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Protections of Criminal Procedure: An
Economic Analysis

Vikramaditya S. Khanna
University of Michigan Law School, vskhanna@umich.edu

UNIVERSITY OF MICHIGAN

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PAPER #04-015



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CORPORATE DEFENDANTS AND THE PROTECTIONS OF CRIMINAL PROCEDURE: AN ECONOMIC ANALYSIS

By: Vikramaditya S. Khanna*

Abstract

Corporations are frequently treated as “persons” under the law. One of the fundamental questions associated with this treatment is whether corporations should receive the same Constitutional protections and guarantees as natural persons. In particular, should corporations receive the Constitutional protections of Criminal Procedure? After all, corporations cannot be sent to jail so the sanctions they face are essentially the same as in civil proceedings. If so, then why not have the same procedural protections for corporate defendants in civil and criminal cases? Little scholarly analysis has focused on this issue from an economic perspective and this article aims to fill that gap.

My analysis concludes that the concerns animating most procedural protections in the corporate context (i.e., reducing the costs of adjudicative errors and abusive prosecutorial behavior) would require procedural protections that differ for corporate defendants depending on the identity of the moving party (e.g., government or private litigant), and the type of sanction the corporation is facing, *but not* on the type of proceedings (criminal or civil) against the corporation. The analysis thus calls for a reorientation of procedural protections for corporate defendants along these lines rather than on the current criminal – civil dichotomy. The implications of such a reorientation are sketched in this paper and may, at times, suggest having *stronger* protections for corporations in *civil* proceedings than in criminal proceedings.

* Professor of Law, University of Michigan School of Law; S.J.D. Harvard Law School, 1997. Email: vskhanna@umich.edu or vskhanna2004@yahoo.com.

CORPORATE DEFENDANTS AND THE PROTECTIONS OF CRIMINAL PROCEDURE: AN ECONOMIC ANALYSIS

By: **Vikramaditya S. Khanna**[†]

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I. INTRODUCTION

The frequent treatment of corporations as “persons” under the law raises a number of fundamental questions.¹ One such question is whether corporations should receive the same Constitutional protections and guarantees as natural persons. Although a corporation’s claim to the First Amendment has received considerable attention,² much less scholarly attention has been focused on whether a corporation should receive the Constitutional protections of Criminal Procedure, such as double jeopardy or the reasonable doubt standard.³ After all,

[†] Professor of Law, University of Michigan School of Law; S.J.D. Harvard Law School, 1997. Email: vskhanna@umich.edu or vskhanna2004@yahoo.com. I would like to thank the John M. Olin Foundation for funding support and Rick Bierschbach, Jill Fisch, Michael Heller, Keith Hylton, Avery Katz, Mitch Polinsky, Steven Shavell, Steven Thel, and participants at seminars at the University of Michigan Law School, Stanford Law School, Fordham Law School, and _____ for helpful comments and discussion. I would also like to thank Caitlyn Campbell, Nathan Howell, Kristin Jenkins, Jay Krawitz, Philip Maxwell, George Qi, Mike Silberfarb, Steve Weaver, and Natalie Wong-Brink for excellent research assistance.

¹ See, e.g., John J. Flynn, *The Jurisprudence of Corporate Personhood: The Misuse of a Legal Concept*, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 131 (Warren J. Samuels & Arthur S. Miller eds., 1987); Warren J. Samuels, *The Idea of the Corporation as a Person: On the Normative Significance of Judicial Language*, in CORPORATIONS AND SOCIETY: POWER AND RESPONSIBILITY 113 (Warren J. Samuels & Arthur S. Miller eds., 1987); John C. Coffee, Jr., “No Soul to Damn, No Body to Kick: An Unscandalized Inquiry into the Problem of Corporate Punishment,” 79 MICH. L. REV. 386 (1981); Morton J. Horwitz, *Santa Clara Revisited: The Development of Corporate Theory*, 88 W. VA. L. REV. 173, 217 – 18 (1988); V.S. Khanna, *Corporate Criminal Liability: What Purpose Does It Serve?*, 109 HARV. L. REV. 1477, 1492 (1996) [hereinafter *Liability*]; V.S. Khanna, *Is the Notion of Corporate Fault a Faulty Notion?: The Case of Corporate Mens Rea*, 79 B.U. L. REV. 355 (1999) [hereinafter *Corporate Fault*]; William S. Laufer, *Corporate Bodies and Guilty Minds*, 43 EMORY L.J. 648 (1994); Steven D. Walt & William S. Laufer, *Why Personhood Doesn’t Matter: Corporate Criminal Liability and Sanctions*, 18 AM. J. CRIM. L. 263 (1991). Robert A. Baruch Bush, *Between Two Worlds: The Shift from Individual to Group Responsibility in the Law of Causation of Injury*, 33 UCLA L. REV. 1473, 1529 (1986).

² See, e.g., Robert Post, *The Constitutional Status of Commercial Speech*, 48 UCLA L. REV. 1 (2000); Ronald A. Cass, *Commercial Speech and the First Amendment*, 56 U. CIN. L. REV. 1317, 1988; Martin H. Redish, *The Value of Free Speech*, 130 U. PA. L. REV. 591 (1982). Much of the campaign finance literature also entails some discussion of the corporation’s first amendment rights. [collecting cites].

³ The economically oriented discussion of *corporate* procedural protections is usually a few pages in an article that mainly deals with other issues. See Khanna, *Liability*, *supra* note 1, at 1495 – 96; John T. Byam,

corporations cannot be sent to jail so the sanctions they face are essentially the same as those in civil proceedings. If so, then why not have the same procedural protections for corporate defendants in civil and criminal cases? This article examines these questions from an economic perspective.

Addressing these questions is important not only for their intrinsic value, but also because they may help shed some light on the desirability and efficacy of corporate criminal liability. This is because the primary, and perhaps only, substantive differences between corporate criminal liability and corporate civil liability are the procedural protections that apply to them.⁴ Although these differences have persisted for years, there is little economically-oriented discussion of their desirability.⁵ Specifically, there is little analysis of whether these procedural protections are desirable for corporations or whether having

Comment, *The Economic Efficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582 (1982); *Developments*, *supra* note 4, at 1365-75. There is more discussion of corporate procedural protections from other perspectives. See, e.g., Howard Friedman, *Some Reflections on the Corporation as Criminal Defendant*, 55 THE NOTRE DAME LAWYER 174 (1979); Peter J. Henning, *The Conundrum of Corporate Criminal Liability: Seeking a Consistent Approach to the Constitutional Rights of Corporations in Criminal Prosecutions*, 63 TENN. L. REV. 793 (1996); Stephen G. Wood & Brett G. Scharffs, *Applicability of Human Rights Standards to Private Corporations: An American Perspective*, 50 AM. J. COMP. L. 531 (2002); William J. Stuntz, *The Substantive Origins of Criminal Procedure*, 105 YALE L. J. 393, 429 – 30 (1995); Scott Trainor, *A Comparative Analysis of Corporation's Right Against Self-Incrimination*, 18 FORDHAM INT'L L.J. 2139, 2140 (1995); Carl J. Mayer, *Personalizing the Impersonal: Corporations and the Bill of Rights*, 41 HASTINGS L.J. 557 (1990). See also JULIE R. O'SULLIVAN, FEDERAL WHITE COLLAR CRIME: CASES AND MATERIALS 788 – 862, 1008 – 44 (2001).

⁴ See Khanna, *Liability*, *supra* note 1, at 1492 (1996); Vikramaditya S. Khanna, *Corporate Crime Legislation: A Political Economy Analysis*, 82 WASH. U.L. Q. 95 (2004) [hereinafter *Political Economy*]; Vikramaditya S. Khanna, *Politics & Corporate Crime Legislation*, 27 REGULATION 30 (Spring 2004) [hereinafter *Politics*]; Friedman, *supra* note 3; *Developments in the Law – Corporate Crime: The Use of Criminal Sanctions to Regulate Corporate Behavior*, 92 HARV. L. REV. 1227, 1230 (1979) [hereinafter *Developments*]. For discussion of corporate criminal liability see generally KATHLEEN F. BRICKEY, CORPORATE CRIMINAL LIABILITY (2d ed., 1992); O'SULLIVAN, *supra* note 3; JOHN KAPLAN, ROBERT WEISBERG & GUYORA BINDER, CRIMINAL LAW CASES AND MATERIALS 975 – 1013 (4th ed., 2000).

⁵ The economically oriented discussion of *corporate* procedural protections is usually a few pages in an article that mainly deals with other issues. See Khanna, *Liability*, *supra* note 1, at 1495 – 96; John T. Byam, Comment, *The Economic Efficiency of Corporate Criminal Liability*, 73 J. CRIM. L. & CRIMINOLOGY 582 (1982); *Developments*, *supra* note 4, at 1365-75. There is more discussion of procedural protections for individual defendants from an economic perspective. See RICHARD A. POSNER, AN ECONOMIC ANALYSIS OF THE LAW 604 – 05 (discussing one economic justification for criminal procedure), 748 (noting that searches and seizures generate social costs) (5th ed. 1998); Paul G. Cassell, *Miranda's Social Costs: An Empirical Reassessment*, 90 NW. U.L. REV. 387, 451 (1996) (finding criminal suspects less likely to confess after *Miranda*); John J. Donohue III, *Did Miranda Diminish Police Effectiveness?*, 50 STAN. L. REV. 1147, 1150 (1998); Keith N. Hylton & V.S. Khanna, *A Public Choice Theory of Criminal Procedure*, Discussion Paper No. 318, John M. Olin Center for Law,

different procedural protections for corporations depending on the type of liability proceedings – criminal or civil – is desirable.

My analysis concludes that the concerns animating most procedural protections in the corporate context (e.g., reducing the costs of adjudicative errors and abusive prosecutorial behavior) would require procedural protections for corporate defendants that differ depending on the identity of the moving party (e.g., government or private litigant), and the type of sanction the corporation is facing, *but not* on the type of proceedings (criminal or civil) against the corporation. The analysis thus calls for a reorientation of procedural protections for corporate defendants along these lines rather than on the current criminal – civil dichotomy. The implications of such a reorientation are sketched out in later parts of this article and may involve providing corporations with *stronger* protections in some *civil* proceedings than criminal proceedings.

Part II begins by describing the major procedural protections of interest to my analysis. These include the beyond reasonable standard of proof, double jeopardy, right to a jury trial, fourth amendment protection, and the privilege against self-incrimination. These protections create a pro-defendant bias in criminal proceedings and it becomes important to examine what might justify this bias.

Part III notes that the literature identifies a number of potential justifications including (i) protecting the defendant's privacy interests and liberty interests against unwarranted government intrusion, (ii) reducing the costs associated with adjudicative error (error costs) and (iii) reducing the costs associated with abusive prosecutorial behavior (rent-seeking or improper

Economics & Business, Harvard Law School (2001)(revised 2004), 2001 version available at http://www.law.harvard.edu/programs/olin_center/; 2004 version available from authors upon request.

enforcement costs).⁶ Although these are clearly important goals, only the last two apply in the corporate context. This is because corporations do not possess the same kinds of liberty and privacy interests as humans do.⁷ Part III then elaborates the error cost justification in the context of individual defendants and suggests that the social sanctioning costs associated with wrongful imprisonment may provide a good partial justification for the pro-defendant bias in criminal procedure.

Part IV then examines the error cost justification in the context of corporate defendants. Because corporations cannot be sent to jail the primary error cost justification for criminal protections is weaker.⁸ Indeed, corporations face the same kinds of sanctions in criminal and civil proceedings (only monetary ones) suggesting little need, on error cost grounds, to have different procedures based on the kind of proceedings. However, not all monetary sanctions have the same error costs. Indeed, certain sanctions, such as loss of license sanctions, punitive damages, and other large sanctions imposed under uncertain legal standards, may have greater social costs than simple cash fines *regardless of whether these sanctions are imposed in criminal or civil proceedings*. These greater social costs may justify some departure from the civil procedural protections, but perhaps not all the way to the criminal protections.⁹ This is because the social sanctioning costs of a wrongful loss of license or punitive damages sanction are

⁶ See YALE KAMISAR, WAYNE R. LAFAVE & JEROLD H. ISRAEL, *MODERN CRIMINAL PROCEDURE* 114 – 127 (8th ed., 1994) [more recent edition]; Friedman, *supra* note 3, at 192 – 95; Hylton & Khanna, *supra* note 5. One could also list constraining litigation costs as a justification for these procedural protections. See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 447 (1973). I do not because the analysis relevant for litigation costs can be quite complex and is best left to another paper. Moreover, most of the discussion of procedural protections does not necessarily suggest the reduction of litigation costs as the primary justification(s). [collecting cites]

⁷ See Friedman, *supra* note 3, at 192 – 95. [collect more cites]

⁸ See POSNER, *supra* note 5, at 604 – 05 (discussing the error cost justification); JOSHUA DRESSLER, *UNDERSTANDING CRIMINAL PROCEDURE*, (2d ed. 1997) (describing justifications for pro-defendant bias); Randolph N. Jonakait, *Biased Evidence Rules: A Framework for Judicial Analysis and Reform*, UTAH L. REV. 67, 68 (1992).

⁹ See Khanna, *Liability*, *supra* note 1, at 1497 – 1512.

probably not as large as the social sanctioning costs of wrongful imprisonment.¹⁰ Thus, on error cost grounds, we would be inclined to provide corporations with protections that vary with the type of sanction (not type of proceedings), but the highest protection would be less than the criminal protections for individual defendants.

Part V then moves on to discuss the costs of improper or abusive enforcement and how they might justify a pro-defendant bias in criminal procedure when dealing with individual defendants. In essence, the pro-defendant protections make it harder for prosecutors, and those who might lobby them, to use the law enforcement process to benefit themselves or extract wealth from others.¹¹

Part VI then examines improper enforcement costs in the corporate context. As a general matter, these costs are probably quite large in the corporate context. This is because the gains from abusive or improper enforcement are likely to be greater when there is a corporate defendant because it has more wealth to be expropriated than most individual defendants.¹² Moreover, in the corporate context the improper enforcement concerns may be greater in government civil enforcement than criminal enforcement because civil enforcement is more frequent, possesses larger sanctions, and is enforced by government agencies that are more easily “captured” than the agencies that

¹⁰ See *id.* When sanctioning costs are between the civil and criminal extremes some have suggested relying on intermediate or hybrid standards. See Kenneth Mann, *Punitive Civil Sanctions: The Middle Ground Between Criminal and Civil Law*, 101 *YALE L. J.* 1795, 1813 (1992) (discussing hybrid liability structures for individual defendants).

¹¹ Improper enforcement concerns may arise in private litigation too (e.g., frivolous litigation), but the methods of dealing with frivolous litigation in private enforcement are difficult to transport to criminal enforcement brought by the government. See *infra* discussion Part V. Cf. also Eric Talley, et al, *A Theory of Legal Presumptions*, 16 *J. L. ECON. & ORG.* 1 (2000). See generally, *Developments in the Law--Lawyers' Responsibilities and Lawyers' Responses*, 107 *HARV. L. REV.* 1547 (1994); Byron C. Keeling, *Toward a Balanced Approach to “Frivolous” Litigation: A Critical Review of Federal Rule 11 and State Sanctions Provisions*, 21 *PEPP. L. REV.* 1067, 1075 (1994).

¹² See *infra* discussion in Part VI.C.

enforce the criminal law. Thus, on improper enforcement cost grounds, we would be inclined to provide corporate defendants with potentially stronger protections in some government civil proceedings than criminal proceedings.

