) (requiring disclosure in registration statements of a corporation's indemnification provisions); 10 LOUIS LOSS & JOEL SELIGMAN, *SECURITIES REGULATION* 4724 n.530 (3d ed. rev. 2005) (describing how the Trust Indenture Act prohibits indemnification of certain persons for judgment costs and expenses). Compare *Baker, Watts & Co. v. Miles & Stockbridge*, 876 F.2d 1101 (4th Cir. 1989) (en banc) (agreeing with the SEC position that providing a right to indemnification for violators of securities laws would undermine the deterrent effect of laws), *Laventhol, Krekstein, Horwath & Horwath v. Horwath*, 637 F.2d 672 (9th Cir. 1980) (same), and *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276 (2d Cir. 1969) (same), with *Raychem Corp. v. Fed. Ins. Co.*, 853 F. Supp. 1170 (N.D. Cal. 1994) (rejecting the SEC position for cases in which the defendant settles, as opposed to cases in which the defendant is found at trial to have violated securities laws). The SEC does not take a similarly dim view of a company insuring against liability for violations of securities law. Griffith, *supra* note 154, at 1197-98; see also 10 LOSS & SELIGMAN, *supra*, at 4733 (speculating that the SEC takes a less dim view of insurance because its presence increases investor recovery).

167. See, e.g., CAL. INS. CODE § 533 (2007) (precluding coverage for willful but not for negligent acts); Bucy, *supra* note 153, at 332-34 (describing the exclusions in standard policies covering liability of directors and officers); LoPucki, *supra* note 30, at 73 ("In recognition of the moral hazard involved in insuring against liability for certain kinds of intentional harm, courts void such coverage as contrary to public policy."); Mary Coate McNeely, *Illegality as a Factor in Liability Insurance*, 41 COLUM. L. REV. 26, 30-60 (1941) (arguing that insurance law and contracts have been forced to draw lines excluding coverage for certain illegal conduct so as not to increase crime and have generally done so according to distinctions between mala prohibita and mala in se); see also Bucy, *supra* note 153, at 310-11 (noting that public policy arguments against indemnification grew out of insurance law). Insurance coverage has now expanded in the corporate context to cover even conduct against which corporations are not legally authorized to indemnify. Griffith, *supra* note 154, at 1162-68.

a. Effects of the firm

First, the effects of inserting the firm between the individual and the state—on the incidence of crime *ex ante* and on the effectiveness of investigating crime *ex post*—are highly relevant. The availability of indemnification assures managers *ex ante* that they will not face financial ruin as a result of legal proceedings for conduct on the job.¹⁶⁸ This assurance causes managerial talent to be efficiently allocated by removing a factor that would otherwise chill managers from accepting offers of employment, and it causes managers to engage in desirable risk-taking once they begin employment. These points are especially strong in the business firm context because the nature of applicable substantive prohibitions means that instances of wrongdoing are often coincident with and closely related to valuable economic activity. Indemnification by the firm is preferable to self-insurance by managers because the firm is a more efficient risk-bearer across all cases of wrongdoing and all employment relationships, especially in the case of a public company whose shareholder owners can diversify their portfolios.¹⁶⁹

However, it is also true that the more funding a person can use to litigate with the state, the lower the probability that a sanction will be imposed for an act of wrongdoing. And probability of sanction is at least as important as—many have concluded more important than—severity of sanction in determining the effectiveness of legal prohibitions in deterring violations.¹⁷⁰ The principal cost of indemnification is that it reduces deterrence *ex ante*, even if limited to litigation costs.¹⁷¹ Reduction in deterrence will be greatest where, as in most criminal cases, the applicable legal prohibition concerns an intentional violation of law.¹⁷² Indemnification may lead managers to engage in

168. See Bucy, *supra* note 153, at 312-13, 338-39; Griffith, *supra* note 154, at 1170-71; Kraakman, *supra* note 41, at 864-65; see also *Homestore, Inc. v. Tafeen*, 888 A.2d 204, 218 (Del. 2005) (discussing how permitting corporate advancement enhances benefits to shareholders by facilitating the corporation's ability to attract and retain managers).

169. See Griffith, *supra* note 154, at 1168-69.

170. See Gary S. Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169, 178 (1968); John C. Coffee, Jr., *Regulating the Market for Corporate Control: A Critical Assessment of the Tender Offer's Role in Corporate Governance*, 84 COLUM. L. REV. 1145, 1193 (1984).

171. Bucy, *supra* note 153, at 342-43; see also Stephen McG. Bundy & Einer Richard Elhauge, *Do Lawyers Improve the Adversary System? A General Theory of Litigation Advice and Its Regulation*, 79 CAL. L. REV. 313, 391 (1991); LoPucki, *supra* note 30, at 14-38. It has been argued that "payment of attorneys' fees by a corporation is not a failure of cooperation unless one views the presence of a lawyer for a corporate officer as an impediment to an investigation." Peter J. Henning, *Targeting Legal Advice*, 54 AM. U. L. REV. 669, 673 (2005). It is an empirical rather than normative assertion that lawyers are impediments to sanctioning. The normative question is under what conditions we should welcome that impediment and under what conditions it is socially undesirable.

172. LoPucki, *supra* note 30, at 72-73.

excessive risk taking, which imposes costs on firms that may result in a net expected loss from risk-taking activities.

