

**THE LAST STRAW: THE DEPARTMENT OF JUSTICE'S  
PRIVILEGE WAIVER POLICY AND THE DEATH  
OF ADVERSARIAL JUSTICE IN CRIMINAL  
INVESTIGATIONS OF CORPORATIONS**

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INTRODUCTION

The white-collar criminal defense bar has never been reticent to complain about U.S. Department of Justice (DOJ) policies that threaten its clients or the viability of its practice. But nothing—at least in the author's twenty-plus years of involvement in white-collar issues—has consumed the bar as much as the threats posed to the corporate attorney-client privilege and work-product doctrine.<sup>1</sup> While commentators have identified a variety of assaults on these protections,<sup>2</sup> the bar is most vocally outraged by the DOJ policy, pursuant to which, it charges, federal prosecutors regularly insist that corporations waive these protections to secure cooperation credit, declination of criminal action against the corporate actor, and consideration at sentencing.<sup>3</sup> For some time now, the defense objections to this particular

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\* Professor, Georgetown University Law Center. I would like to thank my friends in practice for their insights and corrections (all mistakes and misjudgments remain my own), my friends in academe for their excellent comments, and my students for everything.

1. See, e.g., Lance Cole, *Revoking Our Privileges: Federal Law Enforcement's Multi-Front Assault on the Attorney-Client Privilege (And Why It Is Misguided)*, 48 VILL. L. REV. 469 (2003); David M. Zornow & Keith D. Krakaur, *On the Brink of a Brave New World: The Death of Privilege in Corporate Criminal Investigations*, 37 AM. CRIM. L. REV. 147 (2000). See also Am. College of Trial Lawyers, *The Erosion of the Attorney-Client Privilege and Work Product Doctrine in Federal Criminal Investigations*, 41 DUQ. L. REV. 307 (2003); *Counsel Group Assails Prosecution Policy Compelling Corporations to Waive Privileges*, 67 CRIM. L. REP. 391 (2000); Joseph F. Savage, Jr. & Melissa M. Longo, 'Waive' Goodbye to Attorney-Client Privilege, 7 BUS. CRIMES BULL., Oct. 2000, at 1; Breckinridge L. Willcox, *Attorney/Client Privilege Waiver: Wrongheaded Practice?*, 6 BUS. CRIMES BULL., Jan. 2000, at 1.

2. See Cole, *supra* note 1; *Counsel Group Assails Prosecution Policy Compelling Corporations to Waive Privileges*, *supra* note 1.

3. See Memorandum from Paul J. McNulty, U.S. Deputy Att'y Gen., to Heads of Dep't Components & U.S. Att'ys (Dec. 12, 2006), available at [http://www.usdoj.gov/dag/speeches/2006/mc-nulty\\_memo.pdf](http://www.usdoj.gov/dag/speeches/2006/mc-nulty_memo.pdf) [hereinafter McNulty Memo]; Memorandum from Larry D. Thompson, Deputy Att'y Gen., to Heads of Dep't Components & U.S. Att'ys (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/cftf/corporate\\_guidelines.htm](http://www.usdoj.gov/dag/cftf/corporate_guidelines.htm) [hereinafter Thompson Memo]; Memorandum from Eric H. Holder, Jr., Deputy Att'y General, to Heads of Dep't Components & U.S. Att'ys (June 16, 1999), reprinted in *Justice Department Guidance on Prosecution of Corporations*, 66 CRIM. L. REP. 189 (1999) [hereinafter Holder Memo].

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policy have been unusually sustained, widespread, and passionate. Until recently, few outside the DOJ have questioned the bona fides of these objections.<sup>4</sup>

The defense bar's call to arms has been joined by heretofore strange bedfellows, including the ACLU, Chamber of Commerce, and Association of Corporate Council.<sup>5</sup> This alliance has been successful in pursuing its cause, for example, by securing the deletion from the U.S. Sentencing Guidelines of a reference to privilege waivers in the context of assessing corporate cooperation efforts.<sup>6</sup> More importantly, the defense bar and its allies were able to get the attention of some in Congress, who proposed "fixing" the problem through legislation that would bar federal prosecutors from considering corporate privilege waivers when deciding whether to bring criminal or civil charges.<sup>7</sup> The DOJ, eager to avoid a congressional "fix," responded by issuing a revised policy under the name of Deputy Attorney General Paul J. McNulty.<sup>8</sup>

The McNulty Memo contemplates requests for waivers of the corporate attorney-client privilege and work-product protection, but requires prosecutors to weigh identified factors before requesting waivers, details the types of materials that may be requested, and mandates that requests be considered—and, in some cases, ap-

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4. See, e.g., Lonnie T. Brown, Jr., *Reconsidering the Corporate Attorney-Client Privilege: A Response to the Compelled-Voluntary Waiver Paradox*, 34 HOFSTRA L. REV. 897, 897–900 (2006); Daniel Richman, *Decisions About Coercion: The Corporate Attorney-Client Privilege Waiver Problem*, 57 DEPAUL L. REV. 295 (2008).

5. Jason McLure, *The Life and Death of the Thompson Memo*, LEGAL TIMES, Dec. 18, 2006, at 14.

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

7. See McLure, *supra* note 5 (discussing the proposed Attorney-Client Privilege Protection Act of 2006). See also Letter from Jerry E. Smith, Chair Advisory Comm. on Evidence Rules, to David F. Levi, Chair Standing Comm. on Rules of Practice & Procedure (May 15, 2006), <http://www.uscourts.gov/rules/Reports/EV05-2006.pdf>. The committee proposed the following language as FED. R. EVID. 502(c):

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

*Id.*

8. McLure, *supra* note 5, at 14.

proved—at the highest levels of Main Justice.<sup>9</sup> It is not yet clear whether the DOJ's efforts will successfully forestall congressional action. The post-McNulty Memo introduction of a bill barring federal prosecutors from requesting privilege waivers or conditioning lenient treatment on disclosure of privileged information does not bode well for the DOJ.<sup>10</sup> While the bar may eventually be satisfied with this olive branch, the early returns are not hopeful.<sup>11</sup> For example, the Memo was barely posted before American Bar Association President Karen J. Mathis issued a press release stating that these guidelines “fall far short of what is needed to prevent further erosion of . . . fundamental attorney-client privilege, work product, and employee protections during government investigations.”<sup>12</sup>

Why has this issue energized the corporate defense bar as never before and seemingly resonated with the judicial and political establishments? At the outset, let me state what I do *not* think is going on. The rationale most often used to explain the bar's aversion to the DOJ's compelled-voluntary waiver policy is that it undermines the policies underlying the attorney-client privilege and work-product

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9. See McNulty Memo, *supra* note 3; see also Julie R. O'Sullivan, *Does the DOJ's Privilege Waiver Policy Threaten the Rationales Underlying the Attorney-Client Privilege and Work Product Doctrine? A Preliminary "No,"* (2008) (unpublished manuscript, on file with author). R

10. See Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. (2007) (prohibiting government agents from requesting or demanding disclosure of privileged material or conditioning leniency on privilege waivers).

11. See also Brown, Jr., *supra* note 4, at 907 (“Though well-intended and understandable . . . the DOJ's mandate for greater scrutiny of waiver requests . . . is [not] likely to move the compelled-voluntary waiver discussion towards a meaningful resolution.”). Some practitioners seem cautiously hopeful. See, e.g., David Z. Seide, *Department of Justice McNulty Memo Curtails Controversial Portions of Thompson Memo—Legislation Introduced in the Senate* (Dec. 13, 2006), available at <http://www.wilmerhale.com/publications/whPubsDetail.aspx?publica> (noting that, “[a]s a practical matter, the Memorandum is likely to substantially curtail privilege waiver demands from line prosecutors” principally by placing “what appear to be meaningful hurdles [such as DOJ approval requirements] in the path of any line prosecutor bent on making such demands”). In the main, however, they identify potentially significant problems with the revised policy. See, e.g., Richard Ben-Veniste & Raj De, *The “McNulty Memo”: A Missed Opportunity to Reverse Erosion of Attorney-Client Privilege*, 22 LEGAL BACKGROUNDER, Jan. 19, 2007, at 1; Abbe D. Lowell et al., *Is the DOJ's New Policy on Prosecuting Corporations Real Reform or Business as Usual?* (Jan. 31, 2007), available at <http://www.nacdl.org/public.nsf/whitecollar/wcnews069?Open>. R

12. *The McNulty Memorandum's Effect on the Right to Counsel in Corporate Investigations: Before the Subcomm. on Crime, Terrorism, and Homeland Security of the H. Comm. on the Judiciary*, 110th Cong. 11–12 (2007) (Statement of Karen J. Mathis, President, ABA), available at [http://www.abanet.org/poladv/letters/attyclient/2007mar08\\_privwaivh\\_t.pdf](http://www.abanet.org/poladv/letters/attyclient/2007mar08_privwaivh_t.pdf) [hereinafter Mathis Statement]; Margaret Aulino, *House Subcommittee Wants to Bolster Means to Combat Forced Waiver of Privilege* (Mar. 9, 2007), available at <http://www.nacdl.org/public.nsf/whitecollar/wcnews072?OpenDocument>; McLure, *supra* note 5. R

doctrine.<sup>13</sup> Rather than rehashing previous efforts to analyze this issue, I will simply summarize my earlier findings: (1) the attorney-client privilege is *not* necessary to ensure that public corporations continue conducting competent internal investigations when allegations of wrongdoing arise; and (2) the corporate privilege is *not* effective in inducing rational employees to disclose to corporate counsel information that they otherwise would not.<sup>14</sup>

Public corporations essentially have no choice but to investigate when confronted with possible corporate malfeasance. Internal investigations certainly have their costs, but, given the imperatives created by statutory, regulatory, prosecutorial, sentencing, civil liability, and corporate law pressures, “the internal investigation has become the standard of care whenever credible allegations of significant misconduct are raised in organizational settings.”<sup>15</sup> Corporations, then, have compelling incentives to investigate allegations of potential criminal wrongdoing, whether or not the attorney-client privilege will ultimately shield the facts revealed by their investigative efforts.

