Corporate Defendants and the Protections of Criminal Procedure: An Economic Analysis

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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.

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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,

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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. Although these differences have persisted for years, there is little economically-oriented discussion of their desirability. Specifically, there is little analysis of whether these procedural protections are desirable for corporations or whether having

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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

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enforcement costs). 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. 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. 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. This is because the social sanctioning costs of a wrongful loss of license or punitive damages sanction are

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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]


9 See Khanna, Liability, supra note 1, at 1497 – 1512.
probably not as large as the social sanctioning costs of wrongful imprisonment.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{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).


\textsuperscript{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. 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.

A. Standard of Proof.

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

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. In the civil context res judicata and collateral estoppel apply with somewhat similar effect. Corporate defendants receive double jeopardy and collateral estoppel in criminal cases and res judicata and collateral estoppel in civil cases. As collateral estoppel applies in both types of cases the

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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).
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].”)
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,
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. Double jeopardy, however, does not require that all offenses based on the same set of facts be heard in one trial. 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. 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. 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.” 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

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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.

allow it.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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”.\textsuperscript{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.\textsuperscript{36} A similar right does not appear to exist in civil proceedings.\textsuperscript{37}

\textsuperscript{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 reprobe 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).

\textsuperscript{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).

\textsuperscript{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.


\textsuperscript{36} See Developments, supra note 4, at 1302; GRUNER, supra note 20, at § 5.027H.

\textsuperscript{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. 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. The second function is not really associated with protecting the corporation, whereas the first is. However, one doubts that grand juries serve a serious screening function for corporate defendants. In the vast majority of cases the grand jury indicts the defendant.

Civil cases do not have a direct analogue to grand juries. 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.

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38 See Developments, 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).

39 See Development, supra note 4, at 1293.

40 See Khanna, Liability, supra note 1, at 1519. 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. L. & POL. 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. However, the corporation receives lesser protection than individual defendants might. Thus, what might be considered a “reasonable” search for a corporate defendant might not be for an individual defendant. 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. For corporations only the latter concern is really triggered. Consequently, the level of protection is lower than what would arise for individuals.

F. Self-Incrimination.

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

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

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. 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**

<table>
<thead>
<tr>
<th>PROTECTION</th>
<th>CORPORATION</th>
<th>DEFENDANT</th>
<th>INDIVIDUAL</th>
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</thead>
<tbody>
<tr>
<td></td>
<td>Criminal</td>
<td>Civil</td>
<td>Criminal</td>
</tr>
<tr>
<td>Standard of Proof</td>
<td>Reasonable Doubt</td>
<td>Preponderance</td>
<td>Reasonable Doubt</td>
</tr>
<tr>
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<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Grand Jury</td>
<td>Yes</td>
<td>No</td>
<td>Yes</td>
</tr>
<tr>
<td>Self-Incrimination</td>
<td>No</td>
<td>No</td>
<td>Yes</td>
</tr>
</tbody>
</table>

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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. 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.

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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.\(^{61}\)

\(^{57}\) 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. Sched, 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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{65} Here the costs of false convictions (i.e., false findings of liability) and false acquittals are roughly similar.\textsuperscript{66} Consequently, we might expect the procedural protections to be more evenly balanced.\textsuperscript{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.\textsuperscript{68}

\textsuperscript{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).

\textsuperscript{63} See Winship, supra note 57, at 363 – 64.

\textsuperscript{64} See Khanna, Liability, supra note 1, at 1497 – 98.

\textsuperscript{65} See id.

\textsuperscript{66} See id.

\textsuperscript{67} See Posner, supra note 5, at 604 – 05

\textsuperscript{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 procedures 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. Corporations cannot be sent to jail and all the sanctions they may suffer (e.g., cash fines, loss of license, suspension) through appeals and retrials. Further, this rule appears to increase false acquittals, 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. Moreover, empirical support for the error cost account is wobbly. See id.; Hylton & Khanna, supra note 5, at 383–84.

There may, however, be offsetting effects in play. See id. at 383–84. 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 (3d 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,
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). 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.

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. 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. 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. For

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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.\textsuperscript{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.\textsuperscript{80} Moreover, for corporate defendants we are missing the liberty and privacy interests that buttress the reasonable doubt standard.\textsuperscript{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.\textsuperscript{82} Perhaps an intermediate standard – between reasonable doubt and preponderance might be desirable.\textsuperscript{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.\textsuperscript{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.\textsuperscript{85} Normally reputations are built by the

\textsuperscript{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).

\textsuperscript{80} See Hylton & Khanna, supra note 5, at 12; David Anderson, The Aggregate Burden of Crime, 42 J.

\textsuperscript{81} See Friedman, supra note 3, at 192 – 95; [collect more cites – cases, ...].

\textsuperscript{82} See Khanna, Liability, supra note 1, at 1515 – 16.

\textsuperscript{83} See id., at 1516.

\textsuperscript{84} See Karpoff & Lott, supra note 72, at 761 – 66.

\textsuperscript{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. 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. 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. 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. This latter account seems more plausible. 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.

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. 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. 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. 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

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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. Further, this is likely to be influenced in some measure by the efforts of the corporation’s public relations or marketing department. 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. Sometimes simply the announcement of the investigation or the filing of charges can impose the largest reputational loss. 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).

