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## CORPORATE CONFESSIONS

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### ABSTRACT

*In corporate crime investigations, when prosecutors pursue charges against both employees and corporations, confessions raise several novel questions without clear answers in constitutional criminal procedure. First, corporations confess. The firm, a target of a criminal investigation, may itself admit to crimes by employees as part of a settlement agreement with prosecutors. While useful to study in their impact and form, as a constitutional matter such confessions can not be coerced; the Supreme Court has adopted a “collective entity rule” that corporate persons may not invoke Fifth Amendment privilege. Second, before itself confessing, the firm may encourage employees to provide statements to law enforcement, placing some in the precarious position of deciding whether to speak and inculcate themselves or invoke Fifth Amendment privilege and be disciplined or fired. The question then arises whether the Fifth Amendment protects such employees. This Article develops how the Fifth Amendment, as interpreted by the Supreme Court in its line of “penalty cases,” offers scant protection absent substantial formal cooperation between prosecutors and the employer. Instead, cooperation with internal investigators and law enforcement will be structured by employment contracts and a firm’s interest in avoiding conflicts of interest and formation of unintended attorney-client relationships between employees and corporate counsel. Thus, not only may the corporation confess, but the environment in which employee confessions occur is largely defined by interests of the corporation.*

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## INTRODUCTION

Confessions during corporate crime investigations, unlike confessions made while under police custody, implicate relationships between corporations and employees far more than constitutional criminal procedure. In cases involving custodial interrogations, the Supreme Court adopted Fifth Amendment protections, including the *Miranda* warnings, intended to remedy the coercion inherent when police question an unrepresented suspect in an isolated room, and the voluntariness standard, that assesses police pressure ranging from psychological tactics, threats of violence, and torture. In corporate crime investigations, however, confessions arise in a far more genteel environment. Employees are interviewed at their workplace, by corporate counsel, or also by independent auditors, regulators or law enforcement.

Prior to any prosecution, the firm, a target of a criminal investigation, may itself admit to crimes by employees as part of a settlement agreement with prosecutors. Corporations confess, and this Article examines recent prosecution agreements in which they confess and briefly considers the implications of such confessions. Such confessions may increasingly be used to inculcate other entities and employees. As a constitutional matter, however, such confessions may not be considered coerced by the state. The Supreme Court has adopted a “collective entity rule” that corporate persons, which lack any state of mind, lack Fifth Amendment privilege.<sup>1</sup>

The same is not the case for employees, the second subject of this Article. Before itself confessing, the firm may encourage employees to provide statements to law enforcement, placing some in a precarious position of deciding whether to speak and incriminate themselves or invoke Fifth Amendment privilege and not incriminate themselves, but as a result face discipline or termination by their employer. The question then arises whether the Fifth Amendment protects such employees. This Article develops how criminal procedure offers scant protection, while instead employment relationships structure cooperation with law enforcement.

In response to a series of corporate governance scandals, the Department of Justice (DOJ) and federal prosecutors now investigate corporate conduct and pursue charges against corporations and their employees with far greater frequency than in the past.<sup>2</sup> Following the

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<sup>1</sup> See *Braswell v. United States*, 487 U.S. 99, 105 (1988) (“[A] corporation has no Fifth Amendment privilege . . .”).

<sup>2</sup> See Stephen Labaton, *Downturn and Shift in Population Feed Boom in White-Collar Crime*, N.Y. TIMES, June 2, 2002, § 1, at 11; Brandon L. Garrett, *Structural Reform Prosecution*,

January, 2003 DOJ guidelines known as the Thompson Memorandum, updated in several revised Memoranda, federal prosecutors typically defer prosecution if a firm will agree to adopt compliance programs, admit its guilt, and more controversial, cooperate with any investigation or prosecution of current or former employees.<sup>3</sup> Criminal defense attorneys, legislators and several legal scholars have complained that in doing so, prosecutors use their leverage over the corporation to “coerce” statements from vulnerable employees.<sup>4</sup> Several scholars who have examined the issue in more depth have concluded the Fifth Amendment does not readily apply to such criminal investigations.<sup>5</sup>

The legal contention underlying the controversy, premised on the Supreme Court’s line of “penalty cases”<sup>6</sup> beginning with *Garrity v. New Jersey*,<sup>7</sup> is that the Fifth Amendment privilege against self-incrimination

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93 VA. L. REV. 853 (2007) [hereinafter Garrett, *Structural Reform*].

<sup>3</sup> See *infra* note 15.

<sup>4</sup> Practitioners and some scholars have argued that the penalty cases apply to the DOJ’s charging policies, though typically only in a conclusory fashion. See, e.g., Am. Bar Ass’n et al., *Task Force On Attorney-Client Privilege: Report to the House of Delegates* 17 (2006), available at <http://www.abanet.org/media/docs/302Brevised.pdf> (stating that the DOJ’s charging practices “can also result in the organization’s Employees being unfairly deprived of their Constitutional rights to decline to be interviewed by government investigators and to seek the assistance of counsel before speaking with the government.”); Nicolas Grabar, *Interim Report Of The Committee On Capital Markets Regulation*, 1601 PLI/CORP 11, 113 (2007) (“because the cost of defending complex criminal prosecutions is so severe, a decision not to advance attorneys’ fees effectively forces capitulation of individuals to prosecutorial demands, irrespective of guilt or innocence, thus burdening Fifth Amendment and Sixth Amendment rights”); George Ellard, *Making the Silent Speak and the Informed Wary*, 42 AM. CRIM. L. REV. 985, 991 (2005); Lawrence D. Finder, *Internal Investigations: Consequences of the Federal Deputation of Corporate America*, 45 S. TEX. L. REV. 111, 122 (2003) (“Information gathered by the corporation and subsequently disclosed to the government may circumvent an employee’s Fifth Amendment protection against self-incrimination.”); Colin P. Marks, *Thompson/McNulty Memo Internal Investigations: Ethical Concerns of the “Deputized” Counsel*, 38 ST. MARY’S L.J. 1065, 1095 (2007) (“If an employee consents to the interview and waives Fifth Amendment protections only out of a fear of termination, it could be argued that the attorney is using methods of obtaining evidence that violate the employee’s constitutional rights.”); Earl J. Silbert & Demme Doufekias Joannou, *Under Pressure to Catch the Crooks: The Impact of Corporate Privilege Waivers on the Adversarial System*, 43 AM. CRIM. L. REV. 1225, 1238 (2006).

<sup>5</sup> See Lisa Kern Griffin, *Compelled Cooperation and the New Corporate Criminal Procedure*, 82 N.Y.U. L. REV. 311 (2007); Samuel W. Buell, *Criminal Procedure Within the Firm*, 59 STAN. L. REV. 1613 (2007); Preet Bharara, *Corporations Cry Uncle and Their Employees Cry Foul: Rethinking Prosecutorial Pressure on Corporate Defendants*, 44 AM. CRIM. L. REV. 53 (2007). As will be developed further, none of these articles suggest that existing law supports the type of extension of the penalty cases that critics of DOJ policy describe. Without doing these excellent pieces justice, but rather to briefly state some of their conclusions: Lisa Griffin argues that the penalty cases apply not at the charging stage, but in the context of deferred prosecution agreements in which a complex formal relationship exists between prosecutors and the entity; Sam Buell argues that an extension of the cases at the charging stage is unsupported by case law and inadvisable for a range of practical and policy reasons; and Preet Bharara describes why such an extension is unlikely, particularly given Supreme Court rulings on other privilege issues in corporate prosecutions.

<sup>6</sup> *McKune v. Lile*, 536 U.S. 24, 40 (2002).

<sup>7</sup> 385 U.S. 493 (1967).

is violated when a corporation threatened with indictment pressures employees to provide statements to law enforcement. The pressure applied is economic. The firm threatens to terminate uncooperative employees or deny advancement of attorneys' fees. Many critics cited to Judge Lewis A. Kaplan's July 2006 opinion in *United States v. Stein*, finding that after the government "threatened KPMG with the corporate equivalent of capital punishment," as a result, "KPMG took the only course open to it," and "exerted substantial pressure on its employees to waive their constitutional rights."<sup>8</sup> Judge Kaplan suppressed inculpatory statements by two employees, decrying the use of the Thompson Memo by prosecutors to produce "the exertion of enormous economic power by the employer upon its employees to sacrifice their constitutional rights."<sup>9</sup> The president of the American Bar Association called the Thompson Memorandum approach "an affront to the Bill of Rights, particularly the Fifth Amendment."<sup>10</sup> In response to this outcry, Congress threatened legislation, and the DOJ has so far twice modified the Thompson Memo.<sup>11</sup> Most recently, the Second Circuit affirmed Kaplan's decision, holding that the factual findings that KPMG disciplined employees due to prosecutors' conduct were not clearly erroneous.<sup>12</sup>

This Article argues that despite widespread and justified concern regarding the unenviable position employees may be placed in during such criminal investigations, the legal contention that such a situation violates the Fifth Amendment remains equivocal and of limited application.<sup>13</sup> Upon a closer examination, the penalty cases do not readily apply to the situation confronting many white-collar defendants facing potential criminal charges. The Court's rulings extend only to situations in which the state statutes or orders directly threaten dire and career-ending consequences upon employees for failing to waive privilege. Second, the state action requirement cannot be satisfied if the state does not directly impose any penalty and does not collaborate in the firm's efforts to penalize employees, but rather considers the firm a target. There may be state action, however, when a firm cooperates with prosecutors, particularly in the implementation of a deferred prosecution agreement. Third, private employee discipline may not satisfy the heightened standard required to show involuntary waiver of privilege in the non-custodial context.

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<sup>8</sup> U.S. v. Stein (*Stein II*), 440 F. Supp. 2d 315, 319 (S.D.N.Y. 2006).

<sup>9</sup> *Id.* at 337.

<sup>10</sup> Michael S. Greco, *U.S. Should Rethink Attorney-Client Policy*, THE MONT. LAW., May 2006, at 24, 24.

<sup>11</sup> See *infra* note 15.

<sup>12</sup> U.S. v. Stein, 541 F.3d 130 (2d Cir. 2008).

<sup>13</sup> See Geraldine Szott Moohr, *On the Prospects of Deterring Corporate Crime*, 2 J. BUS. & TECH. L. (2007), available at <http://ssrn.com/abstract=1001707>.

This Article hopes to reorient the debate by emphasizing the primary role of employment relationships. Employees should receive guidance on their rights, but statutory, regulatory and contractual relationships inform employment relationships and primarily define employee cooperation with criminal investigations. This Article concludes examining protections non-constitutional in origin that better safeguard employee rights, including *Upjohn* warnings, warnings of possible conflicts of interest, and other related warnings. These warnings are provided by employers primarily because such warnings serve employer interests in avoiding uncertainty, waiver, and conflicts.