Some object that, if work-product waivers are encouraged, corporate counsel will respond by compromising the depth or quality of their investigation. In particular, counsel will refuse to record incriminating evidence. However, given the dynamics of internal corporate investigations and the regulatory environment, this author does not think that competent lawyers will compromise the quality of either their investigations or their eventual advice to clients because of the potential for government-induced privilege waivers. First, serious cor-

13. See, e.g., Mathis Statement, *supra* note 12, at 8, 14–15; see also *supra* note 1 and accompanying text.

14. O’Sullivan, *supra* note 9.

15. Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 886; accord Timothy J. Coleman & Christine Y. Chi, *Internal Investigations: Who, What, When, Why and How*, in ADVANCED CORPORATE COMPLIANCE WORKSHOP 2006 265, 272–73 (Practising L. Inst. 2006); Nancy Kestenbaum & Jason P. Criss, *Credit Where Credit is Due? The Role of Internal Investigations in the Outcome of Government Investigations*, in INTERNAL INVESTIGATIONS: LEGAL, ETHICAL & STRATEGIC ISSUES 2006 121, 151–52 (Practising L. Inst. 2006); Aaron R. Marcu, *Investigating Indications of Wrongdoing: Necessary and Proper in the Post-Enron Era*, in INTERNAL INVESTIGATIONS: LEGAL, ETHICAL & STRATEGIC ISSUES 2006 199, 202–03 (2006); O’Sullivan, *supra* note 9; A. Redding & Edward Han, *The Horns of a Dilemma: Coerced Waivers in the Name of “Cooperation,”* in SECURITIES LITIGATION & ENFORCEMENT INSTITUTE 2006 445, 450–51 (Practising L. Inst. 2006); John Jeffrey Thomas & Susan T. Stead, *Attorney-Client Privilege and Confidentiality Issues in Internal and External Investigations*, 35 THE BRIEF 12 (Summer 2006); Kenneth B. Winer et al., *Internal Investigations and the Foreign Corrupt Practices Act*, in THE FOREIGN CORRUPT PRACTICES ACT: COPING WITH HEIGHTENED ENFORCEMENT RISKS 286, 296–303 (Practising L. Inst. 2007); Marjorie J. Pearce & Peggy M. Cross, *Independent Corporate Investigations*, 14 BUS. CRIMES BULL., Jan. 2007, at 1. For advice on the conduct of internal investigations, see DAN K. WEBB ET AL., CORPORATE INTERNAL INVESTIGATIONS (2007).

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porate investigations require papering; if counsel decides not to write down facts she finds troubling to the corporation, she is necessarily going to do a shoddy job. Counsel needs all the facts to adequately advise the client, and ignoring certain facts will necessarily disserve the client. In addition to compromising the quality of counsel's advice, such actions would more generally run contrary to the entity's interests.

Criminal prosecutors are certainly one audience for internal investigations, but far from the only, or even the most crucial. In fact, one of the "primary goals in retaining investigatory counsel is to conduct a fair, thorough and complete investigation so [companies] can assure investors, regulators and employees that [they have] discovered the extent of any problems that exist and [have] a plan not only to correct them but to prevent their recurrence."<sup>16</sup> Marjorie Peerce and Peggy Cross have further explained this goal:

Whether the company succeeds in providing these assurances depends in significant part on the degree of confidence these groups have in the outside counsel conducting the investigation. One thing is certain: unless they trust that the investigation was truly an independent one, they are not likely to have faith in the outcome. Such a lack of faith can have devastating consequences for the company: valuable employees distrustful of management may leave, investors may pull their support, and regulators may disregard the results of the internal investigation and decide to conduct their own, disrupting the company and further undermining the investing public's faith in it. And if regulators feel that the investigation was deliberately compromised by the lack of independence, they may decide to investigate the company and its senior management further.<sup>17</sup>

Accordingly, some practitioners, far from cautioning counsel to stop taking notes of potentially inculpatory statements made in witness interviews, actually stress that such material *must* be included in the final report counsel renders to the entity's board, because "[i]f the company decides to disclose the report to the Government a report that presents the incriminating evidence as well as the exculpatory evidence is more likely to be credited by law enforcement officials; government officials are likely to discount a report that ignores incriminating evidence."<sup>18</sup>

The report will also be ignored, or worse, by the other regulatory and business constituencies noted above. In the eyes of prosecutors, a selective, biased, or sloppy investigative effort is worse than no effort

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16. Peerce & Cross, *supra* note 15, at 6.

17. *Id.*

18. Winer et al., *supra* note 15, at 334.

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at all, because the government is likely to view it as a whitewash, an attempt to protect management, or, at worst, an actionable obstruction. If it is in the corporate client's best interest to investigate—as it will almost always be—it will also be in the entity's best interest that the investigation is unbiased, fair, and thorough.<sup>19</sup>

Finally, the existence of a privilege owned by the corporation does not create incentives for the rational employee to share information with corporate counsel *that she otherwise would not*. Some employees will provide corporate counsel with the details of their wrongdoing even after being given the so-called *Upjohn* warning informing them that counsel does not represent them and that the corporation owns the privilege shielding their conversation.<sup>20</sup> But those employees' irrational choices certainly cannot be attributed to the existence of a corporate attorney-client privilege; rather, it is likely precipitated by corporate threats to fire uncooperative employees. Indeed, to the extent that the extension of the corporate privilege to these circumstances carries an obligation to warn the witness that she does not own or control the privilege and that her statement is confidential only so long as the corporation wants it to be, the privilege may actually inhibit fulsome communication.

If privilege waivers do not unduly undermine the rationales for the attorney-client privilege and work-product protection, why is the bar so distraught? There are, no doubt, a complex of factors, some of them self-interested, that contribute to this phenomenon. But, after numerous conferences, discussions, and informal talks with white-collar practitioners, my sense of the predominant "why" of this is difficult to footnote but very clear: these advocates are genuinely outraged by the feeling that the government has stepped over the line and made it virtually impossible for them to function as defenders of corporate clients in an adversarial confrontation with the government.

This Article's thesis turns on a circumstance that is rarely raised in this debate, but which is central to it: collective entities, such as corporations, cannot claim the Fifth Amendment right against self-incrimination. The attorney-client privilege and the work-product doctrine are critical, not because they encourage self-correction or candid communication between corporate client and counsel, but

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19. Also, to the extent that the bar asserts that any uncertainty with respect to the applicability of the privilege will impair counsel's willingness to record information adverse to the company, such uncertainty exists in spades without reference to the DOJ policy. See, e.g., O'Sullivan, *supra* note 9.

20. See *Upjohn Co. v. United States*, 449 U.S. 383 (1981).

rather because they serve as a substitute for the Fifth Amendment in criminal investigations of corporations in two senses.

First, from a systemic point of view, the lack of a Fifth Amendment privilege strips a company of the only weapon it has in the preindictment stage to counterbalance the weighty advantages the government enjoys at that point: the power to refuse to provide evidence that will be a link in the chain to its own conviction. Second, and more concretely, these protections are the only means by which corporations, deprived of any privilege against self-incrimination, may shield from government scrutiny that which the government truly wants and often needs to make its case: the informed conclusions of counsel regarding what records are relevant and the witness statements to which counsel will be privy. Demands for this analytical and evidentiary material—in effect, in many cases, a roadmap for liability—force counsel not only to lay her client open for the government, but also to be the engineer of the case against it. Counsel's ultimate aim, of course, is to persuade the government that such extraordinary efforts warrant a declination of prosecution.

Practitioners do not analyze the waiver issue in these terms, but the general objections contained in some of their literature are entirely consistent with this thesis. In particular, two related themes emerge from a survey of practitioners' writings on this and related issues. First, practitioners seem to object to the pervasive presuppositions underlying the DOJ's policy—and the policies of a wide array of federal institutions—that corporations have duties not visited upon individuals to self-report potential wrongdoing within the company, cooperate fully with government investigators, remedy any damage, and act aggressively to prevent recurrence of the objectionable behavior.<sup>21</sup> The assumption is that the proper role of corporations confronted with allegations of wrongdoing is, quite simply, to roll over. Individual defendants can fight like hell, but corporations should self-report, remediate harm, cooperate fully, and take whatever prosecutors and regulators believe they have coming. Zealous defense counsel find this assumption beyond galling.

The second theme resonating throughout the literature flows from the first. The bar argues that the waiver policy essentially “deputizes” corporate counsel in furtherance of this “crime-fighting partnership” between corporate America and the government. By definition, the reigning conception of what corporations *ought* to do when con-

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21. See, e.g., George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985 (2005); Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputization of Corporate America*, 45 S. TEX. L. REV. 111 (2003).

fronted with allegations of criminal wrongdoing means that counsel are no longer conceived of as the corporation's champions, poised to defend their clients in an adversarial joust. Rather, they are simply functionaries charged with exposing whatever wrongdoing has occurred, and advocates only in trying to convince the government to take the least-damaging avenue—such as regulatory sanction rather than criminal prosecution—in response to whatever is uncovered. In short, zealous advocates feel that they have become junior g-men, and they hate it.

What prevents corporate counsel and their clients from simply saying “no” to this new paradigm? The answer is that they would if they could, but a variety of circumstances make such choices exceedingly difficult. The same coercive forces that make the adversary system a myth in the context of corporate criminal liability also take away the bargaining leverage of corporations in attempting to resist DOJ privilege waiver “requests.” These circumstances, examined in Part II, include the malleable nature of the federal criminal code, the overbroad standards of corporate criminal liability, and the range and harshness of sanctions applicable upon conviction. The DOJ and other regulators could talk about “crime-fighting partnerships with corporate America”<sup>22</sup> all they wish and could attempt to “deputize” defense counsel to work on their behalf, but, absent these circumstances, the defense could quite simply say “no” or “prove it,” as is at least their hypothetical privilege in an adversary system. Given the existence of these coercive factors, however, counsel have few options in resisting government inquiries.