Part VII takes this analysis and examines its implications for procedural protections as applied to corporations. The analysis generally suggests weaker protections for corporate defendants than individual defendants, but similar protections for corporate defendants in criminal and civil proceedings. To the extent there is a difference in protections between criminal and civil proceedings for corporate defendants it may cut in favor of stronger protections in some *civil* cases than criminal cases. The net impact of this analysis on the overall mix of procedural protections is sketched out in this Part. Part VIII then discusses some special evidentiary concerns with certain procedural protections and Part IX concludes.

II. CORPORATE PROCEDURAL PROTECTIONS IN CIVIL AND CRIMINAL LIABILITY

Procedural protections cover a vast area of jurisprudence that spawns an impressive amount of discussion.¹³ I cannot hope to cover every aspect of it in this paper. Consequently, I narrow my focus to those procedural protections that differ for corporate and individual defendants and those procedural protections that differ for corporations depending on the type of proceedings they are facing. It is these differences that I am interested in examining.

¹³ See, e.g., YALE KAMISAR, ET AL., *BASIC CRIMINAL PROCEDURE* (2000); SUSAN N. SUBRIN, ET AL., *CIVIL PROCEDURE DOCTRINE: PRACTICE, AND CONTEXT* 643 – 46 (2000); Paul Hoffman, *The Rodney King Trials: Civil Rights Prosecutions & Double Jeopardy: Double Jeopardy Wars: The Case for a Civil Rights “Exception”*, 41 *UCLA L. REV.* 649 (1994); Robert Bartels, *The Hearsay Rule, The Confrontation Clause, and Reversible Error in Criminal Cases*, 26 *ARIZ. ST. L.J.* 967 (1994); Susan R. Klein, *Special Issue, Reducing the Criminal Civil Boundary*, 2 *BUFF. CRIM. L. REV.* 697 (1999).

A. *Standard of Proof.*

In criminal proceedings corporate defendants receive the benefits of the beyond reasonable doubt standard of proof.¹⁴ This stands in contrast to the preponderance of the evidence standard commonly used in civil proceedings.¹⁵ It appears that the reasonable doubt standard is much more pro-defendant than the preponderance standard.¹⁶ Simply put, the moving party has a greater burden in corporate criminal proceedings compared to corporate civil proceedings.¹⁷

B. *Rules on Retrials.*

In both civil and criminal proceedings there is the possibility of retrial and each area has rules governing this. In the criminal context double jeopardy and collateral estoppel can be used to prevent retrials or to make the issues in a potential retrial moot.¹⁸ In the civil context res judicata and collateral estoppel apply with somewhat similar effect.¹⁹ Corporate defendants receive double jeopardy and collateral estoppel in criminal cases and res judicata and collateral estoppel in civil cases.²⁰ As collateral estoppel applies in both types of cases the

¹⁴ See *Developments*, *supra* note 4, at 1341 – 50.

¹⁵ See Hylton and Khanna, *supra* note 5, at 5; Mary M. Cheh, *Constitutional Limits on Using Civil Remedies To Achieve Criminal Law Objectives: Understanding and Transcending the Criminal-Civil Law Distinction*, HASTINGS L.J. 1325, 1394 (1991)

¹⁶ See Hylton & Khanna, *supra* note 5, at 4 – 5. *But see* Irwin A. Horowitz, *Reasonable Doubt Instructions: Commonsense Justice and Standard of Proof*, 3 PSYCHOL. PUB. POL'Y & L. 285, 295 (noting “reasonable doubt” does not have a uniform interpretation among jurors) (1997).

¹⁷ See Khanna, *Liability*, *supra* note 1, at 1512. *See also* Hylton & Khanna, *supra* note 5, at 5 (noting that “the preponderance rule is assumed to require that the decision-maker be 51% certain that the defendant is liable... whereas the reasonable doubt standard [assumes] that the decision-maker [is] 90% to 95% certain [of liability].”)

¹⁸ See *Second Annual Review of Criminal Procedure: Double Jeopardy*, 91 GEO. J. L. 409 – 52; DRESSLER, *supra* note 8, at 687 – 95.

¹⁹ See SUBRIN, *supra* note 13, at 883 – 911.

²⁰ Double Jeopardy protection applies to corporations in criminal proceedings. *See Developments*, *supra* note 4, at 1341 - 44; RICHARD S. GRUNER, CORPORATE CRIME AND SENTENCING §§ 5.031M, 5.7.11 (1994); Friedman, *supra* note 3, at 195 – 98 (1979); *United States v. Louisville Edible Oil Prods., Inc.*, 926 F.2d 584, 588 (6th Cir. 1991); *United States v. Alder Creek Water Co.*, 823 F.2d 343, 345 (9th Cir. 1987).

differences in protection depend on the differences between *res judicata* and double jeopardy.²¹

One difference is in the availability of an appeal right. Under *res judicata* either party can appeal an initial trial outcome,²² whereas under double jeopardy normally only the defense can appeal the outcome in an initial trial.²³ Another difference is that *res judicata* applies once there is a final decision on the merits, whereas double jeopardy often applies much earlier.²⁴ In other words, if a civil trial ends without a verdict then that is not a reason to prohibit a second civil trial under *res judicata*, whereas in criminal cases double jeopardy prohibits a second criminal trial once the defendant is “in jeopardy”, which could be well before a final verdict.²⁵ This suggests that double jeopardy is more pro-defendant than *res judicata* and that the protection against retrials is stronger in criminal cases.

This, however, ignores some instances where *res judicata* might actually be stronger than double jeopardy in protecting against retrials.²⁶ Generally,

For discussion of the protections for corporate defendants in civil proceedings see *Developments*, *supra* note 4, at 1349 – 60; Richard Gruner, *Towards an Organizational Jurisprudence: Transforming Corporate Criminal Law Through Federal Sentencing Reform*, 36 ARIZ. L. REV. 407, 432 (1994).

²¹ See Cynthia L. Randall, Comment, *Acquittals in Jeopardy: Criminal Collateral Estoppel and the Use of Acquitted Act Evidence*, 141 U. PA. L. REV. 283, 290 – 91 (1992) (discussing difference between double jeopardy and collateral estoppel doctrines); 18 JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE*, § 132.01[4][a] (3d ed. 1998) (comparing *res judicata* and collateral estoppel); RESTATEMENT (SECOND) OF JUDGMENTS §§ 26(1)(f) (1980) (claim preclusion), 28(5)(c) (issue preclusion); BLACK'S LAW DICTIONARY 256, 567, 1312 – 13 (7th ed., 1999).

²² See *Developments*, *supra* note 4, at 1343; Vikramaditya S. Khanna, *Double Jeopardy's Asymmetric Appeals Rights: What Purpose Do They Serve?*, 82 B.U.L.REV. 341, 344 (2002).

²³ See Khanna, *supra* note 22, at 344; *Kepner v. United States*, 195 U.S. 100, 133 (1904) (holding that the government may not appeal an acquittal); 430 U.S. 564, 567 (1977). This rule does apply to corporations according to *United States v. Martin Linen Supply Co.* 430 U.S. 564, 567 (1977).

²⁴ See DRESSLER, *supra* note 8, at 687 – 88 (discussing double jeopardy); SUBRIN ET. AL., *supra* note 13, at 887 – 89 (discussing *res judicata*); *Crist v. Bretz*, 437 U.S. 28 (1978) (elaborating on when “jeopardy” attaches).

²⁵ See *Crist*, *supra* note 24. Discussion of the double jeopardy treatments of mistrials can be gleaned from see Stephen Schulhofer, *Jeopardy and Mistrials*, 125 U. PA. L. REV. 449 (1977). Here also there is some possibility that there will not be another trial. See *id.*, at 468 – 69.

²⁶ See *Developments*, *supra* note 4, at 1343; Hylton & Khanna, *supra* note 5, at 26; *Blockburger v. United States*, 284 U.S. 299 (1932) (defining what “same” offense means for double jeopardy purposes).

under *res judicata* when you have the same parties in litigation the courts will prefer to have claim joinder so that all the issues/claims can be heard in one trial when dealing with the same sets of facts.²⁷ Double jeopardy, however, does not require that all offenses based on the same set of facts be heard in one trial.²⁸ There can simply be no further trials for the *same offense*, but there can be further trials for *different offenses* based on the *same set of facts*.²⁹ To see this difference imagine that there are two offenses – one with elements *A, B*, and *C* and the other with elements *A, B*, and *E* – arising from the same set of facts and involving the same parties. If these were civil wrongs *res judicata* would require that they be argued in one trial.³⁰ If these were criminal wrongs then there is a greater chance that double jeopardy jurisprudence would allow the prosecution to bring two trials. This is because “[t]wo offenses are different for double jeopardy purposes whenever each contains an element that the other does not.”³¹ Thus, it may actually be easier to obtain a retrial in criminal cases because of the definition of same offense within double jeopardy.

Although true in the abstract, there are reasons to believe that double jeopardy’s ease of permitting retrials for different offenses on the same set of facts is more illusory than real. Many states will not permit prosecutors to split charges based on the same set of facts so that although the Constitutional protection of double jeopardy may permit charge-splitting few states would

²⁷ See E. William Stockmeyer, Symposium Note, *Res Judicata Effects of Unappealed, Independently Sufficient Alternative Determinations*, 70 CORNELL L. REV. 717, 723 (1985) (*res judicata* has goal of “full and fair” litigation); Walter W. Heiser, *California’s Confusing Collateral Estoppel (Issue Preclusion) Doctrine*, 35 SAN DIEGO L. REV. 509, 512 (1998) (noting function of a successful *res judicata* doctrine is finality); *Massari v. Einsiedler*, 78 A.2d 572, 574 (1951) (arguing that *res judicata*’s purpose is to conclusively determine issues).

²⁸ See Randall, *supra* note 21, at 290 – 91; Judge Nancy Gertner, *Circumventing Juries, Undermining Justice: Lessons from Criminal Trials and Sentencing*, 32 SUFFOLK U. L. REV. 419, 435 (1999).

²⁹ See *Blockburger*, *supra* note 26, at 299 (1932) (holding that prosecution of different offenses arising from the same set of facts might not be prevented under double jeopardy protection).

³⁰ See Stockmeyer, *supra* note 27; Heiser, *supra* note 27.

³¹ *Lewis v. U.S.* 523 U.S. 155, 176 (1998). See also *Carter v. U.S.*, 530 U.S. 255, 260 (2000).

allow it.³² Also, prosecutors might have little incentive to pursue later trials based on the same facts because the factual holdings in the first criminal trial may have collateral estoppel effects on later trials.³³ Moreover, prosecutors faced with a budget constraint might not find it in their interests to pursue a retrial when the first trial was unsuccessful.³⁴ The acquittal in the first trial may provide a signal that the likelihood of success in another trial is bleak.

Thus, overall double jeopardy may have a greater pro-defendant bias than *res judicata* given asymmetric appeal rights and the timing of when jeopardy attaches. This suggests that in terms of protection against retrials there is a greater pro-defendant bias in criminal cases.

C. *Right to a Jury Trial.*

A number of federal courts have held that a corporation has the right to a jury trial for wrongdoing that is not considered “petty”.³⁵ The US Supreme Court has not yet affirmatively decided the issue, but the lower courts appear to agree that corporations do have a right to a jury trial in such criminal cases.³⁶ A similar right does not appear to exist in civil proceedings.³⁷

³² See Anne Bowen Poulin, *Double Jeopardy Protection Against Successive Prosecutions in Complex Criminal Cases: A Model*, 25 CONN. L. REV. 95, 100 (1992) (suggesting some legislatures constrict the state’s prosecutors’ ability to re prosecute cases eligible for double jeopardy protection); Khanna, *supra* note 22, at 394 n. 204; Elizabeth R. Lear, *Contemplating the Successive Prosecution Phenomenon in the Federal System*, 85 J. CRIM. L. & CRIMINOLOGY 525, 554 n. 175 (1995) (noting that 23 states have, by statute, barred charge splitting).

³³ See Gertner, *supra* note 28, at 435 – 36; *United States v. DeAngelo*, 138 F.2d 466, 469 (3d Cir. 1943) (holding that jury could not reconsider certain pre-litigated findings of fact upon which the defendant’s prior acquittal was based).

³⁴ See Steven Shavell, *The Appeals Process as a Method of Error Correction*, 24 J. LEGAL STUD. 379, 383 – 85 (1995). Also, in countries where prosecutors can appeal acquittals we see very few prosecutorial appeals probably for the reasons identified in the text. See Khanna, *supra* note 22, at 370 – 71 n 113.

³⁵ See GRUNER, *supra* note 20, at § 5.027H; James Joseph Duane, *Jury Nullification: The Top Secret Constitutional Right*, LITIG., SUMMER 1996, at 6.

³⁶ See *Developments*, *supra* note 4, at 1302; GRUNER, *supra* note 20, at § 5.027H.

³⁷ See *Developments*, *supra* note 4, at 1302; F. Joseph Warin & Michael D. Bopp, *Corporations, Criminal Contempt and the Constitution: Do Corporations Have a Sixth Amendment Right to Trial by Jury in Criminal Contempt Actions and, if So, Under What Circumstances?*, 1997 COLUM. BUS. L. REV. 1, 7 (noting that “petty/serious” distinction is what determines the corporation’s right to a jury trial). One interesting area of debate is when a penalty would be considered sufficiently “petty” that the jury trial protection would not

D. Grand Jury.

Grand juries are common features of corporate prosecutions.³⁸ They serve at least two functions. First, they serve as a screen on weak cases and second, they serve as a powerful tool for gathering information about wrongdoing.³⁹ The second function is not really associated with *protecting* the corporation, whereas the first is.⁴⁰ However, one doubts that grand juries serve a serious screening function for corporate defendants.⁴¹ In the vast majority of cases the grand jury indicts the defendant.⁴²

Civil cases do not have a direct analogue to grand juries.⁴³ Nonetheless, given the fairly weak protection afforded by Grand Juries in criminal cases the lack of availability in civil cases probably does not harm defendants too much.

apply. See GRUNER, *supra* note 20, at § 5.027H; The courts have adopted different positions on this point. In *United States v. Twentieth Century Fox Film Corp.*, 882 F.2d 656, 663 (2d Cir. 1989), *cert. denied*, 493 U.S. 1021 (1990), the court held that when prosecutors threatened fines above \$100,000 then the offense would not be considered “petty” and would trigger the right to a jury trial. See *id.* at 658. When the threatened offense was below \$100,000 then the right to a jury trial arose if the maximum fine would have a significant financial impact on the corporation. See *id.* at 664; This is usually measured by reference to the fine’s relationship to the corporation’s financial resources. See *id.*, at 664. What percentage is significant “enough” is open to debate, but apparently anything below 15% will be considered not significant enough. See Warin & Bopp, *supra*, at 22; GRUNER, *supra* note 20, at § 5.028. The fine’s relationship to the corporation’s ability to pay does seem to be an important factor in other cases too. See *United States v. Troxler Hosiery Co.*, 681 F.2d 934 (4th Cir. 1982); *Musidor, B. V. v. Great American Screen*, 658 F.2d 60, 66 (2d Cir. 1981).

³⁸ See *Developments*, *supra* note 4, at 1293.

³⁹ See Khanna, *Liability*, *supra* note 1, at 1519.

⁴⁰ See *id.*, at 1519 – 20. This statement is a bit over-broad. All else equal, more information should lead to more accurate decision making which should benefit innocent parties (i.e., here corporations). See generally Louis Kaplow, *The Value of Accuracy in Adjudication: An Economic Analysis*, 23 J. LEGAL STUD. 307 (1994) For purposes of analytical simplicity I simply treat the information gathering function as something not necessarily designed to benefit defendants because it does not seem biased in their favor.