### I. CONFESSIONS BY CORPORATIONS

Corporations not only confess, but they do so when facing substantial government pressure from a threat of an indictment that may have dire collateral consequences. Federal prosecutors appear to highly value confessions by the entity itself and have secured admissions in almost all deferred and non-prosecution agreements entered in recent years. These confessions have not previously been examined. However, not only do confessions by corporations receive no Fifth Amendment protection, but they may themselves have dramatic consequences for employees and for other corporations.

In the recent wave of corporate prosecutions, the DOJ, including for these purposes the various U.S. Attorneys offices, typically suspends prosecution of corporations before an indictment, much less a conviction, by entering detailed agreements. The agreements impose a series of compliance requirements, including admissions of wrongdoing, payment of fines and restitution, and full cooperation with prosecutors in ongoing investigations of individual current and former employees.<sup>14</sup> Corporations can and do confess, through the statements they make in such agreements. In the past this rarely arose, but the DOJ has obtained increasingly detailed admissions as a matter of course when securing such agreements.

The Thompson Memo, promulgated in January 2003, details the

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<sup>14</sup> For a description of this approach and analysis of agreements entered through 2007, see Garrett, *Structural Reform*, *supra* note 2. For updated data current through January 2008 presented in testimony to Congress, see *Deferred Prosecution and Corporate Settlement Agreements: Hearing Before the Subcomm. On Commercial and Administrative Law of the H. Comm. on the Judiciary*, 110th Cong. (Mar. 11, 2008) (statement of Brandon L. Garrett), available at [http://judiciary.house.gov/hearings/hear\\_031108\\_2.html](http://judiciary.house.gov/hearings/hear_031108_2.html). The agreements themselves have been posted on a UVA Law Library resource website, together with updated data concerning such agreements. *Prosecution Agreements*, UVA LAW LIBRARY, <http://www.law.virginia.edu/agreements> (last visited Nov. 15, 2008).

DOJ's approach towards charging organizations.<sup>15</sup> That Memo cited to factors that should inform charging decisions, and though "timely and voluntary" disclosure of wrongdoing is a factor, nowhere to be found is a reference to admissions of guilt. Instead, the Memo emphasized the importance of "the authenticity of a corporation's cooperation" and reform efforts to create effective compliance programs. The Organizational Sentencing Guidelines, however, reward with a sentence reduction a firm's "affirmative acceptance of responsibility" for its criminal conduct.<sup>16</sup>

Despite no official guidance on the inclusion of admissions of guilt, prosecutors find such admissions to be important to obtaining lenient treatment. In reviewing all such agreements entered during the first five years after the promulgation of the Thompson Memo in 2003, almost all such deferred and non-prosecution agreements contained admissions of wrongdoing or acceptance of responsibility for the charged acts. Out of forty-two such agreements, only six did not include such admissions.<sup>17</sup> Similarly, all but three of the 51 subsequent agreements entered in 2007 through Fall 2008 contained admissions of wrongdoing.<sup>18</sup>

The KPMG agreement provides an example of a lengthy and quite detailed corporate confession. The agreement begins with a section titled "Acceptance of Responsibility for Violation of Law."<sup>19</sup> That section, stating that KPMG "[a]ssisted high net worth United States citizens to evade United States individual income taxes on billions of dollars in capital gain and ordinary income by developing, promoting and implementing unregistered and fraudulent tax shelters," listed five patterns of fraudulent and illegal conduct. The agreement then, in an appended single-spaced, ten page statement of facts, describes the conduct in detail, stating that it was "deliberately approved and perpetrated at the highest levels of KPMG's tax management, and involved dozens of KPMG partners and other personnel," and recounting the development, marketing and the concealment of those tax shelters from the IRS, together with the "false and fraudulent"

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<sup>15</sup> See Memorandum from Dep. Atty. Gen. Larry Thompson to United States Attorneys: Principles of Federal Prosecution of Business Organizations, Part I.B (Jan. 20, 2003), available at [http://www.usdoj.gov/dag/business\\_organizations.pdf](http://www.usdoj.gov/dag/business_organizations.pdf) (hereinafter Thompson Memo).

<sup>16</sup> U.S. Sentencing Guidelines Manual § 8C2.5(g) (2006).

<sup>17</sup> Those were the agreements with Adelphia Communications, Hitachi, NEC Corporation, M.C.I., Royal Ahold, Stryker Orthopedics, and Tommy Hilfiger. See *Prosecution Agreements*, *supra* note 14.

<sup>18</sup> The Collins & Aikman, NetVersant and Omega Advisors agreements did not include an acceptance of responsibility. See *id.*

<sup>19</sup> Letter from David N. Kelley, U.S. Attorney, S.D.N.Y., to Robert S. Bennett, Attorney for KPMG para. 2 (Aug. 26, 2005), available at <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgdpagmt.pdf>.

representations made concerning their legality.<sup>20</sup>

Notable among firms that did not sign such an agreement was Arthur Andersen LLP, which apparently objected to entering a deferred prosecution agreement in which it would admit wrongdoing and accept responsibility as a firm.<sup>21</sup> Having failed to reach an agreement, Andersen was prosecuted and ultimately dissolved.<sup>22</sup> That failed negotiation provides some evidence of the importance that prosecutors attach to the entity admission of guilt.

Why is that the case; what additional purpose does an admission of guilt from an artificial entity serve? Perhaps prosecutors need not ask any more of a corporation if it makes sufficient efforts to cooperate, discipline responsible employees, fashion effective compliance programs, and pay fines and restitution. Those acts could demonstrate the corporation's "acceptance of responsibility" as an entity. There are good reasons not to require a confession, and instead secure something like a *nolo contendere* plea at the charging stage.<sup>23</sup> A confession brings with it reputational costs to the corporation, though not to the degree that it would if the corporation pleaded guilty and had a conviction.

Additional terms in these agreements shed light on why the corporate confession may be so sought after. The agreements almost all state that should the corporate breach the agreement, the DOJ may unilaterally declare a breach and then prosecute.<sup>24</sup> The agreements typically provide that as to its detailed admissions of wrongdoing, the entity "agrees it will not contest the admissibility into evidence of the Statement of Facts in any subsequent criminal proceedings occurring in the event of a breach of this Agreement."<sup>25</sup> Should prosecutors declare a breach and prosecute, they may rely fully on the admissions of criminality. Thus, the confession provides prosecutors with enormous leverage during the implementation of the agreement. As discussed

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<sup>20</sup> Press Release, Dep't of Justice, KPMG Statement of Facts (Aug. 26, 2005), available at <http://www.usdoj.gov/usao/nys/pressreleases/August05/kpmgstatementoffacts.pdf>.

<sup>21</sup> See Kathleen Brickey, *Andersen's Fall From Grace*, 81 WASH. U. L. Q. 917, 945 n.48 (2003).

<sup>22</sup> See generally *id.*

<sup>23</sup> See John C. Coffee, "No Soul to Damn: No Body to Kick": An Unscandalized Inquiry into the Problem of Corporate Punishment, 79 MICH. L. REV. 386, 441 (1981) (recommending use of *nolo contendere* pleas in entity prosecutions as a possible means to avoid collateral consequences).

<sup>24</sup> See Garrett, *Structural Reform*, *supra* note 2, at Part III.B. The SEC has similarly adopted a policy that parties may not deny, in subsequent proceedings, the factual allegations from complaints in prior SEC consent decrees. See also *In re Marshall E. Melton and Asset Mgmt. & Research, Inc.*, Admin. Proc. File No. 3-9865 (July 25, 2003), available at <http://www.sec.gov/litigation/opinions/ia-2151.htm>.

<sup>25</sup> See, e.g., Press Release, Dep't of Justice, U.S. Attorney's Office, S.D. Tex. (June 16, 2006), available at <http://www.state.gov/m/ds/rls/67985.htm>; see also Garrett, *Structural Reform*, *supra* note 2, at Part III, regarding legal questions that may arise should prosecutors unilaterally declare a breach of such an agreement.

further below, the confession may provide prosecutors and regulators with information they can use to exercise leverage over other individuals and firms as well.

While corporations entering into deferred prosecution agreements do so under government pressure, they can not be coerced into admitting criminal acts, at least as a constitutional matter. Under the “collective entity rule,” corporate persons can not claim Fifth Amendment privilege and thus lack any constitutional right to be free from coercion.<sup>26</sup> Even if the “collective entity rule” did not exist, no privilege would likely apply regarding admissions made in a prosecution agreement. Such agreements are contractual and entered at arms-length during a bargaining process. This makes it all the more surprising that not only do deferred prosecution agreements universally contain admissions of guilt, but they also often state that the corporation “is entering into this Agreement voluntarily,” perhaps for public relations purposes, or perhaps lifting language from similar agreements involving individual defendants.<sup>27</sup>

Individual people must sign the confession on behalf of the corporation. The agreements are often signed by counsel and sometimes also by officers of the corporation who affirm that they entered into the agreement voluntarily, or they include documentation of a board resolution. For example, in the Ingersoll-Rand deferred prosecution agreement, the CEO signed a certificate stating that he was “duly authorized by Ingersoll to execute this Agreement on behalf of Ingersoll and all the subsidiaries named herein.”<sup>28</sup> He then stated, “No promises or inducements have been made other than those contained in this Agreement. Furthermore, no one has threatened or forced me, or to my knowledge any person . . . in any way to enter into this agreement.”<sup>29</sup> Similarly, counsel provided a certificate stating: “To my knowledge, Ingersoll’s decision to enter into this Agreement is an informed and voluntary one.”<sup>30</sup>

A separate set of questions arise regarding the impact of such admissions of wrongdoing in other prosecutions. The investigative material obtained during the process of obtaining such admissions may prove highly useful in prosecutions of individual defendants, and also other corporations. In a subsequent prosecution of employees, the entity admissions would be hearsay and would raise confrontation

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<sup>26</sup> See *Braswell v. United States*, 487 U.S. 99, 105 (1988) (“[A] corporation has no Fifth Amendment privilege . . .”).

<sup>27</sup> See, e.g., Boeing Deferred Prosecution Agreement para. 5 (June 30, 2006), available at <http://www.law.virginia.edu/pdf/faculty/garrett/boeing.pdf>.