This Article provides some context for these themes and explains more completely why “requests” for waiver of a corporation's attorney-client privilege and work-product doctrine are viewed both as virtually irresistible and as the critical “tipping point” in both the balance of power between the government and the defense and the evisceration of defense counsel's role. To mix metaphors, the coercive factors mentioned above are the lever that DOJ prosecutors and other government agents have used to move the corporate boulder up to the precipice overlooking the Sea of Complete Capitulation. Once the

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22. See, e.g., John F. Savarese & David B. Anders, *DOJ Adopts Revised Policies on Corporate Prosecutions* (Dec. 13, 2006), available at <http://online.wsj.com/public/resources/documents/wachtell121306.pdf>. The McNulty Memo does not “[change] the fundamental principle that corporations are liable, in virtually all cases, for criminal misconduct by their employees. Thus, prosecutors will continue to have enormous leverage over corporations and corporations will, in turn, continue to have powerful incentives to try to appear as cooperative as possible to prosecutors.” *Id.*

“last straw” of privilege waivers is laid on, the lever sends the boulder over the cliff to be smothered in that Sea.

Next, this Article asks whether the DOJ’s policy is unwise, because it is the last straw in destroying corporations’ claims to adversary process in criminal proceedings. Here, it is worth revisiting *Hale v. Henkel*—the case in which the Supreme Court effectively denied corporations a Fifth Amendment right—to determine whether that holding supports the proposition that “legal” persons ought to be treated differently than “natural” persons in terms of their entitlement to criminal process.<sup>23</sup> The examination of *Hale* in Part III reveals, however, that the Court’s decision was primarily driven by practical exigency. Far from adopting a conception of corporations as “persons” not entitled to adversary process, the Court actually employed a completely schizophrenic approach. Critics are left, then, with the question of public policy.

The DOJ would argue that it can, and should, do everything possible to quickly and efficiently nip corporate crime in the bud and that corporate cooperation in this regard, through waivers of privilege and other means, is in the best interests of the public, as well as the entity and its shareholders. Prosecutors’ positions are not irrational. Corporate crime can be exceedingly costly to society—whether that cost is assessed in financial terms, as collateral damage (for example, to the environment or to public safety), or by reference to public confidence in markets, financial institutions, and the like. Viewed from the perspective of punishing and deterring corporate crime through the most efficient and effective allocation of government resources, a “crime-fighting partnership” between the government and corporate America makes sense, as does enlistment of experienced corporate counsel as investigating arms of the government.

The only problem is that a similar balancing could be made for rapists, drug dealers, and murderers. Individual defendants’ rights to resist the government to the bitter end are also costly and counterproductive measured by law enforcement imperatives. Yet the government has not structured its policies, at least as explicitly or comprehensively, with the clear expectation that individuals are wrong or irrational to stand on their rights. The assumption that corporations should engage in a “crime-fighting partnership” with the government, even if it means criminal prosecution and hefty penalties, is such a constant that its foundation is rarely, if ever, examined. But it does require justification, and I have not heard a convincing one.

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23. 201 U.S. 43, 69–70 (1906).

The bulk of this Article lays a foundation for further conversations in which the central concern is not the symptom—the DOJ’s waiver policy—but rather the underlying malady—the circumstances that conspire to rob organizational defendants of the benefits of the adversarial system—and the fallout from that reality. It is beyond the scope of this Article to contribute much to the debate over whether corporations, as “legal” rather than “natural” persons, should have abbreviated rights in criminal cases, but it will essay a few thoughts to start the conversation. As a preliminary matter, it is important to note that, if society truly believes that the adversary system is the best and fairest way to test criminal charges when individuals are in the government’s cross-hairs, it is not at all clear why legal entities such as corporations should be denied its benefits. Further, society has obvious and significant—even if rarely articulated—interests in redressing the existing imbalance of power or at least providing corporations with some process by which to have prosecutorial theories and charges reviewed. As noted briefly in Part IV, regardless of how one conceptualizes corporations in terms of traditional models of justice, the status quo—in which organizational defendants have the protections of neither adversarial justice nor the bureaucratic safeguards of the inquisitorial system—is unacceptable, because not every theory of prosecution is valid and not every corporate subject deserves criminal sanction. That being the case, the DOJ could at least ameliorate the “justice” imbalance by reconsidering its “compelled-voluntary” waiver policy.

## II. THE OBSTACLES THE CORPORATION FACES IN RESISTING GOVERNMENT INVESTIGATIONS

### A. *The Coercive Circumstances Operating on Corporate Subjects in Criminal Investigations*

It is exceedingly difficult to conceive of the criminal process that applies to corporations today as truly “adversarial.” In reality, a variety of circumstances make it nearly impossible for public companies, especially those in regulated industries or those who do significant business with the government, to mount any meaningful resistance to a criminal investigation. These factors certainly make resisting privilege waiver “requests” very hard.

To begin, under the federal code and regulations, the crimes that can be charged in white-collar cases are virtually limitless and shock-

ingly malleable.<sup>24</sup> The breadth and flexibility of the criminal code allows prosecutors to charge the corporation for something in almost any case in which any arguable skulduggery is uncovered. Further, the exposure of corporations to criminal sanction is even more extensive than it is for individuals, because corporations, unlike many individuals, are subject to a vast array of federal regulations. It is a shocking fact that no one has been able to come up with an accurate count of the number of criminal statutes on the books, let alone the number of criminalized regulations.<sup>25</sup> Some commentators, however, have posited that there may be as many as 300,000 federal regulations subject to criminal enforcement.<sup>26</sup> Corporations are more vulnerable than individuals for another reason:

The black-letter law of corporate criminal liability is straightforward: a corporation is liable for the criminal misdeeds of its agents acting within the actual or apparent scope of their employment or authority if the agents intend, at least in part, to benefit the corporation, even though their actions may be contrary to corporate policy or express corporate order.<sup>27</sup>

The extremely broad, judicially created standards for corporate criminal liability mean that virtually *anything* that a corporate agent does can be imputed to the corporation and thus result in the organization's criminal conviction.<sup>28</sup> This *respondeat superior* standard has been extended to apply in situations where no one actor's conduct and mens rea can be imputed to the corporation.<sup>29</sup> Indeed, corporations can be criminally liable even when no one agent did *anything* illegal under the "collective knowledge" and "flagrant organizational indifference" theories, which augment the already over-broad *respondeat superior* standards.<sup>30</sup>

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24. I begin my white-collar crime class each year by assuring my eighty-odd students that I could indict them all for something and then proceeding to horrify those law-abiding citizens by demonstrating why that is indeed so.

25. See, e.g., Julie R. O'Sullivan, *The Federal Criminal "Code" Is a Disgrace: Obstruction Statutes as Case Study*, 96 J. CRIM. L. & CRIMINOLOGY 643, 648-50 (2006).

26. *Id.* at 649.

27. JULIE R. O'SULLIVAN, *FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS* 161-62 (3d ed. 2007); accord *N.Y. Cent. & Hudson River R.R. v. United States*, 212 U.S. 481 (1909); *United States v. Sun-Diamond Growers*, 138 F.3d 961 (D.C. Cir. 1998), *aff'd on other grounds*, 526 U.S. 398 (1999); *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972).

28. See, e.g., *Sun-Diamond Growers*, 138 F.3d 961; Jennifer Moore, *Corporate Culpability Under the Federal Sentencing Guidelines*, 34 ARIZ. L. REV. 743, 759 (1992).

29. For example, a corporation's criminal liability has been upheld where one employee harbored the requisite mens rea while another performed the actus reus, and where a corporation was convicted but all conceivable individuals were acquitted. See John C. Coffee, Jr., *Corporate Criminal Responsibility*, in 1 ENCYCLOPEDIA OF CRIME & JUSTICE 253, 255-56 (Sanford H. Kadish ed., 1983).

30. *United States v. Bank of New England, N.A.*, 821 F.2d 844, 855 (1st Cir. 1987).

Even were a corporation to conclude that it has a shot at defending itself against a particular charge or theory of liability, one must recognize that its calculus regarding whether to resist a government investigation is hugely affected by the number, range, and seriousness of the sanctions available should it fail in that effort. The array of penalties to which convicted corporations may be subject is extensive and onerous. Although not every conviction is in essence a corporate death sentence—as was the case in the obstruction prosecution of Arthur Andersen LLP—the company will certainly take a pronounced pounding in a variety of ways: (1) the restitution, fine, and corporate probation obligations under the Federal Sentencing Guidelines applicable to organizations;<sup>31</sup> (2) potential debarment from government contracting; (3) possibly ruinous regulatory or licensing repercussions; (4) loss of employees, customers, and financing; and (5) the application of collateral estoppel to foreclose the entity from resisting the civil damages demands of any number of potential private plaintiffs.

Corporations, unlike most individuals, will take a hard look at their bottom line and often decide that, whether or not their guilt is contestable, they have no choice but to cooperate fully with the government in hopes of avoiding the financial train wreck of a criminal conviction. This dynamic is reinforced by the incentives recent legislation and developments in corporate law have created for corporate boards—and particularly the increasingly powerful independent directors in the post-Enron era—to protect themselves against civil liability by rolling over whenever prosecutors come calling.

The above dynamic, peculiar to corporate crime cases, is compounded by the general inequality in arms between the government and persons subject to criminal investigation. The government has at its disposal some serious artillery. Subject to constitutional and other legal restraints, it can make arrests, search and seize private property, conduct surveillance in person and by wiretap, and call out all of the human, analytical, and technical resources of investigating agencies. Prosecutors can, by statute, override individuals' right to remain silent and, by statute or contract, enter into cooperation agreements by which testimony is secured by grant of immunity, dismissal of charges, sentencing discounts, or other valuable consideration. The government can force defendants to produce records and witnesses to testify through grand jury subpoenas. If that which is subpoenaed is not forthcoming, the government can ask that the contemnors be jailed until they comply. It can promise "things of value" for witnesses'

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31. U.S. SENTENCING COMMISSION, GUIDELINES MANUAL 474–518 (2007).

help,<sup>32</sup> threaten to indict their families members,<sup>33</sup> and, in some circumstances, lie to get what it wants.