⁴¹ See Khanna, *Liability*, *supra* note 1, at 1519.

⁴² See *id.*, at 1519 n. 4. Further, the object of screening is to cull out potential false convictions. See *id.*, at 1519. The perception appears to be that in the corporate context false convictions are fairly uncommon in the first place and that there is little need to devise a screening mechanism to knock them out at an early stage. See *id.*, at 1520.

E. *Fourth Amendment Unreasonable Search & Seizure.*

The fourth amendment applies to corporations in criminal proceedings and to corporations in civil proceedings when initiated by an administrative agency.⁴⁴ However, the corporation receives lesser protection than individual defendants might.⁴⁵ Thus, what might be considered a “reasonable” search for a corporate defendant might not be for an individual defendant.⁴⁶ The courts have stated that the reason for this difference is that in the context of individual defendants the fourth amendment protects against unnecessary invasions into the privacy of the individual and against the costs associated with an endless parade of searches.⁴⁷ For corporations only the latter concern is really triggered.⁴⁸ Consequently, the level of protection is lower than what would arise for individuals.⁴⁹

F. *Self-Incrimination.*

The corporation does not have a right against self-incrimination in criminal or any other proceedings.⁵⁰ The primary reason for this is that the privilege appears concerned with preventing coerced testimony.⁵¹ In this context coercion is usually taken to mean violent or psychological coercion – both of

⁴³ Although civil cases have discovery, that is more analogous to criminal discovery than to grand juries. *See id.*, at 1522 – 25.

⁴⁴ *See* Graham Hughes, *Administrative Subpoenas and the Grand Jury: Converging Streams of Civil and Compulsory Process*, VAND. L. REV. 573, 587 – 89 (1994) (discussing abilities of agencies to subpoena); Friedman, *supra* note 4, at 194 – 95 (discussing applicability of fourth amendment in criminal proceedings with corporate defendants); *Developments, supra* note 4, at 1286 (same).

⁴⁵ *See Developments, supra* note 4, at 1286; Henning, *supra* note 3, at 826.

⁴⁶ *See Developments, supra* note 4, at 1288; Friedman, *supra* note 3, at 192.

⁴⁷ *See Developments, supra* note 4, at 1288; Friedman, *supra* note 3, at 194.

⁴⁸ *See Developments, supra* note 4, at 1288; Friedman, *supra* note 3, at 192.

⁴⁹ *See Developments, supra* note 4, at 1286; Friedman, *supra* note 3, at 192.

⁵⁰ *See Developments, supra* note 4, at 1278; Friedman, *supra* note 3, at 193.

⁵¹ *See Developments, supra* note 4, at 1278 n. 13 (stating purpose of self incrimination). *See also* *Murphy v. Waterfront Commission*, 378 U.S. 52, 55 (1964) (noting that self incrimination protects against “self-accusation, perjury, [and] contempt”).

which do not apply to corporations *per se*.⁵² Consequently, courts have held that there is little need for this privilege in the corporate context.⁵³

There are other protections that might apply to corporations, but they tend not to be different in civil and criminal cases or they are the same as for individual defendants.⁵⁴ Consequently, I do not discuss them any further. To summarize I put the discussion of the last few paragraphs into the following Table.

TABLE 1
CURRENT LAW ON PROCEDURAL PROTECTIONS

PROTECTION	DEFENDANT			
	CORPORATION		INDIVIDUAL	
	<i>Criminal</i>	<i>Civil</i>	<i>Criminal</i>	<i>Civil</i>
Standard of Proof	Reasonable Doubt	Preponderance	Reasonable Doubt	Preponderance
Retrial Protection	Double Jeopardy & Collateral Estoppel	Res Judicata & Collateral Estoppel	Double Jeopardy & Collateral Estoppel	Res Judicata & Collateral Estoppel
Jury Trial	Yes	No	Yes	No
Grand Jury	Yes	No	Yes	No
Evidentiary Restrictions	Weak Search & Seizure.	Weak Search & Seizure when government is moving party.	Strong Search & Seizure.	No Search & Seizure protection.
Self-Incrimination	No	No	Yes	No

⁵² See *Developments, supra* note 4, at 1278.

⁵³ See *id.*, at 1279. An interesting set of issues relates to what happens to corporate employees who are in charge of corporate documents. See *id.* at 1281. As a general matter, if they are not targets of criminal prosecution they cannot claim the privilege against self-incrimination. See *id.*, at 1282. Also, there have been a series of cases that seem to suggest that business documents, whether held by a corporation or a corporate official, may not trigger the self-incrimination privilege – perhaps because of a lesser concern with violent coercion for business documents. See *id.*, at 1283. Further, even if a corporate official could claim the privilege the government could give the employee immunity and thereby compel production of information to use against others and the corporation. See *id.*, at 1285 – 86 (noting that “the government can secure the documents simply by using a search warrant, from the perspective of the accused, a subpoena is both more dignified and less intrusive”).

Quickly scanning this table raises the basic question examined in this paper: can the current treatment be justified on economic grounds? The next few Parts address this question for the first four protections in Table 1, while the last two protections are addressed separately in Part VIII because they have more direct effects on the ability to generate evidence that require separate discussion.

III. ERROR COST CONCERNS

To begin our analysis it is important to step back and ask what policy concerns are motivating these procedural protections. After this we can ask how these concerns operate in the different contexts discussed above.

Procedural protections serve a number of related, yet distinct, functions. For example, they may help to reduce the costs associated with adjudicative error, the costs associated with improper government enforcement, address concerns with the government encroaching on liberty and privacy interests, and yet others.⁵⁵ However, of these only the first two – reducing error costs and reducing improper enforcement costs – really apply in the corporate context. Corporations do not have the same liberty and privacy interests as individuals.⁵⁶

⁵⁴ See *id.*, at 1289.

⁵⁵ See Friedman, *supra* note 3, at 192 – 95. Reducing litigation costs may also be an important consideration in assessing procedural protections. See *United States v. Scott*, 437 U.S. 82, 106 (1978) (Brennan J., dissenting); Posner, *supra* note 6. I do not discuss them here because a thorough treatment would require a separate paper. A more complete analysis of litigation costs would look at feedback effects as well. For example, stronger protections lead to fewer convictions (and cases) and more guilty people going free. This worsens deterrence and should induce more wrongdoing which may generate more cases (or higher sanctions, but sanctions may have an upper limit). On the other hand, weaker protections lead to more convictions (i.e., more cases) and potentially more deterrence and hence less wrongdoing which leads to less cases. Whether weaker or stronger protections lead to less litigation costs is not unambiguously clear. [collecting cites] Another reason I do not discuss litigation costs is because they may be related to error costs. As errors increase (and deterrence decreases) we would expect to see more wrongdoing and more cases thereby increasing litigation costs. [collecting cites] Finally, most of the prior discussion of these procedural rules does not necessarily consider reduction of litigation costs as the primary motive. See Peter Westen & Richard Drubel, *Toward a General Theory of Double Jeopardy*, 1978 SUP. CT. REV. 81, 87 – 97 (arguing that this is not a very compelling justification). [collecting cites]

⁵⁶ See Friedman, *supra* note 3, at 192 – 95; [collect more cites – cases, ...]. Corporations do not appear to have the same kind of autonomy concerns as individuals and hence do not really have the same

In this Part I discuss error costs and then, in Part IV, how they apply in the corporate sphere. Similarly, Parts V and VI discuss improper enforcement cost concerns.

The most common justification given for why criminal procedural protections are biased in favor of the defense is that the costs of false conviction errors are greater than the costs of false acquittal errors.⁵⁷ In criminal cases with individual defendants a false conviction may result in the wrongful imposition of a prison sentence which involves substantial sanctioning costs.⁵⁸ The sanctioning costs are high for a number of reasons including, that prisons are expensive to run and maintain, the person falsely convicted is deprived of his liberty as well as gainful employment for some time, and because a conviction (even a false one) imposes a difficult to remove stigma.⁵⁹ Moreover, false convictions reduce the deterrent effect of the law and might dilute its moral force.⁶⁰ *False acquittals*, on the other hand, do not impose sanctioning costs (because no sanction is imposed), but they do carry deterrence costs and costs associated with diluting the law's moral force.⁶¹

privacy and liberty interests. Moreover, corporations cannot feel shame in the way individuals might. What impact corporate convictions may have on executives is not discussed in this paper. See Khanna, *Liability*, *supra* note 1, at 1509 – 12.

⁵⁷ See 4 WILLIAM BLACKSTONE, COMMENTARIES *358; see also *In Re Winship*, 397 U.S. 358, 363 – 64, 372 (Harlan, J., concurring) (1970).

⁵⁸ See POSNER, *supra* note 5, at 246.

⁵⁹ See *id.*; *Winship*, *supra* note 57.

⁶⁰ See POSNER, *supra* note 5, at 246; *Winship*, *supra* note 57.

⁶¹ See Hylton & Khanna, *supra* note 5, at 12; *Winship*, *supra* note 57. On deterrence cost, see A. Mitchell Polinsky & Steven Shavell, *Legal Error, Litigation, and the Incentive to Obey the Law*, 5 J. L. ECON. & ORG'N 99 (1989). A false conviction “lowers the incentive to obey the law because [the defendant] will face liability even if he obeys, thereby reducing the benefit to him of obeying the law”. *Id.*, at 104. False acquittals hamper deterrence by reducing the costs of engaging in harm causing behavior. See *id.*

Erroneous decisions may dilute the law's moral force and impose disutility costs – the disutility people suffer when they realize that sometimes the guilty escape punishment and the innocent are wrongly punished. See Don E. Scheid, *Constructing a Theory of Punishment, Desert, and the Distribution of Punishments*, 10 CAN. J.L. & JURIS. 441, 455 (1997) (stating that “[p]eople are willing to obey the law themselves so long as they can reasonably assume that those who break the law will not be able to do so with impunity, that they will not get away with it.”); Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 HARV. L. REV. 961 (2001). These disutility costs are, however, rather difficult to measure. See Hylton & Khanna, *supra* note 5, at 47 – 51; Erik Lillquist, *Recasting Reasonable Doubt, Decision Theory and the Virtues of*

If the costs of false convictions are higher than false acquittals, then we may want to have procedural protections more biased against false convictions, or simply biased in favor of the defense.⁶² The reasonable doubt standard appears to do just this. Indeed, the US Supreme Court in *In Re Winship* suggested that the error cost account provided a good justification for why convictions in criminal cases must be obtained on proof beyond a reasonable doubt.⁶³

Might a similar error cost differential arise in civil cases? In civil cases the sanctions are basically monetary (e.g., cash sanctions) and these do not involve many of the sanctioning costs associated with prison.⁶⁴ The primary costs of a cash fine are the costs of transferring the cash from one party to another, which are not terribly large.⁶⁵ Here the costs of false convictions (i.e., false findings of liability) and false acquittals are roughly similar.⁶⁶ Consequently, we might expect the procedural protections to be more evenly balanced.⁶⁷ For example, the preponderance of evidence standard in civil cases seems to keep such an even balance.

Of course, the error cost account is not without controversy. Arguments have been made that it, by itself, does not explain too much of criminal procedure and that some procedures appear to have little effect on error rates.⁶⁸

Variability, 36 U.C. DAVIS L. REV. 85, 135-36 (2002). For an important and more general discussion on proof standards see John Kaplan, *Decision Theory and the Fact Finding Process*, 20 STAN. L. REV. 1065, 1073-74 (1968).

⁶² See POSNER, *supra* note 5, at 246; Hylton & Khanna, *supra* note 5, at 2, 6 – 7 (describing the basic error cost rationale); Khanna, *Liability*, *supra* note 1, at 1513. Criminal procedural protections are directly biased against convictions and indirectly biased against false convictions (which are simply a subset of convictions).

⁶³ See *Winship*, *supra* note 57, at 363 – 64.

⁶⁴ See Khanna, *Liability*, *supra* note 1, at 1497 – 98.

⁶⁵ See *id.*

⁶⁶ See *id.*

⁶⁷ See POSNER, *supra* note 5, at 604 – 05

⁶⁸ This is for two reasons. First, it is not clear that all procedural protections reduce errors or reduce false convictions. See, e.g., Raymond A. Atkins & Paul H. Rubin, *Effects Of Criminal Procedure On Crime Rates:*

Nonetheless, my interest is not in debating the strength of the error cost account. Rather, I will assume that the error cost account provides at least a partial explanation for our pro-defendant criminal procedures⁶⁹ and then ask how this account plays out in the context of corporate defendants.

IV. ERROR COSTS AND THE CORPORATE DEFENDANT

As a preliminary matter, corporations face essentially the same monetary sanctions in civil and criminal proceedings.⁷⁰ Corporations cannot be sent to jail and all the sanctions they may suffer (e.g., cash fines, loss of license, suspension)

Mapping Out The Consequences Of the Exclusionary Rule, (Oct. 23, 1998) (unpublished manuscript available on file with authors) (finding total crime rates increased by 11 per cent after *Miranda*); Cassell, *supra* note 5, at 451 (finding criminal suspects less likely to confess after *Miranda*); Donohue, *supra* note 5, at 1150. *See also*, Paul D. Carrington, *Restoring Vitality to State and Local Politics by Correcting the Excessive Independence of the Supreme Court*, 50 ALA. L. REV. 397, 443 (1999); Charles D. Weisselberg, *Saving Miranda*, 84 CORNELL L. REV. 119, 170-77 (1998). *Cf.* Daniel J. Seidman & Alex Stein, *The Right to Silence Helps the Innocent: A Game Theoretical Analysis of The Fifth Amendment Privilege*, 113 HARV. L. REV. 430, 498 – 502 (discussing how the right to silence might have desirable effects on benefiting the innocent).

In other contexts it is not clear that procedural protections have clear or significant effects on error rates. For example, double jeopardy in the US has asymmetric appeal rights (prosecution cannot appeal an acquittal, but defense can appeal convictions). *See Kepner*, *supra* note 23, at 105; *Sanabria v. United States*, 437 U.S. 54, 64 (1978) (holding that erroneous legal rulings leading to acquittals were not appealable); Khanna, *supra* note 22, at 342 - 352. This rule appears to decrease false conviction errors, relative to symmetric appeal rights, by preventing the prosecution from taking correct trial court acquittals and turning them into false convictions through appeals and retrials. Further, this rule appears to increase false acquittals, relative to symmetric appeal rights, by preventing the prosecution from appealing false acquittals at the trial level.

There may, however, be offsetting effects in play. *See Khanna*, *supra* note 22, at 360 – 88. Because the prosecution has only one shot at getting a conviction it has an incentive to spend more in that one shot (the initial trial). *See id.* at 374 – 88. This increased expenditure may lead, holding all else constant, to a rise in convictions (including potentially false convictions) in the initial trials relative to symmetric appeal rights. *See id.* This makes the net effect on false convictions ambiguous. *See id.* Similar arguments operate in the false acquittals context suggesting that the effects are likely to be ambiguous there too. *See id.* at 383 – 84. Moreover, in countries where prosecutors can appeal we see very few appeals suggesting that the likely impact on error rates is not only ambiguous, but also likely to be quite small. *See id.* at 344 (listing various countries where prosecutors can appeal).

It is noteworthy that others have suggested that a number of procedural protections are unlikely to be correlated with guilt or innocence. *See William J. Stuntz, The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 46 (1997). Moreover, empirical support for the error cost argument is wobbly. *See Hylton & Khanna*, *supra* note 5, at 7 – 13 (discussing empirical strength of error cost account). Finally, the history of this area suggests that error costs were not the sole factor motivating the development of certain procedural protections. *See e.g.*, KAMISAR, ET AL., *supra* note 6, at 114 – 127 (8th ed., 1994); WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR. *CRIMINAL LAW* 97 - 100 (2d. ed.); WAYNE R. LAFAVE, JEROLD ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* 25 – 39 (3rd ed., 2000); *Ashe v. Swenson*, 397 U.S. 436, 447 (1970).