<sup>28</sup> Ingersoll-Rand Deferred Prosecution Agreement, Officer’s Certificate (Oct. 10, 2007), available at <http://www.law.virginia.edu/pdf/faculty/garrett/ingersollrand.pdf>.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*, Certificate of Counsel.

clause problems, but could be used as impeachment to cross-examine the entity that confessed, presumably through an authorized representative.<sup>31</sup> Questions of employee discipline may arise. Some of the agreements require cooperation and also that employees not contradict the entity admissions; doing so might place the corporation in breach of the agreement and then subject to prosecution.<sup>32</sup> For example, the Pfizer agreement states that not only does the entity “expressly and unequivocally admit . . . that it knowingly, intentionally and willfully committed the crime charged in the Information,” but that “Pfizer Inc. will not make any public statement contradicting anything set forth in” the Information.<sup>33</sup> Employees may therefore be reluctant to assist the defense; as defense attorneys have pointed out, though enforcement of such terms might undermine the credibility of the prosecution case.<sup>34</sup>

Of far more use to prosecutors seeking to leverage their limited resources, may be the use of entity confessions to support prosecutions of other corporations.<sup>35</sup> In cases involving industry collusion, one player after another might be targeted, or less culpable corporate partners might be targeted first, to go after the “big fish” among a number of corporations. Questions will arise whether and under what circumstances prosecutors may use the statements or information provided by the cooperating entity to support such entity prosecutions.<sup>36</sup> The admissions of the corporation may include information gleaned from internal and government investigations and quite detailed accounts of wrongdoing. Prosecutors could make powerful use of that information in subsequent prosecutions of another firm, or of another firm’s employees. In recent cases, prosecutors have begun to do just

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<sup>31</sup> See *Pointer v. Texas*, 380 U.S. 400 (1965); Paul Marcus, *Re-evaluating Large Multiple-Defendant Criminal Prosecutions*, 11 WM. & MARY BILL RTS. J. 67 (2002).

<sup>32</sup> See Richard B. Zabel & James J. Benjamin Jr., “*Queen for a Day*” or “*Courtesan for a Day*”: *The Sixth Amendment Limits to Proffer Agreements*, 15 No. 9 WHITE-COLLAR CRIME REP. 1 (2001), U.S. v. Duffy, 133 F. Supp. 2d 213 (E.D.N.Y. 2001); Leonard Post, *Deferred Prosecution Deal Raises Objections*, NAT’L L.J., Jan. 30, 2006, at 4, available at <http://www.law.com/jsp/ihc/PubArticleIHC.jsp?id=1138788312206>; Brandon L. Garrett, Essay, *United States v. Goliath*, 93 VA. L. REV. IN BRIEF 105, 107-08 (2007), <http://www.virginialawreview.org/inbrief/2007/06/18/garrett.pdf> [hereinafter Garrett, *Goliath*] (describing cooperation requirements in deferred prosecution agreements).

<sup>33</sup> See Side Letter Agreement with Pfizer (Mar. 27, 2007), available at <http://www.law.virginia.edu/pdf/faculty/garrett/pfizer.pdf>.

<sup>34</sup> See Post, *supra* note 32 (quoting Stephanie Martz of the National Association of Criminal Defense Lawyers, while noting that “the threat to witnesses of being fired if they don’t adhere to a government-approved truth could backfire on prosecutors. ‘Not a single employee is going to be a credible witness.’”).

<sup>35</sup> On the lack of federal resources and resulting “radical underenforcement,” see Daniel C. Richman & William J. Stuntz, Essay, *Al Capone’s Revenge: An Essay on the Political Economy of Pretextual Prosecution*, 105 COLUM. L. REV. 583, 613-14 (2005).

<sup>36</sup> See Garrett, *Structural Reform*, *supra* note 2, at 867 (regarding possible use of these admissions by the IRS and the DOJ).

that.<sup>37</sup> Again, no Fifth Amendment issues arise as to such detailed admissions of an entity's wrongdoing, but such statements may prove highly valuable to the government in corporate prosecutions.

## II. CONFESSIONS BY INDIVIDUALS AND THE PENALTY CASES

### A. DOJ Guidelines and the KPMG Case

The confessions that have attracted controversy are not those of the corporation, but those of the individual current or former employees who provide statements during a criminal investigation. As to those sorts of inculpatory statements, the Fifth Amendment's application remains murkier. The DOJ's prosecution agreements not only place a focus on structural reform, but they also facilitate the prosecution of the individual employees deemed to have played the most serious role, who after all, may be punished with fewer collateral consequences to blameless employees and shareholders. Thus, the Thompson Memo emphasized that the "[p]rosecution of a corporation is not a substitute for the prosecution of criminally culpable individuals within or without the corporation" and that "[o]nly rarely should provable individual culpability not be pursued, even in the face of offers of corporate guilty pleas."<sup>38</sup>

Unlike in the typical criminal case, federal prosecutors provided advance guidance on what sorts of cooperation they value. The Thompson Memo listed as factors, "the adequacy of the prosecution of individuals responsible for the company's malfeasance" and "the corporation's timely and voluntary disclosure of wrongdoing and its willingness to cooperate in the investigation of its agents."<sup>39</sup> The Memo elaborated: "Another factor to be weighed by the prosecutor is whether the corporation appears to be protecting its culpable employees and agents." The Memo added that:

[W]hile cases will differ depending on the circumstances, a corporation's promise of support to culpable employees and agents, either through the advancing of attorneys fees, through retaining the employees without sanction for their misconduct, or through

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<sup>37</sup> See *United States v. Stolt-Nielsen*, 524 F. Supp. 2d 609, 627-28 (E.D. Pa. 2007) ("When Stolt-Nielsen approached the Division in November 2002 to report its antitrust violations, the Division did not have sufficient evidence to sustain a conviction of any company in the parcel tanker industry. Using highly incriminating evidence produced by Stolt-Nielsen and its employees, including the 'combined lists' provided by Wingfield, the Division obtained the benefit of its bargain—it successfully dismantled the cartel and secured guilty pleas from Stolt-Nielsen's co-conspirators which included prison terms and fines totaling \$62 million.").

<sup>38</sup> See Thompson Memo, *supra* note 15, at Part I.B.

<sup>39</sup> *Id.* at Part II.A.

providing information to the employees about the government's investigation pursuant to a joint defense agreement, may be considered by the prosecutor in weighing the extent and value of a corporation's cooperation.<sup>40</sup>

The Securities and Exchange Commission and other federal agencies similarly use such cooperation as an important consideration when they decide whether to impose civil penalties on a firm during regulatory action.<sup>41</sup>

Prosecution emphasis on corporate cooperation sparked a remarkable outcry amongst the bar, a few scholars, and in Congress, which has pending legislation that would forbid rewarding a corporation for its waiver of attorney-client privilege and securing employee cooperation by terminating wrongdoing employees.<sup>42</sup> Most of the outcry centered on pressure to waive attorney-client privilege, sensibly so from a defense perspective, because the documents prepared by counsel may be central to the government's case.<sup>43</sup> While corporate crime prosecutions remain highly document dependent,<sup>44</sup> employee or former employee testimony can provide a critical piece in the government's case. Further, as George Cohen notes, "[t]he main motivation for employees to cooperate with corporate investigations has always been the threat of being fired or incurring other job-related consequences, not the corporate privilege."<sup>45</sup> This Article examines such pressures applied on employees.

Commentators argue that federal prosecutors coerce cooperation of firms, which in turn pressure employees to provide statements to prosecutors, or risk non-advancement or non-payment of legal fees, which can be substantial in complex white collar prosecutions. In

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<sup>40</sup> *Id.*, at Part VI.B.

<sup>41</sup> See, e.g., Press Release, SEC, Statement of the Securities and Exchange Commission Concerning Financial Penalties (Jan. 4, 2006), available at <http://www.sec.gov/news/press/2006-4.htm> ("The degree to which a corporation has self reported an offense, or otherwise cooperated with the investigation and remediation of the offense, is a factor that the Commission will consider in determining the propriety of a corporate penalty."); *in re* Merrill Lynch, Pierce, Fenner & Smith, Inc., Admin. Proc. File No. 3-12236 (Mar. 13, 2006) (imposing fine in part due to non-cooperation during investigation, citing failure to promptly produce and retain emails); see also Garrett, *Structural Reform*, *supra* note 2, at Part II.A.

<sup>42</sup> See Attorney-Client Privilege Protection Act of 2007, S. 186, 110th Cong. § 1 (2007).

<sup>43</sup> The outcry may not have been entirely justified, as DOJ practice was far from uniformly insistent on waiver; between the time the Thompson Memo was released in 2003 and 2007, "the DOJ did not seek privilege waiver in many of its agreements, though it did seek privilege waiver in the majority, or twenty agreements (fifty-seven percent)." Garrett, *Structural Reform*, *supra* note 2, at 900.

<sup>44</sup> See *Braswell v. United States*, 487 U.S. 99, 115 (1988) ("The greater portion of evidence of wrongdoing by an organization or its representatives is usually found in the official records and documents of that organization.") (internal quotation omitted).

<sup>45</sup> See George M. Cohen, Essay, *Of Coerced Waiver, Government Leverage, and Corporate Loyalty: The Holder, Thompson, and McNulty Memos and Their Critics*, 93 VA. L. REV. IN BRIEF 153, 160 (2007), <http://www.virginialawreview.org/inbrief/2007/07/23/cohen.pdf>.

response to the outcry, the DOJ revised its Thompson Memo guidelines; the 2006 McNulty Memo stated that prosecutors “generally should not take into account” payment of legal fees and must seek approval from the Deputy Attorney General to do so, though leaving unchanged considering failure to terminate non-cooperating employees and existence of a joint defense agreement.<sup>46</sup> The latest iteration of the Principles of Federal Prosecution of Business Organizations, the 2008 Filip Memo, changed this language to make a far clearer statement forbidding consideration of employee compensation or discipline. The Memo states that “prosecutors should not take into account whether a corporation is advancing or reimbursing attorneys’ fees or providing counsel to employees, officers or directors under indictment.”<sup>47</sup> The Memo adds, “Likewise, prosecutors may not request that a corporation refrain from taking such action.”<sup>48</sup> The Memo does not, however, address termination or other discipline of employees.

Few have asserted Fifth Amendment claims, where most employees, blameless or not, assist in an investigation voluntarily,<sup>49</sup> and the overwhelming majority of employees who prosecutors do pursue, just as their employer does, plead guilty and then cooperate.<sup>50</sup> Current regulations encourage “layering” of internal investigations, with simultaneous efforts that may include: audits conducted by audit committees; independent investigations by the board and board committees; internal investigations by the management employing in-house or outside counsel; and compliance with “real-time” investigations by regulators.<sup>51</sup> Following such compliance efforts, preventative measures may be adopted and discipline may be imposed, including firing uncooperative employees and refusing to pay their legal

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<sup>46</sup> Memorandum from Paul J. McNulty, Deputy Attorney Gen., U.S. Dep’t of Justice, to Heads of Department Components and U.S. Attorneys, Principles of Federal Prosecution of Business Organizations (Dec. 12, 2006) [hereinafter McNulty Memo], available at [http://www.usdoj.gov/dag/speech/2006/mcnulty\\_memo.pdf](http://www.usdoj.gov/dag/speech/2006/mcnulty_memo.pdf).