By contrast, those under investigation have no Sixth Amendment right to counsel until formal proceedings are launched against them.<sup>34</sup> Even the Fifth Amendment right to counsel created in *Miranda* does not apply outside of the narrow context of custodial interrogations by known government actors.<sup>35</sup> Subjects and targets are not entitled to any sort of pre-indictment discovery;<sup>36</sup> indeed, were they to attempt to find out what the grand jury is doing, they may well face obstruction charges.<sup>37</sup> The law also prohibits them from providing witnesses with any consideration in return for testimony, even for cooperation and truthful stories.<sup>38</sup> Threats or lies by the subjects or targets of investigations, in many circumstances, could lead to criminal sanction.<sup>39</sup> Additionally, there is no legal process in the criminal system through which putative defendants can compel third parties to give them any sort of assistance in identifying the relevant facts or in trying to fend off an indictment.<sup>40</sup>

What does the adversary process provide subjects and targets of criminal investigations to even this imbalance? The sole real counterweight, at the investigative stage at least, is the Fifth Amendment privilege against self-incrimination. It is this privilege that gives individuals the right to resist through silence—the right to *not* cooperate in one's own undoing. The Supreme Court has provided us with many rationales for the privilege against self-incrimination, many of which are grounded in conceptions of human dignity that do not apply comfortably to impersonal entities.<sup>41</sup> The Fifth Amendment value that is

32. *United States v. Singleton*, 165 F.3d 1297 (10th Cir. 1999) (holding that 18 U.S.C. § 201(c)(2) does not apply to the United States or an Assistant U.S. Attorney functioning within the official scope of her office).

33. *See, e.g., Miles v. Dorsey*, 61 F.3d 1459, 1469 (10th Cir. 1995).

34. *See, e.g., Brewer v. Williams*, 430 U.S. 387, 398 (1977).

35. *See, e.g., Berkemer v. McCarty*, 468 U.S. 420 (1984); *Rhode Island v. Innis*, 446 U.S. 291 (1980).

36. *See, e.g., FED. R. CRIM. P. 16; O'SULLIVAN, supra note 27, at 801–39.*

37. *See, e.g., 18 U.S.C. § 1503* (2000).

38. *See id.* § 201(c).

39. *See id.* § 1512(b).

40. *See, e.g., O'SULLIVAN, supra note 27, at 801–39.*

41. *Murphy v. Waterfront Comm'n*, 378 U.S. 52, 55 (1964). In *Murphy*, the Court provided the following explanations:

The privilege against self-incrimination “registers an important advance in the development of our liberty—‘one of the great landmarks in man’s struggle to make himself civilized.’” It reflects many of our fundamental values and most noble aspirations: our unwillingness to subject those suspected of crime to the cruel trilemma of self-accusation, perjury or contempt; . . . our fear that self-incriminating statements will be elicited by inhumane treatment and abuses . . . ; our respect for the inviolability of the human

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critical for this Article's purposes, however, is that which deals with the balance of power between the hunter and the hunted. As the Supreme Court explained, in part, in *Murphy v. Waterfront Commission*, the privilege reflects several values:

[O]ur preference for an accusatorial rather than an inquisitorial system of criminal justice; . . . [and] our sense of fair play which dictates "a fair state-individual balance by requiring the government to leave the individual alone until good cause is shown for disturbing him and by requiring the government in its contest with the individual to shoulder the entire load."<sup>42</sup>

Even this counterweight is denied to corporate subjects or targets of government inquiries. In *Hale v. Henkel*, the Supreme Court held that corporations cannot, through their agents, assert a Fifth Amendment right against self-incrimination to resist the production of corporate books and records.<sup>43</sup> Nor can corporate agents claim their own, personal Fifth Amendment right against self-incrimination when they are compelled to produce corporate records in their capacity as corporate agents.<sup>44</sup>

### B. Counsel's Role in Corporate Criminal Defense

This Section examines how corporate defense counsel operate in an environment that is heavily weighted in favor of the government. Two points are worth emphasis at the outset. First, because of the above-described consequences of a criminal charge, white-collar practitioners will do everything in their power to secure a disposition short of criminal indictment and, ideally, a declination from the DOJ. Most white-collar cases are viewed as won or lost in this pre-indictment phase. Second, during this phase, there are at least four challenges facing defense counsel: (1) divining what the government is investigating without the benefit of formal discovery or other means of compelling the production of most types of information; (2) tracing or,

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personality and of the right of each individual "to a private enclave where he may lead a private life[ ]"; our distrust of self-deprecatory statements; and our realization that the privilege, while sometimes "a shelter to the guilty," is often "a protection to the innocent."

*Id.* (internal citations omitted); cf. Norman M. Garland, *The Unavailability to Corporations of the Privilege Against Self-Incrimination: A Comparative Examination*, 16 N.Y.L. SCH. J. INT'L & COMP. L. 55, 58 (1996) (noting that the High Court of Australia does not accord corporations a privilege against self-incrimination and supports this ruling "with a policy pronouncement that the privilege against self-incrimination is truly based only on the desire to prevent torture and other inhumane treatment of human beings").

42. 378 U.S. at 55 (citation omitted).

43. 201 U.S. 43, 70 (1906).

44. See, e.g., *Braswell v. United States*, 487 U.S. 99 (1988).

with luck, keeping a step ahead of the government in learning the facts; (3) limiting, consistent with ethical and legal constraints, government access to incriminating evidence; and (4) using the facts, law, and equitable arguments to persuade the government to decline prosecution. As the above outline reveals, information control is *the* central function of the defense enterprise.<sup>45</sup>

Without a Fifth Amendment right, how can this central function be achieved? This Article argues that the means that corporate counsel use to pursue this “fundamental modus operandi constituting [the] basic defense plan” is to shield, to the extent possible, their work in investigating and documenting corporate wrongdoing by invoking the attorney-client privilege and work-product doctrine.<sup>46</sup> Thus, when the government seeks to force the waiver of these protections, it essentially takes away the last, and virtually only, weapon that corporate counsel have to control information and resist the government.

Let us test this theory by reference to what most corporate counsel actually do when, as is almost *de rigueur* these days, they respond to allegations of corporate wrongdoing by conducting an internal investigation. Corporate counsel will focus on two categories of evidence: physical or electronic records and statements provided by witnesses.

Either in-house lawyers or, if the matter is particularly sensitive or high-profile, outside counsel will scour the relevant documents and computer files and isolate those that they think are relevant. In white-collar investigations, counsel generally seek letters and emails; memoranda; reports; financial data; telephone and banking records; personnel, expense account, and travel records; and datebooks. Witness testimony will often be required to prove the authenticity, or lack thereof, of such materials; explain how and why they were generated; and discuss their use or meaning in context. Witnesses will also often be critical to establish the putative defendants’ *mens rea*—for example, in demonstrating that the defendant *knew* that the inarguably incorrect figures in a tax return were false or *intended* to obstruct justice

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45. See, e.g., KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985). Mann notes that, “above all, and this is the central theme of the white-collar crime defense function, the defense attorney works to keep potential evidence out of government reach by controlling access to information.” *Id.* at 5. He also explains that “[w]hat is distinctive in white-collar cases is the centrality of information control strategies to defense work: they are fundamental modus operandi constituting a basic defense plan, rather than merely tactics in a broader strategy.” *Id.* at 8. One defense lawyer affirmed Mann’s thesis: “My own belief is that the more information you control as [a] defense lawyer, the more effective you are, meaning that the only weapon you have as a defense lawyer in my view is control of information.” *Id.* at 171.

46. *Id.* at 8.

by misleading investigators. But the corporate records are vital; they provide the skeleton upon which a case is built or refuted. They are also essential reference points that attorneys use to check the credibility of witness accounts, refresh recollections of those involved, and fill in the blanks where memory fails. In short, this category of materials is critical to the construction and defense of a criminal white-collar case.

If possible, after the document review, corporate counsel will also seek to interview all relevant agents for the reasons discussed above. Often, at least at the inception of an inquiry, when the “status” of an employee is unclear, employees will not have their own counsel. Before interviewing these employees, however, corporate counsel will give what are called *Upjohn* warnings.<sup>47</sup> These warnings can take a number of forms, but often involve the following cautions: (1) the investigating attorneys represent the entity and not the individual employee being interviewed; (2) the company’s attorney-client privilege protects the confidentiality of the interview; (3) the company retains the right to decide whether to reveal to the government or others outside the company what is said during the interview; and (4) the company wishes the employees to keep the interview confidential.<sup>48</sup> Employees *can* choose not to speak to counsel. They may claim their personal Fifth Amendment rights or simply decline to cooperate. Many corporations, however, will sanction and often fire those agents who are unwilling to assist counsel. A company may have such a policy for a variety of reasons, including the corporation’s own interest in identifying malefactors, remedying the wrongdoing, and preventing further damage. That said, the DOJ’s cooperation policy certainly gives corporations a compelling incentive to take a hardline with uncooperative employees. One observer noted that “[p]rosecutors . . . expect the corporation’s lawyers to conduct an investigation for the government with tools the government does not have, particularly the threat of firing employees who refuse to provide information.”<sup>49</sup>

### C. *The Tools for Resistance*

#### 1. *Corporate Records*

The corporation and its agents cannot resist a properly drafted subpoena *duces tecum* requiring the production of corporate books and

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47. See, e.g., Duggin, *supra* note 15, *passim*.

48. See *id.* at 941–47.

49. *Programs Examine Trend Toward Seeking Corporate Waiver of Attorney-Client Privilege*, 71 U.S. L. WK., Apr. 8, 2003, at 2635.

records on Fifth Amendment grounds. Additionally, Fourth Amendment objections almost always fail. Thus, corporate actors may be compelled to gather and surrender corporate records through agents of the corporation, such as those designated as custodians of records.

Counsel's document review is not protected by a corporate Fifth Amendment right, and a company cannot defend against the production of preexisting, unprivileged materials simply based on the fact that an attorney, in investigating the misconduct alleged or upon receipt of a subpoena, reviewed the records.<sup>50</sup> But the lawyers' identification, selection, and organization of potentially probative documents is protected work product.<sup>51</sup> That is, the work-product doctrine and, in some circumstances, the attorney-client privilege can protect that which the government truly wants: the work product counsel has generated after conducting its own review of these records and winnowing the warehouses and computers full of potentially relevant material to a core set of pertinent records.

Are there legitimate reasons, aside from sheer ease, for the government to insist on provision of these materials? Certainly having the results of corporate counsel's document review will save the government time and resources. It is also important to note that government agents lack a variety of advantages corporate counsel have in reviewing corporate records. What will long remain a black box to prosecutors—the internal workings of the corporation—will likely be laid bare for the corporation's own investigators. Thus, for example, corporate lawyers can quickly come up to speed on the corporate hierarchy, chains of command, culture, standard operating procedures, and histories and personalities of the principal players, whereas prosecutors will need months, if not years, to achieve the same level of knowledge. Corporate counsel will also have access to people within the corporation who can quickly point them to the critical documents, interpret those documents, and evaluate their import.