⁶⁹ *See id.*; Hylton & Khanna, *supra* note 5, at 2.

are available or could easily be made available in civil proceedings.⁷¹ Moreover, prior studies suggest that the reputational consequences for corporations appear to be fairly similar in criminal and civil proceedings, holding the type of wrongdoing constant.⁷² Consequently, the costs of false convictions and false acquittals for corporate defendants are fairly similar in criminal and civil cases because the sanctions in both types of proceedings are basically identical.⁷³ This suggests little need, on error cost grounds, for stronger procedural protections for corporate defendants in criminal, as compared to civil, cases.

However, that does not end the discussion. It still leaves open the question of whether the procedural protections should vary for corporations based on the different kinds of monetary sanctions (e.g., cash fines, loss of license, reputational loss) *regardless* of whether they arise in criminal or civil cases. This is because not all monetary sanctions have the same social costs.

To elaborate on this I will consider three cases. First, I discuss the social costs associated with using sanctions imposed by the law such as cash fines, loss of license and so forth. Second, I discuss the social costs associated with the presence of sanctions imposed by society, such as stigma and reputational loss. Third, and finally, I discuss the potential for, and social costs associated with,

⁷⁰ See Khanna, *Liability*, *supra* note 1, at 1497; Reinier H. Kraakman, *Corporate Liability Strategies and the Costs of Legal Controls*, 93 YALE L.J. 857, 857 – 58 (1984).

⁷¹ See Diane Marie Amann, *Capital Punishment: Corporate Criminal Liability for gross Violations of Human Rights*, 24 HASTINGS INT'L & COMP. L. REV. 327, 327 (2001); Coffee, *supra* note 1; Stephen R. Gleisler, *Commentary, Voluntary Disclosure of Corporate Violations of Federal Law*, 51 ALA. L. REV. 375, 384 (1999) (stating that “[a]lthough corporations cannot receive jail time, they can receive heavy fines and can even receive the corporate ‘death penalty,’ which involves divestiture of all assets.”); Khanna, *Liability*, *supra* note 1, at 1497 – 99; F. Joseph Warin & Jason C. Schwartz, *Deferred Persecution: The Need for Specialized Guidelines for Corporate Defendants*, 23 IOWA J. CORP. L. 121, 130-31 (1997) (noting that “[u]pon conviction, a corporation cannot be sentenced to jail, but only to pay restitution, fines and adopt measures aimed at enhancing internal controls to prevent and detect future wrongdoing.”).

⁷² See Jonathan M. Karpoff & John R. Lott, Jr. *The Reputational Penalty Firms Bear from Committing Criminal Fraud*, 36 J.L. & ECON. 757, 761 – 63 (1993); Khanna, *Liability*, *supra* note 1, at 1502 – 12. *But see* Lawrence Friedman, *In Defense of Corporate Criminal Liability*, 23 HARV. J.L. & PUB. POL'Y 833, 838 – 39 (2000).

⁷³ See Khanna, *Liability*, *supra* note 1, at 1513 – 17.

over-deterrence. In each case I consider what procedural protections, if any, may prove desirable.

A. *Legally Imposed Sanctions*

Sanctions imposed by the law encompass sanctions that simply transfer value (e.g., cash fines) and those that do more than simply transfer value (e.g., loss of license, debarment and suspension).⁷⁴ These sanctions result in different kinds of social costs. For example, the costs associated with a simple cash fine are essentially the costs of ascertaining the desirable amount of the sanction and the costs associated with collecting that amount.⁷⁵

On the other hand, the social costs associated with a loss of license sanction are larger and include ascertaining the appropriate sanction, enforcing it, and assessing whether denying (or revoking) a license will cost the corporation the appropriate amount.⁷⁶ To divine the answer to this last question we need to have some sense of the corporation's profits in the future, how much these profits would be diminished by the sanction, and then we need to discount back the lost profits to place them in present value terms.⁷⁷ None of these matters are easy to compute and are likely to generate costs. One thus expects the social costs to be higher for sanctions that do more than transfer value.

In light of this, one might consider some adjustment to the procedural protections to bias the error rate against bearing these costly sanctions.⁷⁸ For

⁷⁴ See *id.*, at 1497 – 98; Brian D. Shannon, *Debarment and Suspension Revisited: Fewer Eggs in the Basket?*, 44 CATH. U. L. REV. 363 (1995).

⁷⁵ See Khanna, *Liability*, *supra* note 1, at 1497 – 98.

⁷⁶ See *id.*

⁷⁷ See *id.*, at 1498.

⁷⁸ Further, the parties do not fully internalize these increased costs because some portion of these costs are borne by the courts and judicial process. See Steven Shavell, *The Fundamental Divergence between the Private and Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 577 – 79 (1997); A. Mitchell Polinsky, *Private Versus Public Enforcement of Fines*, 9 J. LEGAL STUD. 105 (1980).

example, procedures that reduce the false conviction rate even if they might increase the false acquittal rate.⁷⁹ An example might be to increase the standard of proof above the preponderance standard, although not as high as the criminal standard. This is because the social costs of sending someone erroneously to prison are probably greater than the social costs of wrongfully imposing a loss of license sanction.⁸⁰ Moreover, for corporate defendants we are missing the liberty and privacy interests that buttress the reasonable doubt standard.⁸¹ Thus, we may wish to reserve the criminal standard for cases where prison is an option and have a lesser standard for loss of license cases.⁸² Perhaps an intermediate standard – between reasonable doubt and preponderance might be desirable.⁸³ I discuss how we might do this later in Part VII.

B. *Socially Imposed Sanctions.*

Sometimes society may also impose penalties on corporations that are distinct from the sanctions imposed by law. Such sanctions are usually referred to as reputational sanctions and they often have social costs that exceed those associated with cash fines.⁸⁴ In this section I define what reputational sanctions are, examine their costs, and argue that adjusting procedural protections may not be a desirable response to these costs.

As a preliminary matter, reputational sanctions presume the corporation has a good reputation in the first place.⁸⁵ Normally reputations are built by the

⁷⁹ Of course, one could increase the overall accuracy of the adjudicative process which would reduce both kinds of errors. For simplicity I do not discuss this option in this article, which is about procedural protections, rather than methods of enhancing accuracy. For a greater discussion of accuracy see Louis Kaplow, *The Value of Accuracy in Adjudication*, 23 J. LEGAL STUD. 307 (1994).

⁸⁰ See Hylton & Khanna, *supra* note 5, at 12; David Anderson, *The Aggregate Burden of Crime*, 42 J. LAW & ECON 121, 123 (1999).

⁸¹ See Friedman, *supra* note 3, at 192 – 95; [collect more cites – cases, ...].

⁸² See Khanna, *Liability*, *supra* note 1, at 1515 – 16.

⁸³ See *id.*, at 1516.

⁸⁴ See Karpoff & Lott, *supra* note 72, at 761 – 66.

⁸⁵ See Karpoff & Lott, *supra* note 72, at 761, 765 – 66; Khanna, *Liability*, *supra* note 1, at 1500.

corporation investing something (e.g., assets, effort and time) in producing high quality goods or services, which then permits it to charge a supra-competitive price.⁸⁶ The amount above the competitive price that a corporation can charge may be treated as the corporation's return on its investment in building a good reputation.⁸⁷ If a corporation with a good reputation provides low quality, and this is revealed, then a reputational penalty may be imposed. This could be reflected in a drop in the supra-competitive price a corporation charges its customers or in the reluctance of people to purchase products from the corporation.⁸⁸ Thus, a reputational penalty operates by diminishing a corporation's return on its investment in high quality (i.e., reducing the supra-competitive price built on investments in reputation). If someone else receives the corporation's return (the ability to charge a supra-competitive price) then the social loss is simply the effort needed to transfer this return to someone else. However, if this return is not fully transferred to someone else then the amount that is not transferred is a social waste.⁸⁹ This latter account seems more plausible.⁹⁰ Simply put, a cash fine is received by someone, but the value of the corporation's reputation (the ability to price above competitive levels) is probably not received by anyone in its entirety.⁹¹

⁸⁶ See Karpoff & Lott, *supra* note 72, at 761 – 62.

⁸⁷ See Khanna, *Liability*, *supra* note 1, at 1500; Karpoff & Lott, *supra* note 72, at 761, 763.

⁸⁸ See David Charny, *Nonlegal Sanctions in Commercial Relationships*, 104 HARV. L. REV. 373, 396 – 97 (1990); Coffee, *supra* note 71, at 408; HERBERT L. PACKER, *THE LIMITS OF THE CRIMINAL SANCTION* 361-62 (1968); Karpoff & Lott, *supra* note 72, at 761, 763, 765 - 66 (discussing reputational penalties which become large for companies involved in criminal proceedings).

Corporations cannot feel shame and hence the focus on lost business opportunities. Of course, managers can feel shame if they are convicted. Whether managers can suffer a reputational loss if their corporation is convicted (a reputational rub-off) is a separate matter and is discussed in Khanna, *Liability*, *supra* note 1, at 1509 – 12. My prior analysis suggests that the deterrence rationale for using reputational rub-off is very wobbly. See *id.*

⁸⁹ See Khanna, *Liability*, *supra* note 1, at 1500; Karpoff & Lott, *supra* note 72, at 761, 763. It is plausible that Y and Z may under some situations actually be able to recover the return on X's investment or that X built a reputation based on false information or on less than the amount of investment needed to generate its supra-competitive pricing. In these cases the social waste from reputational penalties is either muted or non-existent. My thanks to Mitch Polinsky for suggesting this point.

⁹⁰ See Khanna, *Liability*, *supra* note 1, at 1500 – 05.

⁹¹ See *id.* at 1503. Reputational penalties then operate by the corporation saying, in effect, that we are placing our investment (in the form of assets, time, effort) as a bond for high quality and if we fail to live up to that, and you discover it, then we will burn that investment. See Karpoff & Lott, *supra* note 72, at 760 –

To illustrate consider the following example. Assume that corporation X has a great reputation for high quality and it competes in a market that has two other corporations – Y and Z. Further, assume that X charges \$25 for its product while Y and Z charge only \$20 each. Also, X has invested \$100,000 in developing this reputation. One day it is revealed that X is no longer really producing such high quality. The likely effect of this is that X may no longer be able to charge \$25 for its product and that Y and Z may receive some of X's customers.⁹² Thus, the return on the \$100,000 investment that X made is no longer present (i.e., the higher amount it charges per unit). Unless Y and Z can charge a *higher price* for their product to recover the return on the \$100,000 investment X made we have a diminution in social assets. This can be considered a social waste – it would be better that someone else receives the return on the investment rather than it go to no one.⁹³ Of course, it is plausible that some amount of this return may be recovered by Y and Z or by other parties, but the total amount is unlikely to be.⁹⁴ The amount not recovered is a social loss. In such a situation one should consider whether using procedural protections may help to reduce these social costs.

There are, however, reasons to be cautious about adjusting procedural protections based on likely reputational losses. First, we may not be sure how large a reputational loss will be – this is something society (or the market for the

62. This is wasteful because it would be better, from society's viewpoint, to hand the assets used to build the reputation over to someone rather than burn them. See Khanna, *Liability*, *supra* note 1, at 1500 – 05.

⁹² See Karpoff & Lott, *supra* note 72, at 772 – 73.

⁹³ See Khanna, *Liability*, *supra* note 1, at 1503.

⁹⁴ See *discussion supra* note 89. One might argue that customers gain when X suffers a reputational loss because customers no longer pay the higher price for a product that is not really high quality. I am doubtful this captures the entire picture. When X loses its reputation for high quality then its customers go back to paying the competitive price. This is the price they would pay even if X had made no investment in quality in the first place. This does not appear to be customers *gaining* the ability to receive a sub-competitive price.

corporation) essentially determines.⁹⁵ Further, this is likely to be influenced in some measure by the efforts of the corporation's public relations or marketing department.⁹⁶ Given that we are unsure about the likely magnitude of the reputational penalty it may be unwise to set a higher standard of proof based on its fairly uncertain anticipated effect.

Second, it is not so clear that heightening procedural safeguards will have much effect. Studies suggest that most of the reputational loss suffered by a corporation occurs upon the initial announcement of investigation and generally before any verdict in a trial.⁹⁷ Sometimes simply the *announcement* of the investigation or the filing of charges can impose the largest reputational loss.⁹⁸ Consequently, one probably does not reduce the magnitude or likelihood of reputational losses all that much by tightening procedural safeguards that operate *at the trial stage* (as the bulk of procedural protections do).⁹⁹

Third, even if reputational penalties arise later at the trial stage they may create asymmetric stakes that would reduce the need for heightened protections.¹⁰⁰ Defendants may sometimes have more to lose (reputation plus damages) than plaintiffs have to gain (largely damages).¹⁰¹ This is unlike the case with loss of license or punitive damages where defendant losses may be largely gains to the plaintiff. When we have asymmetric stakes then this should

⁹⁵ See Khanna, *Liability*, *supra* note 1, at 1503.

⁹⁶ See *id.*

⁹⁷ See Karpoff & Lott, *supra* note 72, at 769 – 73.

⁹⁸ See *id.*

⁹⁹ Throughout the analysis I have assumed that there is only a scant possibility of bearing sanctions for falsely investigating or charging (as opposed to convicting) a corporation. If such sanctions are a significant possibility then this point would become weaker.

¹⁰⁰ See Cindy R. Alexander, *Penalties: Public and Private: A Conference Sponsored in Part by the John M. Olin Program in Law & Economics at the University of Chicago Law School and the George J. Stigler Center for the Study of the Economy and the State at the University of Chicago Graduate School of Business: On the Nature of the Reputational Penalty for Corporate Crime: Evidence*, 42 J. LAW & ECON. 489 (1999).

¹⁰¹ This assumes that reputational losses are not fully offset by gains to the plaintiffs. If they were fully offset there would be no reason to adjust procedural safeguards on error cost grounds because the error costs of false convictions and false acquittals would be roughly the same as for cash fines.

induce the defendant to spend more to defend against the suit.¹⁰² The defendant's increased expenditure should lead to a lower probability of success for the plaintiff, holding all else equal.¹⁰³ This has effects that are analogous to a higher standard of proof – there is a lower probability of plaintiff success.¹⁰⁴ Thus, even when reputational penalties are socially more costly than cash fines there may be little need to adjust procedural protections.

C. *Over-deterrence Costs*

Over-deterrence may sometimes be a concern and could influence us in setting procedural protections. For our purposes, over-deterrence refers to the defendants over-complying with the law out of a fear of suffering a large sanction (e.g., defensive medicine).¹⁰⁵ This is socially undesirable because over-complying with the law suggests that too much is being spent on compliance from a societal perspective or alternatively that some products and services are not provided in the optimum amount because of a fear of liability.¹⁰⁶ This kind of over-deterrence can occur in a number of different situations and can be

¹⁰² See George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1, 26 (1984) (showing how defendants are likely to offer more money to settle disputes when they stand to lose more than the plaintiff stands to gain); Stephen J. Spurr, *An Economic Analysis of Collateral Estoppel*, 11 INT'L REV. L. & ECON. 47, 50-59 (1991) (arguing that a defendant facing many claims would invest heavily in the first litigation under very plausible assumptions). Of course, there may be instances in which the plaintiff gains more than damages – some people may praise or esteem a plaintiff for bringing certain suits. See Richard H. McAdams, Symposium, *The Legal Construction of Norms: A Focal Point Theory of Expressive Law*, 86 VA. L. REV. 1649 (2000). In these cases the asymmetric stakes problem is reduced.