<sup>47</sup> See U.S. Dept. of Justice, Principles of Federal Prosecution of Business Organizations, Title 9, Chapter 9-28.730, available at <http://www.usdoj.gov/opa/documents/corp-charging-guidelines.pdf> [hereinafter Filip Memo].

<sup>48</sup> *Id.*

<sup>49</sup> See Buell, *supra* note 5, at 1648-49.

<sup>50</sup> See Kathleen F. Brickey, *In Enron’s Wake: Corporate Executives On Trial*, 96 J. CRIM. L. & CRIMINOLOGY 397 (2006) (developing data regarding prosecutions of corporate executives showing that ninety percent pleaded guilty, “virtually all” of whom became cooperating witnesses for the government, often in trials of “high-level executives”). A typical case is the recent guilty plea of three top members of Oxycontin-maker Purdue Pharma, along with the entity’s plea agreement and non-prosecution agreement involving adoption of compliance measures. See Barry Meier, *In Guilty Plea, OxyContin Maker to Pay \$600 million*, N.Y. TIMES, May 10, 2007, at C2.

<sup>51</sup> See Robert S. Bennett, Alan Kriegel, Carl S. Rauh & Charles F. Walker, *Internal Investigations and the Defense of Corporations in the Sarbanes-Oxley Era*, 62 BUS. LAW. 55 (2006); Harvey L. Pitt, SEC Chairman, Remarks at PLI 33rd Annual Institute on Securities Regulation (Nov. 8, 2001), <http://www.sec.gov/news/speech/spch520.htm>.

fees. Any Fifth Amendment claims would be litigated only in cases in which the employer makes efforts to secure employee cooperation after prosecutors become involved, and where employees do agree to provide statements, they are prosecuted, but they do not plead guilty but rather proceed to trial.

The KPMG prosecution provided the example that focused criticisms of these policies. Contributing to a revival of interest in the Supreme Court's line of "penalty cases," Judge Kaplan found that two KPMG employees, one a senior vice-chair and the other a junior partner, made statements based on pressure to cooperate or lose advancement of up to \$400,000 in legal fees, and that this was coercion violating the Fifth Amendment protection against compelled self-incrimination.<sup>52</sup> Both employees had made statements to prosecutors after signing proffer agreements, which receive a strong presumption of voluntariness.<sup>53</sup> The vice-chair had initially refused to proffer, but according to Judge Kaplan, changed course "acting against the advice of his attorney and in order to keep his job" after the government reported his non-cooperation to KPMG, which in turn "implicitly but unmistakably threatened to fire him if he did not fall into line."<sup>54</sup> The junior partner had provided three separate statements under proffer agreements, according to the court, viewing himself as a whistleblower cooperating with the investigation, but also "because he could not afford to pay for what he regarded as an adequate defense."<sup>55</sup>

The court found that KPMG's conduct was "fairly attributable" to the government,<sup>56</sup> and that this pressure was applied on the two employees because the U.S. Attorney's Office "threatened also to consider any failure by KPMG to cause its employees to make full disclosure to the government as favoring indictment."<sup>57</sup> Judge Kaplan later dismissed the indictments against those two employees and eleven others on other grounds, citing to the Sixth Amendment right to counsel, as affected by KPMG's failure to advance employee legal fees so it is unclear whether the Second Circuit will take up the Fifth Amendment issue.<sup>58</sup>

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<sup>52</sup> See *United States v. Stein (Stein I)*, 435 F. Supp. 2d 330, 341 (S.D.N.Y. 2006); *U.S. v. Stein (Stein II)*, 440 F. Supp. 2d 315, 326 (S.D.N.Y. 2006).

<sup>53</sup> See *Stein II*, 440 F. Supp. 2d. at 321 n.20 (The agreements stated "the government may not use the statement in its case-in-chief, but it is free to use leads obtained from it and may use the statement on cross-examination and in a variety of other circumstances."); Benjamin A. Naftalis, "Queen For A Day" Agreements And The Proper Scope Of Permissible Waiver Of The Federal Plea-Statement Rules, 37 COLUM. J.L. & SOC. PROBS. 1 (2003).

<sup>54</sup> *Stein II*, 440 F. Supp. 2d. at 322, 330.

<sup>55</sup> *Id.* at 323.

<sup>56</sup> *Stein I*, 435 F. Supp. 2d at 334.

<sup>57</sup> *Stein II*, 440 F. Supp. 2d. at 318.

<sup>58</sup> *U.S. v. Stein*, 495 F. Supp. 2d 390 (S.D.N.Y. 2007).

The Second Circuit did not take up the Fifth Amendment issue in its ruling. Largely because it found not clearly erroneous Judge Kaplan's factual findings that "but for the Thompson Memorandum and the prosecutors' conduct, KPMG would have advanced legal fees without condition or cap," the Second Circuit affirmed the finding of a Sixth Amendment violation.<sup>59</sup>

### B. *Revisiting the Penalty Cases*

In the Supreme Court's line of penalty cases, the Court stated that "threat of disbarment and the loss of professional standing, professional reputation, and of livelihood are powerful forms of compulsion" and that those goods can not in some circumstances be constitutionally conditioned on a waiver of the Fifth Amendment privilege.<sup>60</sup> Some commentators have similarly argued in response to the KPMG decision and recent corporate prosecutions that the penalty cases should apply in corporate prosecutions.<sup>61</sup> The penalty cases deserve closer examination.

The Supreme Court in *Garrity v. New Jersey* first held that the Fifth Amendment supported exclusion absent coercion during a custodial interrogation, where under a state statute, police officers would be have their employment terminated should they not cooperate with a criminal investigation.<sup>62</sup> The Court then extended *Garrity* to other contexts, ranging from an attorney disbarred by a court order for failure to comply with a subpoena, in *Spevack v. Klein*<sup>63</sup>; independent contractors, threatened with statutory disqualification from government contracting for five years if the did not waive privilege and answer questions, in *Lefkowitz v. Turley*;<sup>64</sup> and an unsalaried political party official, facing statutory disqualification from public office for five years absent refusal to waive Fifth Amendment privilege, in *Lefkowitz v. Cunningham*.<sup>65</sup>

In a further and not uncontroversial extension of the doctrine, appellate courts have given the penalty cases greater force by treating statements found to be coerced by such penalties to be subject not just to exclusion, but to a "*Garrity* immunity" such that, like immunized statements they are not just suppressed in their use at trial, but also in

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<sup>59</sup> U.S. v. Stein, 541 F.3d 130, 144 (2d Cir. 2008).

<sup>60</sup> Spevack v. Klein, 385 U.S. 511, 516 (1967).

<sup>61</sup> See *supra* notes 4-5.

<sup>62</sup> 385 U.S. 493 (1967); see also *Uniformed Sanitation Men Ass'n, Inc. v. Comm'r of Sanitation*, 392 U.S. 280 (1968) (finding unconstitutional discharge of public employees for asserting Fifth Amendment privilege).

<sup>63</sup> 385 U.S. 511 (1967).

<sup>64</sup> 414 U.S. 70 (1973).

<sup>65</sup> 431 U.S. 801, 807 (1977).

their derivative use, along with any fruits of the affected testimony.<sup>66</sup>

The penalty cases remain distinctive in a number of respects. They each involved state action; they each involved a penalty of severe economic harm threatening livelihood; they each involved action upon an individual and not a separate charged entity; none involved negotiated agreements like proffer agreements; and they all involved a context specific analysis of voluntariness.

### 1. State Action and Charging Decisions

State action was present in each of the penalty cases, because in each of those cases, the government itself sought to extract information by using the threat of a penalty, either through the direct operation of state statutes or, in *Spevach*, a court order. In contrast, the typical corporate prosecution will not involve state action during the charging stage, where any “cooperation” is not the product of joint interests and participation in a common project. Prosecutors pursue cases as adversaries and not as allies. A firm in a corporate prosecution will typically remain a prosecution target, given broad respondeat superior standards.<sup>67</sup> Prior to entering a deferred prosecution or plea agreement, the firm’s interests will typically not be aligned with but opposed to the government’s.

The Supreme Court admits that “[w]hat is fairly attributable” to the state “is a matter of normative judgment, and the criteria lack rigid simplicity.”<sup>68</sup> Clear cases of state action include the situation where the state delegated a public function to private persons or controlled a private entity using explicit or implicit orders.<sup>69</sup> In more muddled relationships between state and private actors, the Court has found state action if the government had “pervasive entwinement”<sup>70</sup> with relevant operations of the private entity, or exercised “coercive power.”<sup>71</sup> Though not uncontroversially so, decisions adopt a narrow view of circumstances required to find a private entity a joint participant with the state, in part to avoid undue extension of constitutional regulation to private entities.<sup>72</sup> Based on these state action rulings, in the white collar

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<sup>66</sup> See Steven D. Clymer, *Compelled Statements from Police Officers and Garrity Immunity*, 76 N.Y.U. L. REV. 1309, 1329-30 (2001).

<sup>67</sup> See *N.Y. Central & Hudson River R.R. Co. v. United States*, 212 U.S. 481 (1909).

<sup>68</sup> *Brentwood Acad. v. Tenn. Secondary Sch. Athletic Ass’n*, 531 U.S. 288, 295 (2001).

<sup>69</sup> *Id.*

<sup>70</sup> *Id.*

<sup>71</sup> *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982).

<sup>72</sup> See, e.g., *Jackson v. Metropolitan Edison Co.*, 419 U.S. 345, 351 (1974) (requiring “close nexus between the State and the challenged action” such that seemingly private behavior “may be fairly treated as that of the State itself”).

crime context, lower courts have held that no Fifth Amendment issues arise as to interviews conducted even by heavily regulated private actors, such as the National Association of Securities Dealers.<sup>73</sup>

During the charging stage, far from being a partner of the prosecution, the corporate employer not only remains a target, but risks committing the additional crime of obstruction of justice if it does not ensure that its employees do not hinder the investigation. Obstruction of justice charges led to the demise of Anderson; such charges may also be far easier to prove than the underlying fraud.<sup>74</sup> The firm could also be responsible if employees do not remain silent, but make false statements to investigators—including the mere denial of the commission of a crime.<sup>75</sup> While employees may be placed between a rock and a hard place, the entire firm shares that unenviable position.