## 2. *Witness Statements*

With respect to oral statements, "the corporation" cannot be subpoenaed to testify, and its individual agents can assert their own, personal Fifth Amendment rights. Here, then, the government has a more obvious need for the assistance of corporate counsel. Corporate counsel have a number of potential advantages over the government

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50. See, e.g., *Fisher v. United States*, 425 U.S. 391, 403–04 (1976); *Gould, Inc. v. Mitsui Mining & Smelting Co.*, 825 F.2d 676, 679–80 (2d Cir. 1987).

51. See, e.g., *Sporck v. Peil*, 759 F.2d 312 (3d Cir. 1985) (holding that an attorney's selection of documents in preparation for client deposition reflects that attorney's mental impressions).

in securing the statements of critical witnesses outside of the grand jury room. The DOJ recognizes this in its cooperation policy:

In investigating wrongdoing by or within a corporation, a prosecutor is likely to encounter several obstacles resulting from the nature of the corporation itself. It will often be difficult to determine which individual took which action on behalf of the corporation. Lines of authority and responsibility may be shared among operating divisions or departments, and records and personnel may be spread throughout the United States or even among several countries. Where the criminal conduct continued over an extended period of time, the culpable or knowledgeable personnel may have been promoted, transferred, or fired, or they may have quit or retired. Accordingly, a corporation's cooperation may be critical in identifying the culprits . . . .<sup>52</sup>

In short, corporate counsel will have a better chance of locating witnesses before evidence disappears, statutes of limitations run, and witnesses' memories fade.

As noted above, this author does not believe that a rational employee, with full information and good advice, will freely share self-incriminating information with corporate counsel that she otherwise would not share in reliance upon the protections of the corporation's attorney-client privilege. Because the employee will be told that the conversation is privileged only so long as the corporation wishes it to be, self-preservation would counsel silence.<sup>53</sup> That said, not all culpable employees *are* rational or truly understand the import of *Upjohn* warnings. Some employees will be interviewed before they or counsel realize the extent of their possible exposure, and some may take their chances in talking—or lying—to counsel, rather than facing the employment consequences of taking the Fifth.<sup>54</sup> In short, corporate counsel is likely to have access to at least some witness statements that the government will not. By the time employees receive a subpoena demanding their testimony before a grand jury, they will likely have separate counsel who will strongly advise them that the only rational course is to take the Fifth if they have any possible criminal exposure. Further, those corporate employees who do not have personal exposure will probably be more candid and forthcoming with corporate counsel—not because of the existence of the corporate privilege but rather out of loyalty to those in trouble or concerns about how ful-

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52. Thompson Memo, *supra* note 3.

53. See O'Sullivan, *supra* note 9.

54. *But cf.* Julie R. O'Sullivan, *The DOJ Risks Killing the Golden Goose Through Computer Associates/Singleton Theories of Obstruction*, 44 AM. CRIM. L. REV. 1447 (2007) (discussing the dynamic facing employees when interviewed in the course of an internal corporate investigation).

some cooperation with government investigators will affect their employer, as well as their personal employment prospects.

Should counsel decide, as is very common, to keep notes or debriefing memoranda detailing what witnesses shared with them in the course of the investigation, these materials are not subject to the Fifth Amendment shield. If their confidential nature is maintained, however, such notes and memos may be protected by the attorney-client privilege, depending upon the forum in which that evidentiary privilege is asserted.<sup>55</sup> Even without the privilege, however, they will be protected from discovery by the work-product doctrine.<sup>56</sup> Work-product protection can, in some cases, be overcome with a sufficient showing of need.<sup>57</sup> But, if the corporation's lawyers are careful to sprinkle their "opinion" throughout the notes, this protection is nearly impregnable, absent a waiver.

In sum, public corporations have virtually no choice but to investigate allegations of wrongdoing. In so doing, they are responding not just to legal, regulatory, and business imperatives, but also to the necessity of determining the extent of their criminal exposure and the course of action that may best avoid such an eventuality. The results of counsel's investigation, if properly done, will identify relevant evidence, provide insight into likely witness testimony, and evaluate the legal culpability of the corporation. The corporation cannot claim the Fifth Amendment to resist government efforts to access inculpatory evidence, whether it be documents or witness statements.<sup>58</sup> Thus, in conducting the investigation, corporate counsel will do everything possible to cover the potentially dangerous fruits of their investigation with privilege. Absent the protection of the attorney-client privilege and the work-product doctrine, counsel's work would, in many cases, give the government and others a blueprint for corporate criminal and civil liability—a blueprint paid for, in more ways than one, by the corporation.<sup>59</sup>

The DOJ seeks this blueprint, and the facts and work underlying it, through its waiver "requests." The reason corporations have waived applicable attorney-client and work-product protections, with or without explicit DOJ "requests," is that most public corporations simply do not have the bargaining power to withstand a criminal prosecution

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55. See, e.g., O'Sullivan, *supra* note 9 (discussing the *Upjohn* attorney-client privilege standard and contrasting it with the narrower tests adopted in some U.S. states and foreign countries).

56. See, e.g., *Upjohn Co. v. United States*, 449 U.S. 383, 397–402 (1981).

57. See, e.g., FED. R. CIV. P. 26(b)(3); see also *Upjohn*, 449 U.S. at 400–02.

58. See *Hale v. Henkel*, 201 U.S. 43, 70 (1906).

59. See O'Sullivan, *supra* note 9 (discussing the lack of a selective waiver doctrine).

due to the coercive circumstances outlined above. Putting the government to its burden is not even on the table.

### III. DID *HALE V. HENKEL* DENY ADVERSARIAL PROCESS TO LEGAL “PERSONS”?

The DOJ would, no doubt, note at this point that it did not create the conditions that make it exceedingly difficult for corporations to turn down prosecutors’ waiver “requests.” Prosecutors are not principally responsible for the dismal state of the federal criminal code; Congress is the true culprit there. Nor are prosecutors solely responsible for the overbroad standards controlling corporate criminal liability; although they may propose them, it is judges who ultimately decide what standards to adopt. Finally, prosecutors, again, do not set the applicable penalties, criminal or civil. Although the executive branch is responsible for agency-created penalties, such as disbarment, Congress, the U.S. Sentencing Commission, and a variety of other regulators and private actors are responsible for the onerous consequences of a corporate criminal conviction. Thus, the DOJ would likely argue that it is simply pursuing its own entirely legitimate agenda within the framework created by others.

As a matter of public policy, is this the appropriate position, or should the DOJ, in the larger interests of justice, forswear exploiting the current circumstances and abjure waiver requests? The answer to this question depends on two further queries: first, whether one believes that the current imbalance between the government and corporations is good or bad; and second, if it is a bad thing that corporations are, as is vehemently asserted by the bar, effectively denied the benefits of an adversarial criminal process, what should be done about it?

With respect to the first query—to determine whether corporations *should* be able to resist the government’s access to incriminating corporate information—it is worthwhile to return to the Supreme Court’s decision in *Hale v. Henkel*, which denied corporations the benefit of a privilege against self-incrimination.<sup>60</sup> In revisiting *Hale*, one might ask whether the Supreme Court’s decision reflected a judgment that corporations are not, in fact, as entitled as “natural” persons to the normal processes of adversarial criminal justice.

#### A. Corporate “Personhood”

What is a “corporation”? What does it mean to call a corporation a legal “person”? These questions emerged as the corporation became

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60. 201 U.S. 43, 70 (1906).

a popular form of business organization in the late nineteenth century and sparked considerable debate into the first part of the twentieth century. In the late twentieth century, corporate scholars turned to other subjects. The debate has only recently been resumed. This Article cannot capture that extensive literature in these pages and so will summarize its broad outlines, with apologies to readers for omitting the nuances of the debate.<sup>61</sup>

During the colonial period and into the nineteenth century, corporations were relatively rare for two reasons. First, as Professor Hamill explained, “[i]n the late eighteenth and early nineteenth centuries, few enterprises other than strictly public organizations needed the legal benefits offered by the corporation. . . . The size and level of business activity had not yet evolved to a point of needing the legal benefits provided by the corporate form.”<sup>62</sup> Second, corporate charters were available during this period only through political grants; there were no general incorporation statutes that permitted any willing businessperson to engage in the corporate form.<sup>63</sup> During the colonial days, corporate charters came directly from the King of England or, later, through grants of colonial assemblies.<sup>64</sup>

After independence, state legislatures chartered each corporation by special act.<sup>65</sup> Incorporation was viewed as a limited privilege flowing from explicit and specific state sanction, and the vast majority of corporate charters were issued for public purposes, such as building bridges or roads.<sup>66</sup> As a factual matter, then, the corporation was conceived of as “the creation of the legislature, owing its existence to state action, rather than to the acts of the shareholder-incorporators,”<sup>67</sup> and engaging essentially in public functions. This conception is called the “artificial entity theory” and finds its iconic expression in Justice Marshall’s opinion in *Dartmouth College v. Woodward*: “A corporation is an artificial being, invisible, intangible, and existing only in contemplation of law. Being the mere creature of law, it possesses only those properties which the charter of its creation confers upon it, either expressly, or as incidental to its very existence.”<sup>68</sup> The

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61. For an excellent treatment of the subject, see Gregory A. Mark, *The Personification of the Business Corporation in American Law*, 54 U. CHI. L. REV. 1441 (1987).

62. Susan Pace Hamill, *From Special Privilege to General Utility: A Continuation of Willard Hurst’s Study of Corporations*, 49 AM. U. L. REV. 81, 91–92 (1999).

63. *Id.* at 91–92, 103–20.

64. *Id.* at 88–89.

65. *Id.* at 89.

66. *See id.* at 92.

67. Phillip I. Blumberg, *The Corporate Entity in an Era of Multinational Corporations*, 15 DEL. J. CORP. L. 283, 292 (1990).

68. 17 U.S. (1 Wheat.) 518, 636 (1819).

most important characteristic of the artificial entity conception is its emphasis on the corporation as a creation of the state—a creation that has special privileges and thus may bear special duties to the government.