¹⁰³ See Spurr, *supra* note 102; William M. Landes, *An Economic Analysis of the Courts*, 14 J. LAW & ECON. 61, 63 – 71 (modeling the behavior of prosecutors and defendants considering their resources, likelihood of conviction, and sentence length).

¹⁰⁴ See Priest & Klein, *supra* note 102, at 24 – 29. One difference between increasing procedural protections and asymmetric stakes is in who is expending greater resources. For asymmetric stakes it is the defendant expending resources to avoid liability, whereas with procedural protections it is the plaintiff expending resources to impose liability. Which approach may be better is a matter left to future research.

¹⁰⁵ See John Calfee & Richard Craswell, *Some Effects of Uncertainty on Compliance With Legal Standards*, 70 VA. L. REV. 965, 977 – 79 (1984).

¹⁰⁶ See Calfee & Craswell, *supra* note 105, at 978. A related sense in which over-deterrence can occur is if a legal decision outlaws an efficient arrangement (thereby causing social losses). This is sometimes referred to as over-deterrence costs in antitrust. See Ronald A. Cass & Keith N. Hylton, *Antitrust Intent*, 74 S. CAL. L. REV. 657, 684 – 90.

triggered by a number of different things.¹⁰⁷ However, one fairly common trigger for over-deterrence is the presence of large penalties, especially under uncertain legal standards.¹⁰⁸

Is there any reason to believe that corporate sanctions are very large? Here the evidence seems to suggest that corporate crime penalties are not very large. Prior to 1991 both the magnitude of corporate crime penalties and their enforcement was quite paltry so that the threat of over-deterrence was somewhat muted.¹⁰⁹ After 1991, corporate crime penalties did increase but even then the

¹⁰⁷ See *id.*, at 977 – 79 (depicting a situation where a railroad reduces the speed of its trains below an optimal level in response to expected damage payments).

¹⁰⁸ See *id.*, at 995.

¹⁰⁹ On penalty size see Cindy Alexander, Jennifer Arlen & Marc Cohen, *Regulating Corporate Criminal Sanctions: Federal Guidelines and the Sentencing of Public Firms*, 42 J. LAW & ECON. 393, 395, 404 (1999). There is considerable evidence that corporate crime penalties are perceived to be generally lower than corporate civil sanctions. See, e.g., Philip Shenon, *Ideas & Trends: Proposals for Punishment; The Case of the Criminal Corporation*, N. Y. TIMES, Jan. 15, 1989, at 28; William Glaberson, *S.E.C. Aide Assails Plan on Punishing Companies*, N. Y. TIMES, Oct. 12, 1988, at D3, p. 6; Stephen Labaton, *Corporate Penalty Plan Stirs Debate*, N. Y. TIMES, Oct. 10, 1988, at D3, p. 1.

The frequency of corporate crime enforcement is quite thin and usually against smaller firms. See UNITED STATES SENTENCING COMMISSION ANNUAL REPORT 2001, available at <http://www.ussc.gov/ANNRPT/2001> (last visited Mar. 21, 2003); Harry First, *Criminal Antitrust Enforcement*, Occasional Papers from the Center for Research in Crime and Justice, NYU School of Law, 1991 (noting that many antitrust enforcement actions have been against smaller firms); Alexander, et al, *supra*, at 403; Jeffrey S. Parker, *Rules without...: Some Critical Reflections on the Federal Corporate Sentencing Guidelines*, 71 WASH. L. U. Q. 397, 399 – 400 (1993); Joe Davidson, *Corporate Sentencing Guidelines Have Snagged Mostly Small Firms*, 28 August 1995, THE WALL STREET JOURNAL, at B3 (stating that “[t]he commission said 97% of the 280 firms sentenced under the guidelines since they took effect have been privately held or controlled by only a small group of shareholders”); Annie Geraghty, *Corporate Criminal Liability*, 39 AM. J. CRIM. L. REV. 327, 338 (2002) (noting that the majority of defendants sentenced are small, closely held organizations); Judge Diana E. Murphy, *The Federal Sentencing Guidelines for Organizations: A Decade of Promoting Compliance and Ethics*, 1291 PLI/CORP 97, 113 (2002) (finding median number of employees at convicted corporations to be 20); Jed S. Rakoff, *Avoiding Corporate Indictments Under New Sentencing Guidelines*, BUS. CRIMES BULL.: COMPLIANCE & LITIG., Feb. 1994, at 2 (stating that Commission data suggests that prosecutors are reluctant to indict public companies unless there are very serious offenses by high-level managers).

Prior to the Organizational Sentencing Guidelines in 1991 it would appear that criminal fines represented about 15% of the harm caused when the corporation was held liable and the total sanction (all the monetary payouts such as the criminal fine, restitution, and civil payouts) was about 100% of the harm caused when the corporation was *detected and held liable*. See Alexander, et al, *supra*, at 409. If the wrongdoing is the kind that is detected with a high probability then this suggests that the total sanction is roughly equal to total harm. However, if the wrongdoing is the kind that is not easily detected (as most corporate wrongdoing is) then the total sanction will be substantially below the amount of total harm (which includes the harm when the corporation is detected and held liable and the harm committed when the corporation is not detected). In either case it seems unlikely that there is real threat of over-deterrence. See *id.*, at 409.

frequency of enforcement has not appeared to increase dramatically.¹¹⁰ Thus, after 1991 there was a somewhat higher risk of over-deterrence from corporate crime penalties, although one doubts that risk is great.

On the other hand, corporate civil sanctions have been and continue to be quite large and important. The presence of greater than compensatory damages (e.g., treble and punitive damages) in corporate civil liability and the greater frequency of their imposition (relative to corporate crime penalties) suggests that the risk of over-deterrence is greater here than under corporate criminal liability.¹¹¹ Moreover, sometimes treble and punitive damages are available under fairly uncertain legal standards.¹¹² This suggests that there is likely to be a fear of over-deterrence when these kinds of sanctions are available. In response one might consider enhancing the standard of proof to reduce the likelihood of these penalties being imposed. For example, we might consider an intermediate standard of proof between the preponderance and reasonable doubt standards.¹¹³ Other measures might also be countenanced,¹¹⁴ but changes in the standard of proof are certainly an option.

To summarize, our desire to increase procedural safeguards on error cost grounds for corporate defendants is likely to vary with the type of sanction rather than type of proceedings. Thus, for cash fines simple civil protections are sufficient. However, for other legally imposed sanctions that generate higher

¹¹⁰ See US SENTENCING GUIDELINES Chapter 8 (1995).

¹¹¹ See 18 U.S.C. §§ 1961-1968 (1982) (treble damages available under the Racketeer Influenced and Corrupt Organizations Act (RICO)); Charles A. Sullivan, *Breaking Up the Treble Play: Attacks on the Private Treble Damage Antitrust Action*, 14 SETON HALL L. REV. 17, 18-25 (development of treble damages in antitrust actions); *Corporate and White Collar Crime: An Anthology* 16 (Leonard Orland ed., 1995).

¹¹² See John C. Coffee, Jr., *Does "Unlawful" Mean "Criminal"?: Reflections on the Disappearing Tort/Crime Distinction in American Law*, 71 B.U. L. REV. 193, 220 (1991); Dorsey D. Elias, Jr., *Fainess and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 62 (1982); Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 MINN. L. REV. 1 (1991).

¹¹³ See Khanna, *Liability*, *supra* note 1, at 1514 – 1516. The error cost analysis here would be the same if the government was the moving party or if a private litigant was the moving party.

social costs, such as loss of license, we may want to consider adjustments to the procedural safeguards (e.g., an intermediate standard of proof). Similarly, we may at times want to consider adjustments to the procedural safeguards when the sanctions are large and could trigger over-deterrence concerns. However, we probably do not want to adjust procedural safeguards in response to fears about the social costs associated with the imposition of reputational penalties.

V. IMPROPER ENFORCEMENT CONCERNS

In addition to error costs, one might be concerned with the potential for litigation to be abusive, extortionary and frivolous.¹¹⁵ These kinds of improper enforcement can also generate large social costs and may be reduced through the use of procedural protections.

Before engaging in a discussion on this a few words are in order. Abusive, frivolous, and extortionary enforcement can occur both when private parties initiate litigation and when government entities initiate litigation. There are fairly direct methods of influencing the behavior of private litigants to deter them from bringing these kinds of suits – for example, increasing the costs for bringing frivolous or abusive litigation. Because most private litigation against corporations seeks to obtain monetary recovery and most private litigants bear the costs of their litigation we can influence their behavior by having some effect either on the amount of recovery or by having some impact on litigation costs.¹¹⁶ Thus, fee-shifting rules and penalties for frivolous litigation can help to reduce

¹¹⁴ See Hylton & Khanna, *supra* note 5, at 18 – 24; Cass & Hylton, *supra* note 106 (discussing use of intent to curtail improper concerns).

¹¹⁵ See Lisa L. Casey, *Reforming Securities Class Action from the Bench: Judging Fiduciaries and Fiduciary Judging*, 2003 B.Y.U.L. REV. 1239, 1243-44 (2003); Richard H. Walker, et al., *The New Securities Class Action: Federal Obstacles, State Detours*, 39 ARIZ. L. REV. 641, 644 – 45 (1997).

¹¹⁶ See John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669 (1986); Shavell, *supra* note 34, at 384 – 86.

this kind of litigation in the private enforcement context.¹¹⁷ Such measures are not easily available for government enforcement because government enforcers are not as directly impacted by the litigation costs of enforcement and because government enforcers rarely receive direct financial gains from a favorable judgment.¹¹⁸ Thus, measures targeted to the amount of recovery and costs of litigation may be more useful in private enforcement regimes than in governmental enforcement. Procedural protections, however, are more likely to matter in settings where these private litigation control techniques are less effective – such as government enforcement (criminal or civil).¹¹⁹ As procedural protections are the focus of this paper we shall primarily discuss how they may curtail improper enforcement in the context of government enforcement. In the next few sections I discuss: how improper enforcement can occur in government enforcement against individual defendants, what are its costs, and how the procedural protections can help to constrain these costs.

A. *Forms of Improper Government Enforcement.*

One of the basic concerns animating the legal process is constraining the

¹¹⁷ This particular topic has spawned an awesome amount of discussion. See Lucian Arye Bebchuk, *Suing Solely to Extract a Settlement Offer*, 17 J. LEGAL STUD. 437 (1988); Lucian Arye Bebchuk & Howard F. Chang, *An Analysis of Fee Shifting Based on the Margin of Victory: On Frivolous Law Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEGAL STUD. 371 (1996); Coffee, *supra* note 116; Virginia G. Maurer, et al., *Attorney Fee Arrangements: The U.S and Western European Perspectives*, 19 NW. J. INT'L L. & ECON. 272 (1999); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctions, Frivolous Suits: An Economic Analysis*, 82 GEO. L. J. 397 (1993); Thomas D. Rowe, Jr., *American Law Institute Study on Paths to a "Better Way: Litigation Alternatives and Accommodations*, 1989 DUKE L.J. 824, 871 (1989).

¹¹⁸ Cf. Landes, *supra* note 103, at 64 (noting the effect of the fact that prosecutors do not pay for their prosecutions directly); Mark A. Cohen & Paul H. Rubin, *Private Enforcement of Public Policy*, 3 YALE J. ON REG. 167, 175-76 (1985); Edward L. Glaeser et al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 J.L. & ECON. 259, 262-266 (2000).

¹¹⁹ See Hylton & Khanna, *supra* note 5, at 8 – 9. Finally, a little more discussion on litigation control techniques may be appropriate. There are many other methods we could use to reduce the social costs of certain kinds of litigation besides procedural protections – we could impose penalties on certain suits, deny standing, impose scienter requirements, and so forth. I do not consider these other options here because they are outside the scope of this paper. Nonetheless, in a more global analysis one would want to examine these other methods of curtailing undesirable litigation and how they may also prove valuable in retarding improper enforcement concerns with governmental enforcement. Cf. Vikramaditya S. Khanna, *Toward a Functional Understanding of Standing*, Discussion Paper No. 355, John M. Olin Center for Law, Economics & Business, Harvard Law School (2002), available at: http://www.law.harvard.edu/programs/olin_center/.

discretion, or power, granted to government agents who enforce the law.¹²⁰ If this power is unfettered then it may be used by enforcers to benefit themselves.¹²¹ For example, unconstrained prosecutors might, in effect, sell their power to enforce the law to the highest bidder in exchange for either monetary gain or something else of value (e.g., political power and prestige, a chance to become an elected official).¹²²

One way in which this could happen is if prosecutors, responding to the lobbying efforts or political clout of one group (group X), disproportionately pursued prosecutions against members of another group (group Y).¹²³ Such a strategy may benefit group X by imposing costs on group Y and may also help group X by deflecting away some of the criminal enforcement that it would otherwise face.¹²⁴ This is particularly a concern when prosecutors are elected as they may obtain the support of certain groups by offering to use the criminal process to benefit that group at the expense of other groups.¹²⁵ For example, the Jim Crow South was replete with instances of prosecutors using the criminal law

¹²⁰ See e.g., KAMISAR, *supra* note 6, at 114 – 127; WAYNE R. LAFAVE & AUSTIN W. SCOTT, JR. *CRIMINAL LAW* 97 – 100 (2d. ed); WAYNE R. LAFAVE, JEROLD ISRAEL & NANCY J. KING, *CRIMINAL PROCEDURE* 25 – 39 (3rd ed., 2000); *Ashe v. Swenson*, 397 U.S. 436, 447 (1970).

¹²¹ See Hylton & Khanna, *supra* note 5, at 20 – 22. I am not suggesting that all prosecutors do this, just that this is to some degree a concern with enforcement.

¹²² See *id.*, at 9 – 11. These were some of the historical concerns motivating the development of some procedural protections. See *id.*

¹²³ See *id.*, at 13 (giving an example of lobbying efforts).

¹²⁴ See RICHARD EPSTEIN, *FORBIDDEN GROUNDS* 91-97 (1992); Dwight L. Greene, *Symposium: Criminal Law, Criminal Justice and Race Justice Scalia and Tonto, Judicial Pluralistic Ignorance, and the Myth of Colorless Individualism in Bostick v. Florida*, 67 *TUL. L. REV.* 1979, 1982 (1993); Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 *HARV. L. REV.* 1413, 1498 (1989).

¹²⁵ See Daniel C. Richman, *Federal Criminal Law, Congressional Delegation and Enforcement Discretion*, 46 *UCLA L. REV.* 757, 767 (1999); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 *MICH. L. REV.* 505, 520 – 34 (2001) (discussing the incentives of various participants in the American Criminal Justice system); John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating a Committee to Decide Whether to Seek the Death Penalty*, 65 *FORDHAM L. REV.* 2571 (1997); Tracey L. McCain, *The Interplay of Editorial and Prosecutorial Discretion in the Perpetuation of Racism in the Criminal Justice System*, 25 *COLUM. J.L. & SOC. PROBS.* 601, 648, n. 81 (1993) (noting that prosecutions are susceptible to political influence because most prosecutors are elected); Dwight L. Greene, *Abusive Prosecutors: Gender, Race & Class Discretion and the Prosecution of Drug-Addicted Mothers*, 39 *BUFF. L. REV.* 737, 777 (1991) (noting that prosecutors can attain status by utilizing class bias to pursue particular groups).

to coerce black citizens while rarely enforcing the law against white citizens.¹²⁶ If the prosecutor is willing to behave in this manner then we would expect groups to lobby the prosecutor to secure such enforcement and to make it harder for others to impose costs on them through such enforcement.¹²⁷

Another example of misuse of enforcement power is simple corruption.¹²⁸ For example, a prosecutor who threatens to charge and prosecute someone unless that person pays the prosecutor (i.e., extortion) is one example of corruption.¹²⁹ Also, consider a prosecutor or other enforcement official who is simply willing to take bribes not to enforce the criminal law.¹³⁰ These kinds of improper enforcement, arising from the divergence of prosecutorial incentives from those of the social welfare maximizing ideal,¹³¹ can lead to a series of social costs that require discussion.