There is also an agency cost problem with indemnification. The agents who are most likely to have occasion to use indemnification (top managers) are the same agents most likely to exercise control over *ex ante* decisions about indemnification policy and specific expenditures for indemnification *ex post*. They may also be the agents in a position to do the most harm through wrongdoing.¹⁷³ The agency cost problem is particularly acute as to criminal litigation costs because an agent facing potential loss of liberty has incentive to spend limitless resources of the firm on a defense; it is easily possible to spend tens of millions of dollars in such circumstances.¹⁷⁴

Perhaps policy choices about indemnification produce rules that alter the form but not the substance of bargaining.¹⁷⁵ The choices will be choices among, at most, various transaction costs. If the law prohibits indemnification for legal costs (indeed, even if it prohibited *ex ante* contracting for indemnification), agents negotiating for employment with firms will demand extra wages to offset their expected costs of having to defend against legal charges or having to purchase insurance for such costs.¹⁷⁶ This may be less efficient than firm-funded insurance or indemnification, and it will not result in greater deterrence.

Or so the argument goes. The Coasean insight seems like it could be subject to two qualifications in this context. First, agents probably have limited ability to demand compensation or contractual guarantees for expected costs of engaging in *criminal* acts and facing legal proceedings as a result. Second, as

173. *Ridder v. CityFed Fin. Corp.*, 47 F.3d 85 (3d Cir. 1995) (giving the executive's claim for advancement of expenses out of the assets of the illiquid corporation priority over creditors who claimed that advancement would dissipate assets); *Lasker v. Burks*, 567 F.2d 1208, 1212 (2d Cir. 1978) ("It is asking too much of human nature to expect that the disinterested directors will view with the necessary objectivity the actions of their colleagues in a situation where an adverse decision would be likely to result in considerable expense and liability for the individuals concerned."); *In re Adelpia Commc'ns Corp.*, 323 B.R. 345 (Bankr. S.D.N.Y. 2005) (addressing whether managers who were subject to numerous civil and criminal claims for looting a corporation were entitled to payments from the corporation for the advancement and indemnification that they authorized for themselves); Kraakman, *supra* note 41, at 859 ("[I]t is precisely . . . among top corporate decisionmakers, that contractual devices and legal policies function most effectively to deflect personal legal risks.").

174. *See, e.g.*, Mary Flood, *Skilling Due to Get Some Cash*, HOUSTON CHRON., June 15, 2004, at B1 (reporting that two years before the former Enron CEO's trial, \$23 million had been paid to a law firm for his defense); Maureen Orth, *Black Mischief*, VANITY FAIR, Feb. 2007, at 164 (reporting that former newspaper executive Conrad Black, awaiting trial on criminal fraud charges based on alleged looting of corporate assets, has expended more than \$100 million on his legal defense, with most of it coming from corporate funds).

175. *See generally* R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960).

176. Kornhauser, *supra* note 38, at 1358. *But see id.* at 1357 (prohibiting insurance or indemnification might result in replacement by "complicated contractual devices that were more costly to implement").

noted, the disutility of imprisonment generally cannot be offset by monetary compensation, at least not for substantial terms of imprisonment. And, even if one thought it could be offset in theory, agents who have never suffered imprisonment would struggle to calculate ex ante how much compensation to demand for any given expected term of incarceration.

b. Slow ripening of the criminal case

The indemnification issue also connects to the phenomenon of the slow ripening of most criminal cases within firms. Consider a spectrum of cases. In Case A, the most desirable case for indemnification for litigation costs, a lower-level employee who is without substantial resources and merely a witness to wrongdoing needs the assistance of counsel because she has received an interview request early in an investigation of wrongdoing. Especially given her self-incrimination dilemma (which may apply to some extent even if she is purely a witness) and the reasonable assertion that her obligations as a witness are a job responsibility, considerations of both utility to the system and fairness to the individual tilt clearly in favor of indemnification.

Case A is fairly common but so are two more difficult cases. In Case C, the least desirable one for indemnification, a high-level manager loots millions from the firm, is indicted, and turns around and demands limitless funding of a protracted defense out of the firm's assets. In Case B, the middle case, a manager engages in an "aggressive" transaction that may or may not turn out to be criminal, depending on specific facts bearing on mental state that will take a long time for the legal system to develop and analyze; this manager demands firm assets to fund the litigation that is necessary to determine the propriety of the manager's conduct (and therefore the desirability of indemnification).¹⁷⁷

The optimal conditions for, and level of, indemnification are moving targets in Cases B and C, especially in Case B. The usual response is a regime of "advancement."¹⁷⁸ Under such a system, all three agents in the above cases are fully entitled to firm funding for their litigation costs. However, all three must supply an undertaking, that is, a contractual obligation to repay their litigation costs to the firm if they are found liable on the merits.¹⁷⁹

177. Henning, *supra* note 171, at 698-99.

178. See, e.g., DEL. CODE ANN. tit. 8, § 145(e) (2007); *In re Adelpia Commc'ns*, 323 B.R. at 375; MODEL BUS. CORP. ACT § 8.53(a) (2004); Bucy, *supra* note 153, at 316-19.

179. DEL. CODE ANN. tit. 8, § 145(e) (2007); Bucy, *supra* note 153, at 316-19; see also *Happ v. Corning, Inc.*, 466 F.3d 41 (1st Cir. 2006) (rejecting the claim of an employee who had been convicted of insider trading that the undertaking he signed to repay defense costs was unenforceable because the corporation procured his agreement through duress). The Sarbanes-Oxley Act, which among other things prohibited most corporate loans to executives, 15 U.S.C. § 78m(k) (2007), could be read as barring advancement. However, it is highly unlikely either that the legislation was intended to have that effect or that a court would apply it that way. 2 WILLIAM E. KNEPPER & DAN A. BAILEY, LIABILITY OF CORPORATE OFFICERS AND DIRECTORS § 22.14, at 22-40.3 to -40.8 (7th ed. 2006).

(Advancement regimes can set the conditions in various ways, such as by limiting the repayment obligation to criminal violations, intentional violations, decisions on the merits versus dismissals for procedural flaws, and so on.)