Other, competing views of the corporate entity emerged during the nineteenth century in response both to economic changes that made the corporate form more attractive as a business model and to the boom in state general incorporation statutes, which made this form available to every businessperson, not just to those able to secure a special legislative act.<sup>69</sup> Although there were various permutations, the “aggregate theory” cast the corporation as an association of individuals contracting with each other, rather than an entity created by and dependent upon the state.<sup>70</sup> This was the dominant view of the corporation during the latter half of the nineteenth century, although it by no means completely eclipsed the artificial entity theory in the Supreme Court’s jurisprudence. The aggregate theory was instrumental in giving the Supreme Court a rationale for extending constitutional rights to the corporate entity.<sup>71</sup> This theory attributes shareholders’ rights to the corporation, reasoning that “the courts will always look beyond the name of the artificial being to the individuals whom it represents.”<sup>72</sup>

Finally—at least for our purposes—in the beginning of the twentieth century, another conception of the corporation found its way into the literature and Supreme Court case law. The “natural entity theory” conceived of the corporation as neither a legal fiction nor an accumulation of its shareholders’ interests. Rather, it argued that a corporation was “an organic social reality with an existence independent of and consisting of something more than its changing shareholders. . . . [T]he corporation has its own claims, [similar to] natural

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69. Hamill, *supra* note 62, at 104–22.

70. See Mark, *supra* note 61, at 1457–58.

71. See, e.g., Blumberg, *supra* note 67, at 293; Jess M. Krannich, *The Corporate “Person”: A New Analytical Approach to a Flawed Method of Constitutional Interpretation*, 37 LOY. U. CHI. L.J. 61, 72 (2005).

72. *The Railroad Tax Cases*, 13 F. 722, 744 (D. Cal. 1882). Justice Field’s statement in the *Railroad Tax Cases* is representative:

Private corporations are, it is true, artificial persons, but . . . they consist of aggregations of individuals united for some legitimate business. . . . It would be a most singular result if a constitutional provision intended for the protection of every person against partial and discriminating legislation by the states, should cease to exert such protection the moment the person becomes a member of a corporation.

*Id.* at 743–44.

persons, that extend beyond both the circumstances of its legal creation by the state and the claims or interests of its shareholders.”<sup>73</sup>

*B. Hale v. Henkel: The Court Takes the Expedient Approach*

Far from establishing that the Court has adopted a conception of the corporation that warrants a denial of adversary process, it is evident from *Hale*, as well as other constitutional decisions involving corporations, that the Court has never settled long on any one of these, or other, competing conceptions.<sup>74</sup> The Court, as in *Hale*, has relied upon the artificial entity theory when determined to deny corporations constitutional protection, while turning to the aggregation or natural entity theories when it determined that corporations ought to be able to claim constitutional safeguards.<sup>75</sup> Its *Hale* ruling is responsive to practical concerns—such as the needs of law enforcement in pursuing corporate violators of new regulatory regimes—rather than any more abstract conceptions regarding the differences in criminal process applicable to “legal,” as opposed to “natural,” persons.

The Supreme Court heard argument in *Hale* in 1906,<sup>76</sup> when neither it nor criminal law enforcement officials had much experience with issues of corporate criminal investigations or prosecutions. Petitioner *Hale* was the secretary-treasurer of MacAndrews & Forbes Company (M&F), an affiliate of the American Tobacco Company.<sup>77</sup> M&F controlled the sale in the United States of imported licorice, which was an essential ingredient in the manufacture of tobacco.<sup>78</sup> Independent tobacco manufacturers claimed that American Tobacco Company limited the supply of licorice available to them and, as a consequence, they paid much more for licorice than did members of the “Tobacco Trust.”<sup>79</sup> “The government sought to ascertain from Mr. Hale, the Secretary of [M&F], whether these results were brought about by an agreement, combination or arrangement in violation of the law.”<sup>80</sup> Also before the Court was the case of William McAlister, who was the Secretary of the American Tobacco Company.<sup>81</sup> In his case, the grand

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73. Blumberg, *supra* note 67, at 295.

74. See, e.g., *id.*; Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793 (1996); Krannich, *supra* note 71; Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 577 (1990).

75. See *supra* note 74 and accompanying text.

76. 201 U.S. 43 (1906).

77. See Henry W. Taft, *The Tobacco Trust Decisions*, 6 COLUM. L. REV. 375, 377 (1906).

78. *Id.*

79. *Id.*

80. *Id.* at 377–78.

81. *Id.* at 378.

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jury was investigating whether his company and the Imperial Tobacco Company, a large British corporation, entered into agreements, *inter alia*, to allot all British business to the Imperial Tobacco Company and all American business to the American Tobacco Company.<sup>82</sup>

Enforcement of the Interstate Commerce Act, passed in 1887, and the Sherman Act, enacted in 1890, had, until the Tobacco Trust litigation, generally been enforced through the civil remedy of injunction. Thus, the six trust cases before the Supreme Court from 1895 to 1904 all involved suits for injunctions.<sup>83</sup> According to contemporaneous commentators, the cases shared a more significant characteristic:

In none of those cases was the policy of suppressing the facts resorted to by the defendants, for the reason, probably, that the corporations relied upon the contention that, even conceding that they had made the agreements, they were not in violation of the law. It has been mainly since the law has come to be better understood that notable instances have occurred where great corporations have resorted to obstructive measures which would, if successful, make it difficult or impossible to procure evidence by which the legality of their acts may be tested.<sup>84</sup>

The point of this history is that the *Hale* Court had no experience with federal criminal investigations of corporations, nor had the lower courts wrestled with the issue of what criminal process and rights ought to control when corporations are the target of such investigations.

McAlister and Hale were both subpoenaed by the grand jury to testify and to bring with them corporate documents responsive to a very broad subpoena *duces tecum*.<sup>85</sup> Both refused to answer questions—even over a grant of transactional immunity—or to produce the responsive books and records, and were therefore imprisoned for contempt.<sup>86</sup> It was McAlister's and Hale's petitions for writs of habeas corpus that eventually brought them before the Supreme Court in a consolidated case.<sup>87</sup>

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82. *Id.*

83. See *N. Sec. Co. v. United States*, 193 U.S. 197 (1904); *Cotting v. Kan. City Stock Yards Co.*, 183 U.S. 79 (1901); *Addyston Pipe & Steel Co. v. United States*, 175 U.S. 211 (1899); *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Mo. Freight Ass'n*, 166 U.S. 290 (1897); *United States v. E.C. Knight Co.*, 156 U.S. 1 (1895) (Sugar Trust).

84. Taft, *supra* note 77, at 377. Indeed, the question of the constitutionality of corporate criminal liability was not settled by the Court until three years after *Hale* was decided, in *New York Central & Hudson River Railroad Co. v. United States*, 212 U.S. 481, 499 (1909).

85. *Hale v. Henkel*, 201 U.S. 43, 44–58 (1906).

86. *Id.*

87. *Id.*

McAlister's and Hale's counsel argued first that a federal grand jury was limited to its common law powers and thus that it could only act after a bill of indictment had been presented to it; the Court rejected these contentions after extensive treatment of the relevant authorities.<sup>88</sup> More important for our purposes was the Court's schizophrenic treatment of the appellants' final two arguments: (1) that a corporation, through its agents, could claim a Fifth Amendment privilege against self-incrimination to resist the compelled production of incriminating testimonial and documentary evidence; and (2) that the corporation, through its agents, could claim the Fourth Amendment's bar on unreasonable searches and seizures when forced by a subpoena *duces tecum* to produce corporate books and records. To the first question, the Court ultimately said "no"; to the second, it answered "yes."

One must understand that the *Hale* Court was operating under the shadow of its 1886 decision in *Boyd v. United States*, in which it ruled that claimants doing business as a partnership were entitled under the Fourth Amendment to resist the compelled production of certain partnership business invoices.<sup>89</sup> That decision came in an in rem forfeiture action against cases of plate glass allegedly imported in violation of the revenue laws.<sup>90</sup> In *Boyd*, the Court determined first that the compelled production of documents pursuant to a subpoena *duces tecum* is a "search or seizure" within the meaning of the Fourth Amendment.<sup>91</sup> The Court went on to hold that "a compulsory production of a man's private papers, to be used in evidence against him in a proceeding to forfeit his property," is an *unreasonable* search and seizure.<sup>92</sup> In so doing, the Court used the perceived requisites of the Fifth Amendment's right against self-incrimination as the *criteria* for Fourth Amendment "reasonableness," noting that in "this regard the Fourth and Fifth Amendments run almost into each other."<sup>93</sup> That is, the Court looked to whether the compelled production would violate the claimant's Fifth Amendment rights in order to judge the Fourth

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88. *Id.* at 58–66.

89. 116 U.S. 616 (1886).

90. *Id.* at 617.

91. *Id.* at 622. Only the following portion of *Boyd* has continuing force:

It is our opinion, therefore, that a compulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the Fourth Amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure.

*Id.*

92. *Id.* at 622, 634–35.

93. *Id.* at 630.

Amendment reasonableness of the subpoena. In a decision that would dog the Court's Fifth Amendment analysis for decades—and in fact haunts it still<sup>94</sup>—the Court made the following statement:

[C]ompulsory production of the private books and papers of the owner of goods sought to be forfeited in [a quasi criminal in rem forfeiture proceeding] is compelling him to be a witness against himself, within the meaning of the Fifth Amendment to the Constitution, and is the equivalent of a search and seizure—and an unreasonable search and seizure—within the meaning of the Fourth Amendment.<sup>95</sup>

*Boyd* has been overruled in every significant doctrinal respect but one: as the *Hale* Court reaffirmed, over the government's argument to the contrary, a subpoena *duces tecum* is indeed a "search and seizure" for purposes of the Fourth Amendment.<sup>96</sup> But the *Hale* Court rejected the *Boyd* Court's analysis for testing whether such a search or seizure is constitutionally "reasonable." The Court ruled that the Fourth and Fifth Amendments do not, in fact, run together but rather are "quite distinct, having different histories, and performing separate functions."<sup>97</sup> Accordingly, the Court separated the Fourth and Fifth Amendment analyses. The focus of the Fourth Amendment reasonableness analysis is not whether the compelled production of documents would incriminate, but rather whether the "*subpoena duces tecum* is . . . too sweeping in its terms to be regarded as reasonable."<sup>98</sup> As restated in subsequent cases, the Fourth Amendment reasonableness test after *Hale* is whether "the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome."<sup>99</sup>

Disentangling the Fifth Amendment right against self-incrimination from the question of Fourth Amendment reasonableness permitted the *Hale* Court to split the baby with respect to corporate constitutional rights. In doing so, the Court exhibited a positively schizophrenic understanding of the corporate "person."