Causation might be difficult to show, where employers have good reasons to themselves independently desire to discipline non-cooperative employees, even apart from any pending investigation and avoidance of secondary crimes. As discussed next, employer discipline may be permitted for any reason in an at-will state. The firm may also desire to avoid employee assertion of Fifth Amendment rights not just due to criminal but also civil consequences.<sup>76</sup>

Finally, to the extent the government took any action at all in promulgating the Thompson, and McNulty and now Filip memos, it publicly announced not a penalty, but factors to be considered in its purely discretionary exercise as to charging, an area in which prosecutors traditionally have almost unlimited legal latitude.<sup>77</sup>

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<sup>73</sup> See, e.g., *United States v. Solomon*, 509 F.2d 863 (2d Cir. 1975); *D.L. Cromwell Invests., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002); see also *U.S. v. Stein (Stein II)*, 440 F. Supp. 2d 315, 335-37 (S.D.N.Y. 2006).

<sup>74</sup> *Arthur Anderson LLP v. United States*, 544 U.S. 696 (2005) (found guilty of violating 18 U.S.C. §§ 1512(b)(2)(A)-(B) (2006)). “These sections make it a crime to knowingly use intimidation or physical force, threaten, or corruptly persuade another person with intent to cause that person to withhold documents from, or alter documents for use in, an official proceeding.” *Id.* at 698 (internal quotations omitted); see also John Hasnas, *Ethics and the Problem of White Collar Crime*, 54 AM. U.L. REV. 579, 618-19 (2005).

<sup>75</sup> *Brogan v. United States*, 522 U.S. 398, 400 (1998); 18 U.S.C. § 1001 (2006); Richman & Stuntz, *supra* note 35, at 637 (criticizing the Court’s broad interpretation of the false statement statute to include a mere denial of guilt).

<sup>76</sup> In any civil litigation, Fifth Amendment invocations by employees may result in an adverse inference drawn against the corporation, even if the employees were terminated. See, e.g., *FDIC v. Fidelity & Deposit Co.*, 45 F.3d 969 (5th Cir. 1995); *Cerro Gordo Charity v. Fireman’s Fund Am. Life Ins. Co.*, 819 F.2d 1471 (8th Cir. 1987); *Rad Servs. Inc. v. Aetna Cas. & Sur. Co.*, 808 F.2d 271 (3d Cir. 1986); *Rosebud Sioux Tribe v. A & P Steel, Inc.*, 733 F.2d 509 (8th Cir. 1984); *Brink’s Inc. v. City of New York*, 717 F.2d 700 (2d Cir. 1983).

<sup>77</sup> To the extent that the ruling in *Stein II* was based on any direct threats found to have been made, prosecutors can simply in the future avoid any reference during negotiations to employee discipline. After all, general statements of principle such as in the McNulty Memo send the desired message, but without using direct coercion. Judge Kaplan found that the U.S. Attorney’s Office “threatened also to consider any failure by KPMG to cause its employees to make full disclosure to the government as favoring indictment.” *Stein II*, 440 F. Supp. 2d at 318.

To find state action under such circumstances extends the concept of state action beyond its farthest limits: beyond the Supreme Court's penalty cases, which applied only to state statutes and judicial orders; applying the notion to firms that are the targets of criminal prosecutions with adverse interests to the government; and finding action where the government exercised purely discretionary charging decisions. Supposing state action extended to such adversarial and ill-formed situations as fluid as the investigation and negotiation that leads to a charging decision, prosecutors could never be certain which employees a judge might later determine were coerced under the totality of the circumstances, thus tainting an entire prosecution.<sup>78</sup>

The Second Circuit did find state action in its *Stein* decision. However, it did so largely in deference to the factual findings of the lower court, which determined that "the government forced KPMG to adopt its constricted Fees Policy."<sup>79</sup> Withdrawal of attorneys' fees more directly implicates a Sixth Amendment right to counsel than the Fifth Amendment right related to employee statements discussed here. The Second Circuit did, however, include broad language on state action suggesting that though a target of a prosecution is typically an adversary, "The government's threat of indictment was easily sufficient to convert its adversary into its agent."<sup>80</sup>

In addition to the factual findings from the lower court, the Second Circuit relied upon language in the Thompson Memo stating that one factor to be considered in whether to prosecute a corporation is whether that corporation shields, or "appears to be protecting its culpable employees and agents."<sup>81</sup> That entire paragraph on "Shielding Culpable Employees and Agents" was eliminated in the section on cooperation in the new Filip Memo.<sup>82</sup> The Thompson Memo discussed the issue of

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Regardless, a threat to consider does not make for a direct showing of coercion. This is particularly so where indictment would be a legitimate course; prosecutors have no obligation to offer leniency to a target entity. Possible withdrawal of a discretionary benefit to an employer is very different from a penalty the state directed at an employee, for state action purposes at least.

<sup>78</sup> As Sam Buell describes, further problems arise, where "(1) civil regulatory agencies, beyond the control and knowledge of criminal authorities, often investigate and take statements in a matter before it progresses to the criminal stage; and (2) a firm and its employees would have the ability and the motive to confer 'Garrity immunity' and cause that immunity to permeate the state's enforcement efforts by disseminating immunized statements." See Buell, *supra* note 5, at 1645. Garrity immunity, if extended to such ambiguous situations, might require prosecutors to adopt in all corporate prosecutions, the cumbersome technique adopted in police misconduct cases in which the trial team of prosecutors can only examine evidence vetted and approved by a separate "Garrity team" that first investigates any potentially coerced statements. For analysis of this problem in police misconduct prosecutions, see Clymer, *supra* note 66, at 1332 ("Without a clear warning, prosecutors and investigators may overlook the possibility that Garrity immunity has attached and thus neglect to avoid exposure or take other precautions.").

<sup>79</sup> U.S. v. Stein, 541 F.3d 130, 148 (2d Cir. 2008).

<sup>80</sup> *Id.* at 151.

<sup>81</sup> *Id.* at 148.

<sup>82</sup> Filip Memo, *supra* note 47, at 7.

making employees available for interviews. It stated that prosecutors will consider whether the firm “engaged in conduct that impedes the investigation” for example by “inappropriate directions to employees or their counsel, such as directions not to cooperate openly and fully with the investigation including, for example, the direction to decline to be interviewed.”<sup>83</sup> In contrast, the Filip Memo now steers clear of any consideration whether employees participated in interviews. It instead states that examples of obstruction “could include: inappropriate directions to employees or their counsel, such as directions not to be truthful or to conceal relevant facts; making representations or submissions that contain misleading assertions or material omissions; and incomplete or delayed production of records.”<sup>84</sup> Thus, DOJ has allayed potential Fifth Amendment concerns arising from language in the Thompson and McNulty Memos.

Further, the reason the Second Circuit found state action was that Judge Kaplan had found that KPMG did not have a clear policy on advancement of attorneys fees, and that the prosecutors themselves secured the KPMG decision to condition payment of fees on cooperation with the government.<sup>85</sup> Even assuming prosecutors were to take such a heavy handed approach in a case after *Stein* (and doing so would be contrary to the Filip Memo), they could only impose policy where a corporation like KPMG had no existing policy on say, employee interviews, and instead merely followed the Government’s lead, or where the corporation changed pre-existing policies due to government pressure.

Now, if a corporation does change pre-existing corporate compliance policies regarding employee interviews to accede to prosecution demands, then perhaps state action exists. Such situations may be far more likely to occur where a corporation has deficient compliance programs, and is then subject to a deferred or non-prosecution agreement designed to overhaul such procedures. Thus, far more interesting state action questions, explored by Lisa Griffin, will arise during internal investigations supervised by monitors established by deferred prosecution agreements, non prosecution agreement, or plea agreements with prosecutors.<sup>86</sup> Such agreements typically contain terms requiring the entity to hire monitors chosen by the prosecutors with sweeping powers to remedy any persistent criminality.<sup>87</sup> Those

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<sup>83</sup> Thompson Memo, *supra* note 15, at VI(B).

<sup>84</sup> Filip Memo, *supra* note 47, at 9-28.730.

<sup>85</sup> *Stein*, 541 F.3d at 148-50.

<sup>86</sup> Lisa Griffin develops how although otherwise state action might be “more attenuated” during an internal investigation, it is more readily observed when employer discipline is “according to the express requirements in a DPA.” Griffin, *supra* note 5, at 358, 368.

<sup>87</sup> For a description of those agreements and the powers they provide to monitors, see Garrett, *Structural Reform*, *supra* note 2, at Parts I.A, II.A-B; regarding ongoing cooperation obligations,

monitors report to prosecutors but are paid by the corporation. So far, in the years since these agreements have been entered into, no individual prosecutions arose from inquiries conducted under such agreements.<sup>88</sup> If new individual prosecutions were to result, however, such a contractual monitoring agreement may very well render the firm a state actor.

## 2. The Voluntariness Inquiry and Private Employer Discipline

The Fifth Amendment's voluntariness test must also be satisfied. The court must find that the individual's will was overborne based on an objective and subjective inquiry into the totality of the circumstances.<sup>89</sup> In the KPMG case, all of the defendants but two, Judge Kaplan ruled, failed to satisfy that test.<sup>90</sup> In the penalty cases, the Supreme Court did not clearly apply its modern voluntariness test, in part because those decisions mostly precede its modern jurisprudence. The Court did state, however, that mere economic pressure is not enough, but that it must rise to the level of coercion, and must therefore be "substantial," tantamount to "economic catastrophe," similar to the "end of their police careers" that the plaintiff's in *Garrity* faced, or the disbarment faced in *Spevack*.<sup>91</sup> More recently, the Court's plurality took a narrower view in summarizing that "[t]hose cases . . . involved free citizens given the choice between invoking the Fifth Amendment privilege and sustaining their economic livelihood."<sup>92</sup> That formulation does expand the type of impermissible state penalty from loss of public employment to other severe economic harm, but the harm must be

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see also Garrett, *Goliath*, *supra* note 32.

<sup>88</sup> Indeed, in at least one case, the University of Medicine and Dentistry of New Jersey case, although the monitor uncovered substantial new criminality, the deferred prosecution agreement was permitted to expire with no new prosecution announced. Josh Margolin and Ted Sherman, *UMDNJ Trustees Vote to Take Back the Reins, Christie to End Monitorship After Board Declines Offer to Continue*, THE STAR-LEDGER, Dec. 14, 2007, at 31.

<sup>89</sup> See *Schneekloth v. Bustamonte*, 412 U.S. 218, 226 (1973) ("In determining whether a defendant's will was overborne in a particular case, the Court has assessed the totality of all the surrounding circumstances—both the characteristics of the accused and the details of the interrogation."); see also Mark A. Godsey, *Rethinking the Involuntary Confession Rule: Toward a Workable Test for Identifying Compelled Self-Incrimination*, 93 CAL. L. REV. 465 (2005).