The obvious flaw in such a regime is that a firm's ability to achieve a "claw back" of its advancement is severely limited.¹⁸⁰ A criminal defendant facing a serious sentence of imprisonment has little incentive to leave her own assets unspent at the end of a case, and sanctioning regimes (fines, forfeiture, restitution, and the like) are apt to take most or all of what may be left.

c. Special roles of counsel

Most firm actors enjoy a form of indemnification that goes virtually unnoticed: transactional lawyers, paid by and working for the firm, supply ex ante legal assistance to actors contemplating whether to engage in a particular action or activity. From one perspective, this form of indemnification seems highly desirable. Counsel operating effectively ex ante may serve a beneficial gatekeeping function by giving the client advice that causes the client to forego activity that would have violated the law.¹⁸¹ From another perspective, however, this form of indemnification may be undesirable. Ex ante, counsel may assist a client in pursuing an "aggressive" activity that either (1) impinges more closely on the interests the applicable law seeks to protect than would a more risk-averse behavior pursued in the absence of fine-tuned legal advice, or (2) directly contravenes the law, or the interests the law seeks to protect, but is insulated from later sanction by virtue of the client's reliance on counsel.¹⁸² Access to costless, ex ante attorney services certainly advantages actors who operate in the firm setting over those who operate at large.

With regard to litigation counsel, the direct provision of counsel by firms (as opposed to indemnification for attorneys' fees) often continues for some period following an instance of potential wrongdoing. In its initial investigative efforts, a firm usually will interview witnesses, gather and review documents,

180. Sykes, *supra* note 41, at 1243 ("[E]mpirical evidence suggests that principals very rarely pursue their rights to indemnity against their agents."); Phred Dvorak & Serena Ng, *Check, Please: Reclaiming Pay from Executives Is Tough to Do*, WALL ST. J., Nov. 20, 2006, at A1 (describing numerous cases in which corporations struggled with or abandoned efforts to reclaim earnings-based bonuses paid to executives who achieved bonus targets by engaging in fraud); *see also* William M. Bulkeley, *CA Sues Ex-CEO to Recoup Legal Fee*, WALL ST. J., Nov. 17, 2006, at B2 (describing one case in which the corporation sought a convicted former executive's "house, sports cars, yacht and other assets" as repayment for advanced defense costs).

181. *Upjohn Co. v. United States*, 449 U.S. 383, 389-93 (1981); Kaplow & Shavell, *supra* note 11, at 597-98.

182. *See* William H. Simon, *After Confidentiality: Rethinking the Professional Responsibilities of the Business Lawyer*, 75 *FORDHAM L. REV.* 1453, 1455-64 (2006). Kaplow and Shavell, *supra* note 11, at 600, do not recognize this problem in arguing that ex ante legal advice is categorically beneficial to society while ex post advice is not.

and advise managers and employees through a single (usually outside) counsel who represents the firm rather than the managers and employees. This method is often more efficient than the provision of separate counsel for all the relevant actors, especially in matters that do not progress past, or much past, an initial internal investigation. If the matter is not serious and can be disposed of relatively quickly, both the firm and its agents benefit from dealing with a single counsel paid by the firm. As I discussed in Part II, however, when matters become more serious and the stakes grow higher, firm counsel's role in an investigation following wrongdoing can become confusing to the firm's agents and prone to conflict.

When separate counsel are therefore retained to represent firm agents—a common occurrence in serious matters involving investigation by both the firm and the state—it is necessary to distinguish among several situations in which the firm's agents might find themselves. The DOJ's "status" categories are useful here.¹⁸³ A "witness" is someone whom investigators believe has knowledge of probative facts but for whom the current evidence does not suggest any possibility of liability. A "subject" is someone for whom current evidence suggests a possibility of liability. A "target" is someone whom investigators believe is likely to be charged. As a matter progresses from the stage of earliest investigation all the way to the stage (if reached) of final sanctioning, individuals often move from one category to another and the information about—and therefore degree of confidence in—an individual's placement in a particular category rises. The desirability of indemnification for legal expenses might turn not only on the nature of counsel's role but also on the position of the client whom counsel represents in relation to the matter subject to inquiry or sanctioning.

d. Prescriptions

To assess the recent controversy about the state's policies on indemnification for attorneys' fees, one should distinguish legal incentives from allocation of institutional authority. As a debate about legal incentives, the fracas over indemnification for litigation costs has been misguided and mostly unhelpful. The effort to give this discussion constitutional valence is a red herring (some might think an offensive one). And it is rational to maintain that overly permissive advancement and indemnification regimes fail to force managers of large firms, whose wrongdoing can impose great social harm, to internalize sufficiently the costs of their delicts—in terms of both *ex ante* behavioral calculus and who foots the bill for wrongdoing *ex post*.¹⁸⁴

183. See U.S. DEP'T OF JUSTICE, U.S. ATTORNEYS' MANUAL § 9-11.151 (2007), available at http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/index.html.

184. Kraakman, *supra* note 41, at 877.

The useful move is not to say, in a broad brush manner, that the state should be banned from disfavoring advancement or that the law should give employees wide access to employer funding through a cause of action in implied contract.¹⁸⁵ The DOJ, in modifying its policies on this issue, missed an opportunity to engage the substance of the applicable questions of law and policy. It is telling that the McNulty Memo both bans consideration of advancement and recognizes that advancement could be used to impede public enforcement objectives. The memo makes no effort to identify a theory for distinguishing cases of legitimate (desirable) advancement from cases of obstructive (undesirable) advancement, other than to assert that the latter cases, whatever they look like, are “rare.” Leaving aside what one might ultimately conclude in a balanced analysis of policy considerations, it is undeniably true that a firm’s selection and funding of counsel for its agents, in relation to a situation in which a firm does not do so, *does* impede regulation.