*Hale* is commonly cited for the proposition that the corporation has no Fifth Amendment right against compelled self-incrimination. Although its discussion supports this proposition and it is the practical result of the Court's reasoning, that is not what the *Hale* Court held. "The question whether a corporation is a 'person' within the meaning

94. See, e.g., *United States v. Hubbel*, 530 U.S. 27, 49 (2000) (Thomas, J., concurring).

95. *Boyd*, 116 U.S. at 634–35.

96. *Hale v. Henkel*, 201 U.S. 43, 76–77 (1906).

97. *Id.* at 72.

98. *Id.* at 76.

99. See *v. City of Seattle*, 387 U.S. 541, 544 (1967).

of [the Fifth Amendment] really does not arise,” the Court stated, because the “[t]he Amendment is limited to a person who shall be compelled in any criminal case to be a witness against *himself*.”<sup>100</sup> “The right of a person under the Fifth Amendment to refuse to incriminate himself is purely a personal privilege of the witness”; thus, “[i]t was never intended to permit him to plead the fact that some third person might be incriminated by his testimony, even though he were the agent of such person.”<sup>101</sup> In short, because the grants of immunity had removed Hale’s and McAlister’s *personal* Fifth Amendment rights, and because they could not assert the right of a third party, they could not assert whatever rights their corporate principal could claim. Because a corporate entity can never lumber into the grand jury room, smokestacks steaming, to assert the Fifth, the practical import of the *Hale* decision is that the corporation lacks a Fifth Amendment right.

Is the Court’s ruling unassailable? It is not, and this precedent, fairly viewed, is vulnerable in a number of respects. The *Hale* Court was on firm ground in asserting that a witness cannot rely on the constitutional rights of another to shield herself.<sup>102</sup> It was on much shakier ground, however, in saying that an agent cannot assert the privilege of a principal. Lawyers regularly do so, as do corporate agents, without objection by the Supreme Court. Indeed, in *Hale*, the Supreme Court upheld the right of these self-same agents to assert the Fourth Amendment rights of their corporate principals over the objection of Justice Harlan. In his concurring opinion, Justice Harlan took the position that a corporation has no Fourth Amendment right to assert and also noted that the witnesses’ “personal rights, let it be observed, were in no wise involved in the pending inquiry” and thus could not be used to resist disclosure; Harlan concluded that “[i]t was not [the witness’s] privilege to stand between the corporation and the Government in the investigation before the grand jury.”<sup>103</sup>

The *Hale* Court’s conception of the corporation may have had some sway in the Fifth Amendment result, but, given the Court’s treatment of the corporation for Fourth Amendment purposes, it is more likely that these theories simply allowed the Court to dress up results-driven holdings in convenient metaphors. For Fifth Amendment purposes, the predominant metaphor was the artificial entity conception of the

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100. *Hale*, 201 U.S. at 70 (emphasis in original).

101. *Id.* at 69–70.

102. See, e.g., Mitchell Lewis Rothman, *Life After Doe? Self-Incrimination and Business Documents*, 56 U. CIN. L. REV. 387, 403 (1987).

103. *Hale*, 201 U.S. at 78 (Harlan, J., concurring).

corporation. Indeed, the Court's reasoning in this respect is such a wonderful explication of this conception that it is worth quoting at length:

[T]he corporation is a creature of the state. It is presumed to be incorporated for the benefit of the public. It receives certain special privileges and franchises, and holds them subject to the laws of the State and the limitations of its charter. Its powers are limited by law. . . . It would be a strange anomaly to hold that a State, having chartered a corporation to make use of certain franchises, could not in the exercise of its sovereignty, inquire how these franchises had been employed, and whether they had been abused, and demand the production of the corporate books and papers for that purpose. . . . While an individual may lawfully refuse to answer incriminating questions unless protected by an immunity statute, it does not follow that a corporation, vested with special privileges and franchises, may refuse to show its hand when charged with an abuse of such privileges.<sup>104</sup>

Just two paragraphs after the above exegesis, however, the Court took a drastic turn by relying on the aggregate theory to recognize that a corporation could claim the Fourth Amendment's ban on unreasonable searches and seizures:

[By denying the corporation the benefit of the Fifth Amendment], we do not wish to be understood as holding that a corporation is not entitled to immunity, under the Fourth Amendment, against *unreasonable* searches and seizures. A corporation is, after all, but an association of individuals under an assumed name with a distinct legal entity. In organizing itself as a collective body it waives no constitutional immunities appropriate to such body. Its property cannot be taken without compensation. It can only be proceeded against by due process of law, and is protected, under the Fourteenth Amendment, against unlawful discrimination. Corporations are a necessary feature of modern business activity, and their aggregated capital has become the source of nearly all great enterprises.<sup>105</sup>

It is important to note, for purposes of assessing the strength of the *Hale* result, that four Justices disagreed with the Court's decision to "split the baby." Justice Harlan's concurring opinion expressed his belief that corporations could claim neither the Fourth nor the Fifth Amendment. In aid of this belief, he relied on the artificial being conception: "[A] corporation—'an artificial being, invisible, intangible, and existing only in contemplation of law'—cannot claim the immunity given by the Fourth Amendment; for, it is not part of the 'People,' within the meaning of that Amendment. Nor is it embraced by the

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104. *Id.* at 74–75 (majority opinion).

105. *Id.* at 76 (emphasis in original) (citation omitted).

word ‘persons’ in the [Fifth] Amendment.”<sup>106</sup> Justice McKenna wrote a separate concurrence, arguing that subpoenas *duces tecum* should not be treated like search warrants for purposes of the Fourth Amendment.<sup>107</sup> Although, for this reason, McKenna did not have to reach the question of whether corporations can claim Fourth Amendment protection, he noted that “[t]here are certainly strong reasons for the contention that if corporations cannot plead the immunity of the Fifth Amendment, they cannot plead the immunity of the Fourth Amendment.”<sup>108</sup>

Justice Brewer, in dissent, argued on behalf of himself and the Chief Justice that the corporation should have the benefit of both the Fourth and Fifth Amendments.<sup>109</sup> His analysis was founded in part on precedents finding that corporations are “persons” with rights under the Fourteenth Amendment; thus, he reasoned, corporations must also be “persons” within the meaning of the Fifth Amendment.<sup>110</sup> Further, the Court, having found that corporations are “citizens” of a state for purposes of federal court jurisdiction, Brewer argued that it could no less deny that these entities are part of the “people” granted Fourth Amendment rights.<sup>111</sup> As could be expected, he relied upon the aggregate theory.<sup>112</sup>

What, then, accounts for the Court’s Fifth Amendment holding? Many have pointed to passages in the *Hale* opinion that indicate that the Court’s decision was dictated by pure practical exigency.<sup>113</sup> For example, after concluding that appellants, as agents, could not assert the rights of their corporate principal for Fifth Amendment purposes, the *Hale* majority reasoned as follows:

As the combination or conspiracies provided against by the Sherman Anti Trust Act can ordinarily be proved only by the testimony of the parties thereto, in the person of their agents or employees,

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106. *Id.* at 78.

107. *Id.* at 82 (McKenna, J., concurring).

108. *Id.*

109. *Hale*, 201 U.S. at 83–89 (Brewer, J., dissenting).

110. *Id.* at 84–85.

111. *Id.* at 85–86.

112. *Id.* at 86.

[A corporation] is essentially but an association of individuals, to which is given certain rights and privileges, and in which is vested the legal title. The beneficial ownership is in the individuals, the corporation being simply an instrumentality by which the powers granted to these associated individuals may be exercised. As said by Chief Justice Marshall . . . : “The great object of an incorporation is to bestow the character and properties of individuality on a collective and changing body of men.”

*Id.* (quoting *Providence Bank v. Billings*, 4 U.S. (1 Pet.) 514, 562 (1830)).

113. *See, e.g.*, Rothman, *supra* note 102, at 394 (arguing that the *Hale* decision “is animated almost entirely by social control concerns”).

the privilege claimed would practically nullify the whole act of Congress. Of what use would it be for the legislature to declare these combinations unlawful if the judicial power may close the door of access to every available source of information upon the subject?<sup>114</sup>

This reading seems correct.

The Court was unconvinced that such practical imperatives controlled with respect to corporate claims to Fourth Amendment protection, even though such claims were made by the government and were argued by Justice Harlan in concurrence. In particular, Harlan argued that, if the corporation is given a Fourth Amendment right, “the power of the Government by its representatives to look into the books, records, and papers of a corporation of its own creation, to ascertain whether that corporation has obeyed or is defying the law, will be greatly curtailed, if not destroyed.”<sup>115</sup> Yet Justice Harlan failed to note that the Fourth Amendment, unlike the Fifth, is a conditional right. What is barred is the *unreasonable* search and seizure of private property, and the Court adopted in *Hale* a view that the constitutional “reasonableness” of grand jury subpoenas no longer was tied to the Fifth Amendment and concerned only whether the subpoena was sufficiently limited, defined in terms of temporal and subject-matter limitations on the volume of the document production. In short, the Court denied corporations the unqualified Fifth Amendment right against self-incrimination and accorded it the protections of the conditional Fourth Amendment right against unreasonable searches and seizures. This was a very law-enforcement friendly means of splitting the baby, but it is not one that is grounded in any consistent view of what constitutes a corporate “person” for constitutional purposes or, by extension, any belief that corporations are not entitled to the normal adversarial process of U.S. justice.

#### IV. PUBLIC POLICY

Hopefully, the above has persuaded readers of a number of circumstances, which the author at least believes to be incontestable: (1) the balance of power between defense and prosecution in corporate crime cases heavily favors the government; (2) this flows from a number of factors, including an overbroad and vague criminal code, an overly generous standard of criminal liability, onerous and diverse corporate penalties upon conviction, and the lack of a corporate Fifth Amendment privilege; (3) the forced “waiver” issue that has so consumed the debate is the “last straw,” which accounts for its high profile in the

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114. 201 U.S. at 70.