¹²⁶ See EPSTEIN, *supra* note 124; William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1839 (1998) (discussing the Jim Crow South which involved selective law enforcement against African-Americans who committed crimes against other African-Americans). See also William N. Eskridge, *Religion, Homosexuality, and Collisions of Liberty and Equality in American Public Law*, 106 YALE L.J. 2411, 2447 (1997); Elisabeth Rosenthal, *Rural Flouting of China's One-Child Policy Undercuts Census*, N.Y. TIMES, April 14, 2000; Stuntz, *supra*, at 1795 (arguing that selective law enforcement drawn on racial lines will fail); David E. Bernstein, *Lochner, Parity and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999).

¹²⁷ See DENNIS C. MUELLER, PUBLIC CHOICE II 229 - 46 (rev. ed. 1989); Shavell, *supra* note 78, at 612 n. 46 (noting factors that influence prosecutors from state compensation to collective private efforts); Hylton & Khanna, *supra* note 5, at 10 - 11. See generally Gary S. Becker, *A Theory of Competition Among Pressure Groups for Political Influence*, 98 QUARTERLY JOURNAL OF ECONOMICS 371 (1983); Guang-Zhen Sun & Yew-Kwang Ng, *The Effect of the Number and Size of Interest Groups on Social Rent Dissipation* (Draft) (on file with authors) (discussing how size and number of interest groups affects rent-dissipation).

¹²⁸ See Mehmet Bac, *Corruption, Supervision and the Structure of Hierarchies*, 12 J.L. ECON & ORG'N. 277 (1996) [hereinafter *Corruption*]; Mehmet Bac, *The Scope, Timing and Type of Corruption*, 18 INT'L REV. L. & ECON. 101, 104 (1998) [hereinafter *Scope*]; Elisabeth Rosenthal, *Rural Flouting of China's One-Child Policy Undercuts Census*, N.Y. TIMES, April 14, 2000 (noting that local law enforcement officials have tried to enrich themselves with selective enforcement of one-child prohibitions at the expense of local farmers).

¹²⁹ See Bac, *Corruption*, *supra* note 128; Bac, *Scope*, *supra* note 128; Rosenthal, *supra* note 128.

¹³⁰ See James Lindgren, *The Theory, History, and Practice of the Bribery-Extortion Distinction*, 141 U. PA. L. REV. 1695, 1701 (1997); Mehmet Bac & Parimal Kanti Bag, *Law Enforcement Costs and Legal Presumptions* 5 - 6 (Draft, 2000) (on file with author); Bac, *Corruption*, *supra* note 128; Bac, *Scope*, *supra* note 128, at 104.

¹³¹ See generally Gordon Tullock, *Efficient Rent-Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY (James M. Buchanan, R.D. Tollison & Gordon Tullock eds., 1980). The divergence may occur for a number of reasons including that prosecutors may value things that are not entirely congruent with social welfare. Maximizing social welfare may involve, within a particular budget, minimizing false convictions and maximizing correct convictions. See Khanna, *supra* note 22, at 361 - 62. See also Edward Glaeser & Andrei Schleifer, *Incentives For Enforcement*, Draft 2000; Darryl K. Brown, *Criminal Procedure Entitlements, Professionalism, and Lawyering Norms*, 61 OHIO ST. L.J. 801, 801 (2000). Prosecutors, on the other hand, may want career advancement, many convictions, big sentences, or many other things. See Edward L. Glaeser, et

B. *Costs Associated with Improper Government Enforcement.*

The direct costs of improper enforcement involve the costs associated with lobbying for targeted or selective enforcement, which are often socially wasteful. The social waste is comprised of some part of the lobbying efforts of the successful groups, the counter-lobbying efforts of the unsuccessful groups, and some part of government officials' efforts in jockeying to obtain positions from which to extract rents as well as actually engaging in selective enforcement.¹³² Similar costs arise in the context of simple corruption.¹³³

In addition to these direct costs, selective enforcement can influence deterrence too. For example, imagine group X lobbies for little enforcement

al., *What Do Prosecutors Maximize? An Analysis of the Federalization of Drug Crimes*, 2 AM.L. & ECON. REV. 259, 262-266 (2000); Dirk G. Christensen, *Comment, Incentives vs. Nonpartisanship: The Prosecutorial Dilemma in an Adversary System*, 1981 DUKE L.J. 311, 325 (1981) (noting that prosecutors are usually rewarded on their effectiveness in obtaining convictions); Gordon Van Kessel, *Adversary Excess in the America; Criminal Trial*, 67 NOTRE DAME L. REV. 403, 441 (1992); William M. Landes, *Economic Analysis of the Court*, 14 J. LAW & ECON. 61 (1971); Jeffrey Standen, *Plea Bargaining in the Shadow of the Guidelines*, 81 CAL. L. REV. 1471, 1477 - 78 (1993); Daniel C. Richman, *Essay Old Chief v. United States: Stipulating Away Prosecutorial Accountability?*, 83 VA. L. REV. 939, 939 n. 93 (1997); Christensen, *supra*, at 321.

¹³² See MUELLER, *supra* note 127, at 334 (citing Gary S. Becker, *A Theory of Competition among Pressure Groups for Political Influence*, QUARTERLY JOURNAL OF ECONOMICS 371, 373-374 (August 1983)); Hylton & Khanna, *supra* note 5, at 13 - 14. See generally Jack M. Beerermann, *Interest Group Politics and Judicial Behavior: Macey's Public Choice*, 67 NOTRE DAME L. REV. 183, 201- 04 (1991). Of course, lobbying for enforcement may at times produce socially desired results too, but there is little reason to believe that all lobbying will - some social waste will arise. See Gordon Tullock, *Efficient Rent-Seeking*, in TOWARD A THEORY OF THE RENT-SEEKING SOCIETY 97 - 112 (James M. Buchanan, R.D. Tollison & Gordon Tullock eds., 1980).

Furthermore, the social waste of lobbying is likely to increase with certain factors. For example, the amount of lobbying should tend to increase as it becomes easier to obtain governmental favors. See MUELLER, *supra* note 127, at 334; Beerermann, *supra*, at 183. Moreover, as the stakes rise so should lobbying to capture those stakes. See Daniel Fischel & Alan O. Sykes, *Corporate Crime*, 25 J. LEGAL STUD. 319, 324 (1996); Arthur B. Laby, W. Hardy Callcott, *Patterns of SEC Enforcement Under the 1990 Remedies Act: the Civil Money Penalties*, 58 ALB. L. REV. 5, 50 (1994) (indicating that as the SEC's stake in cases increases, more defendants are litigating and eventually the SEC will have to slow the growth in workload due to budgetary constraints); Spurr, *supra* note 102. It is also plausible that as the number of groups, political or otherwise, increase in society we might see more lobbying groups and more wasteful spending. See also Sun & Ng, *supra* note 127 (Draft) (on file with authors).

¹³³ These costs include the time, effort and resources spent in bribery and the efforts of government officials in jockeying to benefit from bribes. See Hylton & Khanna, *supra* note 5, at 17; Gary S. Becker & George J. Stigler, *Law Enforcement, Malfeasance and Compensation of Enforcers*, 3 J. LEGAL STUD. 1 (1974); Padideh Ala'i, *The Legacy of Geographical Morality and Colonialism: A Historical Assessment of the Current Crusade Against Corruption*, 33 VAND. J. TRANSNAT'L 877, 899 (2000).

against its own members, but more enforcement against members of group Y, with scant attention to whether the Ys are guilty.¹³⁴ As there is less enforcement against Xs they face a lower expected sanction for their activities and hence would be under-deterred.¹³⁵ Moreover, even the Ys would be under-deterred. This is because Ys are increasingly being punished regardless of whether they behaved legally or illegally.¹³⁶ Simply put, the incentive to behave legally is reduced when the payoffs from acting legally and illegally get closer. Deterrence for both X and Y then drops and is, thus, a concern with selective enforcement.¹³⁷

In addition to this, selective enforcement may reduce the stigma associated with the criminal law and thereby harm deterrence by reducing the total sanction suffered by someone who is convicted.¹³⁸ Moreover, selective

¹³⁴ See Hylton & Khanna, *supra* note 5, at 29 n. 51; Paul H. Rubin & Martin J. Bailey, *The Role of Lawyers in Changing the Law*, 23 J. LEGAL STUD. 807, 822 (1994).

¹³⁵ See Polinsky & Shavell, *supra* note 61, at 104; Oren Bar-Gill & Alon Harel, *Crime Rates and Expected Sanctions: The Economics of Deterrence Revisited*, 30 J. LEGAL STUD. 485 (2001).

¹³⁶ See Polinsky & Shavell, *supra* note 61, at 104 (noting that “A type II error (a truly innocent defendant is found liable) lowers the incentive to obey the law because he will face liability even if he obeys, thereby reducing the benefit to him of obeying the law”); Joel Schrag & Suzanne Scotchmer, *Crime and Prejudice: The Use of Character Evidence in Criminal Trials*, 10 J. L. ECON. & ORG. 319 (1994) (showing that if the jury is prejudiced against “habitual criminals,” they will punish them indiscriminately, so denying character evidence to the jury is good for deterrence).

¹³⁷ This analysis raises a fairly simple question – why would group X lobby for behavior that might reduce deterrence? After all, that could lead to more crimes against Xs too. Group X may lobby in this manner in some situations. First, let us assume that group X prefers to control the behavior of its own members through its own social norms. If so, then deterrence in group X, *with respect to harms inflicted on other Xs*, may not suffer because the norms may lead to compliance. See Kelly D. Hine, *Vigilantism Revisited: An Economic Model of the Law of Extra-Judicial Self Help or Why Can't Dick Shoot Henry for Stealing Janet's Truck?*, 47 AM. U. L. REV. 1221 (1998). Xs may continue to harm Ys, but that may not be a great concern for Xs. Second, if X and Y are not living in the same locality, then X may chose to lobby enforcers to arrest all Ys entering their locality regardless of whether Y was behaving legally. This is akin to racial profiling. See, e.g., David A. Harris, *The Stories, The Statistics, and the Law: Why “Driving While Black” Matters*, 84 MINN. L. REV. 265, 271 (1999) (describing two stories of individuals who were stopped in their vehicles, not because they behaved differently from those around them, but because they were African American); Tracy Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 203-4 (discussing how African American adults in poor neighborhoods with rampant drug problems are unable to instill law-abiding norms in children and because they are unable to move from these neighborhoods, they are more likely to call for legal distinctions between law-abiders and law-breakers); John Knowles, Nicola Persico & Petra Todd, *Racial Bias in Motor Vehicle Searches: Theory and Evidence*, 109 J. POL. ECON. 203 (2001); John J. Donohue III & Steven Levitt, *The Impact of Race on Policing, Arrest Patterns, and Crime* (Draft 1998) (on file with author). Such an approach could lead to a reduction in deterrence, in a fixed budget setting, amongst Ys, while imposing few costs on Xs. This could result in a net benefit to Xs. See generally GORDON TULLOCK, *THE ECONOMICS OF SPECIAL PRIVILEGE AND RENT SEEKING* 11-27 (1989).

¹³⁸ See Hylton & Khanna, *supra* note 5, at 16 – 17 (noting that the total sanction someone suffers is the sum of official sanctions and any reputational or stigmatic losses). Stigma may be related to a belief that

enforcement may increase enforcement costs by making some members of society reluctant to cooperate with law enforcement thereby reducing the probability of conviction and hence the expected sanction wrongdoers face.¹³⁹

C. *Methods of Constraining Improper Government Enforcement.*

Given that improper enforcement generates significant costs it is important to consider methods of reducing these costs.¹⁴⁰ Pro-defendant procedural protections may do this by making it harder for the prosecutor and the lobbying party to find a mutually acceptable price for selectively enforcing

a person convicted of a crime had done something meriting opprobrium and that this was shown in a fair trial. See Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW.U. L. REV. 453, 469, 496 (Winter 1997) (explaining how stigma can increase the costs of disobeying the law, but only if the community perceives the system as one that “never intentionally authorizes failures in administering liability and punishment . . .”); Janice Nadler, *The Effects of Perceived Injustice on Deference to the Law*, at 9-10, Draft 2000 (on file with author). If, however, lobbying leads to selective enforcement then one’s social circle could view a guilty verdict as being more indicative of the system’s bias than any behavior that really merited opprobrium. See ERIC POSNER, *LAW AND SOCIAL NORMS* 97 – 100 (2000); Dan M. Kahan, *Social Influence, Social Meaning, and Deterrence*, 83 VA. L. REV. 349, 357 – 58 (1997); Nadler, *supra*, at 10. There is anecdotal evidence suggesting that criminal sub-cultures may form that might not consider a conviction very stigmatizing. See Kahan, *supra*, at 357 (expressing how stigma has less effect in an inner-city neighborhood where some view convictions as a “badge of honor”); Richard Moran, *Home Sweet Home: Given a Choice, Many Convicts are Now Opting for Jail Instead of Probation: Why?*, BOSTON GLOBE, October 29, 2000, at E1. If stigma drops, and there is no increase in the official sanction, then deterrence should weaken as the expected sanction has declined. See Hylton & Khanna, *supra* note 5, at 16 – 17.

¹³⁹ See Hylton & Khanna, *supra* note 5, at 17 – 18. People may be less inclined to assist with enforcers they consider to be biased. Cf. Nadler, *supra* note 138, at 32 – 41. If this happens then it is more difficult to obtain convictions and the probability of being punished diminishes which should weaken deterrence. See Kay B. Perry, *Fighting Corruption At The Local Level: The Federal Government’s Reach Has Been Broadened*, 64 MO. L. REV. 157, 162 (1999).

¹⁴⁰ Reducing these costs in the criminal enforcement context is roughly analogous to constraining agency costs in the corporate context. See generally ROBERT C. CLARK, *CORPORATE LAW* (1986); WILLIAM A. KLEIN & J. MARK RAMSEYER, *BUSINESS ASSOCIATIONS – AGENCY, PARTNERSHIPS, AND CORPORATIONS* (4th ed. 2000)]. See Rebecca Hollander-Blumoff, *Getting to “Guilty”: Plea Bargaining as Negotiation*, 2 HARV. NEGOTIATION L. REV. 115 (1997) (stating that “[a] prosecutor . . . is the agent of the people whom the office purports to protect.”); Caroline Heck Miller, *Knowing the Danger from the Dance: When the Prosecutor is Punished for the Government’s Conduct*, 29 STETSON L. REV. 69, 78 (1999) (noting that “[p]rosecutors are agents of the sovereign that employs them.”).