<sup>90</sup> *U.S. v. Stein (Stein II)*, 440 F. Supp. 2d 315, 328 (S.D.N.Y. 2006).

<sup>91</sup> *U.S. ex. rel. Sanney v. Montanye*, 500 F.2d 411, 415 (2d Cir. 1974); see also *Lefkowitz v. Turley*, 414 U.S. 70, 82 (1973). Of course, in *Turley*, the Court did not require loss of livelihood. The independent contractors in *Turley* faced only five years of disqualification from state contracts, only one source of income, albeit a lucrative one. The Court noted, however, that the effects swept far more broadly where any firm that employed such a contractor under the New York statute at issue would itself be subject to disqualification. *Id.* at 84. Similarly, *Cunningham* involved a five year disqualification from public office combined with resulting severe effects on reputation. *Lefkowitz v. Cunningham*, 431 U.S. 801, 804 (1977).

<sup>92</sup> *McKune v. Lile*, 536 U.S. 24, 40 (2002).

severe.

Employer discipline short of such harm may not satisfy the Fifth Amendment standard. For example, denial of advance payment of attorneys fees is not “economic catastrophe” within the meaning of the penalty cases, though of course of critical importance to the employees facing prosecution. It is the private withdrawal of a discretionary benefit and not a state penalty.<sup>93</sup> If it were to be provided based on a contractual obligation, the firm could not withdraw payment (without facing a likely meritorious breach of contract suit).<sup>94</sup> While all criminal defendants would benefit from the ability to afford the attorney of their choice, most defendants lack the luxury of an employer that advances legal fees.<sup>95</sup> A threat to fire, on the other hand, if it could be attributed to the government, could depending on the circumstances, satisfy the penalty cases definition of coercion given a substantial threat, tantamount to career-ending consequences.

A separate question remains whether the penalty cases, all decided decades ago, can be squared with the Court’s more recent voluntariness jurisprudence.<sup>96</sup> The Court’s Fifth Amendment jurisprudence is far

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<sup>93</sup> The evidence KPMG had some kind of implied contract based on unwritten prior practice may also be quite thin. See *Stein v. KPMG, LLP*, 486 F.3d 753, 762 n.3 (2d Cir. 2007) (“KPMG’s alleged ‘uniform practice,’ . . . of paying the legal fees for indicted employees and partners—seemingly an indispensable element of an ‘implied-in-fact’ contract—appears to consist of a single instance in which KPMG paid the legal fees of two partners indicted and convicted in a 1974 criminal case. . . . What is more, when the appellees moved to dismiss the indictment on Sixth Amendment grounds, they took the position that the payment of legal fees was a matter of KPMG’s freedom of choice, stipulating with the government that ‘it had been the longstanding *voluntary* practice of KPMG to advance and pay legal fees.’”) (emphasis added and citations omitted). Judge Kaplan found “KPMG long had paid legal fees for any of its employees who were sued or charged with crimes as a result of doing their jobs . . . .” *Stein II*, 440 F. Supp.2d at 318.

<sup>94</sup> *Stein*, 486 F.3d at 762 (“One aspect of that policy was to take into account whether the firm was *voluntarily* paying the legal expenses of members or employees who had been indicted, see Thompson Memo, *supra* note 15, at 7-8, a factor deemed to favor indictment under the Thompson Memorandum. *Id.* That document gave no such weight to payments required by contract.” (citations replaced with internal cross references); see also Nishchay H. Maskay, *The Constitutionality of Federal Restrictions on the Indemnification of Attorneys’ Fees*, 156 U. PA. L. REV. 491 (2007).

<sup>95</sup> In the decision ultimately dismissing most of the indictments, Judge Kaplan explained: This is not to say that attorneys appointed under the CJA inevitably could not provide the minimally effective defense that the Constitution requires. That is unclear, one way or the other. But it is to say that defendants would be wiped out financially as a result of the government’s actions before they became eligible for CJA representation and that the representation they would receive in that event would be constrained in ways that would not have obtained absent the government’s interference. *U.S. v. Stein*, 495 F. Supp. 2d 390, 421 (S.D.N.Y. 2007). Kaplan argued that the constitution, based on a substantive due process theory of his innovation, “prevents the government from interfering if a criminal defendant is fortunate enough to have someone who is willing to give the defendant the money to pay for a defense, even a very expensive one.” *Id.* at 425.

<sup>96</sup> For an excellent treatment of the issue, see Clymer, *supra* note 66, at 1344-46 (“Although some older decisions suggest that confessions that are not the result of free will should be suppressed regardless of the methods police used to obtain them, the Court repudiated that view

from doctrinally uniform, and the Supreme Court has not itself sorted out how the penalty cases fit in with the main body of its self-incrimination jurisprudence.<sup>97</sup> One possibility is that coercion is analyzed more generously where the threats are economic outside the custodial setting. That result would be highly perverse, given the core purpose of the Fifth Amendment to protect against physical and psychological torture.<sup>98</sup> Indeed, in its only recent decision revisiting the penalty cases, the Court ruled that requiring inmates to self-inculcate as part of participation in a sex-offender program as a condition of parole did not implicate the Fifth Amendment, noting the two poles regarding “the physical torture against which the Constitution clearly protects” and “the *de minimis* harms against which it does not.”<sup>99</sup>

The Court is deferential to bargaining that occurs when employees decide whether to provide proffers and prosecutors decide whether to extend leniency or immunity.<sup>100</sup> The Court has also expressed the policy concern in *Braswell v. United States*, with avoiding “a detrimental impact on the government’s efforts to prosecute ‘white-collar crime,’ one of the most serious problems confronting law enforcement authorities.”<sup>101</sup>

The Supreme Court also arguably ratcheted the standard for showing coercion and the causal nexus between state action and coercion in *Colorado v. Connelly*, a case in which the defendant suffered from severe delusions and thought he was hearing the “voice of God” during his interrogation (after confessing, he was medicated for six months before found competent to stand trial for murder).<sup>102</sup> Nevertheless, the Court found that where no pressure was applied to him, there was no “essential link between coercive activity of the State, on the one hand, and a resulting confession by a defendant, on the

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in *Colorado v. Connelly*. There, the Court held that police misconduct is a prerequisite for finding that a confession violates due process.”)

<sup>97</sup> Ronald J. Allen & M. Kristin Mace, *The Self-Incrimination Clause Explained and Its Future Predicted*, 94 J. CRIM. L. & CRIMINOLOGY 243, 243-45 (2004); William J. Stuntz, *Self-Incrimination and Excuse*, 88 COLUM. L. REV. 1227, 1228 (1988). Justice O’Connor acknowledged the lack of coherent doctrine in this area in *McKune*:

Forcing defendants to accept such consequences seems to me very different from imposing penalties for the refusal to incriminate oneself that go beyond the criminal process and appear, starkly, as government attempts to compel testimony; in the latter context, any penalty that is capable of compelling a person to be a witness against himself is illegitimate. But even this explanation of the privilege is incomplete, as it does not fully account for all of the Court’s precedents in this area.

536 U.S. at 53 (O’Connor, J., concurring).

<sup>98</sup> However, such a divergence would fit in with a range of means by which our system treats white-collar crime differently than street crime. See Darryl K. Brown, *Street Crime, Corporate Crime, and the Contingency of Criminal Liability*, 149 U. PA. L. REV. 1295 (2001).

<sup>99</sup> *McKune*, 536 U.S. at 41.

<sup>100</sup> *United States v. Mezzanatto*, 513 U.S. 196, 207 (1995).

<sup>101</sup> For a careful discussion of these decisions, see Bharara, *supra* note 5, at 100.

<sup>102</sup> 479 U.S. 157, 161 (1986); *id.* at 175 (Brennan, J., dissenting).

other.”<sup>103</sup> The Court added that “[t]he most outrageous behavior by a private party seeking to secure evidence against a defendant does not make that evidence inadmissible under the Due Process Clause.”<sup>104</sup> Whether the Court’s decision was defensible as a matter of Fifth Amendment law, its reasoning, demanding a close link between state action, coercion and the confession produced, supports a view that the Court would not today extend the penalty cases.

To conclude, the state action doctrine does not support finding private employment decisions made during criminal investigations to be state action, absent a formal cooperation agreement with prosecutors or perhaps a change in corporation policy at the government’s behest. Nor would coercion be easily shown, at least as to denial of attorneys fees. Further, sound practical reasons counsel against such a regime. For exclusion to apply to mere implicit encouragement to target entities to discipline potentially culpable employees would extend the penalty cases to any number of routine employment decisions made under the shadow of criminal investigations.<sup>105</sup> The consequences could hamper corporate crime prosecutions and disrupt corporate governance.<sup>106</sup>

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<sup>103</sup> *Id.* at 165.

<sup>104</sup> *Id.* The Court found that exclusion serves no purpose under such circumstances, noting a lack of a concern with reliability (surprising, when assessing with statements by a delusional person), but also that exclusion would not in such circumstances “substantially deter future violations of the Constitution.” *Id.* at 166. The Court concluded that “[w]e hold that coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause of the Fourteenth Amendment.” *Id.* at 167.

<sup>105</sup> As Sam Buell explains:

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

Buell, *supra* note 5, at 1642-43.

<sup>106</sup> However, the Court ruled in *Arizona v. Fulminante*, 499 U.S. 279 (1991), that improper admission of concededly unconstitutionally admitted confession statements may be harmless error. In that case, the parties agreed that Fulminante made statements to an inmate who was acting as an agent for the government, and the Court accepted the state court’s conclusion that he faced a credible threat of physical violence from which the agent-inmate promised protection. *Id.* at 287 n.4. In document-intensive white collar prosecutions, particularly where the entity is cooperating and providing access to witnesses and documents, even improper admission employee statements and their fruits may be harmless error.

### III. PRIVATE CONTRACT AND CRIMINAL PROSECUTIONS

#### A. *Employment Relationships During Criminal Investigations*

High-level employees face enormous pressure from all sides during an investigation, from supervisors within the corporate employer, corporate counsel, independent auditors, the Board, state and federal regulators, civil litigants, and finally from prosecutors. Any relationship formed with law enforcement, such as pursuant to a proffer agreement, adds only one final layer above a series of contractual obligations that govern employee status within the firm. Focusing on criminal procedure, specifically the Fifth Amendment, distracts from more important sources for employee protections. Employee relationships are primarily structured by employment contracts with agents together with employment law regulation of such contracts. Further, firms can and will contract around criminal procedure rules, perhaps in ways that undermine effectiveness of any criminal procedure rule.