115. *Id.* at 78 (Harlan, J., concurring).

literature but perhaps distracts from what should be the principle focus of policymakers and legislators—that is, the source of the felt compulsion to waive rather than the consequences of such waivers; (4) *if*, that is, they conclude that the existing failure to provide corporate defendants the benefits of the adversarial system is problematic.

This Article attempts to redirect the debate from its current fixation on privilege waivers to the real issue: should the current state of affairs in corporate criminal investigation—that is the current imbalance in power—be redressed, and, if so, how? This Article does not attempt to comprehensively answer those questions in these pages but offers a few preliminary observations below.

First, if the answer to the appropriate treatment of corporations in criminal law lies in theories of corporate “personhood,” the appropriate paradigm to be applied in this context would be the aggregate theory. Because the predominant standard of liability, *respondeat superior*, does not take any account of the corporate entity’s culpability as an organization, but only looks through the entity to the conduct of the individuals, this seems logical. It also seems fair, given the drastic consequences that corporate criminal liability can have for the various aggregations of persons associated with it.

Second, regardless of how one conceptualizes an organizational defendant, the logic of our system would seem to demand that corporations be accorded the same process as individuals:

The central precept of adversary process is that out of the sharp class of proofs presented by adversaries in a highly structured forensic setting is most likely to come the information from which a neutral and passive decision maker can resolve a litigated dispute in a manner that is acceptable both to the parties and to society.<sup>116</sup>

Why does this “central precept” not apply as much to corporations as to individuals? The author, at least, has heard no convincing rationale for a distinction in this regard.

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116. Stephan Landsman, *A Brief Survey of the Development of the Adversary System*, 44 OHIO ST. L.J. 713, 714 (1983). There are, of course, those who argue that the adversary system is, for a variety of reasons, not the best way of resolving controversies. See, e.g., Kenneth J. Melilli, *Prosecutorial Discretion in an Adversary System*, 1992 BYU L. REV. 669; Carrie Menkel-Meadow, *The Trouble with the Adversary System in a Postmodern, Multicultural World*, 38 WM. & MARY L. REV. 5 (1996). Many participants in the federal criminal justice system, including former prosecutors, argue that if the system was ever adversarial, it is not so today in individual as well as corporate cases. See, e.g., Gerard E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117 (1998). With plea rates consistently hovering at around 95%, it is difficult to argue with Judge Lynch when he asserts that “the American system as it actually operates in most cases looks much more like what common lawyers would describe as a non-adversarial, administrative system of justice than like the adversarial model they idealize.” *Id.* at 2118. That said, this Article obviously emphasizes cases involving the investigation of alleged corporate criminality.

Third, even if one were to accept that adversity is an overrated virtue in the case of a corporate subject or target, presumably *some* process is appropriate through which a disinterested evaluator may review prosecutorial choices. The alternative system of criminal justice most familiar to American readers is the so-called “inquisitorial” system, which is employed in many parts of Europe.<sup>117</sup> Yet, if corporations are not privy to anything approaching truly adversarial process in criminal proceedings, they also do not receive the institutional safeguards built into an inquisitorial system of justice.

It is difficult to make generalizations about the conduct of all inquisitorial systems, but they often share procedural features that are designed to arrive at a fair, impartial “truth,” largely without adversarial testing. It is the investigation, not the trial, that is the heart of the truth-finding process in inquisitorial systems, and one of the important features of the investigation is the role of prosecutors and investigating magistrates in gathering both inculpatory and exculpatory evidence. Rather than looking to prevail in a contest with the defendant, their commitment is principally a bureaucratic one—to find out all the facts, let the chips fall where they may, with the object of having a neutral judge ultimately sort out the allocation of criminal responsibility. There will be layers of bureaucrats investigating, supervising the investigation, and reviewing the investigative results. “The number of official participants in the multi-stage investigation, each subject to supervision, is an inherent check on the [prosecutor’s] power to make independent decisions. Moreover, as civil servants working within a bureaucratic hierarchy, inquisitorial investigators have no reason to be partial and indeed are expected to be impartial.”<sup>118</sup> In many civil law systems, prosecutors have, at least in theory, no discretion in charging; if they believe that a serious crime has been committed, they must bring it to the attention of the investigating magistrate. Even if a defendant elects to confess or tries to plead guilty, in many civil law systems that does not conclude the inquiry. A trial—albeit a much more informal one than is the norm in the United States—is required in every case, because the state’s commitment is to satisfy itself as to the guilt of the defendant.

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117. In the interests of illustrating my point briefly and concisely, I will ignore for the moment the existence of other paradigms and the objections of commentators that the line between these two systems is cloudy and that the characterizations are often misapplied.

118. Geraldine Szott Moohr, *Prosecutorial Power in an Adversarial System: Lessons from Current White Collar Cases and the Inquisitorial Model*, 8 *BUFF. CRIM. L. REV.* 165, 200–01 (2004).

Federal prosecutors in the United States are said to have a dual obligation: to be both zealous advocates and agents of justice.<sup>119</sup> But there is no good explanation for prosecutors' "do justice" obligation that does not, in the end, depend heavily upon the notion that prosecutors should do what is "right" in their minds, and what is "right" is heavily influenced by the adversarial contest in which they are engaged. Given prosecutors' adversarial orientation and training, they are not suited to conduct the type of neutral investigation that is at least theoretically the hallmark of "inquisitorial" justice systems. As Professor Geraldine Szott Moohr concluded in comparing U.S. federal prosecutors with their counterparts in France, "[U.S.] federal prosecutor[s are] freer to act on any unconscious bias that can result from a close association with the investigation. . . . On the whole, the inquisitorial prosecutor, while explicitly in charge of the inquiry, exercises less discretion and has less power than the federal prosecutor investigating white collar crimes."<sup>120</sup>

Certainly U.S. federal prosecutors have no obligation to search for exculpatory evidence, no obligation to turn over whatever they find in the course of their investigation until a trial is certain, and only the barest of obligations under reigning Supreme Court case law at that point. Once a defendant is charged, the prosecutor's job, as it is generally conceived, is to convict her. Prosecutors in the United States can bring their considerable discretion in charging, as well as all the coercive powers discussed above, to bear on a defendant in order to secure guilty pleas; the plea rates in federal court, which hover around 95%, attest to this reality.<sup>121</sup> Once a defendant elects to plead guilty, the only "process" to which she is entitled is a plea hearing, at which a judge ascertains that the plea is knowing, intelligent, and voluntary. Although judges may ask a defendant to "allocute," that is, to concede guilt, there is no judicial "trial" or even a cursory review of evidence.

In sum, corporate subjects and targets of criminal investigations can claim the protections of neither adversarial nor inquisitorial justice to have their criminal liability impartially and reliably tested.<sup>122</sup> This status quo is quite simply unacceptable in a country that prides itself on the rule of law and the fairness of its criminal justice processes. It is also unacceptable for reasons sounding in justice and efficiency.

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119. See, e.g., *Berger v. United States*, 295 U.S. 78, 88 (1935); ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE Standard 3-1.2(b) (3d ed. 1993).

120. Moohr, *supra* note 118, at 201.

121. See, e.g., U.S. SENTENCING COMM'N, 2006 ANNUAL REPORT 33, available at [http://www.ussc.gov/ANNRPT/2006/chap5\\_06.pdf](http://www.ussc.gov/ANNRPT/2006/chap5_06.pdf) (95.7% in 2006).

122. Moohr, *supra* note 118, at 201.

These reasons may be self-evident but are rarely acknowledged by the government in its efforts to press corporations into a “crime-fighting partnership.”

First, it should go without saying that, as strong as the public interest is in enabling the government efficiently and effectively to allocate its investigatory resources to fight corporate criminality, it is certainly not the *only* value worth considering. It must be acknowledged, although it almost never is, that not *every* government investigation is worthy and not *every* theory of corporate liability is sound. Criminal statutes commonly applied in white-collar cases are often vaguely worded and elastic in their application. This indeterminacy in many of the most frequently invoked white-collar statutory provisions means that the question in many white-collar cases is not what the defendant did, but rather whether what the defendant did was a crime.<sup>123</sup> If prosecutors are able to “roll” corporations on any theory at all—whether or not what actually happened is or should be deemed a crime under the statute—the law, public, and innocent corporate constituencies suffer.

Prosecutors, by selecting theories of prosecution, and judges, by responding to them, have essentially created a common law of federal crime, which gives substance to the vague words of the U.S. Code. The public interest in having a reasonably understandable set of criminal prohibitions, then, is unequivocally served by empowering corporate counsel to resist the government’s attempts to pressure a plea and to have a meaningful opportunity to have an impartial arbiter test the viability of prosecutorial legal theories.

Finally, as harmful as corporate crime may be in any number of respects, the harm of an overzealous or unwise prosecution is also great. The stakes in corporate crime cases are often very high, measured both in terms of dollars and the effect that criminal or regulatory action can have on the livelihood and lives of countless innocent persons, including blameless employees and shareholders. Professor John Coffee summarized the “flow-through” effects of a corporate prosecution best: “[a]xiomatically, corporations do not bear the ultimate cost of the [criminal sanction]; . . . put simply, when the corporation catches a cold, someone else sneezes. This overspill of the penalty initially imposed on the corporation has at least four distinct levels, each progressively more serious”: penalizing shareholders, bondholders and other creditors, employees, and even consumers.<sup>124</sup>

123. O’SULLIVAN, *supra* note 27, at 43–44.

124. 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, 401–02 (1981).

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*DOJ PRIVILEGE WAIVERS*

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## V. CONCLUSION

The DOJ's waiver policy is the last straw in the death of adversity in corporate crime cases. It provides a convenient target for the defense bar and one upon which defense counsel, whose cause is not always a political winner, may be able to enlist the help of the many lawyers in Congress. But do not be distracted by what is ultimately a symptom of a much larger malady. It is the death of adversity—and the *many* circumstances that have created the felt compulsion for corporations to forgo resistance—that ought to be the focus of critical inquiry and public policy debate.