However, the corporate context is subject to other factors that help constrain agency costs. But the government sector is not subject to these other factors to a great degree. For example, governments neither have the same risk of losing out to competitors that corporations do, nor do they issue stock as corporations do. Not issuing stock means that governments do not suffer “decline in value” due to agency costs. There are a host of other matters that make explicit constraints on selective enforcement in criminal enforcement more critical than in the corporate context. See CLARK, *supra*, Ch. 4; Tamar Frankel, *Fiduciary Law*, 71 CALIF. L. REV. 795, 811 (1983) (noting devices that protect against the abuse of fiduciary powers).

the law.¹⁴¹ Consider the case where prosecutors target innocents due to successful lobbying or corruption. The procedural protections make going after the innocent more difficult and costly and thus make obtaining convictions against them less likely.¹⁴² If a prosecutor were to then adopt this strategy (i.e., target innocents) he will obtain few convictions and may well lose his job because high conviction rates are important for prosecutors.¹⁴³ This means that the likely price demanded by a prosecutor for targeting innocents will be quite high relative to the price demanded when there are no protections.¹⁴⁴ Further, those who would lobby prosecutors might doubt the veracity of the prosecutor's claim to selectively enforce, given the risk of job loss facing a prosecutor adopting this strategy.¹⁴⁵ Thus, in light of the dubious credibility of the prosecutor's promise and the difficulty of successfully targeting innocents, the lobbyist's willingness-to-pay should drop significantly when these procedural protections are in place.¹⁴⁶

Similar arguments apply for cases where prosecutors might take bribes not to enforce the law against the guilty.¹⁴⁷ A prosecutor who might consider taking such bribes will find it difficult to convict another person in place of the "truly" guilty person because the pro-defendant procedural protections make targeting innocents more difficult relative to where these protections are

¹⁴¹ See Hylton & Khanna, *supra* note 5, at 22.

¹⁴² See *id.* See Robinson & Daley, *supra* note 138, at 488, (explaining how the credibility of the system is reduced when someone is punished for something the community does not view as a crime)

¹⁴³ See *discussion supra* note 131.

¹⁴⁴ See Hylton & Khanna, *supra* note 5, at 23. I am not suggesting that absent these procedures prosecutors would be willing to accept bribes. Rather that the presence of these protections reduces the number of prosecutors willing to accept bribes at the margin.

¹⁴⁵ See *id.*

¹⁴⁶ See A. Mitchell Polinsky & Steven Shavell, *Corruption and Optimal Law Enforcement*, J. PUB. ECON. (forthcoming 2001); A. Mitchell Polinsky & Steven Shavell, *On the Disutility and Discounting of Imprisonment and the Theory of Deterrence*, 28 J. LEGAL STUD. 1 (1999). See also Kaplow & Shavell, *supra* note 61, at 961 n. 637. On the social costs of corruption, see ROBERT KLITGAARD, *CONTROLLING CORRUPTION* (1988); SUSAN ROSE-ACKERMAN, *CORRUPTION: A STUDY IN POLITICAL ECONOMY* (1978); Pranab Bardhan, *Corruption and Development: A Review of Issues*, 35 J. ECON. LITERATURE 1320 (1997); Andrei Schleifer & Robert W. Vishny, *Corruption*, 108 Q.J. ECON. 599 (1993).

¹⁴⁷ See Hylton & Khanna, *supra* note 5, at 26 - 27.

absent.¹⁴⁸ This means the prosecution will be unable to obtain a conviction for the crime if they take such a bribe. This is a problem for prosecutors who value convictions (as most do for both personal and professional reasons) and it means promising not to enforce the law is not very credible given the difficulty of finding an alternative party to convict.¹⁴⁹

To get a better sense of how procedural protections can reduce improper enforcement costs we can consider the operation of the reasonable doubt rule and double jeopardy. Both protections reduce improper enforcement costs by increasing the prosecutor's costs of selective enforcement and by lowering the lobbyist's gains from such enforcement.¹⁵⁰

The reasonable doubt standard achieves this by reducing the likelihood of a conviction and increasing the evidentiary threshold needed for conviction.¹⁵¹ However, even with a very low likelihood of success a prosecutor might still have an incentive to selectively enforce the law when successive actions against a particular defendant for the same wrong are possible. For example, consider the case where the likelihood of conviction rises in the second trial because the prosecutor "learns from his mistakes" in the initial trial thereby increasing his chances of success in the second trial.¹⁵² Thus, a prosecutor who believes the

¹⁴⁸ *See id.*

¹⁴⁹ Also, the target defendant (the person being extorted) would have a low willingness to pay because she considers her chances of being convicted, if she is innocent, to be quite low relative to where these protections are not in place.

A couple of further points. First, it may be easier to cover up taking a bribe for failing to pursue the guilty because prosecutors, due to enforcement constraints and prosecutorial discretion, may not pursue every case. Thus, some bribes for inaction may not be easily noticed in the general cases prosecutors decide not to pursue. On the other hand, bribes to target the innocent are more likely to be noticed and hence may be perceived as more difficult to accomplish.

Second, the analysis in the text would be need to be adjusted if there were high stigma for being charged and little penalty for falsely charging someone. On stigma generally see Eric Rasmusen, *Stigma and Self-Fulfilling Expectations of Criminality*, 39 J. LAW & ECON. 519 (1996).

¹⁵⁰ *See Hylton & Khanna, supra note 5, at 23 - 24.*

¹⁵¹ *See id.*, at 23.

¹⁵² *See Developments, supra note 4, at 1341 - 49.* Another case is where the probability of conviction is the same in every trial (no learning takes place). Even here, if the prosecutor can bring an endless series of successive actions against a defendant then he will obtain a conviction at some point regardless of how low

first trial floundered because of a witness who came off as unreliable could increase his chances of victory in the next trial by coaching the witness.¹⁵³ Double jeopardy prohibits retrials and hence operates as a means to prevent prosecutors and other governmental actors from avoiding the constraints of the reasonable doubt standard by adopting a successive prosecution strategy.¹⁵⁴

This suggests that improper enforcement concerns are important in the context of procedural protections for individual defendants. Let us now examine how these concerns play out in the corporate context.¹⁵⁵

VI. IMPROPER ENFORCEMENT COSTS AND THE CORPORATE DEFENDANT

As a preliminary matter, it is clear that improper enforcement can occur against corporate defendants. For purposes of discussion I provide a few examples put forward by others.

A. *Examples of Improper Enforcement in the Corporate Sphere*

A fair amount of public choice literature has examined insider trading regulation and enforcement in the US and suggests that both the regulation and

the likelihood of conviction is in any given trial. See Hylton & Khanna, *supra* note 5, at 23 n. 53 (stating that “[s]uppose the probability of conviction in one trial is p . If the prosecutor can bring an infinite number of successive actions, each with the same probability of conviction, the likelihood of eventual conviction is $p + (1-p)p + (1-p)^2p + \dots + (1-p)^Np$, which approaches 1 as N approaches infinity. For example, if p is 30% against an innocent individual then by the fourth trial the cumulative probability of conviction has risen to approximately 75%”).

¹⁵³ See *Developments*, *supra* note 4, at 1341 – 49.

¹⁵⁴ See Hylton & Khanna, *supra* note 5, at 20 - 21.

¹⁵⁵ It is noteworthy that other methods could be used to address improper enforcement concerns. One is to place restrictions on the size of penalties or the process by which they are levied. David Friedman has treated the size and process restrictions as “inefficient” punishments. See David Friedman, *Why Not Hang Them All: The Virtues Of Inefficient Punishment*, 107 J. POL. & ECON. 259, 262 - 63 (1999). Another reason frequently given for certain procedural rules is to economize on administrative costs, which in this context refers more broadly to economizing on the resources (e.g., judicial, parties litigation) expended in adjudicating cases. See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 447 (1973). This paper does not discuss the measures used to address this issue.

enforcement by the Securities and Exchange Commission (SEC) can be explained by the notion that certain regulations and enforcement are lobbied for aggressively by one industry group to the detriment of another.¹⁵⁶ Some have argued that the one such example is the response to the Supreme Court's insider trading decision in *Chiarella*.¹⁵⁷ The Court held that for insider trading to generate an actionable claim under section 10(b) an insider must trade with someone to whom the insider owes a duty to disclose when trading, which is usually based on a relationship of trust and confidence.¹⁵⁸ Corporate managers commonly have this duty to their shareholders and that duty will be violated when managers, without disclosure, rely on inside information to trade with their shareholders.¹⁵⁹ Market insiders (e.g., investment analysts), however, do not generally have this duty to shareholders of the corporation.¹⁶⁰ Following the Court's decision in *Chiarella* we saw an increase in enforcement activity.¹⁶¹ This was partly the result of more active lobbying by market insiders in favor of such enforcement because these players were largely immune from regulation under *Chiarella*.¹⁶² Thus, lobbying for greater enforcement did not harm market insiders, but helped them reduce competition for valuable corporate information from corporate insiders (e.g., managers) who were subject to prohibitions on trading after *Chiarella*.¹⁶³ Moreover, there are discussions in the public choice literature suggesting that specific instances of enforcement were the result of lobbied for enforcement.¹⁶⁴

¹⁵⁶ See DANIEL R. FISCHER, *THE RESTRUCTURING OF CORPORATE AMERICA* (1995); Fischel & Sykes, *supra* note 132, David D. Haddock & Jonathan R. Macey, *A Private Interest Model, with an Application to Insider Trading Regulation*, 30 J. L. & ECON. 311, 323 (1987); Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. LEGAL STUD. 101 (1987).

¹⁵⁷ See *Chiarella v. United States*, 445 U.S. 222 (1980).

¹⁵⁸ See *id.*, at 228, 230.

¹⁵⁹ See *id.*

¹⁶⁰ See *id.*, at 232 – 33.

¹⁶¹ See Haddock & Macey, *supra* note 156, at 329 (citing Michael P. Dooley, *Enforcement of Insider Trading Restrictions*, 66 VA. L. REV. 1, 74-83 (1980)).

¹⁶² See *id.*, at 329 – 30.

¹⁶³ See *id.*, at 330.

Outside of securities regulation, the antitrust area is replete with discussions of lobbied for enforcement. There is considerable discussion in case law and commentary about the use of antitrust law (and lawsuits) as a method of squelching competition.¹⁶⁵ The threat of large antitrust penalties could easily deter entry or force some competitors out of business or force them to become weaker competitors.¹⁶⁶

In addition to selective enforcement, there is some suggestion that certain laws were enacted largely at the behest of certain industry groups that benefited from them.¹⁶⁷ It thus seems that the prospect of selective regulation and enforcement in the corporate sphere is real. The next issue is: how does the potential for improper enforcement in the corporate sphere compare to the potential in cases involving only individual defendants.

B. Comparing Improper Enforcement Concerns for Corporate and Individual Defendants.

Assessing the relative degree of improper enforcement concern in the contexts of individual and corporate defendants is difficult. However, we can obtain some insights on it by reference to what we know about rent-seeking and lobbying activities.

¹⁶⁴ See FISCHER, *supra* note 156.

¹⁶⁵ See Cass & Hylton, *supra* note 106.

¹⁶⁶ See *id.*; Harry First, *Criminal Antitrust Enforcement*, Occasional Papers from the Center for Research in Crime and Justice, NYU School of Law, 1991 (noting that many antitrust enforcement actions have been against smaller firms).

¹⁶⁷ See David E. Bernstein, *Lochner, Parity and the Chinese Laundry Cases*, 41 WM. & MARY L. REV. 211 (1999). See also Randall S. Kroszner & Thomas Stratmann, *Interest Group Competition and the Organization of Congress: Theory and Evidence from Financial Services Political Action Committees*, 88 AM. ECON. REV. 1163 (1998); Michael T. Maloney & Robert E. McCormick, *A Positive Theory of Environmental Quality Regulation*, 25 J.L. & ECON. & ORG'N 99, 100-06 (1982); Carlos D. Ramirez & Christian Eigen-Zucchi, *Why Did the Clayton Act Pass? An Analysis of the Interest Group Hypothesis*, Draft 2003 (on file with author); Richard L. Revesz, *Federalism and Environmental Regulation: A Public Choice Analysis*, 115 HARV. L. REV. 553 (2001). On the political economy of regulation see generally Sam Peltzman, *Toward a More General Theory of Regulation*, 19 J.L. & ECON. 211 (1976); George J. Stigler, *The Theory of Economic Regulation*, 2 BELL J. ECON. 3 (1971).

As a general matter rent-seeking activity (e.g., lobbying for enforcement and regulation) tends to increase as the stakes involved increase.¹⁶⁸ This is not too surprising because as the stakes increase the returns to rent-seeking increase too.¹⁶⁹ The monetary stakes involved with corporate defendants are usually greater than the monetary stakes involved with individual defendants.¹⁷⁰ For example, the rent-seeker could impede competition from the corporate defendant, impose costs on it, provide the impetus for a slew of follow-on private civil suits, and so many other things.¹⁷¹ This is not as likely for most individual defendants. Thus, we would expect more rent-seeking activities and lobbying of enforcement agents when dealing with corporate defendants.¹⁷²

C. Improper Enforcement Concerns in Government Civil and Criminal Proceedings Against Corporate Defendants.

The analysis regarding government enforcement has assumed until now that the degree of improper enforcement concern is the same across civil and criminal enforcement by the government. There may, however, be reasons to question this assumption. The federal government agency that enforces the criminal law (the Department of Justice (DoJ)) is different than the agencies that enforce the civil law, such as the SEC and the Environmental Protection Agency

¹⁶⁸ See Hylton & Khanna, *supra* note 5, at 17 n. 51; Becker, *supra* note 127, at 373.

¹⁶⁹ See Hylton & Khanna, *supra* note 5, at 17 n. 51; Becker, *supra* note 127, at 373.

¹⁷⁰ See GRUNER, *supra* note 20, § 1.9.2, at 52 – 55 (1994) (demonstrating that corporate fines are high and have risen).

¹⁷¹ See Cass & Hylton, *supra* note 106, at 705-06 (explaining how false convictions may lead to an increase in firms using antitrust lawsuits as a competitive tool); Haddock & Macey, *supra* note 156, at 328 – 33 (illustrating how market professionals, who are in direct competition with insiders, have a self-interest in aiding the SEC in identifying insider traders).

¹⁷² However, sometimes the payoff from lobbying for enforcement may not be directly monetary. For example, some enforcement may be lobbied for not because it generates immediate monetary gain, but because it generates political points of some kind. See e.g. Becker, *supra* note 127. How this plays out in the individual and corporate contexts is difficult to compare because the political points may vary dramatically with context.

(EPA).¹⁷³ It is plausible that the improper enforcement potential might differ across these different agencies. There are a number of reasons for this.

First, civil agencies may enforce the law more frequently than the DoJ in the corporate arena. Civil agencies tend to have more narrow mandates than the DoJ – for example, the SEC focuses only on securities markets, but the DoJ casts its net more broadly – and hence the civil agencies can focus their resources on fewer areas thereby increasing enforcement.¹⁷⁴ Indeed, much of the criminal enforcement by the DoJ in the corporate arena comes from referrals by civil agencies.¹⁷⁵ This suggests that corporate lobbying efforts are probably more focused on the arm of government with the more frequent and critical enforcement – the civil agencies.

Second, the penalties against the corporation are roughly similar in civil and criminal cases and may even be larger in civil cases.¹⁷⁶ This is yet another

¹⁷³ See Nancy K. Frank & Michael J. Lynch, *Corporate Crime Corporate Violence: A Primer* 26 – 27 (1992). I am referring to the enforcement of Federal Corporate Crime Legislation. State corporate crime laws are enforced by state prosecutors. See CORPORATE MISCONDUCT: THE LEGAL, SOCIETAL, AND MANAGEMENT ISSUES 36 – 38 (Margaret P. Spencer & Ronald R. Sims eds., 1995).

¹⁷⁴ See generally Jonathan R. Macey, *Organizational Design and the Political Control of Administrative Agencies*, 8 J. L. ECON. & ORG'N 93, 99 – 108 (1992) [hereinafter *Organizational*]; Jonathan R. Macey, *Separated Powers and Positive Political Theory: The Tug of War Over Administrative Agencies*, 80 GEO. L. J. 671 (1992) [hereinafter *Separated*].