Consideration of the advancement problem requires confronting a mix of benefits and costs, together with the challenging problem of sorting cases according to the temporal point at which advancement becomes undesirable (and any claw back illusory). A conceivable result of such an analysis would be a regime treating advancement more like a loan and less like a right.¹⁸⁶ An agent’s undertaking would be accompanied by the agent granting the firm some form of priority of claim over the agent’s assets.¹⁸⁷

Such a regime might also tinker with standards that determine: (1) the level of misconduct, in terms of substantive law including elements of mental state, past which advancement should not be provided; (2) the stage of the litigation past which advancement should not be provided (e.g., an initial interview with an enforcer versus a certiorari petition following conviction and sentence); and (3) absolute limits on what a firm should pay in terms of any one agent’s litigation costs.¹⁸⁸ A balanced legal regime might also make distinctions

185. Brown, *supra* note 64, at 4 (“[T]he view that best explains defense counsel regulation is a largely instrumental one that balances adjudication accuracy and law enforcement effectiveness against fairness and defendants’ self-interest.”).

186. Bucy, *supra* note 153, at 349. At one time, some believed that statutory requirements of an “undertaking” included the necessity of a bond, though that is no longer how advancement statutes are read. See William E. Knepper, *Officers and Directors: Indemnification and Liability Insurance—An Update*, 30 BUS. LAW. 951, 953 (1975).

187. *But see* MODEL BUS. CORP. ACT § 8.53(b) & cmts. (2004) (rejecting requirement of security for an undertaking on the ground that it would favor directors with greater financial resources).

188. In terms of the level of misconduct, one helpful resource might be the Delaware Supreme Court’s recent decision in *In re Walt Disney Co. Derivative Litigation*, 906 A.2d 27 (Del. 2006). In that case, the court explored the distinctions among three forms of corporate manager behavior sometimes covered by the label “bad faith”: (1) conduct motivated by an intent to do harm (“subjective bad faith”); (2) intentional dereliction of duty or conscious disregard of one’s responsibilities (“bad faith”); and (3) conduct involving lack of due care (not “bad faith” even if the negligence is gross). *Id.* at 63-68. The court concluded that category (2) conduct should be “treated as a non-exculpable, non-indemnifiable violation of

according to agents' relationship to a particular instance of wrongdoing; the DOJ's "witness," "subject," and "target" categories might be useful in this regard.

It is not unreasonable for an executive branch agency to take the position, for example, that firms serious about encouraging legal compliance do not provide their employees with limitless assets to fund their defenses in cases of clear criminal wrongdoing. If it is reasonable to take such a position, it must be reasonable to think about how to give that position teeth, including by saying that enforcers will consider firms' practices in the exercise of charging and settlement discretion. Legal rules cannot restrict managers from bargaining for compensation to set off legal restrictions in their access to indemnification (short of contract law declaring such deals void). However, managers may lack bargaining power with regard to expected costs of criminal violations. While there might be substantial disagreement about what kind and degree of indemnification are socially desirable, and about the most effective shape of legal rules, there is general agreement that indemnification can affect deterrence and that its blanket use is likely to be problematic.

But the present controversy runs beyond the contours of optimal legal incentives to the question of *who* should make such policy; indeed, the latter concern is likely generating more heat than the former. The critics of federal executive branch practices presume that Delaware, and other states, should have the exclusive authority to weigh interests and issue legal rules.¹⁸⁹ Senator Specter's bill can be seen as a directive to the federal executive branch to exit this realm of corporate law. The DOJ's change of course in the McNulty Memo can be seen as a concession that the DOJ's prior policies on advancement had stepped outside the DOJ's proper regulatory role.

As I will discuss further in Part IV, whether an institutional perspective on the question of indemnification in organizational criminal cases is the right response, and leads to the right result, requires comparative evaluation of the DOJ and the SEC (and perhaps other agencies) as institutional actors. Suffice it to say that if the indemnification controversy largely arises from institutional concerns, the debate ought to focus on real comparative assessment of institutions, not on unhelpful, broad-brush assertions such as that indemnification is uniformly desirable or that discouraging indemnification violates constitutional rights.

the fiduciary duty to act in good faith." *Id.* at 66; *see also* *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1288 (2d Cir. 1969) (denying indemnification for liability for securities violation where defendant "committed a sin graver than ordinary negligence").

189. *See* Robert B. Ahdieh, *From "Federalization" to "Mixed Governance" in Corporate Law: A Defense of Sarbanes-Oxley*, 53 *BUFF. L. REV.* 721 (2005); Lucian A. Bebchuk & Assaf Hamdani, *Federal Corporate Law: Lessons from History*, 106 *COLUM. L. REV.* 1793 (2006).

IV. ADDITIONAL PROBLEMS

Before concluding, I will briefly address three significant features of this Article's subject that, for various reasons, need not be fully resolved here. They are the overbreadth of criminal enterprise liability, the allocation of institutional authority to make policy in this area, and the controversy over the treatment of firms' attorney-client privilege and work-product claims.

A. Overbreadth of Enterprise Liability

Criminal procedure within firms is practiced in the large shadow of criminal enterprise liability. Special features of this form of liability complicate analysis of criminal procedure. Under current law, a firm faces criminal liability for virtually any criminal act by an agent. The standard is respondeat superior: the master is liable if the agent acted within the scope of employment and at least in part to benefit the master.¹⁹⁰ In practice, this standard amounts to strict vicarious liability because almost any act on the job is "within the scope of employment" and because courts have all but read the "intent to benefit" element out of the law.¹⁹¹ In addition, a firm's practices and procedures designed to prevent agent wrongdoing supply no defense to liability, although they usually mitigate punishment.¹⁹²

As I discussed in detail in Part II, this standard might advance an agenda of using enterprise liability as a means of encouraging firms to control their agents (although it sometimes can have perverse effects¹⁹³). Forcing firms to internalize the costs of agent violations, coupled with enhancing compensation of harmed persons, justifies vicarious liability in tort law, where it is a bedrock feature of legal regimes.¹⁹⁴ But criminal law is and should be more concerned with fault distinctions. Organizational causation of individual crime is both real and complex. Normatively, not all cases of agent crime are cases of organizational crime. It depends on the relationship between the agent's act and

190. 1 KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY §§ 3:01-:11, at 89-145 (2d ed. 1992); cf. RESTATEMENT (SECOND) OF AGENCY § 219(1) (2004) (stating that respondeat superior doctrine governs in tort law).