The background norm against which relations between employees and firms are analyzed remains at-will employment in most states.<sup>107</sup> For good reasons, employment contracts have not protected a norm of anti-retaliation for employee silence during investigations of potentially criminal malfeasance. In some cases, the ability to fire wrongdoing employees may be limited by union contracts, or by employment contracts negotiated by high-level officers. Employees also have a duty of loyalty, or a duty to cooperate with their employer, included in statutes in most states and interpreted as implicit in any employment relationship in other states.<sup>108</sup> Unless the employer makes unreasonable demands (or uses statutorily prohibited techniques such as a polygraph,<sup>109</sup>) the employee must cooperate. A request to assist with an internal investigation is presumptively reasonable and failure to cooperate would be proper grounds for termination based on

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<sup>107</sup> Cynthia L. Estlund, *Wrongful Discharge Protections in an At-Will World*, 74 TEX. L. REV. 1655, 1674 (1996) (“The at-will rule presumptively concedes to the employer the power to fire at any time for any reason; unless and until the employee can overcome all the hurdles of delay, cost of litigation, and difficulties of proof in establishing a wrongful discharge, she remains out of a job and without relief.”); see also Akhil Reed Amar & Renee B. Lettow, *Fifth Amendment First Principles: The Self-Incrimination Clause*, 93 MICH. L. REV. 857, 868 (1995) (“A responsible private employer may draw sensible inferences from silence and fire the bank clerk who refuses to respond to accusations of pilfering.”).

<sup>108</sup> See, e.g., CAL. LAB. CODE § 2856 (2008); Joseph F. Coyne, Jr. & Charles F. Barker, *Employee Rights and Duties During an Internal Investigation*, in INTERNAL CORPORATE INVESTIGATIONS 169, 171-72 (Brad D. Brian & Barry F. McNeil eds., 2d ed. 2002).

<sup>109</sup> Employee Polygraph Protection Act of 1988, 29 U.S.C. § 2002 (2006).

insubordination. Employment contracts may also require cooperation in any criminal investigations, as well as internal or external investigations.

Although some states have public policy exceptions to at-will employment, they do not protect employee silence during internal or government investigations, but the reverse—they protect employee speech that assists an investigation by whistle blowers.<sup>110</sup> Civil whistleblower protections and retaliation claims together with Sarbanes-Oxley protections further encourage such employee speech; thus a situation where a corporation would have to tread carefully is that in which the whistleblower refuses to cooperate with an internal investigation but has spoken to outside investigators.<sup>111</sup>

Corporations would be highly likely to contract around any regime in which they would be subject to prosecution for employee malfeasance and yet would be unable to avoid indictment by disciplining or terminating culpable employees. Employers can and do try to avert law enforcement pressure by conducting an internal investigation quickly, perhaps in conjunction with regulators (who increasingly emphasize “real-time” investigation), before prosecutors become involved.

Once law enforcement is involved, as George Cohen writes, inculcating responsible employees is crucial to any effort by the entity to secure an agreement to avoid prosecution: “[t]he ability to help the government nail suspected employee ‘bad guys,’ which includes the ability to waive the privilege, is precisely the ‘cooperation’ that the corporation has to ‘sell’ to the government.” Once employee conduct is the subject of a government investigation, the employer has great incentives to avoid the potentially dire consequences of an indictment by fully cooperating with prosecutors.

Nothing in this analysis supports any notion that firms should neglect to discipline culpable employees. Some practitioners recommend such a step; one states “[i]n short, in the current environment, we believe that the reasoning behind Judge Kaplan’s decision counsels the internal investigator to refrain from threatening an employee with termination if he does not cooperate with the government.”<sup>112</sup> The *Stein* decisions provide no reason to fail to discipline employees that do not cooperate with internal or government investigations—but they highlight that such decisions should be made

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<sup>110</sup> Estlund, *supra* note 107, at 1661 n.26.

<sup>111</sup> See The Sarbanes-Oxley Act of 2002 § 806, 18 U.S.C. § 1514A (2006); Wayne N. Outten, *When Good Deeds Are Punished: The Legal Landscape of Retaliation and Whistleblowing*, 762 PLI/LIT 713 (2007).

<sup>112</sup> See Bridget Rohde & Peter A. Chavkin, *In The Wake Of The KPMG Case, May a Corporation—On Pain of Termination—Still Demand an Employee’s Cooperation with a Government Investigation?*, SN084 A.L.I.-A.B.A. 249 (2008).

under clear and pre-existing policies, and not at the government's behest.

Second, as to attorneys fees, corporations may revise their indemnification agreements to clarify their obligations in response to decisions like that in *Stein*, or as part of efforts to discourage malfeasance.<sup>113</sup> Executives often secure indemnification provisions in contracts, often as required by state law, for legal costs and liability in civil cases and for advancement of legal costs in criminal matters. Where corporate codes in many states bar indemnification in criminal matters, unless the executives prevail on the merits,<sup>114</sup> firms often include contracts that advance costs for legal defense and reserve a final decision whether to pay them after conviction, by which time employees may not recover.<sup>115</sup> The Thompson Memo was clear that such required payment is not indicative of non-cooperation: "Some states require corporations to pay the legal fees of officers under investigation prior to a formal determination of their guilt. Obviously, a corporation's compliance with governing law should not be considered a failure to cooperate."<sup>116</sup> Such contractual terms would not be altered during negotiations with the DOJ and a breach would result in successful suits by employees. Firms could benefit by clarifying to all employees whether under the contract, written or implied, the firm must advance legal fees in the event of a criminal investigation. Indeed, a firm could choose to routinely provide separate counsel to employees during an investigation. Further, as discussed next, retaining separate counsel may be the best protection for individual employees during a criminal investigation. However, it may tend to be only higher level employees with greater bargaining power that obtain contractual agreements entitling them to separate counsel.

B. *Attorney Client Privilege, Not Fifth Amendment Privilege and the Provision of Warnings*

The *Miranda* rule was adopted because "the coercion inherent in

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<sup>113</sup> See Peter Margulies, *Legal Hazard: Corporate Crime, Advancement of Executives' Defense Costs, and the Federal Courts*, 7 U.C. DAVIS BUS. L.J. 55 (2006).

<sup>114</sup> For example, the Delaware Code provides that indemnification for criminal matters is permitted only if the executive meets certain conditions, including having "no reasonable cause to believe his conduct was unlawful." DEL. CODE ANN. tit. 8, § 145(a) (1983 & Supp. 1988).

<sup>115</sup> Pamela H. Bucy, *Indemnification of Corporate Executives Who Have Been Convicted of Crimes: An Assessment and Proposal*, 24 IND. L. REV. 279, 287, 325 (1991). State statutes governing mandatory indemnification often require that the executive have been successful "on the merits" and not simply secure dismissal of the charges or a favorable plea bargain, while statutes typically do not permit indemnification unless the executive "had no reasonable cause to believe that his conduct was unlawful." See, e.g., tit. 8, § 145(a).

<sup>116</sup> Thompson Memo, *supra* note 15, at n.4.

custodial interrogation blurs the line between voluntary and involuntary statements” requiring the adoption of “concrete constitutional guidelines for law enforcement agencies and courts to follow.”<sup>117</sup> The penalty cases represent an additional means by which the Court crafted “‘extensions’ of the bare guarantee,”<sup>118</sup> to protect the privilege, in a manner that does not seek to clarify the standards that govern an interrogation process, but rather prevents entirely the use of statements in the situation in which the state directly and severely penalizes the assertion of the Fifth Amendment privilege. During organizational confessions, the relevant statements are not typically made in a custodial setting, and *Miranda* does not apply.<sup>119</sup> As described, state coercion is also attenuated during organizational interviews and proffer sessions with the government. In contrast, employer pressure may be quite direct and may distort the investigative process. Certain warnings are sensibly provided, if not to avoid the dangers of physical and psychological torture and false confessions the Court was concerned with in *Miranda*, then to secure reliable information, avoid conflicts of interest, and to inform employees of their rights.

A series of such internal “warnings” are typically given to employees during internal investigations by the organization.<sup>120</sup> Employees who are the targets in corporate prosecutions will often be accompanied at proffer sessions by counsel to the firm and not by their own counsel. An emerging literature recommends various approaches towards warning employees, arising in part due to the unsettling of prior practices caused by the surge in recent prosecutions. Former United States District Judge Frederick Lacey coined the term “Adnarim” warnings for such cautionary instructions, that is, *Miranda* spelled backwards.<sup>121</sup> The warnings are in no way constitutionally required, but

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<sup>117</sup> *Dickerson v. United States*, 530 U.S. 428, 435 (2000) (internal quotations omitted).

<sup>118</sup> *Chavez v. Martinez*, 538 U.S. 760, 777 (2003).

<sup>119</sup> The custody requirement for triggering the requirement to provide *Miranda* warnings is whether the suspect was “deprived of his freedom of action in any significant way.” *Miranda v. Ariz.*, 384 U.S. 436, 445 (1966).

<sup>120</sup> Sarah Helene Duggin, *Internal Corporate Investigations: Legal Ethics, Professionalism and the Employee Interview*, 2003 COLUM. BUS. L. REV. 859, 944-46 (2003); Marks, *supra* note 4.

<sup>121</sup> Judge Lacey’s recommended warnings include:

I am not your lawyer, I represent the corporation. It is the corporation’s interests I have been retained to serve. You are entitled to have your own lawyer. If you cannot afford a lawyer, the corporation may or may not pay his fee. You may wish to consult with him before you confer with me. Among other things, you may wish to claim the privilege against self-incrimination. You may wish not to talk to me at all.

What you tell me, if it relates to the performance of your duties, and is confidential, will be privileged. The privilege, however, requires explanation. It is not your privilege to claim. It is the corporation’s privilege. Thus, not only can I tell, I must tell, others in the corporation what you have told me, if it is necessary to enable me to provide the legal services to the corporation it has retained me to provide.

Moreover, the corporation can waive its privilege and thus, the president, or I, or

ethical and pragmatic reasons explain why they are often provided. A particularly robust set of warnings would proceed as follows.

First, corporate counsel should ensure that the employees have full information regarding any possible conflict so that they may seek outside counsel. Judge Lacey recommends that counsel for the corporation inform the employee that they represent the interests of the corporation and that the employee may wish to consult with separate counsel.<sup>122</sup> The caveat that the interviewer is counsel for the organization and not the employee, together with an explanation of any possible conflict, is required by the Model Rules when it is apparent that “the organization’s interest are adverse to those of the constituents with whom the lawyer is dealing.”<sup>123</sup> Whether interests have become adverse may not always be clear; the comment adds that “[w]hether such a warning should be given . . . may turn on the facts of each case.”<sup>124</sup> Such warnings benefit the firm by avoiding possible conflicts and later disqualifications of counsel. However, the bare warning that the attorney represents the firm may also not have a significant effect on employee behavior.