¹⁷⁵ See generally JAMES EISENSTEIN, COUNSEL FOR THE UNITED STATES (1978); Robert L. Rabin, *Agency Criminal Referrals in the Federal System: An Empirical Study of Prosecutorial Discretion*, 24 STAN. L. REV. 1036 (1972).

¹⁷⁶ See Khanna, *Political Economy*, *supra* note 4, at 10 -11, 16 – 17 (noting the considerable evidence that corporate crime penalties are perceived to be generally lower than corporate civil sanctions). For further evidence that appears supportive consider the Exxon Valdez Oil disaster. It would appear that the civil sanction was much greater than the criminal one. Exxon entered a criminal plea bargain wherein it received a \$150 million fine (of which the court forgave \$125 million). See Consent Decree and Agreement at 18-19, Clerk's Docket No. 46 in United States v. Exxon Corp., No. A91-0082-CV, and Clerk's Docket No. 26 in Alaska v. Exxon Corp., No. A91-0083-CV. On the civil side, Exxon paid \$900 million as well as the \$2.1 billion spent on the clean-up. *Id.* In addition, Exxon was adjudged to be liable for \$5 billion in punitive damages (the largest punitive judgment ever visited on a U.S. corporation). See *Spillionaires*, ANCHORAGE DAILY NEWS, March 17, 1996, at B3, available at <http://www.adn.com/evos/stories/EV402.html> (last visited March 16, 2003).

Note that even after the organizational sentencing guidelines (which increased criminal penalties) the criminal fine is still only a small portion of the total loss the corporation suffers from wrongdoing. See Alexander, et al., *supra* note 109, at 409 – 10; Karpoff & Lott, *supra* note 72, at 758 (noting that “[r]eputational cost... constitutes most of the cost incurred by firms accused or convicted of fraud.”).

reason for corporations to be more concerned with civil enforcement. Indeed, for those interested in using the law enforcement process to benefit themselves it would make more sense to use the more frequent and larger penalty mechanism – government civil enforcement.

Another consideration related to the tendency of agencies to focus on one area of regulation is that civil agencies may be more easily “captured” than the DoJ. This is because the groups affected by the civil agency are small in number, have more of their livelihoods dependent on agency practices, and have quite frequent interactions with the agency.¹⁷⁷ Smaller and more concentrated groups who depend on the decisions of the civil agency on a more regular basis have a much stronger incentive to lobby it for regulation and enforcement than to lobby a government agency that responds to many different interests and with whom they have less frequent contact, such as the DoJ.¹⁷⁸ Agency capture is more likely with civil agencies, which is yet another reason to think that improper enforcement concerns are larger here than in the criminal context.

This leads us towards having stronger protections when the government brings civil suits against corporations compared to when it brings criminal suits against corporations. This particular result is counter-intuitive – we would expect the opposite to be true.

VII. DESIGNING PROCEDURAL RULES FOR CORPORATIONS

Overall the key results of my analysis are that procedural protections for corporate defendants should vary based on the type of sanction and the moving party, rather than simply having stronger protections for corporate defendants

¹⁷⁷ See generally Macey, *Organizational*, *supra* note 174; Macey, *Separated*, *supra* note 174.

when charged with criminal wrongdoing. This is for a number of reasons. First, sanctioning costs are lower for corporate defendants than individual defendants because corporations cannot have the socially costly sanction of prison imposed on them. This suggests weaker protections for corporate defendants than individual defendants on error cost grounds. However, the protections for corporate defendants should increase as the social costs associated with sanctions increases (e.g., as we use socially costly sanctions such a loss of license more often), although not to the extent of the reasonable doubt standard. This is because the sanctioning costs of prison are probably larger than the sanctioning costs associated with monetary penalties and because corporate defendants do not have significant liberty and privacy interests. Second, improper enforcement costs are important in the corporate context. Moreover, improper enforcement concerns for corporate defendants are probably larger in civil cases enforced by the government compared to criminal cases enforced by the government.

The implications of these findings for the design of procedural protections for corporate defendants are not very simple. In order to simplify the analysis I will withhold discussion of whether to differentiate between government criminal and government civil proceedings until the end of the analysis.

To start, let us consider the most basic case – a private litigant brings a civil suit for compensatory damages. Here the standard of proof should be the civil standard (preponderance of evidence) because the sanctioning costs are those of a cash fine.¹⁷⁹ The concerns with improper enforcement can be addressed by relying on the standard techniques for controlling frivolous and abusive litigation in the civil side with private enforcement (e.g., fee-shifting).

¹⁷⁸ See Macey, *Organizational*, *supra* note 174; Macey, *Separated*, *supra* note 174; Haddock & Macey, *supra* note 156.

Our next case is when a private litigant brings a suit attempting to impose a loss of license type sanction or punitive damages. Here the standard of proof should increase to something more than the civil standard, but less than the criminal standard because the social costs of loss of license and punitive damages are likely to be between the social costs of cash fines and jail time. Let us call this intermediate standard of proof the clear-and-convincing-evidence standard.¹⁸⁰ The improper enforcement concerns can be addressed with the standard techniques for controlling frivolous and abusive litigation in the civil side.¹⁸¹

Let us then examine what happens when the government brings a suit (criminal or civil) against a corporation to recover a cash fine. I would suggest that the civil standard of proof should apply with something greater than the civil standard of retrial protection (i.e., closer to double jeopardy). The civil standard of proof applies because the social costs of a cash fine are similar to those in standard civil proceedings initiated by a private litigant. The reason for the “greater-than-civil-retrial” protection is that the government enforcement agent does not directly bear much of the cost of litigation as compared to a private litigant.¹⁸² Moreover, the government enforcement agent is not as easily influenced as a private enforcer by fee-shifting and so forth.¹⁸³ Consequently, the government agent may have stronger incentives to re-litigate a matter compared to private litigants.¹⁸⁴ To curtail this incentive we may impose limits on the ability of the government to go after a defendant that are stronger than the limits

¹⁷⁹ See POSNER, *supra* note 5, at 604 – 05.

¹⁸⁰ See Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U.L. REV. 385, 421; Khanna, *Liability*, *supra* note 1, at 1516 n. 210 (giving examples of states that use the clear and convincing standard before awarding punitive damages against corporations).

¹⁸¹ It is noteworthy that the higher stakes in punitive damages cases can induce more rent-seeking litigation (see Hylton & Khanna, *supra* note 5, at 17 n. 51; Becker, *supra* note 127, at 373 (as stakes increase so do rent-seeking incentives)) which provides further support for an intermediate standard of proof.

¹⁸² See DRESSLER, *supra* note 8, §32.01D, Akhil Reed Amar, *Double Jeopardy Law Made Simple*, 106 YALE L.J. 1807, 1815 (describing how, without the double jeopardy clause, the prosecution could keep retrying an individual until the defendant is, in part, financially worn down).

¹⁸³ Cf. Landes, *supra* note 103, at 64 (noting the effect of the fact that prosecutors do not pay for their prosecutions directly).

imposed under the standard civil law.¹⁸⁵ In other words we could have the civil standard of proof plus something close to double jeopardy.¹⁸⁶

Our next case is when we are dealing with a government suit against a corporation seeking to impose a loss of license sanction (or punitive damages).¹⁸⁷ Here I would suggest we should have a standard of proof higher than the preponderance standard to reflect the greater social costs with these sanctions (e.g. clear-and-convincing-evidence standard).¹⁸⁸ Moreover, double jeopardy-like protection is desired for the same reasons elaborated in the context of a government suit seeking a simple cash fine – government enforcers are not likely to be as influenced by civil law techniques for controlling frivolous or abusive litigation as private parties. Thus, loss of license and punitive damages tend to have higher improper enforcement costs as well as higher sanctioning costs thereby justifying stronger procedural protections.

Finally, let us consider if we should differentiate between government civil and criminal proceedings against corporations in terms of procedural protections due to the differing degree of improper enforcement concerns. My analysis suggests that we should and this may require the development of some new procedural rules for administrative agencies. However, this may be

¹⁸⁴ Cf. *id.*; Glaeser et al., *supra* note 118; Hylton & Khanna, *supra* note 5, at 8 – 9.

¹⁸⁵ We could curtail this incentive by reducing the enforcement budget too, but that may have other effects as well if we face a relatively modest upper limit on sanction size. See J. Mark Ramseyer & Eric B. Rasmussen, *Why is the Japanese Conviction Rate So High*, 30 J. LEGAL STUD. 53 (2001).

¹⁸⁶ I refer to this as “double jeopardy-like” because double jeopardy at present would permit retrials for technically different offenses based on the same set of facts. See *supra text accompanying notes 26 to 34*. Even though this may not happen often I do not want to necessarily suggest this as the retrial standard of “sameness” I would use.

¹⁸⁷ See Andrew L. Sandler, Saul M. Pilchen, and Benjamin B. Klubes, *The Organizational Sentencing Guidelines: Increased Criminal Penalties for Corporations and the Implications for Corporate Self-Governance*, in METHODS ON ANTITRUST COMPLIANCE (2d ed. 1994).

¹⁸⁸ See *in re Winship*, *supra* note 57, at 371 (noting relationship between standard of proof and errors in convictions and acquittals); Hylton & Khanna, *supra* note 5, at 7 n. 28. A higher standard of proof is desired not only because loss of license or punitive damages sanctions have higher social costs (e.g., sanctioning and over-deterrence costs) than a simple cash fine, but also because improper enforcement costs tend to increase with the stakes and as penalty magnitude increases so do the stakes.

ameliorated by the fact that courts can engage in judicial review of administrative agencies, whereas the degree of judicial review of the DoJ is much more limited.¹⁸⁹ This may be enough additional protection for corporate defendants dealing with suits filed by government civil agencies. This is, however, a very tentative suggestion. It may well be the case that judicial review is simply not enough to curtail the potential for greater improper enforcement costs in government civil enforcement. If so, then other measures may also need to be considered. This could easily be the topic for a separate paper(s). Moreover, greater discussion of this issue is well merited, especially as these measures may even vary with the government civil agency (e.g., perhaps the SEC has greater potential for agency capture than the EPA or vice versa).

Table 2 provides a summary of the suggested form of procedural protections for corporate defendants.

TABLE 2
PROCEDURAL PROTECTIONS FOR CORPORATE DEFENDANTS

SANCTIONS	MOVING PARTY		
	PRIVATE	GOVERNMENT	
		<i>Criminal</i>	<i>Civil</i>
Cash Fines	Preponderance and Frivolous Suit Measures.	Preponderance and Double Jeopardy-like.	Preponderance, Double Jeopardy-like, Judicial Review, and more?
Loss of License or Punitive Damages	Clear-and-Convincing-Evidence and Frivolous Suit Measures.	Clear-and-Convincing- Evidence and Double Jeopardy-like.	Clear-and-Convincing-Evidence, Double Jeopardy-like, Judicial Review, and more?

¹⁸⁹ There is a tremendous amount of literature on judicial review. To provide just a flavor see [collecting cites]; Shelby A. Dickerson Moore, *Questioning the Autonomy of Prosecutorial Charging Decisions: Recognizing the Need to Exercise Discretion-Knowing There Will be Consequences for Crossing the Line*, 60 LA. L. REV. 371, 400 (2000); Eric L. Muller, *Constitutional Conscience*, 83 B.U. L. REV. 1017, 1020 (2003); Cass Sunstein, *Law and Administration After Chevron*, 90 COLUM. L. REV. 2071 (1990); Antonin Scalia, *Judicial Deference to Administrative Interpretations of Law*, 1989 DUKE L.J. 511.

VIII. EVIDENTIARY CONSIDERATIONS FOR THE PRIVILEGE AGAINST SELF- INCRIMINATION AND FOURTH AMENDMENT.

In this Part I discuss the two protections that I have largely ignored in my analysis until now – the privilege against self-incrimination and the fourth amendment’s unreasonable search and seizure. My first reason for deferring discussion of them is that both protections are applied with equal vigor in criminal and civil cases where the government is the moving party.¹⁹⁰ Thus, the self-incrimination privilege is not available to corporations in any kind of proceedings and the fourth amendment’s protections are available in both kinds of proceedings when initiated by the government, but it provides lesser protection for corporate defendants compared to individual defendants.¹⁹¹ There is then little scope for comparing the criminal and civil rules with respect to corporate defendants.

The other reason I have deferred discussion is that these two protections have a much more direct effect on the ability of the moving party to gather and present evidence against corporate defendants.¹⁹² Most evidence in corporate cases is documentary and produced by the corporation – a self-incrimination privilege would essentially deny the plaintiff and the decision-maker most of the relevant information.¹⁹³ This is not true in the case of most individual defendants so the cost of the privilege is much higher in the corporate context.¹⁹⁴

¹⁹⁰ See *supra* text accompanying notes 44 - 53.

¹⁹¹ See *id.*

¹⁹² See *Developments, supra* note 4, at 1276 (noting that “[b]ecause often the prohibited conduct leaves no physical trace . . . corporate documents may provide the only evidence that a crime has been committed”).

¹⁹³ See *id.*

¹⁹⁴ See *id.*, at 1276, 1280 n. 29 (quoting *United States v. White* 322 U.S. 694 (1944)).

Moreover, a significant benefit of the privilege – avoidance of violent coercion to obtain confessions – is missing in the corporate context.¹⁹⁵

Similar arguments apply for the fourth amendment too. The privacy benefit of it is largely missing in the corporate sphere and the impact on the ability to gather evidence is quite large.¹⁹⁶ Indeed, the Supreme Court has noted that law enforcement would be severely compromised by any rule that protected all corporate evidence from the subpoena power.¹⁹⁷ Moreover, the only real limit on the government's power to gather evidence from the corporation is a concern with avoiding too much interference with business and the expense of complying with endless requests for information.¹⁹⁸

IX. CONCLUSION

One of the fundamental questions of corporate liability is what kinds of procedural protections, if any, should corporate defendants receive? Should these vary by the kind of proceedings, as they currently do, or is something else more appropriate? This paper examines this question from an economic perspective.

My analysis concludes that the concerns animating most procedural protections in the corporate context (e.g., reducing the costs of adjudicative

¹⁹⁵ See *id.*, at 1278 – 79; Friedman, *supra* note 3, at 192 – 93. Of course, to say there is no self-incrimination privilege may be a bit of an exaggeration. In certain states internal corporate memoranda on corporate compliance efforts (i.e., corporate self-policing) may be privileged so that it cannot be presented in court as evidence. The ostensible advantage of this is that this may reduce corporate concerns that their efforts to self-police could come back and haunt them later in liability proceedings. Making these memoranda privileged reduces this fear and increases the corporate incentive to self-police. See Jennifer Arlen, *The Potentially Perverse Effects of Corporate Criminal Liability*, 23 J. LEGAL STUD. 833 (1994).

¹⁹⁶ See Friedman, *supra* note 3, at 192 – 95 (noting that the privacy interests are weaker in the corporate sphere); *Developments*, *supra* note 4, at 1286 – 89 (same).

¹⁹⁷ See *Developments*, *supra* note 4, at 1287 – 88 (discussing *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946)).

¹⁹⁸ See *id.*

errors and abusive prosecutorial behavior) would require procedural protections for corporate defendants that differ depending on the identity of the moving party (e.g., government or private litigant), and the type of sanction the corporation is facing, *but not* on the type of proceedings (criminal or civil) against the corporation. My analysis thus calls for a reorientation of procedural protections for corporate defendants along these lines rather than on the current criminal – civil dichotomy. The implications of this reorientation are sketched in this paper and may, at times, suggest having *stronger* protections for corporations in some *civil* proceedings than in criminal proceedings.