191. See, e.g., *United States v. Potter*, 463 F.3d 9, 25 (1st Cir. 2006); *United States v. Sun-Diamond Growers of Cal.*, 138 F.3d 961, 970 n.9 (D.C. Cir. 1998); *United States v. Automated Med. Labs., Inc.*, 770 F.2d 399, 406-07 (4th Cir. 1985); *United States v. Gold*, 743 F.2d 800, 822-23 (11th Cir. 1984); *United States v. Cincotta*, 689 F.2d 238, 241-42 (1st Cir. 1982); *United States v. Beusch*, 596 F.2d 871, 877-78 (9th Cir. 1979); *Standard Oil Co. v. United States*, 307 F.2d 120, 127-29 (5th Cir. 1962).

192. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972); U.S. SENTENCING COMM'N, GUIDELINES MANUAL § 8C2.5(f) (2006).

193. See Arlen, *supra* note 41.

194. See *supra* text accompanying notes 39-45; see also Ira S. Bushey & Sons, Inc. v. United States, 398 F.2d 167, 171 (2d Cir. 1968); Guido Calabresi, *Some Thoughts on Risk Distribution and the Law of Torts*, 70 YALE L.J. 499, 544-45 (1961); Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456 (1923).

its organizational context. Sometimes organizations are blameworthy for what their people do, and sometimes they are not. *Respondeat superior* is an overbroad doctrine in the criminal context because it does not comport with blaming practices.¹⁹⁵

The overbreadth of criminal vicarious liability also poses a temporal problem. If the state can level an organizational charge against a firm anytime an employee commits an offense on the job, the state's bargaining leverage can cause a firm to believe it has no alternative but to settle—regardless of the firm's view of the merits. This dynamic is most acute early in a matter, before the firm and the state have developed the facts to a point that would permit fully informed assessment of the merits. Firms may find themselves needing to purge, repent, and reform before knowing whether they have sinned.¹⁹⁶

An obvious response would be to narrow criminal enterprise liability—the imposition of which involves (or should involve) a degree of fault attribution absent in many civil matters. But this is difficult to do. Epistemic barriers to describing the phenomenon of how organizations influence individual acts make it impossible to craft a workable legal rule that selects for sanction only those cases in which an organization is to blame for its agent's act.¹⁹⁷ Previous attempts to do so have generated proposals that suffer from serious problems of under- and overbreadth.¹⁹⁸ I have suggested elsewhere an incremental move: fortify the “intent to benefit” element in existing *respondeat superior* doctrine by applying the criminal enterprise sanction only if an agent genuinely and

195. Buell, *supra* note 31, at 526-27. While some believe that criminal enterprise liability has little instrumental value and ought to be abandoned, I have argued that it is a useful supplement to civil enterprise liability, in part because it carries additional sanctioning effects (primarily in the form of reputational sanctions) that civil regulation cannot impose and that can influence organizational culture in ways that individual sanctions cannot. *Id.* at 498-525. For other contributions to this debate, see Pamela H. Bucy, *Corporate Ethos: A Standard for Imposing Corporate Criminal Liability*, 75 MINN. L. REV. 1095 (1991); John C. Coffee, Jr., “No Soul To Damn: No Body To Kick”: *An Unscandalized Inquiry into the Problem of Corporate Punishment*, 79 MICH. L. REV. 386 (1981); Daniel R. Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319 (1996); Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833 (2000); Dan M. Kahan, *Social Meaning and the Economic Analysis of Crime*, 27 J. LEGAL STUD. 609 (1998); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477 (1996); William S. Laufer & Alan Strudler, *Corporate Intentionality, Desert, and Variants of Vicarious Liability*, 37 AM. CRIM. L. REV. 1285 (2000); Eliezer Lederman, *Criminal Law, Perpetrator and Corporation: Rethinking a Complex Triangle*, 76 J. CRIM. L. & CRIMINOLOGY 285 (1985); Gerard E. Lynch, *The Role of Criminal Law in Policing Corporate Misconduct*, LAW & CONTEMP. PROBS., Summer 1997, at 23; Gerhard O.W. Mueller, *Mens Rea and the Corporation*, 19 U. PITT. L. REV. 21 (1957).

196. Arlen & Kraakman, *supra* note 27, at 748.

197. Buell, *supra* note 31, at 527-30.

198. *Id.* Some have suggested guidelines that would result in essentially no prosecutions. See, e.g., COMM. ON CAPITAL MKTS. REGULATION, *supra* note 11, at 85 (“[The DOJ should] revise its prosecutorial guidelines so that firms are only prosecuted in exceptional circumstances of pervasive culpability throughout all offices and ranks.”).

primarily acts for the purpose of furthering objectives of the firm.¹⁹⁹ Of course, some narrowing can be accomplished through constraining enforcement discretion; this has been the primary motivation for (and value in) the DOJ's corporate charging policies (the McNulty Memo and its predecessors). These policies require federal prosecutors to consider a host of factors relating to institutional blameworthiness in determining which among the many cases of respondeat superior liability merit actual prosecution.²⁰⁰

But even under a narrower form of enterprise liability, firms could be expected to assert an important facet of their current objection. This would be the claim that mere criminal allegation, not ultimate liability, is what makes a firm's position untenable. Firms assert that because an indictment sounds the death knell for a business enterprise, they have no choice but to concede liability and settle before the charging decision is even reached.