Second, *Upjohn* warnings should be provided, stating that all communications may be disclosed to the government without employees consent should the corporation waive its attorney-client privilege.<sup>125</sup> To provide context to such warnings, the interviewer may want to explain whether a government investigation is pending; whether the corporation has retained outside counsel concerning the investigation; and whether the government has expressed an intention to separately interview employees.<sup>126</sup> However, additional explanation beyond the bare warning may often not be provided. The *Upjohn* warnings also may not provide employees with other useful

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someone else, can disclose to the authorities what you tell me if the corporation decides to waive its privilege.

Also, if I find wrongdoing, I am under certain obligations to report it to the Board of Directors and perhaps the stockholders.

Dennis J. Block & Nancy F. Barton, *Implications of the Attorney-Client Privilege and Work-Product Doctrine*, in INTERNAL CORPORATE INVESTIGATIONS, *supra* note 108, 17, 40 (quoting Frederick B. Lacey, former U.S. district judge for the District of New Jersey).

<sup>122</sup> *Id.*

<sup>123</sup> MODEL RULES OF PROF'L CONDUCT R. 1.13(f) (2007) (requiring corporate lawyers only to “explain the identity of the client when the lawyer knows or reasonably should know that the organization’s interests are adverse to those of the” employees).

<sup>124</sup> *Id.* at R. 1.13 cmt 11.

<sup>125</sup> *Upjohn Co. v. United States*, 449 U.S. 383 (1981) (holding that attorney-client privilege extends to corporate employees acting within the scope of their duties).

<sup>126</sup> See Bennett et al., *supra* note 51, at 70 (“[A]lthough it may cause the employee to be less forthcoming, it is prudent to advise the employee affirmatively that the substance of the interview is likely to be disclosed to company officials or the government.”); see also Laurie P. Cohen, *In the Crossfire: Prosecutors’ Tough New Tactics Turn Firms Against Employees*, WALL ST. J., June 4, 2004, at A1.

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information, such as whether the firm intends to waive its privilege or has done so in the past.

Additional warnings could be provided. Employees should also be told not to share the contents of their statements with others, lest privilege be waived and the investigation otherwise contaminated.<sup>127</sup> Last, but not least, employees should be told to tell the truth. Whether further statements are provided might depend on factors including whether the corporation wishes to provide separate counsel before interviewing employees; whether immediate discipline of wrongdoers is intended; whether a prosecution is truly imminent; and what rights to advance payment of attorneys fees are included in the employment contract.<sup>128</sup>

The delivery of such comments would make a record that the employee understands the implications of the conversation and would tend to show that the employee made an informed choice. Warnings regarding policy on advancement of fees and termination of non-cooperating employees would avoid potential misunderstandings.

Providing such warnings has costs. All of these warnings, particularly *Upjohn* warnings, may discourage employees from providing statements at all. The effectiveness of such warnings in protecting employees is also equivocal. Employees may face employer discipline should they not cooperate. As a result, reciting a litany of warnings may not affect their behavior. The warnings do not give employees a more informed sense of the particular risks they face. Suspects routinely waive *Miranda* rights during custodial interrogations; perhaps employees would similarly disregard the various "Adnarim" warnings provided.<sup>129</sup>

The conflict-prevention warnings that counsel for the firm does not represent the employee and that employees may wish to seek their own counsel would be most significant if as a result employees might retain their own counsel. Even given pressure to cooperate, employees with a contractual right to attorneys' fees may be likely to postpone interviews in order to consult with counsel. Employees who lacked the bargaining power to obtain a right to attorneys' fees might be less likely to heed those warnings and secure counsel.

The ubiquity of some version of these warnings can be explained not by constitutional criminal procedure but by ethical rules binding attorneys and also raising practical and reputational concerns for employers. The basic *Upjohn* and conflicts warnings avoid uncertainty

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<sup>127</sup> See Coyne & Barker, *supra* note 108, at 192.

<sup>128</sup> See *id.* at 191 (noting reasons to approach warnings differently depending on the situation and noting that "a debate exists about the exact scope of these warnings.")

<sup>129</sup> See Richard A. Leo, *Criminal Law: Inside the Interrogation Room*, 86 J. CRIM. L. & CRIMINOLOGY, 266, 286 (1996).

regarding conflicts. The alternative would be for the firm to not comply with the ethical rules or provide vague information regarding who counsel represents and then “watered-down ‘Upjohn warnings’” vaguely advert to the fact that the firm might waive its privilege.<sup>130</sup> If as a result of unclear representations by corporate counsel, the employee had a subjective and reasonable belief that counsel represents the employee and not the firm, then a court may find that an attorney-client relationship existed and the employee can assert attorney-client privilege.<sup>131</sup> Having formed such a relationship with the employees, corporate counsel would have a conflict that might make continued representation of the corporation not possible.<sup>132</sup> The relevant statements might then be subject to derivative and use immunity; courts have cited to *Kastigar* as providing an analogy for the immunity conferred in this context.<sup>133</sup> Uncertainty regarding possible conflicts would potentially harm the firm by raising possible disqualification of counsel, but would also undermine prosecution of employees and hamper the firm’s cooperation and disclosure to the government.

Thus, sound reasons relating to attorney client privilege and conflicts of interest support giving such warnings and explain their ubiquity. However, constitutional criminal procedure and the Fifth Amendment do not. A court might avoid a difficult inquiry into voluntariness by relying on the fact that warnings were properly provided to the employee who therefore might be presumed to have waived privilege rationally and absent coercive pressure. Even that benefit would only accrue in the situation where the Fifth Amendment potentially applies, which as discussed, would be the unusual case involving close corporate collaboration with the government or corporate policy change at the behest of the government. In most situations at the charging stage, the warnings serve to protect no criminal procedure rights. They instead serve employer interests in clarity of employee expectations and avoiding unintended formation of attorney-client relationships.

The question then arises whether the *Miranda* analogy should be extended farther so as to render such warnings not just advisable but

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<sup>130</sup> *In re Grand Jury Subpoena: Under Seal*, 415 F.3d 333, 340 (4th Cir. 2005). “[T]he putative client must show that his subjective belief that an attorney-client relationship existed was reasonable under the circumstances.” *Id.* at 339; *see also* *E.F. Hutton & Co. v. Brown*, 305 F. Supp. 371, 387 (S.D.Tex. 1969) (discussing reasonableness of employee belief that attorney-client relationship existed and disqualifying attorneys from representing corporation).

<sup>131</sup> *See In re Grand Jury Subpoena*, 415 F.3d at 339.

<sup>132</sup> *See id.* at 340.

<sup>133</sup> *See id.*; *see also* *United States v. Schwimmer*, 924 F.2d 443, 446 (2d Cir. 1991) (stating in affirming district court ruling that no privileged information was used by government, that “[t]he government must demonstrate that the evidence it uses to prosecute an individual was derived from legitimate, independent sources.”) (citing *Kastigar v. United States*, 406 U.S. 441, 461-62, (1972)).

joined with an exclusionary rule, or even more extreme, use-immunity for statements provided. For the warnings to have any other status, however, federal courts would have to take two radical and inadvisable steps: extending the reach of the penalty cases and then elevating such warnings to *Miranda's* status as "a constitutional decision."<sup>134</sup>

Congress, in rethinking whether to regulate this area, could enact legislation requiring that the government proceed with non-custodial interviews only after providing such warnings. However, even such a rule would not apply to interviews conducted by employers. Prosecutors cannot control what information employers provide to employees during prior interviews, nor what pressure they apply. Not all targets of criminal investigations desire to secure cooperation. A firm seeking to conceal criminality might not wish to elicit inculpatory information, nor inform employees of adverse interests.

Absent rewards for uncovering criminality, some recalcitrant firms might have incentives not to pursue such interviews at all. A firm that does not wish to cooperate might then wish to pursue an internal investigation in a manner designed to produce little information of value, and indeed, to create conflicts that would hinder future litigation. The current regime which rewards cooperation therefore may to a greatly unappreciated extent bolster firm incentives to provide warnings to employees and ensure that they are informed of their rights. Any efforts to further encourage firms to provide such warnings and protections should be directed at firms and not through the route of criminal procedure protections.

Perhaps the best solution would be for DOJ to include as a factor in considering whether to grant leniency to a corporation, not just whether the firm secured the cooperation of employees, but whether the firm did so in a way that informed them of their rights under their employment contracts, whatever those may be, avoided potential conflicts of interest, and informed them of the possibility of entity waiver of privilege. In that way, federal prosecutors would reward not haphazard cooperation at all costs, but cooperation that sensibly elicits informed, sound, and conflict-free statements by employees.

#### CONCLUSION

Confessions by employees are routine and embedded in the management of any workplace, but the threat of a prosecution changes the dynamics surrounding such internal investigations into employee behavior. A firm's compliance efforts will typically not raise issues

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<sup>134</sup> *Dickerson v. United States*, 530 U.S. 428, 438 (2000).

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under the Supreme Court's Fifth Amendment decisions. However, to safeguard the quality of the information they obtain and prevent conflicts, firms may increasingly provide warnings to inform employees before interviewing them. Rewarding such cooperation may help ensure that such information comes to light and that firms valuing compliance do not face the harsh consequences of an indictment.

Understanding that criminal procedure will not typically immunize inculpatory statements that employees deliver during criminal investigations makes it all the more crucial that firms take on the responsibility to ensure that internal interventions prevent conflicts, misunderstandings, litigation, and unreliable evidence. Firms benefit from clear written policies regarding cooperation during investigations. Employees, rather than face substantial pressure from firms, should try to negotiate in advance, contracts with explicit provisions regarding consequences of non-cooperation. Employees may most benefit from a clear entitlement to payment of attorneys' fees, where retaining counsel may best protect their interests during an investigation. Prosecutors, corporations, regulators and attorneys can encourage the use of detailed internal warnings during interview sessions to secured reliable and informed statements. Just as employers have good reasons to avoid conflicts of interest and unintended formation of attorney-client relationships, prosecutors have every interest in avoiding such problems. DOJ Guidelines that reward provision of employer warnings would add useful incentives to clarify murky interview dynamics.

Finally, despite the focus on employee statements, admissions by a corporation may be far more powerful. They can summarize all that was learned during internal and external investigations and in detail acknowledge commission of a series of crimes. Prosecutors are only just beginning to put such statements to use, but they may usher in a new era of confessions by corporations. Self-incrimination by individuals due to pressure from corporations then comes full circle as artificial corporate persons themselves confess and inculcate other individuals and corporations. The Fifth Amendment has little to say about either problem, but these complex confession dynamics will help to define employment relationships at a time when prosecutors increasingly pursue charges against both employees and corporations.