Third, even if reputational penalties arise later at the trial stage they may create asymmetric stakes that would reduce the need for heightened protections. Defendants may sometimes have more to lose (reputation plus damages) than plaintiffs have to gain (largely damages). 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.
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.\textsuperscript{102} The defendant’s increased expenditure should lead to a lower probability of success for the plaintiff, holding all else equal.\textsuperscript{103} This has effects that are analogous to a higher standard of proof – there is a lower probability of plaintiff success.\textsuperscript{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).\textsuperscript{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.\textsuperscript{106} This kind of over-deterrence can occur in a number of different situations and can be

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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.


\textsuperscript{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. However, one fairly common trigger for over-deterrence is the presence of large penalties, especially under uncertain legal standards.

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. After 1991, corporate crime penalties did increase but even then the

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107 See id., at 977 – 79 (de picting 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.

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.uscc.gov/ANNUAL/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. 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. Moreover, sometimes treble and punitive damages are available under fairly uncertain legal standards. 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. Other measures might also be countenanced, 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

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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. 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. Thus, fee-shifting rules and penalties for frivolous litigation can help to reduce

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


\footnotesize{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).}

\footnotesize{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.\textsuperscript{120} If this power is unfettered then it may be used by enforcers to benefit themselves.\textsuperscript{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).\textsuperscript{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).\textsuperscript{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.\textsuperscript{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.\textsuperscript{125} For example, the Jim Crow South was replete with instances of prosecutors using the criminal law

\textsuperscript{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.
\textsuperscript{122} See id., at 9 – 11. These were some of the historical concerns motivating the development of some procedural protections. See id.
\textsuperscript{123} See id., at 13 (giving an example of lobbying efforts).
to coerce black citizens while rarely enforcing the law against white citizens. 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.

Another example of misuse of enforcement power is simple corruption. 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. Also, consider a prosecutor or other enforcement official who is simply willing to take bribes not to enforce the criminal law. These kinds of improper enforcement, arising from the divergence of prosecutorial incentives from those of the social welfare maximizing ideal, can lead to a series of social costs that require discussion.

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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).


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


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.\(^\text{132}\) Similar costs arise in the context of simple corruption.\(^\text{133}\)

In addition to these direct costs, selective enforcement can influence deterrence too. For example, imagine group X lobbies for little enforcement...
against its own members, but more enforcement against members of group Y, with scant attention to whether the Ys are guilty. As there is less enforcement against Xs they face a lower expected sanction for their activities and hence would be under-deterring. Moreover, even the Ys would be under-deterring. This is because Ys are increasingly being punished regardless of whether they behaved legally or illegally. 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.

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. 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).
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. 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

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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 Holland-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. 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. 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. 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. 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. 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.

Similar arguments apply for cases where prosecutors might take bribes not to enforce the law against the guilty. 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.
147 See Hylton & Khanna, supra note 5, at 26 - 27.
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.

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.

The reasonable doubt standard achieves this by reducing the likelihood of a conviction and increasing the evidentiary threshold needed for conviction. 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. Thus, a prosecutor who believes the

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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.
150 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 needed 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).
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. 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.

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.

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)p + ... + (1-p)^n p, 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%”).

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

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

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. Some have argued that the one such example is the response to the Supreme Court’s insider trading decision in Chiarella. 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. 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. Market insiders (e.g., investment analysts), however, do not generally have this duty to shareholders of the corporation. Following the Court’s decision in Chiarella we saw an increase in enforcement activity. 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. 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. Moreover, there are discussions in the public choice literature suggesting that specific instances of enforcement were the result of lobbied for enforcement.

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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. The threat of large antitrust penalties could easily deter entry or force some competitors out of business or force them to become weaker competitors.

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. 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.

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164 See Fischel, 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).
As a general matter rent-seeking activity (e.g., lobbying for enforcement and regulation) tends to increase as the stakes involved increase. This is not too surprising because as the stakes increase the returns to rent-seeking increase too. The monetary stakes involved with corporate defendants are usually greater than the monetary stakes involved with individual defendants. 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. 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.

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.
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


\(^{176}\) 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 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. A 91-0082-CV, and Clerk’s Docket No. 26 in Alaska v. Exxon Corp., No. A 91-0083-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 “[re]putational 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

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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 as 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. 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).

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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. The improper enforcement concerns can be addressed with the standard techniques for controlling frivolous and abusive litigation in the civil side.

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. Moreover, the government enforcement agent is not as easily influenced as a private enforcer by fee-shifting and so forth. Consequently, the government agent may have stronger incentives to re-litigate a matter compared to private litigants. 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

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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.\textsuperscript{185} In other words we could have the civil standard of proof plus something close to double jeopardy.\textsuperscript{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).\textsuperscript{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).\textsuperscript{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

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

\textsuperscript{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, \textit{30 J. LEGAL STUD.} 53 (2001).

\textsuperscript{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.

\textsuperscript{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 \textit{METHODS ON ANTITRUST COMPLIANCE} (2d ed. 1994).

\textsuperscript{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. 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**

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<th>Sanctions</th>
<th>Private</th>
<th>Government</th>
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<tr>
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<td>Preponderance and Frivolous Suit Measures.</td>
<td>Preponderance and Double Jeopardy-like.</td>
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<tr>
<td>Cash Fines</td>
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<td>Preponderance, Double Jeopardy-like, Judicial Review, and more?</td>
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<tr>
<td></td>
<td></td>
<td>Clear-and-Convincing-Evidence, Double Jeopardy-like, Judicial Review, and more?</td>
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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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{198}

\section*{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

\textsuperscript{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).

\textsuperscript{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).

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

\textsuperscript{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.