This claim is oversimplified. As an empirical matter, a criminal charge does not consign any business enterprise to death. Many firms, including large public companies, have survived being charged and even convicted of crimes.²⁰¹ The phenomenon of death-by-indictment is probably limited to what might be called "eggshell logo" firms: businesses that depend on reputation in a manner and to a degree that makes them highly vulnerable to even an allegation of criminality. To be sure, a more tangible problem for firms that need licenses to do business is potential loss of licensure due to indictment. However, licensing regimes need not treat the filing of a charge as the trigger for mandatory revocation, and reinstatement or waiver of revocation is usually negotiable in settlement.

As a theoretical matter, it is not clear *why* the mere filing of a charge should cause liquidation of an enterprise. Actual legal sanctions in a criminal (or other regulatory) matter are usually matched, and often dwarfed, by potential civil liability that nearly always accompanies a case of serious wrongdoing. So is it the mere label "criminal" that sets off a death spiral? It is not clear why an executive branch official or a grand jury raising allegations of criminal liability would be so different from the same statement coming from the pages of the *Wall Street Journal*, from a whistleblower, or by some other public mechanism. Logically, the facts should drive reputational effects more than the label given to those facts, and certainly more than the identity of the person or institution affixing the label. Even reputationally sensitive firms have

199. Buell, *supra* note 31, at 530-34.

200. McNulty Memo, *supra* note 6, at 2-5; Thompson Memo, *supra* note 6, at 1-4. Another response would be to limit prosecutors' plea bargaining power through constitutional doctrine, but the Supreme Court has never demonstrated interest in doing this, and it would raise complex doctrinal problems affecting the whole criminal justice system. Brown, *supra* note 64, at 25-26.

201. See, e.g., *In re Exxon Valdez*, 270 F.3d 1215, 1225 (9th Cir. 2001); *In re Prudential Sec. Inc. Ltd. P'ships Litig.*, 163 F.R.D. 200, 203-04 (S.D.N.Y. 1995); Joann S. Lublin, *Bristol-Myers to Settle U.S. Probe*, WALL ST. J., June 6, 2005, at A3.

settled charges with admissions of criminal wrongdoing (even if short of formal guilty pleas) without suffering collapse.²⁰²

Although the effects of enterprise liability are empirically and theoretically puzzling, one might still ask whether there is a means of ameliorating death-by-indictment risk, regardless of whether or not it is common. One response, of course, would be to say that firms are so vulnerable to charging that the criminal process just cannot be applied to them—ever. But it would be a strange response for the state to abandon a legal regime because it is expressively too potent, especially where the expressive power comes not from the legal regime tapping into an atavistic or unpalatable impulse but from the public learning something material about the firm.²⁰³ Put differently, it is hard to see how the state has an obligation to help a regulated entity prevent the social consequences of its own delict.

A somewhat more moderate position would be to say that some institutions are so vulnerable that they should enjoy a kind of immunity from the otherwise applicable regime. This is essentially what is meant when it is said that a particular firm is “too big to fail.”²⁰⁴ But this argument also is strange. It is difficult to think of a regulatory regime that includes a carve-out for some categories of actors whose conduct falls within the regime but who are just too vulnerable to sanctions to be regulated. It is difficult if not impossible to see how one could pursue such an agenda through law. And any such regime could generate bad incentives, causing firms to structure themselves in a manner that facilitates the argument that “we are too big and too vulnerable to be charged.”

Aside from narrowing the scope of enterprise criminal liability where feasible, how else might problems associated with its sometimes extreme potency be ameliorated? One possibility would be for the executive branch to institute a regime of procedure in such cases that requires a cooling period during which charging decisions and settlement discussions would not be permitted pending full development of the facts.²⁰⁵ Another relatively easy move would be to alter licensing regimes to make their consequences turn on conviction, not charging. One could also choose patience. As more organizational cases are pursued, and some result in findings of no liability after litigation, the expressive force of a mere charge might slacken, or at least vary according to the seriousness and content of the wrongdoing, rather than

202. See Press Release, U.S. Dep't of Justice, KPMG to Pay \$456 Million for Criminal Violations in Relation to Largest-Ever Tax Shelter Fraud Case (Aug. 29, 2005), available at http://www.usdoj.gov/opa/pr/2005/August/05_ag_433.html; see also Jonathan Weil, *KPMG's Settlement Provides for New Start*, WALL ST. J., Aug. 29, 2005, at C1.

203. See Richard A. Bierschbach & Alex Stein, *Overenforcement*, 93 GEO. L.J. 1743, 1749-54 (2005).

204. See Lawrence A. Cunningham, *Too Big to Fail: Moral Hazard in Auditing and the Need to Restructure the Industry Before It Unravels*, 106 COLUM. L. REV. 1698 (2006).

205. This would not always work to firms' advantage. Sometimes firms urge the state to reach a decision quickly, in hopes that a declination to charge will clear a cloud over the firm.

the mere presence or absence of a criminal charge. Indeed, more litigation (especially trials) is likely to benefit everyone by dissipating the current de facto, and more or less exclusive, power of prosecutors to dictate the scope of enterprise liability.

In any event, debate over the status of corporate criminal liability is no reason to neglect problems of criminal procedure that arise in its shadow. Positive law has included criminal enterprise liability for over a century, and it is likely to persist.²⁰⁶ Even if criminal enterprise liability were abolished, procedural problems and controversies would remain. One would still need to ask how to think about procedure for investigating and prosecuting individual crime within firms in the shadow of a regime of negotiable *civil* enterprise liability that provided firms with the same array of incentives (even if to a lesser degree) as under present regimes.²⁰⁷

B. *Institutional Roles and Competency*

A response to much of what I said in Part III might be the following: whether or not I located the correct balancing points in considering what protection should be afforded to employer-compelled statements and the optimal structure of indemnification policies is beside the point. The real question is which institutional actor should make those policy decisions and by what process. Executive branch lawyers enforcing conduct rules in the courts, the argument would proceed, are the wrong actors; case-specific litigation is the wrong process. One might also add that, even among executive branch enforcers, prosecutors are undesirable actors—for any number of reasons.²⁰⁸

At least part of this assertion is uncomplicated. It is preferable to have Congress legislate federal criminal procedure in the firm context by giving statutory content to choices about how to treat employer-compelled statements, privileged materials, indemnification payments, and so on. The legislative process, at least in ideal form, has two primary advantages: robust, democratic deliberation *ex ante* and the production of specific and relatively non-pliable legal rules *ex post*.

But it would be naïve to think of Congress in ideal terms. Any push for legal reform must compete for attention on a crowded agenda. The project of reforming criminal procedure for organizational cases may fail to capture

206. *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481, 494-96 (1909); *see also* 1 BRICKEY, *supra* note 190.

207. *See* Khanna, *supra* note 195, at 1520-25 (contending that a regime of civil enforcement could provide regulators with many of same powers as regime of criminal enterprise liability); Christopher A. Wray & Robert K. Hur, *Corporate Criminal Prosecution in a Post-Enron World: The Thompson Memo in Theory and Practice*, 43 AM. CRIM. L. REV. 1095, 1107-33 (2006) (surveying policies of many civil regulatory bodies governing discretion to use enterprise sanctions).

208. *See* Brown, *supra* note 64, at 4-5.

Congress's attention, or at least enough of it to allow for a thorough balancing of interests. As in many contexts, other legal institutions may be compelled to act where Congress has not. Even if Congress does act, in the absence of full consideration, it may legislate erroneously, possibly worsening matters (as I have argued would be the case with Senator Specter's bill). Also, statutory law has limits. Even an ideal congressional process is likely to leave plenty of work for other institutions when it comes time to enforce and interpret statutes. Finally, Congress may pursue policies that undesirably favor narrow interests due to public choice pressures.

This leads to a facet of the institutional objection that is more complicated than the assertion that legislatures in general are better positioned than other legal institutions to make law. Evaluating the objection requires comparative analysis. The question is not so much whether a particular executive branch agency, standing alone, is well situated to make policy on organizational criminal procedure but whether that agency is better or worse than other institutions that are viable alternatives.

As to any particular practice, one needs to ask whether (and, if so, why) the DOJ is a less desirable actor than Congress, another executive branch agency such as the SEC, the Delaware legislature and courts or those of another state, Article III courts, state attorneys general, self-regulatory organizations, and so on. These are complex inquiries meriting a separate article. Suffice it to say that it is not self-evident either that the DOJ, as an institutional actor, is utterly undesirable or that it would be entirely unproblematic.

On one hand, executive branch policymaking through the litigation process is ubiquitous and, in many areas, well settled. *Enforcement* of the law inevitably includes a large element of *making* law by the state signaling what will lead to sanction within realms of conduct covered by broad statutory schemes. On the other hand, prosecutors acting under broad grants of legislative authority may err in where they set those boundaries and, without sufficient supervision and control, may wander beyond the limits of positive law. The latter concern especially arises in criminal cases involving firms because almost all of them now settle, at the enterprise level, in the form of deferred prosecution agreements, often including extensive reform measures that represent a kind of regulation by settlement.²⁰⁹

Short of a full-blown inquiry into the institutional question, it is safe to say that more legislative guidance *ex ante* and more court supervision *ex post* (especially of settlements, which currently lack real supervision) are desirable to ameliorate risks and costs when executive branch enforcers act as policymakers.²¹⁰ However, some policymaking through enforcement may be

209. This aspect of enterprise liability, and the problems it raises, are thoroughly treated in Garrett, *supra* note 45.

210. *Id.* As Garrett explains, developing workable mechanisms for judicial oversight of these settlements is a difficult challenge. *Id.* at 48-57.

both desirable in the absence of legislative action and inevitable as a gap-filler even if legislation is enacted.

C. Firms' Attorney-Client Privilege and Work-Product Claims

Last, a word about the element of current controversy that has generated the most heat: the state's practice of obtaining waivers from firms of firms' rights to protect information through the attorney-client privilege and the work-product doctrine. I have omitted this issue largely because three current treatments deal with it thoroughly and informatively.²¹¹ In addition, the waiver phenomenon relates primarily to the position of the firm in relation to the state, not the position of the individual (within the firm) in relation to the state.²¹² The three current papers view the state's practices with regard to privilege waiver as raising questions about how to structure legal rules to maximize factual development about wrongdoing without generating perverse effects. All conclude that it is a mistake to analyze the corporate attorney-client privilege as if it were the same thing as the individual's privilege and that waiver practices are not categorically undesirable.²¹³

211. Brown, *supra* note 12; Julie R. O'Sullivan, Does the DOJ's Compelled-Voluntary Privilege Waivers Policy Undermine Corporate Clients' Willingness to Communicate with Counsel and Counsel's Ability to Ensure Corporate Legal Compliance? A Preliminary "No," (2007) (unpublished manuscript, on file with author); Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 56 DEPAUL L. REV. (forthcoming 2007) (on file with author).

212. Of course, when firms waive privilege claims, they can seriously worsen the legal position of individuals. Privileged materials may contain direct admissions by individuals or other highly probative evidence of their wrongdoing. But this does not distinguish an individual who engages in wrongdoing within a firm from one who engages in wrongdoing on her own, unless the individual has been misled into thinking that the firm's lawyer is her lawyer. See RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 163(2) (1997) ("[W]hen the lawyer knows or reasonably should know that the unrepresented non-client misunderstands the lawyer's role in the matter, the lawyer must make reasonable efforts to correct the misunderstanding when failure to do so would materially prejudice the non-client."); *id.* § 163(2) cmt. e ("A constituent may mistakenly assume that the lawyer will act to further the personal interests of the constituent, perhaps even against the interests of the organization."). To the extent that the individual's special problem in the firm setting is that she has *spoken* to someone (firm counsel) to whom she would not have spoken had events occurred outside the firm, her problem relates to the issue of statements and Fifth Amendment protections, which I addressed in Part III, not the attorney-client privilege.

213. Brown, *supra* note 12, at 922-35; O'Sullivan, *supra* note 211 (manuscript at 14-31); Richman, *supra* note 211 (manuscript at 7-20). At least one of these authors questions whether the corporate attorney-client privilege can be justified under the traditional framework of policy analysis that has guided discussion of the individual privilege. O'Sullivan, *supra* note 211 (manuscript at 40-61). It may be that the corporate privilege survives—and that intrusions upon it meet such hot resistance—only because the privilege is one of the few means firms have for controlling information in regulatory matters and contests in which the state enjoys heavy bargaining leverage. See *id.* (manuscript at 60-64).

I will add only that the present debate about corporate privilege waivers (including discussion of the recent modifications to DOJ policy to make waivers less common) would benefit from closer attention to the distinction between the ex ante and ex post roles of corporate counsel, as I described them in Part II.²¹⁴ In most cases of criminal wrongdoing outside firms, no lawyer is present or consulted at the time of the primary conduct; the lawyer appears after the fact, when the potential for sanctioning arises. In most cases of criminal wrongdoing inside firms, at least some lawyers are present and are at least partially consulted at the time of the primary conduct.

Given that attorney involvement in transactional activity is now ubiquitous, a firm's attorney-client privilege could amount to a privilege protecting intra-organizational communications.²¹⁵ A motivational concern amplifies this worry. The existence of a privilege with broad scope would be a strong incentive to involve lawyers in intra-organizational communications in order to shield such communications from discovery.²¹⁶ The DOJ's new guidance about privilege waivers by firms, while clearer than its predecessor, does not sufficiently address the problem of distinguishing among types of legal advice and types of work product when determining the desirability of privilege waivers.²¹⁷

214. The Supreme Court failed to do this in the defining case about the attorney-client privilege of business firms, *Upjohn Co. v. United States*, 449 U.S. 383, 392-93 & n.2 (1981), in which the Court confusingly justified protection of lower-level employee's statements to ex post counsel in internal investigations with arguments about the value of ex ante legal advice.

215. An even harder problem is how to develop facts about wrongdoing within a law firm or other lawyer organization. See, e.g., First Superseding Indictment, *United States v. Milberg Weiss Bershad & Schulman LLP*, No. CR 05-587(A)-DDP (C.D. Cal. May 18, 2006), available at http://www.law.com/pdf/ca/milberg_indictment.pdf.

216. See, e.g., Matt Richtel, *H.P. Investigators Sought Meeting with Top Leaders*, N.Y. TIMES, Sept. 21, 2006, at C3 (describing an email in which the corporation's in-house lawyer explained that the general counsel asked him to "oversee" an internal inquiry into leaks, which later resulted in criminal charges against persons participating in the leak investigation, so that communications relating to the investigation would be protected from disclosure by the attorney-client privilege in the event of litigation or regulatory scrutiny).

217. The new policy recognizes the distinction between ex ante and ex post involvement of counsel and correctly prioritizes materials relating to ex ante transactional advice in terms of their importance to the investigation of misconduct within firms. McNulty Memo, *supra* note 6, at 8-11. However, the new DOJ guidance muddles the distinction between privileged communications and attorney work product and is confusing in other respects. It supports waiver of material ("purely factual information relating . . . to the underlying misconduct") that would seem to include documents and witness statements gathered by counsel investigating ex post. *Id.* at 9. But it simultaneously disfavors waiver of material ("attorney-client communications or non-factual attorney work product") that arguably both includes and excludes such materials. *Id.* at 10. In addition, the DOJ's position that prosecutors can be prohibited from considering a firm's rejection of a certain form of waiver request but can be authorized to consider a firm's *acceptance* of the same request is untenable. See *id.* at 8-11.

CONCLUSION

The process of pursuing crime within firms is commonplace and unavoidable. It affects a large realm of social and economic activity. A variety of phenomena characterize wrongdoing in the firm setting, including the influence of legal entities on the commission and sanctioning of criminal acts, a protracted process of determining criminal responsibility, and special combinations of lawyers representing various interests and functioning both *ex ante* and *ex post*. Few of the procedural characteristics particular to the organizational case implicate constitutional law. They arise from, among other things, privilege law, substantive and vicarious liability regimes, contractual arrangements, economic incentives, and the nature of the firm. This can and should be called criminal procedure because it comprises a system regulating how the state imposes criminal sanctions.

But criminal procedure should be thought of differently in the firm context. The tripartite model of individual, organization, and state leads to a very different balancing exercise than does the binary model that has largely generated our mature law of “traditional” criminal procedure. Recognizing these foundational differences in context should lead to sensible prescriptions. Current public debate about criminal procedure within the firm has produced some misguided proposals, such as to ban the state from encouraging firms to pursue policies toward their employees and evidence in firms’ control that, as long as such state practices are appropriately guided and constrained, advance regulatory objectives without undue cost.